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VIA FEDERAL EXPRESS OVERNIGHT DELIVERY

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RE: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act
Regarding Impacts of Columbia River System Operations on Threatened and
Endangered Species

Dear Sirs and Madam:

This letter provides notice of intent to sue the U.S. Army Corps of Engineers (the “Corps”), the Bureau of Reclamation (“BOR”) and the Bonneville Power Administration (“BPA”) (collectively the “Action Agencies”) for violations of § 7 and § 9 of the Endangered

Species Act (“ESA”), 16 U.S.C. §§ 1536, 1538.¹ These violations arise from the Action Agencies’ failure to comply with the substantive and procedural requirements imposed by § 7, as well as the prohibition on “take” of listed species in § 9, in their coordinated operation and maintenance of federal dams, reservoirs, and related facilities, power marketing and other actions in the Columbia River basin as reflected in their Joint Record of Decision for Columbia River System Operations (the “2020 ROD”) dated September 28, 2020 [available at https://www.nwd.usace.army.mil/Portals/25/docs/CRSO/CRSO_EIS_RecordOfDecision.pdf]. This notice is provided pursuant to § 11(g) of the ESA, 16 U.S.C. § 1540(g).

I. BACKGROUND

A. Listed Columbia River Basin Salmon and Steelhead Populations

The dramatic decline of Columbia and Snake River salmon and steelhead populations is reflected in the listing of thirteen Evolutionarily Significant Units (“ESUs”) or Distinct Population Segments (“DPS”) of these species in the Columbia basin under the ESA. Many other ESUs/DPSs are already extinct. NOAA Fisheries (“NOAA”) has listed the following salmon and steelhead ESUs/DPSs in the Columbia River basin as threatened or endangered and designated their migratory, spawning, and rearing habitat in the basin as critical habitat: Snake River sockeye, Snake River spring/summer chinook, Snake River fall chinook, Snake River steelhead, Upper Columbia River steelhead, Lower Columbia River steelhead, Upper Columbia River spring-run chinook, Lower Columbia River chinook, Middle Columbia River steelhead, Upper Willamette River steelhead, Upper Willamette River chinook, Columbia River chum, and Lower Columbia River coho. *See* 70 Fed. Reg. 37,160 (June 28, 2005) (listing salmon ESUs); 71 Fed. Reg. 834 (Jan. 5, 2006) (listing steelhead DPSs).

The work of the Interior Columbia Technical Recovery Team (“ICTRT”) for seven of these species confirms that each requires significant improvement to be considered “viable.” *See, e.g.*, Required Survival Rate Changes to Meet Technical Recovery Team Abundance and Productivity Viability Criteria for Interior Columbia Basin Salmon and Steelhead Populations at 22 (Nov. 30, 2007). Moreover, the available scientific evidence indicates that many populations of these species are actually declining or remain at dangerously low levels.

¹ This letter is sent by the undersigned on behalf of the following organizations: American Rivers, Idaho Rivers United, Institute for Fisheries Resources, NW Energy Coalition, Northwest Sportfishing Industry Association, Natural Resources Defense Council, Pacific Coast Federation of Fishermen’s Associations, Sierra Club, National Wildlife Federation, Columbia Riverkeeper, and Idaho Conservation League. A list of these organizations’ business addresses is set out below.

Endangered Southern Resident Killer Whales (“SRKW” or orcas) rely on Columbia and Snake River salmon, especially Chinook, as a critical part of their diet. NOAA listed the Southern Residents as endangered in 2005. Since then the population has continued to decline: as of the most recent census in 2019, the SRKW population numbered just 73 whales, the lowest level in 40 years.² New research in the last five years has underscored the fact that inadequate Chinook salmon prey is the primary factor driving the whales’ precipitous decline, and that Chinook from the Columbia and Snake Rivers form a critical part of their seasonal diet in the early spring months.

B. The Action Agencies’ Operations, Maintenance, and Power Marketing

The Corps and BOR own, manage and operate the dams, reservoirs, irrigation projects, and other facilities addressed in the 2020 ROD. BPA coordinates operation and maintenance of these and other facilities with the Corps and BOR and distributes and markets the power generated by these facilities. The projects and actions addressed in the Action Agencies’ 2020 ROD are sometimes referred to collectively in this notice letter as the “CRS” projects and actions.

Specifically, within the Columbia River basin, BOR oversees 30 different projects of different kinds and scales. Of these, 19 are located along the Columbia River or its non-Snake River tributaries and 11 are located within the Snake River basin. Actions by BOR at these projects, including their configuration, water deliveries, administration of uncontracted water, power production, and other project management decisions, have significant influence on the hydrology, water quality and broader ecological function of the Columbia and Snake Rivers.

The Corps has responsibility for operating 12 hydroelectric projects in the Basin. The configuration and operation of the Corps’ hydroelectric projects directly affect the survival of salmon and steelhead attempting to migrate up and down the Snake and Columbia Rivers. Like the BOR, the Corps’ actions in managing these projects have a significant influence on the hydrology, water quality and broader ecological function of the Columbia and Snake Rivers.

BPA coordinates operation and maintenance of these facilities with BOR and the Corps and also markets the electric power created by these projects. In addition, BPA has statutory duties to fund mitigation projects and studies in the basin in an attempt to offset the significant and adverse impacts of dam operations on salmon, steelhead, and other natural resources.

² Center for Whale Research, “Population,” updated as of Dec. 31, 2019 <https://www.whaleresearch.com/orca-population> (accessed September 29, 2020); National Marine Fisheries Service, Endangered Status for Southern Resident killer whales, 70 Fed. Reg. 69903 (Nov. 18, 2005).

The 2020 ROD only addresses the configuration, operation and maintenance of 14 of the Corps and BOR projects in the Columbia Basin as well as BPA's role with respect to these projects. The Action Agencies now refer to these 14 projects as the "Columbia River System" or "CRS" projects.³

II. LEGAL FRAMEWORK

A. The Endangered Species Act

Under ESA § 7(a)(2), "[e]ach federal agency *shall ... insure* that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2) (emphasis added). The obligation to "insure" against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). The substantive duty imposed by § 7(a)(2) is constant, relieved only by an exemption from the Endangered Species Committee. 16 U.S.C. § 1536(h); *Conner v. Burford*, 848 F.2d 1441, 1452 n.26 (9th Cir. 1988).

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

Compliance with the procedural requirements of the ESA—making the determination of the effects of the action through the consultation process—is integral to compliance with the

³ Previously, the agencies had referred to these projects, and on occasion, other federal dams in the Columbia Basin as the "Federal Columbia River Power System" or "FCRPS" projects. In this letter we retain the FCRPS acronym for prior biological opinions and RODs but use the CRS acronym in referring to the 2020 BiOp and the Action Agencies' ROD.

substantive requirements of the Act. Under this statutory framework, federal actions that “may affect” a listed species or critical habitat may not proceed unless and until the federal agency ensures, through completion of the consultation process, that the action is not likely to cause jeopardy to the species or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001) (enjoining delivery of Klamath project water to irrigators until a valid consultation was complete); *Greenpeace v. Nat’l Marine Fisheries Serv.*, 106 F. Supp. 2d 1066 (W.D. Wash. 2000) (enjoining ocean-bottom fishing until § 7(a)(2) consultation was complete); *Conner v. Burford*, 848 F.2d at 1441, 1453-55 (enjoining oil and gas lease sales and related surface-disturbing activity until comprehensive biological opinion assessing the effects of all phases of the oil and gas activities was complete); *Lane Cnty. Audubon Soc’y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992) (“the individual sales cannot go forward until the consultation process is complete on the underlying plans which BLM uses to drive their development”).

Even after the procedural requirements of a consultation are complete, however, the ultimate duty to ensure that an activity does not jeopardize a listed species lies with the action agency. An action agency’s reliance on an inadequate, incomplete, or flawed biological opinion to satisfy its duty to avoid jeopardy is arbitrary and capricious. *See, e.g., Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984). Thus, the substantive duty not to jeopardize listed species (or adversely modify critical habitat) remains in effect regardless of the status of the consultation. While this substantive duty is most readily fulfilled by implementing a federal action that properly has been determined not to cause jeopardy, or by implementing a valid RPA that results from a properly completed consultation, an action agency is technically free to choose an alternative course of action if it can independently ensure that the alternative will avoid jeopardy but does so at its own peril. *See Bennett v. Spear*, 520 U.S. 154, 170 (1997).

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

Separately, ESA § 7(d) prohibits federal agencies, after the initiation of consultation under ESA § 7(a)(2), from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1128 (9th Cir. 1998) (section 7(d) violated where BOR executed water service contracts prior to completion of formal consultation); *Marsh*, 816 F.2d at 1389 (construction of highway outside species habitat barred by § 7(d) pending completion of consultation). This prohibition is not an exception to the requirements of § 7(a)(2); it remains in effect until the procedural requirements of § 7(a)(2) are

satisfied, 50 C.F.R. § 402.09; and it ensures that § 7(a)(2)'s substantive mandate is met. *See, e.g., Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137 (W.D. Wash. 2000).

Section 7(d) thus does not and cannot permit activities to continue that otherwise are in violation of the procedural or substantive requirements of § 7(a)(2); it does not grant permission to proceed with admittedly harmful activities while consultation is still ongoing. *See* 51 Fed. Reg. at 19,940 (“section 7(d) is strictly prohibitory in nature”). Additionally, harm to the protected resource itself is considered a violation of Section 7(d). *Pac. Rivers Council*, 30 F.3d at 1057 (“timber sales constitute ‘per se’ irreversible and irretrievable commitments of resources under § 7(d), and thus cannot go forward during the consultation process”); *Lane Cnty. Audubon Soc’y v. Jamison*, 958 F.2d at 295.

Finally, section 9 of the ESA prohibits all activities that cause a “take” of an endangered species. 16 U.S.C. § 1538(a)(1)(B), (C); 50 C.F.R. § 17.11(h). Congress intended the term “take” to be defined in the “broadest possible manner to include every conceivable way” in which a person could harm or kill fish or wildlife. *See* S. Rep. No. 307, 93rd Cong., 1st Sess. 1, reprinted in 1973 U.S. Code Cong. & Admin. News 2989, 2995. “Take” is defined by the ESA to encompass killing, injuring, harming, or harassing a listed species. 16 U.S.C. § 1532(19). NOAA has further defined “harm” as “an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 222.102. The U.S. Supreme Court has upheld the validity of this definition. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (upholding similar definition used by Fish and Wildlife Service).

Section 9's take prohibition applies on its face to two of the 13 listed ESUs/DPSs affected by the Action Agencies' activities because they are listed as “endangered.” Additionally, NOAA has enacted rules pursuant to ESA § 4(d) that extend the take prohibition to the eleven salmon and steelhead ESUs/DPSs in the Snake and Columbia basins that are listed as “threatened.” 16 U.S.C. § 1533(d); 70 Fed. Reg. 37,160 (June 28, 2005) (updating 4(d) rules for salmon ESUs); 71 Fed. Reg. 834 (Jan. 5, 2006) (incorporating updated 4(d) rules for steelhead DPSs); 71 Fed. Reg. 5178 (Feb. 1, 2006) (incorporating updated 4(d) rules for Upper Columbia River steelhead). While the 4(d) rules contain some exemptions to the take prohibition for threatened species, none is applicable here.

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

FWS and NMFS amended regulations implementing Sections 4 and 7 of the ESA on August 27, 2019. *See* 84 Fed. Reg. 44,753 (Aug. 27, 2019) (ESA Section 4(d) regulation); 84 Fed. Reg. 44,976 (Aug. 27, 2019) (ESA Section 7 regulations); 84 Fed. Reg. 45,020 (Aug. 27, 2019) (ESA Section 4 regulations). These new regulations change some definitions and requirements of the Section 7(a)(2) interagency consultation process but leave others in place. These regulatory changes, including the changes to the Section 7(a)(2) regulations, have been challenged by a number of states and other organizations as contrary to the ESA, arbitrary, and capricious.

B. The 2000 and 2004 Biological Opinions

In December, 2000 NOAA issued a biological opinion for the operation of 14 federal projects that NOAA, the Corps, BOR, and BPA labeled the “Federal Columbia River Power System” or “FCRPS” (the “2000 FCRPS BiOp”). In the 2000 FCRPS BiOp, after explaining its jeopardy standard and analysis, NOAA concluded that the proposed operation of these projects would jeopardize eight of the twelve listed salmon and steelhead ESUs in the Columbia River basin. The agency included a Reasonable and Prudent Alternative (“RPA”) that, according to NOAA, would avoid jeopardy.

A coalition of fishing businesses and conservation and fishing advocacy organizations (including organizations sending this letter) filed a lawsuit in May of 2001, alleging that the 2000 BiOp was arbitrary and capricious and contrary to law because, among other things, it relied on speculative, off-site mitigation actions from both federal and non-federal parties. The State of Oregon, the Nez Perce Tribe and others joined or supported this challenge. On May 7, 2003, the U.S. District Court for the District of Oregon agreed with plaintiffs that the 2000 FCRPS BiOp was legally flawed and relied on improper factors in reaching a no-jeopardy finding for the RPA. *See Nat’l Wildlife Fed’n, et al. v. Nat’l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196 (D. Or. 2003). The Court remanded the opinion to NOAA to prepare a new opinion that complied with the law.

On November 30, 2004, NOAA issued its revised biological opinion (the “2004 FCRPS BiOp”). In sharp contrast to its previous opinions, and with a new, comparative approach to determining jeopardy, NOAA concluded in the 2004 BiOp that the proposed FCRPS operations included in the “Updated Proposed Action” (“UPA”) from BPA, the Corps, and BOR would not jeopardize the continued existence of twelve listed ESUs of salmonids in the Columbia River basin. Both the District Court and the Ninth Circuit sharply rejected the 2004 FCRPS BiOp and once again remanded it to NOAA. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 2005 WL 1278878 (D. Or. May 26, 2005); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, CV-01-640-RE, Opinion and Order of Remand (Oct. 7, 2005); *aff’d, Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) (amended opinion).

C. The 2008 Biological Opinion and the 2010 Supplemental Biological Opinion.

After a nearly three-year remand, NOAA issued a new biological opinion on May 5, 2008 (the “2008 FCRPS BiOp”). The 2008 FCRPS BiOp concluded that the “Prospective Actions”—proposed by the Corps, BOR, and BPA—which were treated as a reasonable and prudent alternative (“RPA”)—would not jeopardize any ESA-listed salmon or steelhead ESUs/DPSs or adversely modify or destroy any of their designated critical habitat. The actions addressed in the 2008 FCRPS BiOp were not materially different from those in the 2004 UPA or the earlier, failed RPA from the 2000 FCRPS BiOp. In fact, in some vital respects the actions considered in the 2008 FCRPS BiOp provided less protection for ESA-listed salmon and steelhead. To reach a no-jeopardy/no-adverse-modification finding for actions that did little to address the fundamental obstacles to the survival and recovery of ESA-listed salmon and steelhead in the Columbia River basin, NOAA once again created from whole cloth a third new kind of jeopardy analysis for this consultation. In doing so, as it did in 2004, NOAA departed markedly from the requirements of the ESA and its implementing regulations, failed to use the best available scientific information, and reached numerous conclusions that were otherwise arbitrary and capricious and not supported by the record. Through formal record of decisions, the Corps and BOR (respectively) agreed to implement the RPA in the 2008 FCRPS BiOp (herein the “2008 RODs”), and on that basis also concluded that their actions would avoid jeopardy.

After notifying the Action Agencies of the violations of law in the 2008 BiOp and agency records of decision described above, the fishing and conservation organizations filed yet another supplemental complaint challenging the 2008 FCRPS BiOp and the 2008 RODs for the Corps and BOR in the district court. Again, the State of Oregon and the Nez Perce Tribe joined or supported this challenge. As part of a brief stay of proceedings, on May 18, 2009, the Court issued guidance in the form of a memorandum to counsel providing its preliminary view that the 2008 BiOp was arbitrary and capricious and suggesting a series of steps that could address the Court’s concerns. The agencies did not take these steps. Instead, on September 15, 2009, the Action Agencies announced a unilaterally-developed Adaptive Management Implementation Plan (“AMIP”) that they and NOAA touted as a response to the concerns outlined in the Court’s guidance memorandum. The plaintiffs pointed out that the AMIP was not properly before the Court but instead was an attempt at an improper post-hoc rationalization for the 2008 FCRPS BiOp. The Court agreed and eventually allowed NOAA and the Action Agencies a 90-day voluntary remand “to consider, among other actions, integrating the Adaptive Management Implementation Plan and its administrative record into the 2008 BiOp.” *See Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, CV-01-640-RE, Order (Docket #1750) (Feb. 19, 2010); *see also* Letter to Counsel (Feb. 10, 2010) (Docket #1749) at 1-2 (explaining basis for proposed voluntary remand order, finding, among other things, that “Federal Defendants have, in effect, acknowledged that the AMIP is procedurally flawed and no one seriously contends that it is properly before the court.”). In addition, the Court directed the agencies to consider the best available science and to consider implementing the parties’ suggestions for actions necessary to comply with the law including restoration of the lower Snake River.

On May 20, 2010, NOAA issued a Supplemental Biological Opinion (“2010 Supplemental BiOp”) after reinitiating consultation with the Action Agencies on May 3, 2010. The 2010 Supplemental BiOp did not alter any of the conclusions or analyses from the 2008 BiOp and did not address the Court’s previous guidance, nor did it propose any new actions that would affect salmon and steelhead survival through the FCRPS. The Action Agencies nonetheless adopted the 2010 Supplemental BiOp through supplemental RODs signed on June 11, 2010 (collectively the “2010 RODs”).

Plaintiffs, including organizations sending this letter, filed a further supplemental complaint challenging the 2010 Supplemental BiOp and the 2010 RODs. On August 2, 2011, the Court held that the 2008/2010 BiOps were arbitrary and capricious for their “entire ten-year term” and made clear that the agencies’ fundamental approach to avoiding jeopardy required re-examination. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1128 (D. Or. 2011) (emphasis in original). The structural problems in the 2008/2010 BiOps were rooted in a jeopardy standard that violated the ESA, the agencies’ inability to identify and implement mitigation measures, and their inability to reliably predict and verify any salmon survival improvements that may accrue even if these measures were to be identified and implemented. Specifically, the Court found that “NOAA Fisheries’ analysis fails to show that expected habitat improvements—let alone the expected survival increases—are likely to materialize,” *id.* at 1127, and that “[t]hus far, Federal Defendants have not implemented the habitat actions necessary to avoid jeopardy . . . [and] there is no indication that they will be able to identify and implement the actions necessary to catch up,” *id.* at 1128. The Court also specifically noted that “the lack of scientific support for NOAA Fisheries’ specific survival predictions is troubling,” *id.* at 1129, and further noted that the government’s own scientists, “the independent experts who reviewed [the plan], and the Independent Scientific Advisory Board (“ISAB”) have expressed skepticism about whether those benefits will be realized,” *id.* at 1130. Overall, the Court found that “[c]oupled with the significant uncertainty surrounding the reliability of NOAA Fisheries’ habitat methodologies, the evidence that habitat actions are falling behind schedule, and that benefits are not accruing as promised, NOAA Fisheries’” approach to these issues is “neither cautious nor rational.” *Id.* at 1128. The Court once again remanded the 2008/2010 BiOp to NOAA and the Action Agencies and required that in any new BiOp, NOAA shall (1) “reevaluate[] the efficacy of the RPAs in avoiding jeopardy,” (2) “identif[y] reasonably specific mitigation plans for the life of the biological opinion, and” (3) “consider[] whether more aggressive action, such as dam removal and/or additional flow augmentation and reservoir modifications are necessary to avoid jeopardy.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 839 F. Supp. 2d at 1130. The Court also granted in part an injunction requested by plaintiffs and others and ordered continuation of previous levels of court-ordered spill to alleviate some of the short-term irreparable harm to ESA-listed species. *Id.* at 1130.

D. The 2014 Supplemental BiOp

After more than two years on remand, NOAA issued the 2014 Supplemental BiOp—which again supplemented the prior inadequate 2008 and 2010 BiOps—on January 17, 2014. Despite the efforts of many in the region to convince the agencies to follow a new path, the 2014 Supplemental BiOp largely repeated and incorporated the problems that plagued the 2008/2010 BiOps it purported to supplement. This included a continued reliance on the illegal jeopardy standard in the 2008 BiOp, and continued reliance on estuary and tributary habitat actions that were not reasonably certain to occur and/or had uncertain benefits. Consequently, all of the flaws described above with respect to the 2008/2010 BiOps were continued in the 2014 Supplemental BiOp. In addition, the 2014 Supplemental BiOp continued and compounded NOAA’s previous errors in multiple ways. Nonetheless, the Action Agencies adopted the 2014 Supplemental BiOp through Supplemental RODs signed on February 28, 2014 (Corps), February 26, 2014 (BOR), and February 27, 2014 (BPA)(the “2014 RODs”).

Plaintiffs, including organizations sending this letter, filed a further supplemental complaint challenging the 2014 Supplemental BiOp and 2014 RODs. On May 4, 2016, the U.S. District Court for the District of Oregon issued a comprehensive opinion rejecting the combined 2008, 2010 and 2014 BiOps for violations of the ESA. *NWF v. NMFS*, 184 F. Supp. 3d 861, 886-934 (D. Or. 2016). The Court also concluded that the Corps and BOR had violated the procedural requirements of the National Environmental Policy Act (“NEPA”) by failing to prepare an environmental impact statement (“EIS”) for their actions. *Id.* at 934-950.

The Court’s opinion regarding the ESA violations in the 2014 BiOp (and its 2008 and 2010 predecessors) provides important and relevant context for this letter. Consequently, key points in the Court’s decision are described below.

- At the outset, the Court rejected the “trending towards recovery” standard the agencies had relied on to evaluate whether the RPA addressed in the BiOps would avoid jeopardy. The Court found that the approach the agencies followed in these BiOps disregarded without explanation the work of the Interior Columbia Basin Technical Recovery Team (“ICTRT”). *Id.* at 886-88. It also found that even an increasing population does not necessarily equate to no-jeopardy, *id.* at 889; that even though a population may be increasing incrementally, its abundance may be so low and growing so slowly that the species’ prospects of recovery would be appreciably reduced, *id.* at 890-91; and that even if the species’ risk of extinction is below some threshold, “that does not necessarily mean its chances of recovery are not being appreciably diminished,” *id.* at 892.
- Similarly, the Court rejected the jeopardy framework in these BiOps as contrary to the ESA and its implementing regulations because it did not “analyze recovery impacts with respect to reaching any recovery abundance level at any point in

time,” *id.* at 893, or assess whether the actions might delay the species’ prospects of recovery and thereby appreciably reduce them, *id.* at 892 (citing NOAA Memorandum). The Court held that these failures prevented the agencies from rationally concluding the RPA would not jeopardize the species’ recovery, *id.* at 895.

- The Court also noted that the agencies’ jeopardy standard had changed with each successive BiOp since 2000 and accordingly “its latest interpretation of the jeopardy standard was entitled to less deference than a court normally gives,” *id.* at 896 (citing cases).
- Separately, the Court concluded that, even apart from the illegal approach the agencies used to assess jeopardy, their analysis failed in multiple ways to “‘give the benefit of the doubt’ to the [listed] species,” *id.* at 901 (citing cases). The Court found, for example, that the agencies’ evaluation of uncertainty was both inconsistent in some respects and consistently (but improperly) favored more positive predictions without explaining why less positive ones could be disregarded, *see, e.g., id.* at 900 (noting, for example, that “even if wide confidence intervals cannot be avoided, they cannot be used as a shield against the need for further analysis”); *id.* at 923-27 (discussing assumed benefits from kelt reconditioning and a program to reduce avian predation); *id.* at 928 (summarizing BiOp failures regarding uncertainty).
- In a similar vein, the Court found the agencies’ reliance on RPA actions intended to benefit salmon arbitrary and contrary to law either because these action were not reasonably certain to occur, or because their projected benefits were too uncertain, or both. *Id.* at 901-02; *see also id.* at 904-06 (benefits of certain actions not reasonably certain to occur), 907-09 (actions themselves not reasonably certain to occur), 910-14 (similar analysis for other actions), 923-29 (same).
- The Court found further that the agencies’ analysis accounting for the effects of climate change on the listed species and the RPA was not complete, reasoned, or adequately explained. *Id.* at 917-23. The Court noted that the agencies had failed to consider significant recent evidence on the ways that climate change will harm salmon, reduce the effectiveness of the RPA measures, and increase the risk of a catastrophic event. *Id.* The Court also found that the agencies had failed to determine whether the RPA was sufficient to avoid jeopardy in light of the expected added harm from climate change and decreased effectiveness of the RPA. *Id.* at 922-23.
- The Court found that the agencies did not act arbitrarily in concluding that Southern Resident Killer Whales (“SRKW”) were not likely to be adversely

affected by the RPA in the 2014 BiOp. *Id.* at 948-49. The Court based this holding on the agencies' reliance on a 2012 study, their view that SRKW primarily eat salmon from the Fraser River during the summer months; and their view of the role of hatchery fish from the Columbia and Snake Rivers in the SRKW's diet. *Id.*

- The Court found the standard employed by the agencies for assessing whether their actions were likely to destroy or adversely modify critical habitat, which asked whether designated critical habitat “retain[s] the ability to become functional,” failed to comply with the ESA. *Id.* at 930. As the Court noted, when the agencies' own finding show that critical habitat does not serve its conservation role for a listed species, they cannot simply rely on the habitat's ability to become functional one day in the future as a rational basis for a finding of no adverse modification or destruction. *Id.* The Court, however, ultimately upheld the conclusion that the RPA would not adversely modify or destroy designated critical habitat based on the record before it.
- Finally, the Court held that the agencies violated NEPA by failing to prepare a comprehensive environmental impact statement for their actions. *Id.* at 933-48. The Court noted that a major benefit of the EIS process would be that “it allows innovative solutions to be considered and may finally be able to break through any bureaucratic logjam that maintains the status quo. . . . The FCRPS remains a system that ‘cries out’ for a new approach. A NEPA process may elucidate an approach that will finally move the listed species out of peril.” *Id.* at 948.

Following this ruling, the Court set a schedule for preparing a new BiOp and for complying with NEPA. At the very strong insistence of the Corps, BOR and NOAA that they could not possibly complete a remand and comply with the ESA and NEPA in less than five years, the Court set a schedule that allowed the agencies until Sept. 24, 2021, to complete a new BiOp and an EIS and issue new RODs. *NWF v. NMFS*, Order of Remand (July 6, 2016) (ECF 2089). On October 19, 2018, however, in a Presidential Memorandum, the President directed the agencies to complete the remand and produce a final environmental impact statement, new BiOp and RODs by September 30, 2020, a full year earlier than the agencies stated was possible. *See* 2020 BiOp at 95 & n.16. The agencies have now complied with this presidential schedule notwithstanding an unprecedented public health emergency, multiple requests from states and others for additional time to review and comment on a draft of their plan, and their statements to the Court regarding the minimum amount of time it would take to adequately prepare these documents.

Separately, in late 2016, the plaintiffs sought an injunction to increase voluntary spring spill at the lower Snake and lower Columbia River dams up to the level allowed by state water quality standards. The Court granted this relief but delayed its implementation until the spring of

2018 to allow the agencies, and state and tribal salmon scientists, to develop more specific plans for implementing this increased spring spill. *NWF v. NMFS*, 2017 WL 1829588 (D. Or. April 3, 2017) (spill injunction order). The Ninth Circuit subsequently affirmed this ruling shortly before it was to take effect in 2018. *NWF v. NMFS*, 886 F.3d 803 (9th Cir. 2018).

Thereafter, a number of parties to this case, including the Corps, BOR, and BPA negotiated a so-called “Flexible Spill Agreement” to govern voluntary spring spill operations during the remainder of the remand, i.e., during the spring of 2019, 2020 and 2021, or until NOAA issued a new BiOp and the Action Agencies issued a final EIS and adopted new RODs. *NWF v. NMFS*, Status Report re: 2019-2021 Spill Operations Agreement (Dec. 18, 2018) (ECF 2298) (and Exhibit thereto). This Agreement, however, explicitly recognized that “no [p]arty makes any concessions regarding the legal validity [or] scientific validity . . . of the spill operations contemplated in this Agreement.” *Id.* at ¶ X. Nonetheless, the remaining parties agreed not to pursue further litigation in this case for the three-year term of the Agreement so long as the Action Agencies implemented the Agreement. *Id.*

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

I. THE 2020 BIOP AND THE ACTION AGENCIES’ ROD.

The 2020 BiOp is a massive document running to well over 1400 pages, not including numerous technical appendices. The Action Agencies’ ROD relies on this BiOp as the basis for concluding that the actions they propose to take over the next fifteen years in managing and operating the CRS⁴ facilities will not jeopardize any of the listed species of salmon and steelhead, destroy or adversely modify any designated critical habitat, or be likely to adversely affect endangered Southern Resident Killer Whales. The 2020 BiOp and ROD, however, represent a significant roll-back of protections for salmon and steelhead from those in the illegal 2008/2010/2014 BiOps and RODs, and even from the 2019-2021 bridge operations described in the Flexible Spill Agreement. They are also contrary to the law of this case in multiple ways. For reasons including, but not limited to, those described below, the ROD and 2020 BiOp are arbitrary and capricious and violate the ESA and its implementing regulations:

- The jeopardy standard set forth in the 2020 BiOp and relied on in the ROD is contrary to the requirements of the ESA and its implementing regulations because it does not assess whether the proposed action will appreciably reduce the listed species’ likelihood of survival and recovery. Instead, the 2020 BiOp and ROD compare the proposed action to the inadequate and illegal actions the Action Agencies have been pursuing under a series of failed BiOps since 2000 and, based on this comparison, conclude that the proposed action will avoid jeopardy. This

⁴ See *supra* at note 3 and accompanying text.

is not the first time the agencies have pursued an improper comparative approach. *See, e.g., Idaho Dep't of Fish and Game v. National Marine Fisheries Service*, 850 F. Supp. 886, 899 (D. Or. 1994); *NWF v. NMFS*, 2005 WL 1278878 (D. Or. May 26, 2005).

- The Action Agencies' ROD and the 2020 BiOp, which are grounded in an arbitrary and illegal comparative jeopardy framework, fail to identify or describe, let alone rationally use and rely on, any articulation of what species recovery and a time frame for achieving it might look like even though the ESA regulations for assessing jeopardy require the agencies' analysis to rationally address this issue in order to comply with the law. *NWF v. NMFS*, 184 F. Supp. 3d at 893-95. Similarly, while the 2020 BiOp describes a threshold associated with survival, neither it nor the ROD explain rationally—or even at all—the relationship of that threshold to the conclusion that the proposed action will not appreciably reduce the listed species' likelihood of survival. Providing some arbitrary and incomplete information about the species' future prospects and how the proposed action may affect these is not a rational or legal basis for concluding that the proposed action will avoid jeopardy. The agencies attempt to justify this new standard as “going back to basics,” *see* 2020 BiOp at 44-45, without acknowledging that the new standard conflicts with the ESA, its implementing regulations, and the Court's prior decisions in this case.
- The Action Agencies' ROD and the 2020 BiOp fail to consider numerous adverse effects to the listed species by improperly categorizing them as either not an effect of the action or part of the baseline or both. The Action Agencies cannot rationally or legally ignore the harm caused by the CRS, especially when they have failed to complete a valid consultation for their actions in at least twenty years. They have also failed to explain why they believe the harm caused by operation of the CRS is part of the baseline or not an effect of the action, despite their substantial discretion over these operations. The no-jeopardy conclusion in the ROD and 2020 BiOp is arbitrary and irrational because it is based on an analysis that minimizes or excludes adverse effects that the ESA and its implementing regulations require them to consider.
- To the extent the Action Agencies' ROD and the 2020 BiOp attempt to justify their improper jeopardy standard and analysis by relying on the recently revised ESA section 7 regulations, or any discussion of those changes in the rulemaking record by NOAA, those regulatory changes and related statements about the section 7 regulations are arbitrary, illegal and contrary to law as applied in this case. In the alternative, to the extent those regulations are valid, the 2020 BiOp and ROD improperly and arbitrarily fail to follow them for reasons including, but not limited to, those described in this letter.

- Even apart from their illegal standard, framework and analysis, the 2020 BiOp and ROD fail in multiple ways to “‘give the benefit of the doubt’ to the [listed] species.” *See NWF v. NMFS*, 184 F. Supp. 3d at 901 (citing cases). For example, the agencies claim that there is uncertainty about the precise extent of “latent mortality,” and that the 15-year proposed action will help to clarify their understanding of this issue, without acknowledging that the assumptions about latent mortality used in the 2020 BiOp and relied on in the ROD lack a rational basis and that any uncertainty regarding these effects must be resolved in favor of protecting the species.
- To the extent the Action Agencies’ ROD and the 2020 BiOp attempt to justify their failure to give the benefit of the doubt to the species on the recently revised ESA section 7 regulations, or any discussion of those changes in the rulemaking record, those regulatory changes and related statements about the section 7 regulations are arbitrary, illegal and contrary to law as applied in this case.
- The agencies also consistently fail to consider and use the best currently available scientific information throughout their ROD and the 2020 BiOp, including, but not limited to, not using available and credible quantitative information and analyses regarding the listed species.
- The jeopardy analysis in the 2020 BiOp and Action Agencies’ ROD relies on a suite of actions not materially different from ones the Court previously rejected, or that the Action Agencies have admitted elsewhere are inadequate. The agencies do not explain why they believe this suite of actions that has failed to avoid jeopardy in the past will now produce different results. Moreover, there are significant inconsistencies in how the agencies have described the proposed action between the ROD, the 2020 BiOp, and other documents. These inconsistencies are arbitrary and unexplained, and prevent the agencies from rationally concluding that the proposed action will avoid jeopardy.
- The proposed action and the agencies’ identification of its effects in the 2020 BiOp and ROD are vague and uncertain. Neither the 2020 BiOp nor the Action Agencies’ ROD can rationally conclude that unknown or unspecified actions and effects will avoid jeopardy. For example, the proposed action, which is for a 15-year period of operation of the CRS dams and reservoirs it addresses, only identifies the spring spill operations that will be implemented in the first year. And these operations are simply those described for the third year of the current three-year Interim Spill Agreement, operations the parties to that Agreement explicitly noted they were not endorsing as legally or scientifically adequate. *NWF v. NMFS*, Notice re 2019-2021 Operations, ECF 2298 (Dec. 18, 2018)

(Attachment A at 9). Beyond the first year, the ROD does not actually identify any specific spring spill operations, establish a floor for these operations, or commit to any specific or binding standards that will determine these operations. Likewise, and unlike the prior 2008, 2010 and 2014 BiOps, the Action Agencies' proposed action and ROD as well as the 2020 BiOp do not identify specific tributary or estuary habitat actions that will be taken or (because they are not specified) rationally evaluate the effects of these unknown actions. Even though these spill, habitat and other actions and their effects are not reasonably certain to occur, the 2020 BiOp and ROD rely on them to conclude that they will be sufficient, in combination with the rest of the proposed action, to avoid jeopardy. This conclusion is arbitrary, capricious and contrary to law.

- The ROD and 2020 BiOp fail to explain the effects of each component of the proposed action in a rational and detailed way. Instead, they simply aggregate all of the components to reach an unsupported and arbitrary conclusion as to their effects on species. Under this approach, the agencies have provided no explanation for how certain components of the action will affect species, and it is impossible to tell whether or how the agency considered certain impacts. For example, under the proposed action, the agencies may start zero nighttime flow operations substantially earlier in the year, but there is no analysis of how this significant change to the flow regime will impact juvenile or adult migration for specific runs. Similarly, where the agencies do discuss the specific effects of a component of the proposed action in the 2020 BiOp and ROD, they frequently overestimate benefits to species and underestimate or ignore harm. For example, the agencies claim that the installation of fish friendly turbines will benefit species but they fail to analyze whether the new turbine design will draw more fish into the turbines, or whether this increase in turbine interactions outweighs any decreased lethality for the species.
- To the extent the Action Agencies' ROD and the 2020 BiOp attempt to justify their lack of analysis and their reliance on unspecified and vague future actions by relying on the recently revised ESA section 7 regulations, or any discussion of those changes in the rulemaking record, those regulatory changes and related statements about the section 7 regulations are arbitrary, illegal and contrary to law as applied in this case.
- The Action Agencies' ROD and the 2020 BiOp fail to consider and incorporate harm to salmon from climate change in their jeopardy analysis. Climate change will worsen conditions for salmon significantly during the 15-year period covered by the proposed action and beyond. The 2020 BiOp and ROD fail to assess accurately or rationally the full scope of climate change impacts on the species or the proposed action based on the best available science. If the effects of the

proposed action are combined with the additional harm from climate change, many species and populations face a substantially higher risk of extinction even under the arbitrary limitations on the analysis imposed in the 2020 BiOp and relied on in the ROD. Despite this heightened risk and the acknowledgement that climate impacts are expected to occur, the ROD and the 2020 BiOp arbitrarily fail to consider whether the proposed action will jeopardize the species once impacts from climate change are incorporated.

- The Action Agencies' ROD and the 2020 BiOp do not include actions to mitigate for the additional risks to the species posed by advancing climate change. The proposed action in the Action Agencies' ROD and 2020 BiOp include some actions that the agencies assert will "increase the resiliency" of the listed species to climate change in unspecified ways and to an unspecified extent. If the agencies are assuming that these actions will mitigate for the adverse effects of both the CRS and climate change, that position is arbitrary and lacks a rational explanation. If the agencies take the position that they need not ensure their action will avoid jeopardy to the listed species in the context of current and advancing climate change, that position is contrary to law, arbitrary, and lacks a rational explanation.
- The Action Agencies' ROD and 2020 BiOp fail to adequately or rationally consider and account for the fact that climate change will reduce the effectiveness of the measures in the proposed action that are intended to benefit salmon. They also fail to consider and account for the fact that some elements of the proposed action will exacerbate the effects of climate change and the harm to species. To the extent the Action Agencies' ROD and the 2020 BiOp attempt to justify their failure to adequately consider and account for the effects of climate change by relying on the recently revised ESA section 7 regulations, or any discussion of those changes in the rulemaking record, those regulatory changes and related statements about the section 7 regulations are arbitrary, illegal and contrary to law as applied in this case.
- The incidental take statement ("ITS") in the 2020 BiOp, and the Action Agencies' reliance on it in their ROD, is arbitrary, capricious, and contrary to law. The ITS must include a rational take trigger and this trigger cannot be an amount of take that causes jeopardy. The 2020 BiOp fails to set a rational take trigger or explain how the level of take anticipated in the ITS will avoid jeopardy. The Action Agencies' reliance on this ITS in their ROD is therefore arbitrary and illegal.
- The ROD and 2020 BiOp, including the not likely to adversely affect ("NLAA") concurrence for Southern Resident Killer Whales ("SRKW"), fail to adequately or rationally consider the impact of CRS configuration and operation on Southern

Resident Killer Whales. The ROD and 2020 BiOp fail to adequately consider recent evidence demonstrating the importance of prey availability to Southern Resident Killer Whale survival, the critical seasonal role of Chinook from the Columbia and Snake Rivers to their reproductive success specifically, the inadequate level of current prey availability, the declining per-fish energetic quality of Southern Resident Killer Whale's preferred Chinook prey, the increased level of Chinook necessary to support SRKW survival and recovery, and the cumulative impact of the declines in the Columbia and Snake River runs alongside other declining runs in the SRKW's prey base as well as compounding threats to both prey and SRKW from other factors, including climate change. The Action Agencies' NLAA finding and NOAA's concurrence are not based on the best available science and are arbitrary and contrary to law.

- In their effort to support the NLAA finding and concurrence for Southern Resident Killer Whales, the agencies repeat the same errors that undermine the rest of their analysis in the ROD and 2020 BiOp. For example, the agencies rely on an improper comparative approach to conclude that their operation of the CRS is not likely to adversely affect SRKW, without a rational analysis of the impact of the proposed action in the context in which it will occur on the species' likelihood of survival and recovery. Similarly, the agencies fail to consider the impact of the proposed action by improperly and inconsistently characterizing certain effects as part of the baseline or not an effect of the action or both. The agencies also fail to give the species the benefit of the doubt, instead putting the risk of uncertainty on SRKW.
- The agencies' assessment in the ROD and 2020 BiOp of impacts of the proposed action on designated critical habitat for the listed species suffers from the same deficiencies outlined above. These include failing to adequately consider and account for impacts on critical habitat likely to result from agency actions that the agencies allege are in the baseline, as well as changes in habitat conditions due to climate change.
- In addition, the ROD's standard for assessing whether the proposed action destroys or adversely modifies the listed species' designated critical habitat, which NOAA also employs in the 2020 BiOp, is contrary to the requirements of the ESA and its implementing regulations because it does not rationally assess whether the proposed action will appreciably reduce the value of the critical habitat for the conservation of the listed species. Indeed, the 2020 BiOp applies, and the ROD relies on, a standard for assessing whether the proposed action affects designated critical habitat that conflicts with the ESA to an even greater degree than the standard the Court found unlawful in *NWF v. NMFS*, 184 F. Supp. 3d at 930.

- The Action Agencies’ ROD and the 2020 BiOp appear to base their rationale for this new standard for assessing destruction or adverse modification of critical habitat at least in part on the recently revised ESA section 7 regulations. Those changes eliminated from the critical habitat analysis the question of whether a proposed action is likely to “preclude or significantly delay development of [] features [essential for conservation of a species].” *See* 81 Fed. Reg. 7214 (2016) (former version of 50 C.F.R. 402.02, defining “destruction or adverse modification”). Consistent with this change, the critical habitat standard employed in the ROD and 2020 BiOp makes no effort to assess or consider the extent to which the proposed action is likely to preclude or significantly delay development of physical or biological features essential for conservation of the listed species, despite acknowledging that important features of critical habitat for listed salmon and steelhead are likely to remain deficient far into the future. This standard is directly at odds with the district court’s rejection of the previous standard for assessing whether already degraded critical habitat retains the ability to someday become functional. *See NWF v. NMFS*, 184 F. Supp. 3d at 930.
- To the extent the ROD and 2020 BiOp rely on the 2019 revisions to the definition of “destruction or adverse modification” in the Section 7 regulations—or any discussion of those changes in the rulemaking record by NOAA—those regulatory changes and related statements about the section 7 regulations are arbitrary, illegal and contrary to law as applied in this case.
- The critical habitat analyses from the 2020 BiOp on which the Action Agencies rely in their ROD also address a different question than whether the proposed action will alter essential features of critical habitat in a manner that appreciably diminishes the value of critical habitat for either survival or recovery of the listed species. In its 2016 decision, the district court recognized that maintaining the status quo when severely degraded habitat does not serve its necessary conservation role is not consistent with Section 7. *See NWF v. NMFS*, 184 F. Supp. 3d at 930. However, despite acknowledging that essential elements of critical habitat such as water quality and safe passage will remain degraded—and in fact identifying additional negative impacts to some essential features—the 2020 BiOp and ROD eschew analysis of whether or the extent to which the proposed action improves critical habitat to a point at which it can fulfill its conservation role and instead concludes that the proposed action will not destroy or adversely modify critical habitat because it will not further degrade essential features of critical habitat by a “meaningful amount.” *See, e.g.*, 2020 BiOp at 293. This “meaningful amount standard” is inconsistent with the ESA, its implementing regulations, and prior court decision in this case. Reliance on this standard by the Action Agencies is arbitrary and capricious.

- Further compounding their errors in assessing impacts of the proposed action on critical habitat, the Action Agencies' ROD and 2020 BiOp arbitrarily fail to consider whether the proposed action's impacts to critical habitat appreciably reduce the species' likelihood of recovery because these documents only describe in vague terms some positive and negative impacts to critical habitat without grounding their analyses in any explanation of what might constitute recovery. The district court in 2016 and the Ninth Circuit in 2008 emphasized that identifying and considering in a rational way salmon and steelhead population performance that would be consistent with recovery is part of a lawful critical habitat analysis. *See NWF v. NMFS*, 184 F. Supp. 3d at 932; *NMFS III*, 524 F.3d at 936. The critical habitat analysis in the 2020 BiOp on which the Action Agencies' ROD relies is arbitrary, capricious and contrary to law.
- To the extent the Action Agency ROD and the 2020 BiOp attempt to justify these errors by relying on the recently revised ESA section 7 regulations, or any discussion of those changes in the rulemaking record by NOAA, those regulatory changes and related statements about the section 7 regulations are arbitrary, illegal and contrary to law as applied in this case.

IV. THE ACTION AGENCIES' VIOLATIONS OF THE ESA

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

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

contrary to law. *See, e.g., Res. Ltd. v Robertson*, 35 F.3d 1300, 1304-1305 (9th Cir. 1993); *Stop H-3 Ass'n. v. Dole*, 740 F.2d 1460.

The Action Agencies also have failed to ensure that their actions are not likely to destroy or adversely modify the designated critical habitat of the listed species. *See* 50 C.F.R. § 402.02 (adverse modification defined as “direct or indirect alteration that appreciably diminishes the value of the critical habitat for both the survival and recovery of a listed species.”). The ESA defines critical habitat as those areas with the “physical or biological features essential to the conservation of the species....” 16 U.S.C. § 1532(5)(A)(i). The final rules designating critical habitat for listed salmon and steelhead describe many features of critical habitat essential for their recovery, including, among other things, adequate water quality and quantity, water temperature, water velocity, and safe passage conditions in migratory corridors. *See, e.g.,* 70 Fed. Reg. 52488, 52521-22 (Sept. 2, 2006). A lawful assessment of whether a proposed action destroys or adversely modifies critical habitat must focus on the ability of the essential features of critical habitat to contribute to recovery of listed species, including an assessment of whether the proposed action precludes or appreciably delays improvements to features essential to recovery—an analysis not present in the 2020 BiOp or Action Agencies’ ROD. Overall, the proposed agency action described in the Action Agencies’ ROD and 2020 BiOp, which is not materially distinguishable from the actions approved in the 2008, 2010, and 2014 BiOps and RODs, adversely impacts essential features of designated critical habitat and destroys and adversely modifies the ability of the critical habitat to contribute to the recovery of the species. *See Gifford Pinchot Task Force*, 378 F.3d 1059; *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d at 933-936. The conclusion that the proposed action will not further degrade already impaired critical habitat by a “meaningful amount” does not support a conclusion that the proposed action is not likely to destroy or adversely modify listed species’ critical habitat.

By implementing the proposed action under these circumstances, the Action Agencies are violating section 7(a)(2).

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

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

of Fishermen's Ass'ns, et al. v. Bureau of Reclamation, 138 F. Supp. 2d 1228 (N.D. Cal. 2001) (requiring that BOR suspend water deliveries in the Klamath basin, unless flows were fully adequate for fish, pending completion of biological opinion); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137 (W.D. Wash. 2000) (enjoining implementation of fishing management plans in specific areas pending completion of BiOp).

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

C. The Action Agencies Have Failed to Comply With § 7(a)(1).

As discussed above, ESA § 7(a)(1) is an additional, mandatory obligation that agencies develop programs for the recovery of listed species, in consultation with NOAA. *See Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998). As the 2020 BiOp and its predecessors since 2000 acknowledge, the biological requirements of salmon and steelhead in the mainstem of the Columbia and Snake Rivers are not being met, and consequently, the species continue to slide towards extinction. In neither the 2008, 2010 nor 2014 BiOps have the Action Agencies identified, or consulted with NOAA regarding those steps they will take to recover these species to the point where they can be removed from ESA protection, nor do they do so in the 2020 BiOp or ROD. Indeed, the Action Agencies continue to arbitrarily reject measures such as increased spill, reservoir drawdown, and dam removal that would both increase fish survival and increase the likelihood of recovery.

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

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

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

E. The Action Agencies Are “Taking” Listed Species Without an Incidental Take Statement, in Violation of ESA § 9.

In their operation of the CRS facilities, the Action Agencies are “taking” or causing the take of endangered and threatened salmon and steelhead. This take occurs in a number of ways, including mortality and injury to adults and juveniles caused by: passing through turbines, spillways, and bypass and collection systems; delayed migration and increased predation associated with reservoir operations and altered hydrograph; loss of spawning and rearing habitat; and impaired water quality. The magnitude of this authorized “incidental” take is quite large. In the absence of a valid Incidental Take Statement (“ITS”) or exemption under the Act, this take is prohibited. Because the 2020 BiOp, including its ITS, is arbitrary and illegal, the ITS is also invalid and does not insulate the Action Agencies from liability for take of the listed species. Since the Action Agencies may not lawfully take listed species, they are in violation of § 9.

V. CONCLUSION

If the Action Agencies do not cure the violations of law described above immediately, upon expiration of 60 days, the parties to this notice intend to file suit against the Corps, BOR, and BPA pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), and other

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U.S. Army Corps of Engineers
Bureau of Reclamation
Bonneville Power Administration
Sixty-Day Notice of Intent to Sue
October 22, 2020
Page 24

applicable laws. If you would like to discuss the significant ESA violations described herein and seek a mutually acceptable solution to them, please contact any of the undersigned.

Sincerely,



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(Continued below)

U.S. Army Corps of Engineers
Bureau of Reclamation
Bonneville Power Administration
Sixty-Day Notice of Intent to Sue
October 22, 2020
Page 25

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