TODD D. TRUE (WSB #12864)
ttrue@earthjustice.org
STEPHEN D. MASHUDA (WSB #36968)
smashuda@earthjustice.org
ANNA M. SEWELL (WSB #48736)
asewell@earthjustice.org
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340 | Phone / (206) 343-1526 | Fax

DANIEL J. ROHLF (OSB #99006)
rohlf@lclark.edu
Earthrise Law Center
Lewis & Clark Law School
10015 S.W. Terwilliger Boulevard, MSC 51
Portland, OR 97219
(503) 768-6707 | Phone / (503) 768-6642 | Fax
Attorneys for Plaintiffs

THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, *et al.*,

Plaintiffs,

and

STATE OF OREGON,

Intervenor-Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE, *et al.*,

Defendants,

and

NORTHWEST RIVERPARTNERS, *et al.*,

Intervenor-Defendants.

No. 3:01-cv-00640-SI

NWF'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR AN INJUNCTION

TABLE OF CONTENTS

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

TABLE OF AUTHORITIES

Page(s)

Cases

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

Regulations

Miscellaneous

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

INTRODUCTION

NWF and the State of Oregon, supported by the Nez Perce Tribe, have moved for a carefully tailored injunction under the ESA to increase voluntary spring spill at eight Snake and Columbia River dams, consistent with existing state water quality standards for total dissolved gas, in order to reduce irreparable harm to juvenile salmon and steelhead migrating to the ocean past these dams and reservoirs in the spring until the Federal Defendants complete consultation and produce a legally valid biological opinion – something they have so far failed to do for more than 15 years. Federal Defendants categorically oppose every aspect of this request even though spill is widely acknowledged to be the safest route of dam passage for juvenile salmon. This resistance is grounded in arguments that seek to dismiss the harm from current dam operations, mischaracterize the available scientific evidence about the beneficial effects of increased spill, and overstate the specter of unintended consequences without acknowledging the provisions of NWF's and Oregon's motions that would address these unlikely effects if need be. The modest increase in spring spill NWF and Oregon seek will reduce irreparable harm to juvenile salmon and steelhead and can be effectively implemented and managed. The Court should grant NWF and Oregon an injunction under the ESA.

NWF also has asked the Court for a limited injunction under NEPA to halt a handful of major capital investments in the four lower Snake River dams, and to afford a mechanism to address whether additional capital investments in these dams should begin while the Action Agencies prepare an EIS that will examine, among other alternatives, whether one or more of these dams should be breached or bypassed in order to comply with the ESA and other laws. Again, Federal Defendants categorically oppose every aspect of this request notwithstanding the clear requirements of NEPA, its implementing regulations, and relevant case law which

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

recognize the irreparable harm an unabated commitment of resources to one course of action can have on the core purposes of an EIS – a full and fair consideration of reasonable alternatives and a fully informed decision based on that analysis. Federal Defendants seek to set aside this core NEPA principle by arguing that there is no such proscription in the absence of direct harm to the environment and that NWF's injunction request itself poses a risk of even greater harm to the public interest. Like their ESA arguments, these arguments construe the law on irreparable harm too narrowly and seek to raise a "parade of horribles" from a limited injunction against some capital spending without any real attempt to examine whether a pause in a few specific capital projects is practical and would better serve the purposes of NEPA, the environment, and the public interest than unchanged and continued headlong investment in four dams that Federal Defendants themselves acknowledge they will consider removing. NWF describes below how best to tailor an injunction under NEPA to limit the prejudicial effect on the NEPA process of continued spending on specific current and future capital projects and also limit any potential risk to other resources and the public interest from doing so.

ARGUMENT

I. THE COURT SHOULD GRANT NWF'S AND ORGEON'S MOTIONS FOR AN INJUNCTION UNDER THE ESA.

NWF and Oregon have explained that operation of the federal dams on the Snake and Columbia Rivers is causing irreparable harm to ESA-listed salmon and steelhead, particularly to juveniles that migrate downstream past these dams in the spring. *See* NWF Inj. Mem. at 6-12; Oregon Inj. Mem. at 12-15; Declaration of Ed Bowles In Support of Oregon's Injunction Motion at ¶¶ 19-23 ("2016 Bowles Inj. Decl.") (all summarizing evidence of harm). This harm is the starting point for our injunction motions. Since Federal Defendants cannot successfully argue that this harm is not occurring, they attempt to change the subject and focus on different

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

questions: whether dam operations today are better than they were yesterday, or whether these operations afford some help to the species. Fed. Opp. Mem. at 26-29, 32. They also argue that the Court's decision to leave the failed 2014 BiOp in place as a floor to avoid worse harm to the species, *NWF v. NMFS*, 184 F. Supp. 3d 861, 949 (D. Or. 2016), as well as the fact that the Court found current conditions in the rivers have improved, *id*. at 932, show that current dam operations are sufficient to avoid irreparable harm to the species, Fed. Opp. Mem. at 16, 31. Finally, they assert that any adverse impacts from dam operations to listed salmon and steelhead only affect their long-term viability and so are not imminent. *Id*. at 25-29. While ensuring the species' long-term survival and recovery is, of course, the primary focus of the ESA, making harm to achieving these goals fully relevant to determining harm for purposes of an injunction, there also is abundant evidence that current dam operations are suppressing salmon and steelhead survival now. Federal Defendants' efforts to change the subject cannot change the fact that these operations continue to cause irreparable harm. NWF addresses Federal Defendants' arguments and the evidence of harm below in section I.A.

The focus of Oregon's and NWF's motions for an injunction under the ESA is on *reducing* the ongoing irreparable harm from current dam operations on juvenile spring migrants through a tailored and flexible increase in a proven measure to improve juvenile downstream survival – voluntary spring spill. While we recognize that this relief will not eliminate the harm to salmon and steelhead from dam operations, it also is not a radical measure or an untested experiment as Federal Defendants assert. Fed. Opp. Mem. at 9, 10, 33-34. And we certainly do not seek its inflexible, across-the-board application. *See, e.g.*, 2016 Bowles Inj. Decl. ¶¶ 7, 10, 40, 43; *see generally* Reply Declaration of Ed Bowles in Support of Oregon's Motion for an Injunction ("2017 Bowles Inj. Reply Decl."). Although Federal Defendants seek to cast this

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

pragmatic approach to tailored spill operations at each dam, and the flexibility to adjust spill further to address any unique circumstances or emergencies that may arise, as somehow fatal flaws in our motions, they are wrong. The voluntary spring spill operations NWF and Oregon seek have already been analyzed and are available. *See* 2017 Bowles Inj. Reply Decl. ¶¶ 27-30 (discussing e.g., elements of the Fish Passage Plan). Moreover, another court recently went even further and required a group of fish management experts to actually develop the details of an injunction under the ESA to increase spring flows in the Klamath River to reduce the risk of harm to ESA-listed salmon. *See Yurok Tribe, et al. v. Bureau of Reclamation*, 2017 WL 512845, at *30-31 (N.D. Cal. Feb. 8, 2017) ("plaintiffs' technical experts and the agency experts shall meet and confer on the precise timing, duration and volume of any flows and submit a proposed injunctive flow plan"); *see generally id.* at *24-30 (discussing irreparable harm and rejecting defendants' arguments that such flows would be an untested experiment, that the Klamath Project is too complex, and that the proposed flows would be too difficult to implement given the agencies' conflicting demands). NWF's and Oregon's injunction motions are reasonable and will meet the ESA's purpose of giving the listed species the benefit of the doubt. *NWF v. NMFS*, 184 F. Supp. 3d at 873 (citing and quoting *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987)). NWF addresses Federal Defendants' various objections to this relief in section I.B below.

A. ESA-Listed Salmon and Steelhead Face Irreparable Harm From Current Dam Operations Under the Failed 2014 BiOp.

As the Court concluded last May, "[r]ecent data shows that the listed species remain in a precarious state." *NWF v. NMFS*, 184 F.Supp. 3d at 879. The evidence to support this conclusion is extensive, much of it already addressed by the Court. *See, e.g.*, *id*. at 879-80 (citing 2014 BiOp at 70–71, 109, 112-13, and Table 2.1–1, Table 2.1-17); *see also* NWF Inj.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

Mem. at 6-12; Oregon Inj. Mem. at 12-15; 2016 Bowles Inj. Decl. ¶¶ 19-23. Moreover, the myriad ways dam operations contribute to the species' "precarious state" is beyond dispute. The agencies' own 2008 Supplemental Comprehensive Analysis ("SCA") catalogues these harms in some detail. 2008 SCA at 5-4 to 5-25.[1] None of these adverse effects has disappeared. Nor has NWF conflated all sources of salmon mortality with mortality associated with passage through the hydrosystem. *But see* Fed. Opp. Mem. at 27 (making this claim). NWF has cited a joint federal, state, and tribal analysis of the allocation of human caused mortality to Columbia and Snake River salmon. *See* NWF Inj. Mem. at 11 (citing 2008 NOAA AR B143). As this multi-agency analysis explains, the scientists who prepared it concluded that the Snake and Columbia River dams are responsible for 43% to 74% of the overall human caused mortality to spring/summer Chinook populations).[2] While Federal Defendants apparently do not like the word "precarious," Fed. Opp. Mem. at 28-29 (disputing the application of this word to ESA-listed salmon and steelhead), the fact remains that operation of the Snake and Columbia River dams is today still a major source of mortality for these fish and hence a major source of irreparable harm. *See NWF v. NMFS*, 422 F.3d 782, 795 (9th Cir. 2005) (noting that "one of the

[1] These facilities adversely affect ESA-listed salmon in a variety of ways including (but not limited to) reducing and shifting river flows in ways that kill and injure juvenile and adult salmon, killing and injuring juvenile salmon migrating downstream, especially those that do not pass the dams via spill, creating slackwater reservoirs that expose salmon to poor water quality, high water temperatures, altered habitat, increased risk of disease, predation, disorientation, and stress, and reducing the fitness and survival of juvenile salmon in the estuary and ocean even after they survive their downstream migration. 2008 SCA at 5-4 to 5-25.

[2] While this analysis is labeled a "draft," 2008 NOAA AR B143, it did not become final because soon after the draft report issued, NOAA and the other federal agencies abandoned this approach in favor of their "trending towards recovery" jeopardy standard and analysis. *See* Oregon Response, Quarterly Status Report (filed Oct. 16, 2006) (Dkt. 1290) (detailing how the then-recently announced "trending toward recovery" standard departed from the ten-step jeopardy framework previously guiding the remand, including Step 4, apportioning sources of salmon mortality).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

important factual findings made by the district court was that the federal operation of the Columbia and Snake River dams 'strongly contribute to the endangerment of the listed species and irreparable injury will result if changes are not made'").

Federal Defendants attempt to avoid this clear conclusion by re-arguing issues on which they did not prevail in defending the 2014 BiOp. Thus, they argue again that the species are improving under the RPA, relying on many of the same points about increased abundance trends, individual dam passage survival rates, and fish travel time that they raised in their merits briefing. *Compare* Fed. Opp. Mem. at 25-29 *with* Fed. Mot. SJ at 15-20. Even after considering this evidence, the Court still concluded that "[r]ecent data shows that the listed species remain in a precarious state." *NWF v. NMFS*, 184 F.Supp. at 879. Federal Defendants' arguments can fare no better on a second try. Likewise, the agencies assert that NWF's claim of irreparable harm must be rejected because the Court left the failed 2014 BiOp in place and acknowledged that it provided some protection for salmon and steelhead. Fed. Opp. Mem. at 16. But the Court left the BiOp in place, not because it adequately addressed harm to the listed species, but because setting it aside would pose a risk of even greater harm. *See NWF v. NMFS*, 184 F.Supp. 3d at 949 (citing *NWF v. NMFS*, 524 F.3d 917, 936 (9th Cir. 2008)).[3] Federal Defendants also incorrectly seek to interpret the Court's finding of no destruction or adverse modification of critical habitat because the 2014 BiOp likely will lead to "significant improvements to the

[3] Indeed, the Court's previous injunctions requiring additional spill were also entered *after* the Court, for similar reasons, decided to leave illegal biological opinions in place during a remand. *See NWF v. NMFS*, No. 01-640-RE, Opinion and Order (Dec. 29, 2005) (Dkt. 1221) (ordering spring and summer spill for 2006 months after a remand order leaving the 2004 BiOp in place); *NWF v. NMFS*, 839 F. Supp. 2d 1117, 1129 (D. Or. 2011) (leaving BiOp in place); *id*. at 1131 (concluding that "[a]s in the past, I find that irreparable harm will result to listed species as a result of the operation of the FCRPS [and granting] Plaintiffs' motion with respect to spring and summer spill"). Moreover, the dam operations in the 2008/2010 BiOp – which this Court found in its 2011 decision would cause irreparable harm – are the same as those in the 2014 BiOp that Federal Defendants now seek to repackage as beneficial.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

mainstem habitat," *NWF v. NMFS*, 184 F.Supp.3d at 933, as an endorsement that this protection is sufficient to avoid irreparable harm, Fed. Opp. Mem. at 27, 31. Of course, the Court also recognized that NOAA itself has concluded the "migration corridors . . . are degraded, are not functional, and do not serve their conservation role." *NWF v. NMFS*, 184 F.Supp. 3d at 930. In light of these findings, it is apparent that Federal Defendants' argument confuses some steps in the right direction with a journey of a thousand miles: just because dam operations are better for fish today than they have been is not evidence that these operations are no longer causing irreparable harm.

Finally, Federal Defendants argue that NWF's evidence of irreparable harm addresses only risk to the species' long-term viability, as if this were not a relevant consideration. Fed. Opp. Mem. at 28.[4] NWF need not show that the species will become extinct in the next two years in the absence of an injunction, or even that the species' condition will become "worse easily or quickly," Fed. Opp. Mem. at 28 (quoting the definition of "precarious" from Black's Law Dictionary). No case of which NWF is aware sets such a high bar for an injunction under the ESA, nor is it likely a court would. As the Court has noted, the immediate risk of a species' further decline may not accurately reflect the danger to its long-term survival and recovery. *See*

[4] Separately Federal Defendants and some Intervenors argue that NWF must show harm "to the species as a whole" to obtain injunctive relief. *See, e.g.*, Fed. Opp. Mem. at 25; NW RiverPartners Opp. Mem. at 17-18. This argument has been raised and appropriately ignored in prior injunction motions. *See, e.g.*, Fed. Opp. Mem. at 15, 34-36 (2004 Summer Spill) (Dkt. 520) (filed July 22, 2004); Fed. Opp. Mem. at 11, 13 (2005 Summer Spill) (Dkt. 947) (filed Apr. 22, 2005); *NWF v. NMFS*, No. 01-640-RE, Opinion and Order (June 10, 2005) (Dkt. 1015) (ignoring this argument). It also was recently rejected again in *Yurok Tribe*, No. 16-CV-06863-WHO, 2017 WL 512845, at *24 (proving harm to the entire species is not necessary for an injunction under ESA Section 7, instead "[e]vidence that the Coho salmon will suffer imminent harm of any magnitude is sufficient to warrant injunctive relief"). Moreover, the argument that dam operations do not have species-level effects strains credulity – all of the juveniles of these species must somehow pass these dams each year. They *are* the species and its future.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

NWF v. NMFS, 184 F.Supp. 3d at 892 (identifying the failure to appreciate this distinction as a key failure that led the Court to reject the 2014 BiOp).[5]

Moreover, there is clear evidence that current dam operations under the failed 2014 BiOp substantially and directly injure salmon survival now, and do so regardless of the type of water year. As Mr. Bowles describes in his Declaration, under 2014 BiOp dam operations, SARs for ESA-listed spring/summer Chinook and steelhead will be below 1% in a substantial number of years, regardless of water-year type. 2016 Bowles Inj. Decl. ¶ 30 & Table 1 (noting that for Snake River Spring/Summer Chinook, SARs below 1% are predicted 47-61% of the time under the 2014 BiOp), Table 2 (noting that for Snake River Steelhead, SARs below 1% are predicted for 32-42% of the time under the 2014 BiOp). Significantly, the probability that these SARs will fail to exceed a minimum threshold for the species' survival exceeds 70% across the board and in some cases exceeds 80% or more, depending on the type of water year. *Id.*[6] While SARs reflect mortality to salmon and steelhead from many sources, the analysis Mr. Bowles discusses also makes it clear that dam operations with different voluntary spill levels can play an important role in increasing – or decreasing – salmon survival rates.[7]

---

[5] "Without a 'full analysis' of the risks to recovery from whatever amount the population is growing, including proper consideration of the 'highly precarious status' of the species and the dangers of sustained low abundance, NOAA Fisheries' conclusion that any population that is 'trending toward recovery' necessarily is not appreciably reducing the species' likelihood of recovery is arbitrary and capricious." *NWF v. NMFS*, 184 F. Supp. 3d at 892.

[6] While Federal Defendants may not like the Northwest Power Council's longstanding SAR goals for salmon survival and recovery, *see* Fed. Opp. Mem. at 28; Declaration of Ritchie Graves at ¶ 43 & n.7, comparing SARs to these goals has long been a measure of whether efforts to protect and restore salmon are succeeding. Unfortunately, they are not.

[7] As Mr. Bowles also explains, there is clear scientific evidence of a significant increase in the likelihood of mortality from each encounter with a dam's turbine or bypass system that a juvenile salmon has, and this increase is multiplicative. *See* 2016 Bowles Inj. Decl. ¶ 34 (citing and discussing these analyses); *accord* Graves Decl. ¶ 24 (citing 2016 Bowles Inj. Decl. ¶ 13

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

The bottom line is that, notwithstanding Federal Defendants' efforts to change the subject and direct the Court's attention elsewhere, the Court's conclusion in 2005, that "[a]mple evidence in the record . . . indicates that operations of the DAMS causes a substantial level of mortality to migrating juvenile salmon and steelhead," *NWF v. NMFS*, No. 01-640-RE, Opinion and Order at 8-9 (June 10, 2005) (Dkt. 1015), *aff'd in part, remanded in part*, 422 F.3d at 795, remains fully valid today. *See also NWF v. NMFS*, 839 F. Supp. 2d at 1131 (concluding hydrosystem operations in the 2008/2010 BiOps, which are essentially identical to those in the 2014 BiOp, will cause "irreparable harm . . . to listed species as a result of the operation of the FCRPS [and granting] Plaintiffs' motion with respect to spring and summer spill"). This continuing harm to ESA-listed species is more than sufficient to support an injunction.

B. The Modest Increase in Voluntary Spring Spill NWF and Oregon Seek Will Reduce the Harm to Salmon and Steelhead Survival, Is Reasonable and Can Be Implemented Flexibly and Effectively.

As Federal Defendants now acknowledge, voluntary spill to improve juvenile survival has been a successful component of dam operations. *See, e.g.*, Graves Decl. ¶ 26 ("Mr. Bowles (Declaration ¶ 17) essentially argues that spill has made things better for migrating fish in terms of juvenile survival. I wholeheartedly agree . . . ."); *see also* 2016 Bowles Inj. Decl. ¶ 25 ("spill is a tool that can have a virtually immediate effect [because] spill levels can generally be adjusted on a short timeline and yield immediate benefits"). For this reason, the Court has enjoined the agencies from discontinuing spill in the summer and also enjoined them to provide more spill in both spring and summer, spill levels the agencies have generally continued to implement even though they vigorously opposed these increases at the time NWF and Oregon

---

which, in turn, cites the same analysis from paragraph 34 of Mr. Bowles Declaration). Increased voluntary spill reduces the likelihood of these harmful dam encounters at each dam and overall.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

sought them – and on many of the same grounds they raise against the current motions.[8] *See, e.g.*, 2005 Fed. Opp. Mem. at 26 (filed April 22, 2005) (Dkt. 947) (arguing that "the relief Plaintiffs seek would have enormously complex technical, biological and legal effects that require further study and public input."), 32 ("[t]his [spill increase would] decrease[] hydropower generation and affects transmission transfer capacity on the intertie, with corresponding increases in costs and lost revenues for the region" and predicting a net cost of $52 million from summer spill).[9]

As with prior injunction motions, NWF's and Oregon's current motions to increase spring spill are limited by the applicable state total dissolved gas water quality standards and further cabined by specific flexibility for recognized factors that may curtail Federal Defendants' ability to provide voluntary spill at this level at each dam at all times throughout the spring migration season. *See, e.g.*, 2016 Bowles Inj. Decl. ¶ 7. Notwithstanding this pragmatic

[8] IPNG's argument that prior spill orders only enjoined the curtailment of voluntary spill, *see* IPNG Opp. Mem. at 17, is incorrect. *See NWF v. NMFS*, Order of June 10, 2005 (Dkt. 1015) (granting in part injunctive relief, including summer spill far in excess of levels under the 2004 BiOp); *NWF v. NMFS*, Opinion and Order (Dec. 29, 2005) (Dkt. 1221) (granting in part injunctive relief to increase spring and summer spill, after considering plaintiffs' proposal to increase spill and defendants' counter proposal for an increase above the levels otherwise required by 2004 BiOp).

[9] *See also* 2006 Fed. Opp. Mem. at 16-18 (filed Nov. 22, 2005) (Dkt. 1132) (arguing that more spring spill would harm spread-the-risk by taking fish out of barges at key times in the spring), 38-39 (arguing that "[p]laintiffs' proposed measures . . . would adversely affect the reliability and stability of the regional power and transmission system. Under such a proposal, the region's power and transmission systems will be strained and more likely to trip into unstable or unreliable conditions as a result of such measures, resulting in power emergencies"); *see also* Montana, Washington & BPA Customers Opp. Mem. at 28 (filed Nov. 22, 2005) (Dkt. 1163) ("NWF's spill program is likely to adversely affect upstream migrating adult salmon" and urging further study), 32 ("NWF's proposal [is] to engage in essentially experimental operations during the remand period without the necessary scientific rigor and without a full consideration of the impacts . . . . NWF's plan, however well intentioned, would have many significant adverse consequences to fish and wildlife and to cultural and societal values without providing a demonstrable or quantifiable benefit to any species").

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

approach, one that we acknowledge could require some cooperation among the federal, state and tribal fish management experts to implement, *see id.* ¶ 43; *see also Yurok Tribe*, 2017 WL 512845, at *31 (requiring cooperation and granting injunctive relief), Federal Defendants object to *any* adjustment of the current court-ordered voluntary spring spill levels because, in their view, the increased spill we seek has not been tested to their satisfaction, is not supported by a perfect scientific understanding or consensus, and its exact benefits to salmon and steelhead are not fully certain. Fed. Opp. Mem. at 31-41. They also object because dam operations are a complex task (a point NWF and Oregon do not dispute) and, in their view, *any* change from current spill operations poses a risk of unintended consequences. *Id*. at 42-45. NWF addresses these objections below.

1. The increased spill NWF and Oregon seek will avoid harm to ESA-listed salmon and steelhead and increase their survival.

Oregon has described in some detail evidence that the increased voluntary spill it and NWF seek pending Federal Defendants' compliance with the ESA will avoid harm to juvenile salmon and steelhead migrating downstream during the spring migration season and increase their survival rates. *See* 2016 Bowles Inj. Decl. ¶¶ 12-37. This Declaration describes both extensive scientific evidence that increased spill increases juvenile salmon survival and specific analyses that predict further increases in survival with the modest increase in spring spill we seek. For their part, Federal Defendants never actually state that they cannot provide more voluntary spill during the spring juvenile migration season, or that any increase in spill from the current levels would be harmful to salmon and steelhead. Instead, they and others simply urge more study and more delay. *See, e.g.*, Graves Decl. ¶ 30; Washington Inj. Mem. at 3-5. At the same time, and despite all the studies and analyses describing the survival benefits of voluntary spill since the Court ordered additional spill over Federal Defendants' objections in 2005,

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

Federal Defendants have failed to propose any material change to the Court-ordered spill measures in over a decade (other than to reserve the option to reduce these spill levels, *see* NWF Inj. Mem. at 5 & n.1). It is in this real world context of persistent justification for inaction that the Court should evaluate the objections to a further increase in voluntary spring spill to benefit salmon survival and reduce avoidable harm.[10]

Federal Defendants' opposition to a flexible increase in spring spill to the "spill caps" at each dam rests on a strawman characterization of the spill injunction NWF and Oregon seek – that we claim "increasing spill rates . . . beyond those levels already provided for fish passage . . . would predictably and substantially improve future smolt survival rates in every circumstance . . . ." Graves Decl. ¶ 27 (also raising minor questions about the precise effects of increased spill the answers to which cannot be known at this point, but that also do not undermine the broad range of evidence that increased spill will benefit juvenile survival). This assertion overstates both our arguments and what we need to show to support an injunction.

Apart from the extensive scientific evidence that spill is beneficial to salmon and steelhead survival, *see* 2016 Bowles Inj. Decl. ¶¶ 12-28, the primary analysis of the benefits of a further increase in spring spill on which NWF and Oregon rely is the analysis of the multi-agency Comparative Survival Study ("CSS"). *See id.* ¶¶ 29-34 (discussing this analysis, which has consistently shown the benefits of increased spring spill, and other corroborating evidence).

[10] Federal Defendants apparently now believe the Court's prior injunction orders hit upon a "Goldilocks" spring spill program – not too little, not too much, but just right – notwithstanding their then vigorous objection to these changes in spill operations. While it is certainly possible to win a trifecta bet at the racetrack, it is not the most likely outcome. What is more likely is that the Court's injunction orders have been based on evidence of the benefits of spill and, because the increases were incremental, they provided an incremental improvement in salmon survival. Based on similar though more extensive evidence and analysis, it is reasonable to conclude that a further carefully-tailored increase in spring spill will also provide a further incremental increase in salmon survival. None of Federal Defendants' arguments prove otherwise.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

As Mr. Bowles plainly acknowledges, this analysis does not unequivocally prove that increasing spill to the spill caps at each dam will "predictably and substantially improve future smolt survival rates in every circumstance." Graves Decl. ¶ 27; *but see* 2016 Bowles Inj. Decl. ¶¶ 29-34 (discussing the significant probabilities that increased spill will increase juvenile survival). Nor are NWF and Oregon required to establish such certainty, let alone in "every circumstance" in order to obtain injunctive relief to increase a measure that has proven benefits to salmon and steelhead survival.

Rather, the CSS analyses are careful, credible, and comprehensive scientific studies of the effects of increasing spring spill to the spill caps (and they have also evaluated even further increases in spill although not relevant to this motion). 2016 Bowles Inj. Decl., References at 37-42 (providing citation to CSS analyses: Hall & Marmorek 2013; McCann, *et al*. 2014; McCann, *et al*. 2015; McCann, *et al*. 2016; and Tuomikoski, *et al*. 2010). Neither Federal Defendants nor any other party has offered similarly comprehensive scientific analyses that indicate the CSS analyses are wrong. Instead, they raise a number of concerns about increasing spring spill that are best characterized as claims that the perfect should be the enemy of the good. *See, e.g.*, Graves Decl. ¶ 27 (no proof of how many minutes, if any, increased spill would decrease juvenile dam passage time), ¶¶ 29, 39 (no proof that spill is the only causative factor in improved juvenile survival), ¶ 30 (no evidence that an injunction to increase spill as requested would "maximize the amount of information gained"). As the court in *Yurok Tribe* recently concluded in response to arguments there that evidence of flushing flows was not certain to reduce harm to listed salmon in the Klamath River, and had not been "properly tested through a comprehensive scientific process," the ESA does not require perfect knowledge to support an injunction to protect a listed species, rather it requires action to protect a species consistent with

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

the best available scientific information. *Yurok Tribe*, 2017 WL 512845, at *29 (rejecting arguments that such flows were not warranted because they had not been "properly tested," because "federal agencies have raised a number of concerns with . . . the [scientific] recommendations," because factors other than increased flow may affect salmon survival, and because the requested flows may "'create unforeseen difficulties for the very species [plaintiffs were] trying to protect'" (quoting record documents)). The same conclusion is warranted here and supports reliance on the CSS analyses, and other evidence of the benefits of spill to juvenile salmon survival, to grant NWF and Oregon's motions for increased voluntary spring spill.

2. The flexibility in the spill injunction request is an effective hedge against unintended consequences, if any arise.

Apart from raising questions and urging more study before making any change to current spring spill levels, Federal Defendants' main objections to NWF's and Oregon's motions for a spring spill injunction involve assuming that the motions would require inflexible, across-the-board spill cap spill at each dam throughout the spring migration season with no adjustments to account for biological or other operational constraints. This assumption is plainly incorrect. *See, e.g.*, Oregon's Proposed Order (Dkt. 2116); 2016 Bowles Inj. Decl. ¶¶ 7, 43 (discussing flexibility for implementing spill at each project and throughout the spring spill season to address operational constraints as well as role of expert fish managers in making these determinations to address biological concerns).[11] Moreover, as Mr. Bowles explains in some detail in his Reply

[11] Even if unanticipated circumstances do arise, our injunction motions include a reasonable and effective mechanism for making adjustments to spill operations at each dam based on specific circumstances. *See* 2016 Bowles Inj. Decl. ¶ 43 (discussing potential role of FPAC); 2017 Bowles Inj. Reply Decl. ¶¶ 53-54 (explaining why the FPAC is an appropriate group to consider and recommend such adjustments if need be). Nor is this approach for implementation of an injunction to avoid harm to ESA-listed salmon unreasonable or unprecedented. *See Yurok Tribe*, 2017 WL 512845, at *31 (directing "[t]he plaintiffs' technical experts and the agency experts

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

Declaration, the spill operations we seek are neither unprecedented nor unassessed. *See* 2017 Bowles Inj. Reply Decl. ¶¶ 27-30 (discussing, *inter alia*, Fish Passage Plan and other resources that support implementation of the voluntary spring spill program we seek). As important, the various objections Federal Defendants raise to increased voluntary spring spill, from its allegedly adverse effects on juvenile fish passage survival to its potential consequences for erosion and other effects at the dams, are based either on an incomplete presentation and analysis of available data, or on operational assumptions that are inconsistent with operational experience. *See id*. at ¶¶ 3-18, 37-52 (explaining errors in analyses underlying Federal Defendants' concerns); ¶¶ 31-36 (addressing alleged concerns regarding dam operations).[12]

Federal Defendants also object to NWF's and Oregon's injunction motions because of the effects they believe an injunction could have on hydropower generation. *See* Fed. Opp. Mem. at 43-44 (cataloguing alleged hydropower risks and impacts). Again, this potential "parade of horribles" depends on the assumption that the injunction motions have no mechanism to address such events when, in fact, this flexibility is built into the motions. *See, e.g.*, 2016 Bowles Inj. Decl. ¶ 7 (acknowledging that "involuntary spill" at one or more projects during the spring migrations season may be necessary because of a variety of hydropower-related issues including "power system or other emergencies," "[g]eneration unit and/or transmission outages," "[n]avigation safety concerns," or "[h]igh runoff conditions where flows exceed the powerhouse hydraulic capacity").

[to] meet and confer on the precise timing, duration, and volume of any flows and submit a proposed injunctive flow plan").

[12] As the Amman Declaration makes clear, the analysis of spill levels and potential consequences described in the Declaration are based on an analysis of our injunction motions that makes no adjustment to spill levels for biological or other reasons. *See* Amman Decl. ¶¶ 42-69. In other words, at best it relies on an unrealistic, worst-case picture of an injunction un-moderated by any of the adjustment mechanisms built into our motions.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

The agencies' predictions of risk to hydropower generation also depend on analyses that disregard current runoff predictions in favor of an historical record that overstates the risk to hydropower generation this year because it includes all flow years. *See* Connolly Decl. ¶ 11 (using an 80-year water record to predict, on a monthly basis, a dramatic increase in the number of years when a project might have to operate at minimum generation levels in order to provide spill cap spill). This analysis fails to account for at least two relevant factors: (1) the 2017 water year is predicted to be a near or above average flow year, *see* Second True Decl., Ex. A at 12, 20, 22, & 25;[13] and (2) the effect low flows have on the likelihood of a dam needing to operate at minimum generation levels in order to meet spill volumes. Nothing in Mr. Connolly's Declaration suggests that the increase in the number of years out of the 80-year water record where the injunction NWF and Oregon seek would require a project to operate at minimum generation levels for some part of a month is not all or mostly accounted for by the inclusion in that 80-year record of below-average flow years.[14]

Finally, Federal Defendants' predictions of lost revenue from foregone power generation, Fed. Opp. Mem. at 44, are modest, *see* Connolly Decl. ¶¶ 25-26 (predicting foregone revenues of up to $40 million per year as a result of increased spill), and could be offset simply by the

[13] Of course, neither Federal Defendants nor NWF know exactly how runoff will occur this year – or next for that matter. As explained in the text, however, the motions for an injunction afford flexibility to address unexpected or unusual flow or other conditions in 2017 or 2018.

[14] Federal Defendants also raise concerns about gas bubble trauma from spill that complies with the current state water quality standards for total dissolved gas. *See* Fed. Opp. Mem. at 38-39. Apparently, Federal Defendants doubt their own ability to do what they have been doing for years – manage spill operations at each dam and overall to keep dissolved gas levels at or below the state water quality standards. Of course, doing so may require spill to be reduced at one or more dams at different points during the spring migration season. NWF and Oregon's motions do not require otherwise.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

savings from delaying the capital investments in the four lower Snake River dams that NWF seeks through its motion for an injunction under NEPA, *see infra* at 33-41 (discussing current and future capital spending projects).[15] In addition, it is not only NWF that believes this foregone revenue risk is not relevant under the ESA, it also is a conclusion this and other courts have reached regarding such economic harm. *See NWF v. NMFS*, No. 01-640-RE, Opinion and Order at 10 (June 10, 2005) (Dkt. 1015) ("The Law is clear that an injunction to protect listed species from harm is necessary regardless of economic costs"), *aff'd*, 422 F.3d at 794 (rejecting argument that district court erred "by failing to weigh economic harm to the public in reaching its conclusion."); *see also Yurok Tribe*, 2017 WL 512845, at *27 ("courts are not permitted to favor economic interests over potential harm to endangered species").[16]

In sum, Federal Defendants' arguments that this is the exceptional situation where the balance of hardships and the public interest override the well-established rule that in ESA cases these factors "tip heavily in favor of endangered species" and that injunctive relief gives them the benefit of the doubt, Fed. Opp. Mem. at 41-42 (quoting *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987)); *see also* NWF Inj. Mem. at 2-3 (discussing the ESA injunction standard and citing additional cases), run afoul not only of the law but also of NWF's and

[15] The notion that foregone revenue is actually a "cost" of voluntary spill is itself incorrect. *See Nw. Res. Info. Ctr. v. Nw. Power and Conservation Council*, 730 F.3d 1008, 1020-1021 (9th Cir. 2013) (explaining that BPA's cost estimates for fish protection based on "foregone revenue" are more than double the estimates for actually replacing any needed power). In addition, "foregone revenue" from operations that would violate the ESA or other laws cannot properly be labeled a "cost": where there is no real opportunity, there can be no opportunity cost.

[16] Among Federal Defendants' speculative "horribles" is the alleged threat these injunction motions pose to their ability to timely comply with the ESA and NEPA. *See* Fed. Opp. Mem. at 42-43. While they provide little actual support for this argument, their claim of surprise that NWF and Oregon have sought injunctive relief is disingenuous. The briefing on a remand schedule they cite clearly indicates Oregon and NWF were contemplating injunction motions before the 2017 spill season. *See* Jt. Resp. Remand at 19-21 (June 17, 2016) (Dkt. 2074).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

Oregon's carefully tailored motions to increase voluntary spring spill.[17] These motions balance flexibility to address both biological and other concerns while also providing proven relief that will reduce the harm juvenile salmon and steelhead would otherwise face during the spring migration season this year and until the agencies comply with the ESA. Such relief is supported by both the ESA, and the balance of hardships and the public interest.

C. There Are No Procedural or Legal Obstacles to the Injunction NWF and Oregon Seek Under the ESA.

Federal Defendants and others raise a number of procedural objections to our injunction motions that are without merit.

1. Rule 60(b) does not apply to the injunction motions.

The argument that our injunction motions are barred by Fed. R. Civ. P. 60(b) is wrong. Neither NWF nor Oregon has filed a motion to modify a final judgment under this Rule and Federal Defendants cannot re-characterize these motions as ones under Rule 60(b) for at least two reasons.[18] First, NWF and Oregon do not seek to "alter or modify" the Court's summary

[17] Any balancing of hardship in weighing the public interest, under the ESA or otherwise, must be based on harms that are actually likely to occur. "'[T]he court should weigh the public interest in light of the likely consequences of the injunction. Such consequences must not be too remote, insubstantial, or speculative and must be supported by evidence.'" *Rubin ex rel. N.L.R.B. v. Vista Del Sol Health Servs., Inc.*, 80 F. Supp. 3d 1058, 1075 (C.D. Cal. 2015) (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009)). The case Federal Defendants cite, *Chalk v. Dist. Court*, holds no different, and in fact found that a "theoretical risk" to the health of students was not an appropriate public interest reason to deny an injunction. *Chalk*, 840 F.2d 701, 710 (9th Cir. 1988). Here, the harm to the public from continuing current dam operations that irreparably harm salmon survival cannot properly be weighed against speculative and alarmist warnings of blackouts and system failure, *but see* Fed. Opp. Mem. at 43-44, especially where these kinds of dangers have been touted before but have not occurred, *see supra* at 9-10 and n.9 (citing similar claims against prior spill injunction motions).

[18] Federal Defendants also erroneously assert that the injunction motions are untimely under Rule 60(c)(1). Fed. Opp. Mem. at 23. This is a surprising argument since in opposing NWF's proposed remand schedule in which it reserved the right to seek an injunction, *see* Jt. Resp. Remand at 19-21 (June 17, 2016) (Dkt. 2074), Federal Defendants stated flatly that NWF could

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

judgment or remand orders in any way. *But see* Fed. Opp. Mem. at 21. Our motions for increased spring spill in no way seek to re-litigate the Court's decision that the 2014 BiOp violates the ESA, its decision to leave the 2014 BiOp in place during a remand, or its order that Federal Defendants prepare a new BiOp. Rather the injunction motions seek to prevent imminent irreparable harm to juvenile fish this year and next while the agencies work to comply with the Court's orders.[19]

Second, Rule 60(b) only applies to a "*final* judgment, order, or proceeding." Fed. R. Civ. P. 60(b) (emphasis added). Courts in the Ninth Circuit have determined that the word "final" in the Rule means orders that are final for appeal. *Corn v. Guam Coral Co.*, 318 F.2d 622, 629 (9th Cir. 1963); *see also Thomas v. Hous. Auth. of Cty. of Los Angeles*, 2005 WL 6136322, at *4 (C.D. Cal. Sept. 19, 2005). In general, remand orders are not "final" orders for appeal.[20] *Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004) ("remand orders generally are not 'final decisions'"); *see also Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir.

---

seek such relief later and urged the Court not to delay a remand order due to NWF's consideration of such a motion. Fed. Remand Reply at 34-35 (July 1, 2016) (Dkt. 2078) ("Plaintiffs are free to move the Court for relief if at some future point they deem it necessary").

[19] To the extent the injunction motions can be construed to modify anything, they would modify the Court's prior spill orders. Such a modification would easily satisfy the requirements of Rule 60(b), as there has been much "newly discovered evidence" supporting the need for increased voluntary spill since the Court's last spill order in 2011. Fed. R. Civ. P. 60(b)(2).

[20] Idaho and Montana's argument that the remand order is final because *agencies* may, under limited circumstances, appeal remand orders, *see* ID & MT Opp. Mem. at 11, misconstrues the scope of this limited exception to finality for agency appeals. *See Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004) (quoting *Collord v. United States Dep't of the Interior*, 154 F.3d 933, 935 (9th Cir. 1998)) ("A remand order will be considered 'final where (1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable.'"). There is no indication that this exception to protect agencies is intended to thwart injunction motions by successful plaintiffs, nor would such an outcome make sense in light of the basis for the exception – it is to aid agencies, not set a trap for other parties.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

1990) (same). Indeed, after Federal Defendants filed their appeal of this Court's summary judgment decision and remand order, the Ninth Circuit ordered the parties to address whether the court had jurisdiction of the appeal, citing *Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181 (9th Cir. 2004). *NWF v. NMFS*, ECF Notice in Appeal No. 16-35726 (Sept. 15, 2016).[21]

2. Rule 65(d) is no bar to the injunction motions.

Federal Defendants also incorrectly assert that NWF's injunction motion fails to comply with Fed. R. Civ. P. 65(d). Fed. Opp. Mem. at 47-49 (spill injunction). This rule specifies the content of an injunction order. By its terms, it applies to *orders*, not *motions*. Fed. R. Civ. P. 65(d). To the extent the Court construes Federal Defendants' argument as a challenge to NWF's compliance with Rule 7(b)(1), which requires motions to state with particularity the grounds for seeking an order, NWF has fully complied with that Rule. Specifically, NWF joined the State of Oregon's motion to increase spill during the spring migration season at each of the eight Snake and Columbia River dams consistent with existing state total dissolved gas standards as specified in Oregon's injunction motion. NWF Inj. Mot. at vi. NWF also referred to the more specific relief in Oregon's motion and supporting documents. *Id*. at vi-vii.

Federal Defendants' argument under Rule 65 apparently is that the operation of the Snake and Columbia River dams is simply too complex to be addressed in a motion for an injunction at

[21] This Order also cited the Ninth Circuit's 2008 opinion in this case noting that in 2005 the Court issued summary judgment and a remand order, followed by a Rule 54(b) order making the remand order final for purposes of appeal. *NWF v. NMFS*, ECF Notice in Appeal No. 16-35726 (Sept. 15, 2016) (citing *NWF v. NMFS*, 524 F.3d 917, 927 (9th Cir. 2008)). Federal Defendants did not seek, and the Court did not issue, a Rule 54(b) order here. There are thus no facts indicating the Court's remand order should be exempt from the rule that remand orders are not final, and Rule 60(b) does not properly apply to a non-final order of remand. In addition, the Court has previously granted injunctive relief in this case in the same procedural posture as the current injunction motions without any mention of Rule 60(b). *See, e.g.*, *NWF v. NMFS*, No. 01-640-RE, Opinion and Order (May 26, 2005) (Dkt. 986) (granting summary judgment against the 2004 BiOp); *Id*., Opinion and Order of Remand (Oct. 7, 2005) (Dkt. 1087); *Id*., Opinion and Order at 19 (Dec. 29, 2005) (Dkt. 1221) (granting, in part, motion for injunctive relief).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

all. Fed. Opp. Mem. at 47-49. This complexity has not prevented the Court from granting injunctive relief to require increased spill in the past, *see, e.g.*, *NWF v. NMFS*, No. 01-640-RE, Opinion and Order at 10 (June 10, 2005) (Dkt. 1015) (granting, in part, motion for injunctive relief); *aff'd* 422 F.3d at 797-98 ("the district court had a more than sufficient basis upon which to conclude that summer spills would provide the best and safest alternative to the planned operations contemplated in the 2004 BiOp"), and should not do so now. The fact that implementing an injunction to increase spring spill may require Federal Defendants to work with other federal, state, and tribal fish managers at some point and may require Federal Defendants to make adjustments to spill operations during the spring migration season depending on river conditions and other factors, does not place these operations beyond the reach of effective relief.

3. No special standard of proof applies to the ESA injunction motions.

Federal Defendants and others also assert that NWF must show a heightened level of both irreparable harm and certainty that it will occur because we are seeking a "mandatory injunction." *See, e.g.*, Fed. Opp. Mem. at 20-21; NW RiverPartners Opp. Mem. at 14; ID & MT Opp. Mem. at 10. This is an unpersuasive semantic distinction. Where the status quo includes continuing dam operation, as with relief from any other ongoing action, an injunction to change the status quo to protect the species, short of stopping the action altogether (which is not possible), will necessarily require the agencies to take some affirmative step to modify the actions they are taking. This does not make our injunction motions "mandatory." In cases like this, where the status quo is harming the species, the Court's inherent authority to remedy a violation of law includes an ability to provide this kind of affirmative relief under a normal injunction standard. *See, e.g.*, *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005) (upholding district court's grant of injunctive relief that, among other things, required

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

EPA to take affirmative steps because "it is the very maintenance of the 'status quo' that is alleged to be harming the endangered species."); *Yurok Tribe*, 2017 WL 512845, at *28-30, 31 (ordering agencies to change the status quo and release water to prevent harm to listed salmon).[22] NWF and Oregon's motions are no different: it is continuation of status quo actions that would cause irreparable harm to spring migrating juvenile salmon. Avoiding this harm is well within the Court's equitable authority to enforce and give meaning to its own orders, especially after it has found multiple violations of the law. *See, e.g.*, *Lester v. Parker*, 235 F.2d 787, 789-90 (9th Cir. 1956) ("The court here has done no more than to follow the recognized power of courts of equity in issuing injunctions, to make those injunctions effective by ancillary provisions . . . which may require the defendant to do something").[23]

[22] Most of the cases in this circuit invoked to support this "heightened" standard involve preliminary injunctions where the likelihood of success on the merits was a factor and the question was limited to preserving the status quo *pendente lite*. *See, e.g.*, *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (cited in Fed. Opp. Mem. at 20-21); *see also Coast Cutlery Co. v. Simple Prods. Corp.*, No. 3:16-CV-0824-SI, 2016 WL 4035332, at *2, *7 (D. Or. July 25, 2016) (discussing denial of a preliminary injunction that sought mandatory relief). Here, the Court has already determined that Federal Defendants have violated the ESA and the question is how best to protect the listed species pending compliance with the law. The only case in this circuit Federal Defendants cite questioning mandatory relief in the context of a permanent injunction involved a request to require an individual to "update the FTC with certain information for *20 years*," *Fed. Trade Comm'n v. Lake*, 181 F. Supp. 3d 692, 704 (C.D. Cal. 2016) (emphasis in original) (rejecting this portion of requested relief because the "Court does not wish to be in the business of refereeing compliance obligations the FTC would like to impose") (cited in Fed. Opp. Mem. at 20-21). The spill relief NWF seeks does not raise the same concern or require the Court to supervise Federal Defendants' compliance for decades.

[23] Federal Defendants and Northwest RiverPartners also assert that we cannot seek relief for an ESA claim on which we did not prevail and point to the Court's ruling on critical habitat. *See* Fed. Opp. Mem. at 31; NW RiverPartners Mem. at 14-15, 29-30. The court in *Yurok Tribe* recently rejected a similar claim, concluding that any substantial procedural violation of ESA section 7 will support an injunction to protect the listed species. *See Yurok Tribe*, 2017 WL 512845, at *20 (the law "'is well-settled that a court can enjoin agency action pending completion of section 7(a)(2) requirements'") (quoting *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005)). And as the Court's opinion here makes clear, notwithstanding

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

Finally, this Court and the Ninth Circuit have already granted and affirmed injunctive relief to require changes to status quo dam operations that unnecessarily harm listed salmon by ordering increased spill – without becoming sidetracked by a semantic discussion of whether this relief is mandatory or prohibitory. *See* NWF Inj. Mem. at 4 (citing past injunction decisions). As at least Idaho has correctly acknowledged, the prohibitory relief injunction standard is law of the case for evaluating requests to increase spill. *See* Idaho Mem. at 4-5 & n.4 (filed Nov. 22, 2005) (Dkt. 1130) (acknowledging that although defendants had urged a heightened "mandatory" injunction standard, "the application of ordinary prohibitory injunction standards constitutes the law of the case") (citing *NWF v. NMFS*, 422 F.3d at 793-94).

II. THE COURT SHOULD GRANT NWF AN INJUNCTION UNDER NEPA.

It is a basic tenet of NEPA that an agency preparing an EIS to examine alternative courses of action and make a well-informed choice among them cannot irreversibly commit resources to one alternative while it analyzes others. *See* 40 C.F.R. § 1506.1(a)(2); 40 C.F.R. § 1502.2(f); *Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000). This proscription is grounded in the common-sense fact that such an irreversible commitment is very likely to prejudice both the unbiased examination of alternatives as well as the final choice among them. This concern is not hypothetical or speculative but grounded in real-world human experience.[24] While this

---

its ruling on critical habitat, NWF has proved a substantial procedural violation of the ESA, and, in any event, the condition of critical habitat is still "severely degraded." *See NWF v. NMFS*, 184 F. Supp. at 949 (summarizing ESA violations), 930 (critical habitat).

[24] "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, THE COMMON LAW 5 (1881); *see also* DANIEL KAHNEMAN, THINKING FAST AND SLOW 278-88 (2011) (describing "loss aversion," an aspect of prospect theory, to explain the consistent tendency of individuals to attach greater value to the loss of something they already have than the facts warrant and so consistently misperceive the relative value between keeping what they have and accepting a better alternative); *see also id*. at 289-99 (describing the related role of a

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

bedrock NEPA principle may be easier to apply to a proposed action that has not yet commenced, it nonetheless applies equally to an agency's examination of alternatives to an ongoing action where the choice is between continuing that action and a range of alternative future actions. The only difference is how, as a practical matter, to best protect the integrity of the NEPA process and avoid irreparable harm from an analysis and decision driven by a prior commitment of resources rather than an unbiased examination of environmental effects.

Federal Defendants fundamentally reject application of this basic NEPA principle to this case while raising a host of alleged harms from any change to continuing capital investments in the lower Snake River dams. The law, the available facts and the history of this case all counsel against Federal Defendants' claim that their actions are an exception to basic NEPA principles, and in favor of an approach that, to the extent possible, protects against prejudicial investments in the agencies' current course of action before they complete a full examination of alternatives to that action.

A. NWF Has Demonstrated Imminent and Irreparable Harm Under NEPA.

Committing resources to an action before completing an EIS to examine alternatives to that action can itself constitute irreparable harm to support an injunction. *Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1187 (N.D. Cal. 2009) (holding that failure to undertake an EIS when required to do so made the plaintiff "virtually certain to suffer irreparable procedural injury"); *see also Sierra Club v. Corps of Engineers*, 645 F.3d 978, 994–95 (8th Cir. 2011) (the district court did not err when it determined that the "harm flowed from a violation of NEPA itself, in that failure to comply with NEPA requirements caused a risk that

---

reference point (here the status quo) in assessing a choice among alternatives, labeled the "endowment effect").

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

'real environmental harm will occur through inadequate foresight and deliberation.'") (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989)). The kind of harm that flows from making a proscribed commitment of resources to one course of action before fully evaluating others is thus sufficient to support injunctive relief under NEPA.[25]

Here, prejudice to an unbiased examination of alternatives as NEPA requires also is accompanied by concrete, ongoing environmental injury. Specifically, Snake River salmon and steelhead are *currently* irreparably harmed by the operation of the four lower Snake River dams. *See supra* at 4-9 (discussing harm from current dam operations). This harm will be locked in and continue if the NEPA review of overall dam operations is biased against a full and fair consideration of Snake River dam removal by continuing multi-million dollar investments in the future operation of these very dams. Continuation of this environmental injury from a biased NEPA process also supports an injunction.

1. Harm to the NEPA process from an irreversible commitment of resources is both imminent and irreparable.

In *Save Strawberry Canyon*, the court explained that procedural harm to the plaintiff from

[25] Federal Defendants cite *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009), for the proposition that procedural harm is insufficient for an injunction without additional "concrete environmental injuries." Fed. Opp. Mem. at 54. *Summers* is about injury-in-fact for standing, not harm for an injunction. *Id*. at 496. To the extent some opposing parties also argue (albeit incorrectly) that NWF must demonstrate additional personal harm to its members to support an injunction, *see, e.g.*, NW RiverPartners Opp. Mem. at 37, NWF has already demonstrated this through its summary judgment declarations. *See, e.g.*, Third Declaration of William Redman (Dkt. 1980) at ¶¶ 5, 10-12; Third Declaration of Liz Hamilton (Dkt. 1978) at ¶¶ 7, 9-10, 16; *see also Yurok Tribe*, No. 16-CV-06863-WHO, 2017 WL 512845, at *23 (plaintiffs have "shown that they are harmed when salmon abundance drops because the potential salmon harvests decrease" and this is "sufficient to show that the plaintiffs will suffer personal harm"). To the extent there is any ambiguity, the Declarations of Kevin Lewis and Liz Hamilton, filed herewith, eliminate it. *See* Lewis Decl. ¶¶ 8-10, 16-21; Hamilton Decl. ¶¶ 8-12, 19-24.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

a failure to undertake NEPA review before proceeding with a proposed development is an imminent and irreparable injury, "even if a NEPA review might later be conducted," because "plaintiff will have been deprived of the opportunity to participate in [a] NEPA process at a time when such participation is required and is calculated to matter." *Id*. at 1189. While the court in *Save Strawberry Canyon* was considering harm from a failure to conduct a NEPA review, it plainly held that failing to comply with NEPA procedures would cause imminent and irreparable harm: "Even if plaintiff ultimately wins, much of the environmental harm will already have occurred and alternatives will have been foreclosed . . . plaintiff is highly likely imminently to suffer irreparable injury from the alleged NEPA breach." *Id*. at 1189-90.[26] There is nothing to suggest that the harm from a NEPA process biased by an irreversible commitment of resources is any less imminent or irreparable than harm from a failure to undertake such a process. In fact, just the opposite: making major capital investments now in continuing operation of the Snake River dams would tilt the NEPA process towards alternatives that continue the status quo and do not waste those investments. This irreparably biases the NEPA process against adequately and objectively considering other reasonable alternatives—a harm that cannot be remedied after the

[26] As the decision in *Save Strawberry Canyon* makes clear, the suggestion that NWF can always challenge an inadequate EIS in 2021 or after, Fed. Opp. Mem. at 59, does not alleviate the immediate and irreparable harm from a process biased by continuing, but avoidable, capital investments in status quo dam operations; nor would such a future challenge prevent the current and continuing harm to salmon and steelhead from these operations. The assertion that the Court cannot assume the agencies will fail to comply with NEPA is beside the point: this presumption applies only where an agency has *not* made an irretrievable commitment of resources during the NEPA process. *But see* Fed. Opp. Mem. at 58 (citing *Pit River Tribe v. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010), and, *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988), both of which cite the presumption against pre-judging a NEPA failure but in conjunction with a finding of no irretrievable commitment of resources). The reason NEPA prohibits – and courts may enjoin – an agency's commitment of resources during the NEPA process is precisely to interrupt that commitment and ensure the integrity of the review *before* an agency makes a decision prejudiced by a prior commitment of resources.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

fact. Indeed, the regulatory prohibition against irretrievable commitments of resources is designed to prevent just such prejudice. *See* 40 C.F.R. § 1502.2(f); *see also* CEQ, Publication of Memorandum to Agencies Containing Answers to 40 Most Asked Questions on NEPA Regulations, 46 Fed. Reg. 18,026 at 18,029 (1981) (recognizing that injunctive relief is an appropriate remedy to prevent the commitment of resources during a NEPA process); *see also Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1099 (9th Cir. 2010) ("NEPA's purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is 'almost certain to affect the agency's substantive decision[s]'" and "relies upon democratic processes to ensure-as the first appellate court to construe the statute in detail put it-that 'the most intelligent, optimally beneficial decision will ultimately be made.'") (citations omitted).

Federal Defendants' argument that the Ninth Circuit does not recognize irreparable procedural harm as the basis for an injunction under NEPA – that the court has not adopted what they call the "bureaucratic steamroller" theory, *see* Fed. Opp. Mem. at 57, n.41 – is incorrect. They selectively cite a district court opinion stating that "the Ninth Circuit has not held that bureaucratic momentum in a NEPA case constitutes irreparable harm to support issuance of a preliminary injunction," *Protecting Arizona's Res. & Children ("PARC") v. Fed. Highway Admin.*, 2015 WL 12618411, at *5 (D. Ariz. July 28, 2015), but ignore the next sentence which states "[a]s a result, Plaintiffs rely on non-binding, out of circuit cases to support their position," *id*. The court then favorably quotes the First Circuit's opinion in *Sierra Club v. Marsh* on the steamroller effect, and concludes that "under *Marsh*, the Court may consider bureaucratic momentum as a factor in assessing whether environmental harm is likely to occur based on failure to comply with NEPA procedures." *Id*. Far from rejecting bureaucratic momentum as

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

the basis for irreparable harm under NEPA, the court actually embraced the theory, a step it properly could not have taken had the Ninth Circuit actually rejected such momentum as a basis for showing harm in a NEPA case.[27]

Federal Defendants' only real argument that NWF has not established irreparable harm to support an injunction under NEPA from continuing capital investments in the lower Snake River dams is the claim that these investments – which will run to at least $50 million and likely much more – are not enough to prejudice their analysis or decisionmaking.[28] The facts of this case, Ninth Circuit direction about assessing the significance of financial commitments under NEPA, and other case law all compel a contrary conclusion. In *WildWest Inst. v. Bull*, for example, the Ninth Circuit found that a financial commitment can be an irretrievable commitment under NEPA (citing 40 C.F.R. § 1506.1(a)); yet, the court ultimately decided the Forest Service could spend $208,000 to mark trees while it completed a NEPA review of whether to proceed with logging. *WildWest Inst. v. Bull*, 547 F.3d 1162, 1168-69 (9th Cir. 2008). The court reasoned that tree marking was such a small expenditure with no environmental impact that it would not likely prejudice the agency's choice of alternatives. *Id*. at 1169. In a case Federal Defendants

[27] Federal Defendants ultimately concede (as they must) that the Ninth Circuit has recognized the prohibition against an irreversible commitment of resources, Fed. Opp. Mem. at 55, including financial resources, that could prejudice the choice of alternatives. *Id*. at 55, n.40.

[28] Federal Defendants suggest that the "focus" of the irretrievable commitment of resources prohibition is only on "natural resources." Fed. Opp. Mem. at 55. But the plain language of 40 C.F.R. § 1506.1(a) makes clear that prohibited commitments include those that "(1) [h]ave an adverse environmental impact; *or* (2) [l]imit the choice of reasonable alternatives" (emphasis added). Their claim also is contrary to established case law and would swallow the proscription against a prejudicial commitment of resources. If agencies could spend unlimited sums during a NEPA analysis so long as the spending had no direct environmental effect, the government could spend millions, even billions, to purchase, fabricate and stage everything necessary to complete a project as long as it took no action at the development site until it completed a NEPA review – with what would surely by that point be a predetermined outcome. A NEPA analysis is not such a paper shuffling exercise to support a decision already made. *See* 40 C.F.R. § 1500.1(c).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

cite, *Nat'l Audubon Soc'y v. Navy*, 422 F.3d 174 (4th Cir. 2005) (cited in Fed. Opp. Mem. at 55-56), the court held the Navy could proceed with various planning steps for its proposed landing field before it completed a NEPA review because the activities were only studies and permit applications allowed by 40 C.F.R. § 1506.1(d), and none of them included "cutting even a single blade of grass in preparation for construction." *Id*. at 206. As these decisions demonstrate, the kind of commitment of resources that will support an injunction to avoid bias to the NEPA process must be both significant and go beyond mere preparatory paperwork.[29]

Both of those criteria are unquestionably met by NWF's narrowly tailored request for an injunction against large, continuing and future capital investments in the four lower Snake River dams. First, the many tens of millions of dollars the Corps will spend in capital investments at these dams before it completes an EIS to consider their removal is a significant amount of money. For context, BPA itself explains that the loss of even $40 million in foregone power generation revenue would be significant and could affect customer rates. *See* Fed. Opp. Mem. at 44; Connolly Decl. at ¶¶ 25-26 (discussing the possible effects of a spill injunction on BPA revenue). Apart from whether this "loss" from foregone power generation is legitimate or likely to occur, *see supra* at 16-17 & n.15, it is difficult to understand how an even larger amount of money in capital investments in dams that the agencies may choose to remove is not also significant.

Federal Defendants' somewhat surprising argument – that because they have already spent well over $800 million on capital investments in the four Snake River dams, spending another $50 to $100 million more is of no concern, *see* Fed. Opp. Mem. at 56-57; Ponganis Decl.

[29] This conclusion also is supported by other cases. *See, e.g.*, *Ctr. for Envtl. Law & Policy v. Bureau of Reclamation*, 715 F. Supp. 2d 1185, 1190 (E.D. Wash. 2010), *aff'd*, 655 F.3d 1000 (9th Cir. 2011) (allowing paperwork to support a permit application, the kind of step that is easily abandoned and also one permitted under 40 C.F.R. § 1506.1(d)).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

¶ 64 – also is not persuasive or credible. In fact, this argument actually reinforces the urgent need for an injunction to limit further capital spending to the extent possible.[30] As the Corps acknowledges, it has spent this very large sum on capital investments in these dams over the last 17 years, *see* Ponganis Decl. at ¶ 64, precisely the time during which the agencies have been operating the dams in violation of the Endangered Species Act through a series of failed biological opinions and in the face of repeated judicial admonitions that they should fully consider the alternative of removing them. *See NWF v. NMFS*, 184 F.Supp. 3d at 942 (acknowledging these past admonitions). This argument for continuing the agencies' investment in the Snake River dams unabated is like a bank robber asking the police to stand aside because he has already removed most of the money from the bank's safe so they might as well allow him to take the rest. It actually stands the principle of avoiding prejudice to the NEPA process from financial commitments on its head: the more an agency spends before it complies with NEPA, the less basis there would be for an injunction against additional spending. The fact that the Corps has so far avoided the requirements of NEPA and its proscription against irreversibly committing resources is not an argument for allowing it to continue to do so.[31]

The agencies also cannot argue that the only steps they are taking before complying with

[30] As NWF explains below, its injunction against specific current and future capital investments can also avoid the risks to power generation, fish passage, and other issues that Federal Defendants attempt to interpose against even a limited injunction. *See infra* at 33-41.

[31] Nor can the agencies dismiss as an inconsequential matter of "sunk costs" that could not possibly affect the NEPA process, *see* Ponganis Decl. ¶ 64, investment of another $50 or $100 million in these dams. Such cavalier treatment of the prospect of wasting this money if the agencies decide to remove the dams would startle the ratepayers who are the source of this capital. Moreover, in a different context, the Corps is quick to condemn the prospect of any costs they consider unnecessary as "economically wasteful and a misuse of taxpayer and ratepayer dollars." *Id*. at ¶ 32. Apparently, money the Corps does not want to spend now is "wasteful" but money it does want to spend now is not—even if it would be more reasonable to avoid spending it now and wait to see if it actually needs to be spent later.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

NEPA are study, analysis, and paperwork. They are, in fact, making major financial investments in long-lasting physical changes to the lower Snake River dams, from new turbine runners to stator windings, to other current and future equipment upgrades. The Corps' narrow focus on whether these capital investments themselves will harm the environment, *see* Fed. Opp. Mem. at 51-53; Ponganis Decl., Ex. 1 (noting for each project, that the project itself is not expected to harm the environment), misses the point. Unlike agency planning and paperwork, which can be shelved if a project does not proceed, *Ctr. for Envtl. Law & Policy v. Reclamation*, 715 F. Supp. 2d at 1195, the capital investments in physical equipment the Corps is carrying out, and has plans to carry out, are tangible, physical, and permanent changes.[32] They are also expensive and justified only on the assumption that the projects will continue to operate in the long-term. Consequently they are precisely the kinds of commitments of resources that are inconsistent with a fair and unbiased NEPA process and support an injunction under NEPA.

2. A biased NEPA process will continue irreparable harm to the environment.

As NWF explains above, the current operation of the Columbia and Snake River dams is causing irreparable harm to ESA-listed salmon and steelhead. *See supra* at 4-9 (discussing the evidence that demonstrates this ongoing harm). Federal Defendants simply ignore this evidence of environmental harm which a NEPA process biased by further large capital investments in status quo dam operations will fail to avoid or mitigate. Moreover, this environmental harm is neither speculative nor contingent but occurring now. Rather than address this evidence, Federal Defendants cite and rely on cases where no action causing environmental harm has commenced

[32] *Cf. Friends of the Earth v. Hall*, 693 F.Supp. 904, 912, 915 (W.D. Wa. 1988) (enjoining upland construction as well as in-water construction pending compliance with NEPA even though there was no argument that the upland work would harm the environment).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

or is ongoing. *See* Fed. Opp. Mem. at 51-54.[33] A NEPA process where the biasing effect of continued significant capital investments in the status quo is limited to the extent practical by an injunction against such spending will also afford the best opportunity to avoid additional environmental harm to still other resources. *See NWF v. NMFS*, 184 F. Supp. 3d at 940 (noting that "if a very large offset can be achieved through bypassing one or more of the four lower Snake River dams, then many other actions may not need to occur, such as killing [double-crested cormorants], [or] hazing Caspian terns") (footnote omitted).

Federal Defendants also are wrong to assert that, in any event, their hands are tied and only Congress can halt the environmental harm from continued dam operations. Fed. Opp. Mem. at 53-54. First, the Corps has authority to suspend operation of these projects for their authorized purposes and has even removed at least one other dam in order to protect fish without seeking congressional authorization. *See* Second True Decl., Ex. C (discussing the Corps' authority over dam operations).[34] Second, if putting the blame on Congress were sufficient to set

[33] Citing, for example: *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (harm from proposed logging); *Idaho Rivers United v. Corps of Engineers*, 156 F. Supp. 3d 1252, 1261-62 (W.D. Wash. 2015) (harm from proposed dredging); *Conservation Cong. v. Forest Serv.*, 2016 WL 6524860, at *4 (E.D. Cal. Nov. 3, 2016) (harm from proposed logging); *Ctr. for Biological Diversity v. Forest Serv.*, 2010 WL 334548, at *1 (D. Ariz. Jan. 22, 2010) (harm from proposed logging). Similarly, in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), the Supreme Court explicitly declined to address whether any particular action could go forward without prejudicing the NEPA process. *See id.* at 160, n.5 (discussing 40 C.F.R. § 1506.1 and finding that "[w]e do not express any view on the Government's contention" that some limited action could move forward during preparation of an EIS); *see also id.* at 164 (emphasizing that "we do not know whether and to what extent APHIS would seek to effect a limited deregulation during the pendency of the EIS process if it were free to do so"). Here of course, there is no uncertainty about the Corps' continued capital investment plans.

[34] Likewise, the agencies incorrectly insist that the need for congressional approval means bypassing or breaching the Snake River dams would take decades, Fed. Opp. Mem. at 53-54, but their claims rest entirely on one example involving removal of two non-federal dams without acknowledging that this removal was vigorously opposed by a home-state Senator. *See* LYNDA V. MAPES, ELWHA: A RIVER REBORN 126-30 (2013).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

aside any risk of harm to the environment under NEPA, the requirement that agencies give unbiased consideration to reasonable alternatives beyond their current authority to implement, *see* 40 C.F.R. § 1502.14(c), would be meaningless. Continuation of the current significant harm to salmon and steelhead from status quo operation of the lower Snake River dams would be a significant consequence of a NEPA process biased by substantial investments in perpetuating these operations and so supports an injunction under NEPA.

B. NWF's Injunction Against Specific Current and Future Capital Projects Can Be Further Tailored to Protect the Public Interest and Avoid Harm to the Corps.

NWF has asked the Court to enjoin the continued commitment of resources to specific current capital projects at the four lower Snake River dams based on information the Corps provided to NWF in December, 2016, *see* NWF Inj. Mot. (Attachment A), and to enjoin the Corps to seek leave of Court before commencing certain future projects, *id*.; *see also infra* at 38-41 (addressing these future projects). As NWF has explained, this is a tailored request aimed at major capital projects related to power generation (not fish passage or safety) that are designed to extend the life of these dams well beyond completion of the EIS the Court has required, an EIS that will examine the alternative of removing these dams. *See* NWF Inj. Mem. at 21-24. Rather than acknowledge any prejudice that this business-as-usual spending poses to an unbiased analysis and decision regarding dam removal, the Corps insists that *any* delay in *any* of these projects will cause unacceptable harm to the public interest. Instead of seeking to identify practical steps it could take to limit the steamroller effect of this continuing commitment to one alternative while examining others, the Corps insists that it must proceed with *all* of its planned spending without *any* modification while it prepares the Court-ordered EIS. This approach unavoidably commits the agency to one of two courses of action: reject any alternative that

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

includes bypass or breach of the lower Snake River dams – regardless of the analysis in the EIS it is preparing – or spend tens of millions of dollars on capital projects at these dams over the next four years that will be wasted if the Corps decides to remove the dams.[35]

1. NWF's motion for an injunction against specific current capital projects

The Corps' all-or-nothing approach to NWF's injunction motion under NEPA is neither necessary nor in the public interest as a review of the additional information about current capital projects, provided in Exhibit 1 to the Ponganis Declaration, reveals.[36] Instead, there are major capital projects at these dams that involve tens of millions of dollars in additional capital spending where a tailored injunction would limit the prejudicial effect of this spending on the NEPA process and, at the same time, also limit the risk to the public interest with which the Corps is so concerned. NWF addresses these specific projects and the scope of its motion for an injunction under NEPA in more detail below.

As Mr. Ponganis indicates, two projects included in NWF's injunction motion have already been completed. *See* Ponganis Decl., Ex. 1 at 3 (discussing Little Goose Digital Governor Upgrade), 6 (discussing Lower Granite Powerhouse Bridge Crane Rehabilitation). This new information indicates that the basis for an injunction against these projects no longer exists. Removing them from our injunction request also removes the alleged harm from enjoining them that Mr. Ponganis recites, *id*., without the need to assess its substance. Likewise, Mr. Ponganis provides new information indicating that four projects are in the final stages and will be completed in the next one to six months. *See id*., Ex. 1 at 7 (Lower Granite Powerhouse

[35] Of course, as discussed above, this is not a real choice: the practical effect of this spending will be to bias the consideration of alternatives against one that includes dam removal.

[36] NWF cites Exhibit 1 to the Ponganis Declaration because it provides more detailed information about the specific status of these capital projects than the Federal Defendants' Memorandum or the text of Mr. Ponganis' Declaration.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

HVAC Upgrade which will be completed in March, 2017), 9-10 (Lower Granite Unit 1 Baldwin-Lima-Hamilton (BLH) Linkage Upgrade which will be completed in April, 2017), 4-5 (Lower Monumental Unit 1 Refurbishment and Units 1 and 2 Cavitation Work which will be completed in June 2017), 3-4 (Little Goose Powerhouse Bridge Crane Rehab which will be completed in October, 2017). NWF acknowledges the horse is sufficiently out of the barn for these projects that enjoining the remaining spending on them may not be reasonable. Eliminating these projects from NWF's NEPA injunction request, however, also removes any alleged harm from enjoining them, again without the need to assess its substance.

Two of the remaining projects, the Ice Harbor Turbine Runner Design and Replacement and the Ice Harbor Stator Winding Replacement, are the largest ongoing capital investments in the four lower Snake River dams.[37] They will involve spending some $37 million just in Fiscal Years 2018 and 2019, *see* Second True Decl. Ex. B at 4 (BPA, "Integrated Program Review 2: Federal hydropower capital program" (February, 15, 2017)) (identifying these projects and expected spending),[38] and the full projects will not be completed until at least 2020, *see* Ponganis Decl., Ex. 1 at 1-3 & 8-9 (discussing these projects). These investments will thus occur before the Corps completes its EIS and so represent substantial capital spending that should be enjoined.

[37] A third project, the "Little Goose Station Service Transformers Replacement" is one of the smaller capital projects for which NWF had moved to enjoin further spending, NWF Inj. Mem. at 23: True Decl., Ex. F-8, will be completed in May of 2018, and is necessary to repair damage from a 2014 accident. Ponganis Decl., Ex. 1 at 9. Because these transformers also can affect operation of the entire dam if they fail, *id.*, NWF will not object if this project proceeds.

[38] This recent BPA report also indicates that by Fiscal Year 2026, capital spending on Ice Harbor alone is anticipated to exceed $100 million and combined capital spending on the other three lower Snake River dams also is expected to exceed $100 million. *See* Second True Decl., Ex. B at 7, 11. While not all of this spending will occur before the Corps completes an EIS in 2021, some significant portion of it almost certainly will.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

Specifically, the Court should enjoin continued investment in the Ice Harbor Turbine Runner Design and Replacement for Units 1, 2 and 3, except for the completion of work on Unit 2 which Mr. Ponganis indicates will be finished by November, 2017. Allowing the completion of work on Unit 2, which is currently out of its housing and disassembled, will provide a fully up-to-date generation unit for fish passage priority, *see* Ponganis Decl., Ex. 1 at 1 (identifying Units 1, 2 and 3 as "fish priority units") (explaining that replacement of Unit 2 will "improve juvenile fish passage survival through the turbine"), while also avoiding the Corps' concerns about extended use of temporary structures at this Unit, *id*., Ex. 1 at 2. Since Units 1 and 3 would also remain in place and available as a backup for Unit 2 if necessary, this approach would further avoid the concerns Mr. Ponganis raises about continuing to rely on the damaged Unit 1 for fish passage and power generation. *Id*. Ex. 1 at 2. The chief impact of enjoining further capital investment in Units 1 and 3 would appear to be to delay off-site manufacture of the turbine runners and other equipment and their eventual installation. *Id*., Ex. 1 at 2. Moreover the Corps' concerns about the juvenile fish passage impacts of completing work on all three turbines without any delay appear overstated: according to the Corps' website for Ice Harbor, only .5% to 8.6% of juveniles pass through all six of the turbines at this dam combined. *See* Corps of Engineers, "New Turbines Improve Fish Passage" (May 2016).[39] Further, the Corps' asserted urgency to complete this project is difficult to square with the fact that the project has been underway since 2001. The Court should enjoin further spending on this major capital project except for completion of work on Unit 2.

The Court also should enjoin further work on the Ice Harbor Stator Winding Replacements for Units 1-3. The Corps has spent only some $500,000 on this ten-million-dollar-

[39]http://www.nww.usace.army.mil/Portals/28/siteimages/Missions/Ice%20Harbor%20Turbine%20Event/FS_160511NewTurbinesFINAL.pdf.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

plus project. Ponganis Decl., Ex. 1 at 8; True Inj. Decl., Ex. F-7 at 10. While Mr. Ponganis makes much of the general potential for a failure of these windings, he does not indicate that any of them have experienced a significant failure to date or are at any particular risk. Ponganis Decl., Ex. 1 at 8. Rather, replacement of these windings seems more a matter of convenience in connection with the turbine runner work on units 1-3 discussed above. *See id*., Ex. 1 at 8 (describing this project as planned in 2014 to "coincide with the new runner installations"). Even so, to the extent fabrication of these windings is intended and scheduled to coincide with the new turbine runner installation at Unit 2, NWF would not object if a new stator winding were also installed at Unit 2 in connection with completion of work on that turbine by November, 2017. This accommodation would even further limit the Corps' concerns about an injunction against continuing capital investment in this project.

In short, a careful review of the information the Corps has now submitted about the status of the specific capital investment projects at the four lower Snake River dams NWF has identified in its injunction motion reveals that, while a number of these projects have been completed or soon will be, the largest projects, those at Ice Harbor, still involve more than $37 million in additional capital investments while the Corps prepares an EIS to consider removing this and the other Snake River dams. Accordingly, NWF hereby limits its motion for an injunction under NEPA against spending on current capital projects as discussed above. This accommodation also sharply limits the concerns the Corps has raised as a basis for objecting to *any* injunction against significant, ongoing capital investments in these dams and shapes NWF's injunction request so that it is targeted, tailored and supported by a balance of equities that favors ensuring, to the extent possible, a NEPA process unbiased by significant and irreversible financial commitments, an injunction that also will avoid the kinds of risks to power generation

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

and fish passage that the Corps seeks to interpose as a bar to any relief.

2. NWF's request for prior Court approval of future capital investments in the four lower Snake River dams should be granted.

NWF's injunction motion also seeks to require the Corps to obtain Court approval before committing to new, or expanding existing, capital investments in the four lower Snake River dams. As with every other aspect of the injunction motions, the Corps flatly objects to this request. Their objection, however, rests on generalizations about the complexity of the process for identifying and evaluating capital investment projects at these (and other) dams, *see* Fed. Opp. Mem. at 67-69 (describing in general "the complex and deliberative process of implementing a specific capital project"), and an assertion of concern that *any* form of involvement by the Court at *any* stage of this process "would result in significant uncertainty for the Agencies and attendant transaction costs." *Id*. at 70. Apart from this generalized anxiety, the Corps offers no specific basis for the Court to conclude that the balance of equities requires rejection of NWF's request for limited oversight of future capital investment in the Snake River dams.[40]

There are, however, facts that provide relevant context for this request and show the request is appropriate to avoid harm to the integrity of the on-going NEPA process and the environment without being unduly burdensome. First, the Corps has actually identified 15 capital projects at the four dams that have not yet been approved, 14 of which are anticipated to cost more than one million dollars each. *See* NWF Inj. Mot. Ex. E (Corps' list of capital projects

[40] To the extent the Corps' concern is with the wording of NWF's request for Court approval of future projects because it does not include a cost limitation and could reach the purchase of even a "small truck," Fed. Opp. Mem. at 71, NWF would apply the same one million dollar threshold it has used in seeking information from the Corps to the requirement to obtain Court approval. In other words, NWF only asks that the Corps seek leave of Court before proceeding with new capital projects that will cost more than one million dollars or with the expansion of an existing capital project that will add more than one million to its cost.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

from the Hydro Assets Strategy). Exhibit E also indicates that of the 14 million-dollar-plus projects, five are at "Stage 2" and nine are at "Stage 3" under the Corps' "planning criteria." *Id.* The Hydro Assets Strategy explains that projects at planning Stage 2 have "[e]quipment identified in the asset strategy aggregated into first order projects" but "[c]ost and schedule estimates are high level and fluid." True Inj. Decl., Ex. A at 114. Projects at planning Stage 3 have "[r]efined cost and schedule estimates awaiting funding approval [and are] [c]onsistent with asset strategy" but "[d]eveloping refined costs and schedule estimates" is ongoing. *Id.* The Strategy also indicates that projects at planning Stage 4 – which none of these 14 projects has yet reached – remain "deferrable," at least until a contract has been approved and advertised. *Id.* (describing the "Implementation Criteria" steps for Stage 4 projects).

What these facts show is that: (a) the universe of currently anticipated future capital projects at the four lower Snake River dams between now and 2030 consists of 15 identified projects, 14 of which will cost more than a million dollars; and (b) that none of these projects has yet reached a stage of planning and development where even the Corps would consider them non-deferrable. These facts sharply undercut the Corps' generalized process anxiety as a basis for denying NWF's request that the agency seek Court approval before proceeding with actual investment in these projects. First, it is not clear how many, if any, of these 14 projects the Corps expects to actually begin implementing before it completes the EIS the Court has ordered it to prepare. Second, it is apparent that the Corps itself currently views all of these projects as deferrable. Third, even if the Corps decides to move forward with actual implementation of one or more of these projects before it completes an EIS, it has offered no evidence why affording the Court a brief opportunity to consider any objection to proceeding with spending money to implement the project, or even a delay in such spending, would cause "significant uncertainty"

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

and "transaction costs." Only if the Corps chooses to delay seeking Court approval for a future project until the last minute would these risks arise.[41] The fact is, the Corps retains considerable control over both the risk of any uncertainty and of any transaction costs regarding these future projects that its own Hydro Assets Strategy and project table identify as both "not approved" and sufficiently early in the planning process to be "deferrable."

At the same time, these 14 projects represent a significant capital investment in the future operation of the four lower Snake River dams. Together they are projected to cost a bare *minimum* of $14 million. They will actually likely cost considerably more as the Corps has only indicated a minimum cost threshold for these projects while BPA has indicated that it expects capital spending on these four dams of as much as $200 million by FY 26. *See* Second True Decl., Ex. B at 7, 11 (BPA February, 2017 report showing expected capital spending by dam through FY 26). While not all of this very large capital investment would occur before the agencies complete an EIS, it is reasonable to assume that the Corps is likely to spend a substantial amount of this money on these future capital projects before 2021. The irony of the Corps' insistence that even its future capital projects cannot brook the risk of any delay from even the briefest process for Court approval is best captured by Mr. Ponganis's statement that any delay "would be economically wasteful and a misuse of taxpayer and ratepayer dollars." Ponganis Decl. at ¶ 32. Remarkably, neither Mr. Ponganis nor Federal Defendants show any

[41] The Corps cites the Ponganis and Connolly Declarations to support its claim of uncertainty and transaction costs. *See* Fed. Opp. Mem. at 70 (citing Ponganis Decl. at ¶¶ 23, 32-33 and Connolly Decl. at ¶ 62). Paragraph 23 of the Ponganis Declaration addresses fish passage and navigation safety projects, projects NWF has not asked to enjoin and does not expect to seek to defer. Paragraph 32 of his Declaration discusses general process concerns and costs that would be incurred once equipment is fabricated, a situation that should not arise before Court review of these future projects. Paragraph 33 is a general statement of the Corps' responsibility for the dams it owns and operates. Paragraph 62 of the Connolly Declaration raises the specter of rate impacts from any delay in planning for future projects without offering any detail regarding how this would occur or other facts that might support this fear.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

similar concern about a "misuse of taxpayer and ratepayer dollars" from headlong insistence on spending the same money and more if the agencies ultimately decide to bypass or breach one of more of the lower Snake River dams and so waste that investment. Simple fiscal prudence suggests that the agencies should be actively engaged in seeking opportunities to defer additional capital investments in these dams while they analyze and decide their future.

NWF's request that the Corps obtain Court approval before proceeding with new or expanded capital projects that will cost more than one million dollars is a reasonable effort to avoid further prejudice to the NEPA process while Federal Defendants complete the EIS the Court has ordered them to prepare.

****

NWF's motion for an injunction under NEPA is grounded in a fundamental principle of NEPA – that agencies should not make irreversible commitments of resources to one course of action while they examine a range of alternatives to that action. Established case law confirms that disregard of this principle poses irreversible harm to the proper and unbiased operation of NEPA as well as to the environment where there is both a significant commitment of financial resources and activities that go beyond planning and paperwork. The targeted nature of NWF's motion to enjoin specific current and future capital spending projects as set out in detail above readily meets these criteria and, as narrowed herein, would prevent irreparable prejudice to the EIS process the Court has ordered and also substantially avoid the various potential concerns the Corps asserts as a basis for denying NWF an injunction altogether. In these circumstances, the balance of the equities supports granting NWF an injunction under NEPA. *See Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (explaining that the court must weigh "the competing claims of injury" in deciding whether to grant an injunction).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

C. The Public Interest Supports an Injunction Under NEPA.

The final factor the Court must consider in resolving NWF's motion for an injunction under NEPA is the public interest.[42] As NWF has explained, in assessing the public interest, both ensuring a fair and unbiased NEPA process, as well as full and prompt compliance with our environmental laws, are compelling public interests. *See* NWF Inj. Mem. at 33-34 (citing cases). The risk to these important public interests is heightened in this case both because of its history and because of Federal Defendants' persistent refusal to acknowledge any need for change.

First, Federal Defendants have achieved the remarkable accomplishment of operating the Columbia and Snake River dams without complying with the requirements of the ESA for more than 15 years and counting. Yet Congress intended the ESA to "halt and reverse the trend toward species extinction, whatever the cost" and accordingly gave the ESA "priority over the 'primary missions' of federal agencies." *TVA v. Hill*, 437 U.S. 153, 184-85 (1978). Indeed, it has been more than 20 years since the Court concluded that the agencies were too focused on "what the establishment is capable of handling with minimal disruption" when "the situation literally cries out for a major overhaul" to protect ESA-listed salmon and steelhead. *IDFG v. NMFS*, 850 F.Supp. 886, 900 (D. Or. 1994). It is of little comfort or relevance to the public interest – or to threatened and endangered salmon and the people who rely on them – that the Court has decided to leave a series of failed biological opinions in place to avoid worse harm while the government attempts to comply with the law. As the Court has observed:

[42] For the reasons discussed *supra* at 18-21, NWF's motion for an injunction under NEPA does not run afoul of either Fed. R. Civ. P. 60(b) or 65. The motion under NEPA does not seek to modify or alter the Court's remand order but instead seeks to protect the integrity of that court-ordered process. NWF's NEPA motion also complies with Rule 65: as carefully described above, it explains which specific current capital projects it seeks to enjoin and which future projects it would reach. *See supra* at 33-41 (discussing these projects).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

> For more than 20 years NOAA Fisheries, the Corps and BOR have ignored the admonishments of Judge Marsh and Judge Redden to consider more aggressive changes to the FCRPS to save the imperiled listed species. The agencies instead continued to focus on essentially the same approach to saving the listed species – minimizing hydro mitigation efforts and maximizing habitat restoration. Despite billions of dollars spent on these efforts, the listed species continue to be in a perilous state.

NWF v. NMFS, 184 F. Supp. 3d at 947-48 (footnote omitted). Of course, as the Court noted, the agencies also have avoided the public scrutiny and analysis that accompanies compliance with NEPA for dam operations for some 15 years as well. *Id*. at 935-38.

Add to this "remarkable series of violations of our environmental laws," *Seattle Audubon Society v. Evans*, 771 F.Supp. 1081, 1089 (W.D. Wa. 1991), consistent evidence of Federal Defendants' truculence in the face of an unmistakable call for a fresh approach, and the need for an injunction to ensure, to the extent possible, a fair and unbiased NEPA process to examine alternatives for the future operation and management of the Snake River dams is palpable. As NWF has explained, the agencies' scoping process for the EIS the Court has ordered showed no sign of encouraging examination of alternatives that could "break through any logjam that simply maintains the precarious status quo," *NWF v. NMFS*, 184 F. Supp. 3d at 876. Instead it avoids any mention of the Court's decision and recycles information touting the agencies' success in managing the dams and restoring salmon – arguments the agencies made to defend the failed 2014 BiOp. *See, e.g.*, http://www.crso.info/posters/Station_08-2_rev1%20-%20FINAL.pdf (touting acres of estuary habitat "protected" or "restored" with no mention of Court's holding that reliance on these projects was arbitrary and capricious).[43] The point is not that the scoping process itself violates NEPA, the point is that the agencies' approach to it

[43] Federal Defendants recite the facts of their scoping process, *see* Ponganis Decl. ¶¶ 70-75, but make no effort to explain how this recitation reveals agencies committed to fully and fairly examining ways to "break through any logjam." *NWF v. NMFS*, 184 F. Supp. 3d at 876.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

continues to reflect steadfast adherence to the failed path they have been on for years and a refusal to even consider a more open and informative call for the development or examination of alternatives that would accomplish the long overdue "major overhaul."

The agencies' current opposition to any form of injunctive relief under either the ESA or NEPA is of a piece with their intransigence in the face of both an urgent need and a plain call for change. Rather than seek ways to provide additional spill to improve salmon survival, the agencies flatly oppose any change. Rather than look for ways to limit additional current and future capital investments in the four lower Snake River dams while the agencies prepare an EIS that will consider bypassing or breaching one or more of them, the agencies insist that no change in their spending plans is even possible. Instead, the agencies assert that every aspect of dam operations, from spending to management and operations is simply too complicated for the Court or anyone else except them to address.

Under these circumstances, the narrow injunction NWF seeks under NEPA to ensure, to the extent possible, a full and fair examination of alternatives that is not prejudiced by continuing multi-million dollar investments in a particular course of action, is surely in the public interest.

CONCLUSION

For all of the foregoing reasons, the Court should grant NWF's and Oregon's motions for a tailored injunction to increase voluntary spring spill until Federal Defendants comply with the ESA. It also should grant NWF's motion for an injunction to limit the harm to the NEPA

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340

process and the environment from specific continuing and future capital investments in the four lower Snake River dams.

Respectfully submitted this 28th day of February, 2017.

s/ Todd D. True
TODD D. TRUE (WSB #12864)
(*Admitted Pro Hac Vice*)
STEPHEN D. MASHUDA (WSB #36968)
(*Admitted Pro Hac Vice*)
ANNA M. SEWELL (WSB #48736)
(*Admitted Pro Hac Vice*)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340 | Phone
(206) 343-1526 | Fax
ttrue@earthjustice.org
smashuda@earthjustice.org
asewell@earthjustice.org

DANIEL J. ROHLF (OSB #99006)
Earthrise Law Center
Lewis & Clark Law School
10015 S.W. Terwilliger Boulevard, MSC 51
Portland, OR 97219
(503) 768-6707 | Phone
(503) 768-6642 | Fax
rohlf@lclark.edu

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2017, I electronically filed the foregoing *NWF's Reply Memorandum in Support of Its Motion for an Injunction, Declaration of Kevin L. Lewis in Support of Plaintiffs' Motion for an Injunction, Declaration of Liz Hamilton in Support of Plaintiffs' Motion for Injunction, and Second Declaration of Todd D. True In Support of Plaintiffs' Motion for an Injunction* with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

I further certify that the following will be served via First Class U.S. Mail to:

Howard F. Horton, Ph.D.
Court Technical Advisor
Professor Emeritus of Fisheries
Oregon State University
Department of Fisheries and Wildlife
104 Nash Hall
Corvallis, OR 97331-3803

/s/ Todd D. True
TODD D. TRUE

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104-1711
(206) 343-7340