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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 MOTION FOR AN
INJUNCTION**

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MOTION FOR AN INJUNCTION

Plaintiffs, National Wildlife Federation, *et al.* (“NWF”), respectfully move the Court for an injunction against the U.S. Army Corps of Engineers to address its violations of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536 (a)(2), and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332.

To address the Corps’ violations of the ESA, NWF joins a motion by the State of Oregon for an injunction to increase spill for juvenile fish passage during the spring salmon migration season at each of the lower Columbia and lower Snake River projects owned and operated by the Corps to the full amount that can be provided consistent with the applicable state water quality standards for total dissolved gas and the procedures for determining operational constraints at each dam as set forth in Oregon’s motion and supporting papers. This relief is necessary to reduce the mortality of, and irreparable harm to, ESA-listed juvenile salmon and steelhead migrating downstream to the ocean in the spring as compared to the harm they would experience under existing operations pursuant to the illegal 2014 BiOp.

To address the Corps’ violations of NEPA, NWF seeks an injunction to prohibit the Corps from expending any additional funds on (1) the 11 largest current and on-going capital improvement projects at the four lower Snake River dams that are specifically identified in Attachment A hereto; and (2) any future new capital improvement projects or expansion of existing projects in the absence of prior approval from the Court. The total capital costs of the 11 specific projects for which NWF seeks an injunction exceed \$110,000,000. Identified but unapproved new projects and the expansion of existing projects likely would add many millions of dollars more in capital investments in the relief NWF seeks. An injunction against committing additional resources to these activities as described herein is necessary to ensure a level playing field for an unbiased evaluation of all reasonable alternatives for managing the

Columbia and Snake River dams, as required by the Court's Opinion and Order on Summary Judgment and NEPA, including the alternative of removing one or more of the lower Snake River dams.

NWF has conferred with the Corps and other parties to this case regarding this motion by email and teleconference and the parties have not been able to resolve the issues raised (other than to agree on a proposed briefing schedule). The Corps has indicated it will oppose the motion and other parties have indicated they reserve the right to take the position they conclude is appropriate after reviewing NWF's complete filing in support of this motion.

This motion is based on NWF's memorandum set out below, the declarations, exhibits, and other papers submitted herewith, the State of Oregon's motion for an injunction and supporting papers, the pleadings previously filed herein, and such other evidence as the Court deems appropriate.

Respectfully submitted this 9th day of January, 2017.

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MEMORANDUM IN SUPPORT OF MOTION FOR AN INJUNCTION

INTRODUCTION

The Court has already concluded that the 2014 BiOp is arbitrary, capricious and contrary to the requirements of the ESA and was prepared without compliance with NEPA. *See NWF v. NMFS*, 184 F. Supp. 3d 861 (D. Or. 2016) (hereinafter “Summary Judgment Opinion”). Where a federal action agency such as the Corps has violated the ESA, an injunction is the appropriate remedy to protect listed species, to the extent possible, until the agency complies with the law. Likewise, where an agency has failed to comply with NEPA but continues to irreversibly commit funds to a particular course of action adopted in violation of that law, an injunction is necessary to ensure an analysis of all reasonable alternatives that is not biased or predetermined by such a continuing commitment of resources and to protect the environment. Accordingly, and for the reasons more specifically set out in this memorandum, the Court should grant NWF’s Motion for an Injunction.

STANDARD OF REVIEW FOR AN INJUNCTION

NWF and Oregon have succeeded on the merits of their claims against the combined 2008/2010/2014 BiOp. This is thus a motion for a permanent injunction pending the Corps’ compliance with the ESA and NEPA. *See Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1019, 1023 (9th Cir. 2009) (noting that after a summary judgment decision, the appropriate form of injunctive relief is a permanent injunction). The standard for granting such relief is the same as the standard for a preliminary injunction except the Court has resolved the merits in the plaintiff’s favor. *See Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987); *see also Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1988). The four-factor injunction standard, as framed for a permanent injunction, requires a plaintiff to demonstrate:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1088 (9th Cir. 2015), *cert. denied*, (U.S. Oct. 11, 2016) (quoting *eBay Inc. v. MercExchange*, 547 U.S. 388, 391 (2006)).

Courts, however, apply this standard in different ways under the ESA and under NEPA as set out below in discussing the relief NWF seeks for the Corps' violations of each law.

ARGUMENT

I. THE COURT SHOULD GRANT NWF AN INJUNCTION UNDER THE ESA

A. The Injunction Standard for the ESA

In ESA cases, the traditional injunction standard from *Cottonwood* is modified to account for the requirements of the ESA. Specifically, the equitable balancing of hardships and the public interest factors always favor an injunction to the listed species because the “plain intent of Congress in enacting the statute was to halt and reverse the trend toward species extinction, whatever the cost,” and thus “the balance has been struck in favor of affording endangered species the highest of priorities” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184, 194 (1978). “[C]ourts may not use equity’s scales to strike a different balance.” *NWF v. NMFS*, 422 F.3d 782, 794 (9th Cir. 2005); *see also NWF v. NMFS*, 839 F. Supp. 2d 1117, 1130–31 (D. Or. 2011) (“In Congress’s view, projects that jeopardized the continued existence of endangered species threaten incalculable harm: accordingly, it decided that the balance of hardships and the public interest tip heavily in favor of endangered species.”) (quoting *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987)).

This principle has not changed even though the courts no longer presume irreparable harm from a violation of the ESA. *See Cottonwood Envt’l. Law Ctr.*, 789 F.3d at 1089,

abrogating Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010)). In fact, the Ninth Circuit specifically reaffirmed that in ESA cases, “the equities and public interest factors *always* tip in favor of the protected species.” *Cottonwood Env’tl. Law Ctr.*, 789 F.3d at 1091 (emphasis added). The Court went on to explain that this weighted scale also means it ordinarily is not difficult to satisfy the remaining factor for an injunction in ESA cases, irreparable harm – even without a presumption of such harm. *Id.* (citing *NWF v. NMFS*, 839 F. Supp. 2d 1117, 1131 (D. Or. 2011)).

For the reasons described below, the relief NWF and Oregon seek in the form of increased spill during the spring juvenile salmon migration season will not only avoid irreparable harm to listed salmon and steelhead that would occur under the illegal 2014 BiOp, but it also is narrowly tailored to reduce this harm. *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014) (“[i]njunctive relief must be tailored to remedy the specific harm alleged’ . . .”) (quoting *Natural Res. Def. Council, Inc. v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007)).

B. The Basis for an Injunction Under the ESA

1. *Spill Is a Keystone Requirement for Salmon Survival.*

For juvenile salmon and steelhead migrating in the Snake and Columbia Rivers, “spill” indisputably provides the safest passage over the FCRPS dams. *See* 2000 BiOp at 6-17 (“In general, relative to other passage routes currently available, direct juvenile survival is highest through spillbays;”); *id.* at 6-15 (explaining that salmon suffer the “lowest direct mortality through spillways”); Declaration of Ed Bowles in Support of Oregon’s Motion for an Injunction at ¶¶ 6-9, 12-18 (describing spill and the benefits of it for juvenile salmon and steelhead survival) (hereinafter “2016 Bowles Inj. Dec.”); *see also* Declaration of Frederick E. Olney in Support of

2008 Injunction Motion at ¶¶ 3-4 (describing benefits of spill), ¶ 5 (explaining types of spill) (ECF 1626) (filed Nov. 25, 2008).

Releasing water over the spillways at the four lower Snake River and four lower Columbia River dams allows juvenile salmon and steelhead to avoid traveling through the power turbines, a passage route that increases mortality by subjecting these fish to life-threatening pressure changes and extremely high water velocities. *See* 2016 Bowles Inj. Dec. at ¶ 14; 2014 BiOp at 345; 2000 BiOp at 9-83. Spill also results in lower mortality than diverting fish from the turbine intakes and “bypassing” them through a series of pipes and tunnels to be ejected at the lower side of the dam, the only other method available to ensure that fish migrating in-river are not subjected to passage through the turbines. *See* 2000 BiOp at 9-82; *see also* 2008 SCA at 5-8 (fish passing through spillways or other surface passage generally have the “lowest direct mortality rates, typically losses are 2% or less.”). In fact, NOAA has long concluded “measures that increase juvenile fish passage over FCRPS project spillways are the highest priority” for passage improvements. 2000 BiOp at 9-82; *see also* *NWF v. NMFS*, 422 F.3d 782, 797-98 (9th Cir. 2005) (reviewing evidence from prior BiOp and that presented by expert declarants).

Based on the strength of this evidence, the Court has previously granted several requests by NWF and Oregon to provide spill at the lower Snake and lower Columbia River dams after finding that the measures were “necessary to avoid irreparable harm.” *See, e.g., NWF v. NMFS*, No. 01-640-RE, Opinion and Order at 10 (June 10, 2005) (Docket #1015) (granting, in part, motion for injunctive relief); *aff’d* 422 F.3d at 797-98 (summarizing evidence and finding that “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 that was rejected by the court.”); *see also* Oregon Injunction Brief at 5-8 (summarizing

history of FCRPS spill since 2005 and sequence of prior Court orders). The available evidence indicates that prior Court-ordered spill has helped avoid harm to juvenile salmon and steelhead that would have occurred otherwise and hence increased, at least to some extent, their survival rates during downstream passage through the hydrosystem. *See generally* 2016 Bowles Inj. Dec. at ¶¶ 12-17, 18 (explaining evidence that increased spill improves both juvenile survival and adult returns). Rather than designing operations to build upon the success of the past several years of court-ordered spill, and increase the benefits of those actions by providing more spill, however, the Corps has, at best, simply continued the Court-ordered spill operations with minor modifications in the 2008 BiOp and its successor supplements, including the 2014 BiOp. *See* Oregon Injunction Brief at 5-8.¹

Based on the available evidence about the benefits of spill in reducing salmon and steelhead mortality and increasing survival rates, NWF and Oregon now seek increased spill during the spring juvenile migration season at all eight mainstem Snake and Columbia River dams, to the full extent allowed by the current or any future applicable limits on total dissolved gas super-saturation except where the salmon managers of the Fish Passage Advisory Committee

¹ The Corps has sought to make more significant reductions in spill in the past, including reducing spring spill and maximizing transportation between May 7 and May 20 each year, even in high flow years, and terminating spring spill after June 1, *compare* 2008 FCRPS BiOp, Table of Actions at 32-33 (RPA #29, Table 2); *id.* at 35, Table 3 *with NMF v. NMFS*, CV-01-640-RE (Docket #1303) (Treaty Tribes' Response to Scheduling Order at Attachment 1, pages 9-10 (Jan. 9, 2007) (2007 spill table)); *see also* Fish Passage Center Memorandum Re: Recent Attempts to Improve Mainstem Migration Conditions for In-river Migrating Salmonids (April 21, 2008) (comparing current operations under Court's injunctions to those of past 15 years). The Court, however, rejected earlier proposals to eliminate spring spill, *NWF v. NMFS*, No. 01-640-RE, Opinion and Order at 9 (Dec. 29, 2005) (Docket #1221), and the Corps has not again sought to make these changes notwithstanding the language of the 2008 BiOp. In the summer, the RPA now also would allow the action agencies to terminate spill in the Snake River before August 31st, *see* 2008 FCRPS BiOp, Table of Actions at 33 & nn.5, 6, another step the Court has previously refused to allow NOAA and the action agencies to take, *NWF v. NMFS*, No. 01-640-RE, Opinion and Order (July 29, 2004) (Docket #602).

(“FPAC”) agree to a reduction in the otherwise allowable level of spill, and specify the operational constraints to achieve such a reduction at a particular dam. *See* Oregon Injunction Motion; 2016 Bowles Inj. Dec. at ¶¶ 37-50 (explaining details of Oregon’s Injunction Motion). This relief will lead to increased survivability of spring migrating ESA-listed salmon and steelhead and reduce the avoidable harm of continuing operations under the 2014 BiOp. *See* 2016 Bowles Inj. Dec. at ¶¶ 29-32 (citing studies demonstrating that spill to the spill caps, on the terms NWF and Oregon seek, would reduce the risk of low “Smolt-to-Adult Returns” (“SARs”) for ESA-listed spring salmon and steelhead migrants). This relief also is narrowly tailored to allow flexibility, through the expertise of the FPAC, to adjust spill levels at any dam and during the migration season to best ensure the most effective overall spill conditions.²

2. *ESA-Listed Salmon and Steelhead in the Columbia Basin Face a Substantial Risk of Extinction.*

The Court is familiar with the plight of ESA-listed Snake and Columbia River salmon and steelhead. *See, e.g., NWF v. NMFS*, 184 F. Supp. 3d 861, 870-71, 879-80 (D. Or. 2016). For example, the analyses of the Interior Columbia Technical Recovery Team (“ICTRT”) – organized by NOAA to assess scientifically the risks facing these species – paint a dire picture of the future. According to the ICTRT, the vast majority of the remaining populations of interior Columbia Basin salmon and steelhead face a high or moderate risk of extinction. *See* 2014 BiOp at 71 and Table 2.1–1 (reporting that 72 of 79 populations within these ESUs and distinct

² NWF does not seek increased summer spill levels for migrating fall chinook in this motion based on its expectation that the Corps will continue the existing court-ordered summer spill regime. *See NWF v. NMFS*, 839 F. Supp. 2d at 1131. This summer spill (with the survival benefits it provides summer migrants) is still necessary (although not sufficient) because, as NOAA concluded just this past May in denying a petition to delist summer migrating Snake River Fall Chinook, “[a]fter reviewing efforts being made to protect salmonids and their habitat in the Snake River Basin, we conclude that these efforts are insufficient to ameliorate the threats facing the Snake River fall-run Chinook ESU to the point where the species would warrant delisting.” 81 Fed. Reg. 33,469, 33,480 (May 26, 2016).

population segments had a high or maintained risk of extinction, including 23 populations with uncertain data that were likely high or maintained risk of extinction, and reporting that only 5 populations had a viable or highly viable rating); *see also NWF v. NMFS*, 184 F. Supp. 3d at 879-80 (also citing 2014 BiOp at 70–71 and Table 2.1–1). Of particular relevance to this motion for an injunction to increase spring spill, all 28 populations of Snake River spring/summer chinook face a high risk of extinction. 2014 BiOp at 71 and Table 2.1-1 (reporting ICTRT results). Likewise, all populations of Upper Columbia River Steelhead and Spring Chinook face a high risk of extinction. *Id.* And of course, Snake River sockeye remain at a high risk of extinction as well. *Id.* at 129. The juveniles of all of these species migrate down river during the spring juvenile migration season.

Even more recently, in March of this year, NOAA conducted a five-year status review for the four Snake River species and found that none of the ESUs are meeting ICTRT’s viability criteria. NOAA Fisheries, 2016 5-Year Review: Summary and Evaluation of Snake River Sockeye, Snake River Spring/Summer Chinook, Snake River Fall Chinook, Snake River Steelhead at 92 (*available at* http://www.westcoast.fisheries.noaa.gov/publications/status_reviews/salmon_steelhead/multiple_species/final_2016_5-yr_review_snake_river_species.pdf). NOAA further found there was no new information indicating the extinction risk has decreased to desired levels for any of the species. *Id.* For Snake River Sockeye, NOAA reported that the ESU “remains at extremely high risk,” *id.* at 29, and for Spring/Summer Chinook, “[t]he majority of populations in the Snake River spring/summer Chinook salmon ESU remain at high overall risk.” *Id.* at 30.

3. *The Injunction Oregon and NWF Seek Will Reduce the Harm to the Listed Species.*

In the absence of the measures requested in the Motions for an Injunction by Oregon and

NWF, spring migrating juvenile salmon and steelhead will face otherwise avoidable irreparable harm from adverse downriver migration conditions under the illegal 2014 BiOp. Given the already precarious existence of these fish, the relief NWF and Oregon request is both necessary and important to reduce the harm to these species and increase their survivability. *See NWF v. NMFS*, 422 F.3d at 797 (affirming grant of injunctive relief based on evidence that “plaintiffs’ request for summer spills would pose less risk for migrating fish than the proposed operations”).

The details of this relief are described and addressed in the Declaration of Ed Bowles that Oregon has filed concurrently herewith. Briefly, these measures seek to increase where possible – and in a way consistent with legal and biological constraints – the spring spill operations that the Court has ordered since 2006 and that largely have been incorporated into the 2014 BiOp. *See Oregon Injunction Motion* at 8-11; *see also supra* at 5-6; 2016 Bowles Inj. Dec. at ¶ 37, T. 3 (describing the specific details of the spring spill increases). These available increases in spring spill will further improve the in-river survival of juvenile salmon and contribute to better subsequent adult returns. *See* 2016 Bowles Inj. Dec. at ¶¶ 29-32 (explaining the studies demonstrating that increased spill above the 2014 BiOp spill operations would improve the SARs for spring-migrating salmon and steelhead). This spill relief builds upon previous requests the Court has granted and is buttressed both by additional scientific evidence and analyses. The effects of the increased spill NWF and Oregon seek will significantly reduce – but certainly not eliminate – the harm that would otherwise occur to spring migrating juvenile salmon and steelhead in 2017 and beyond.³

³ The Court has already ordered continued implementation of all other measures in the 2014 BiOp RPA and the memoranda of agreement with the various Tribes and States.

4. *In the Absence of an Injunction, ESA-Listed Salmon and Steelhead Will Suffer Avoidable Irreparable Harm Under the 2014 BiOp.*

The only way NOAA could conclude that operation of the hydrosystem under the 2014 BiOp would not cause jeopardy to ESA-listed salmon and steelhead was to develop and apply a novel jeopardy framework and analysis that the Court has rejected, and to rely on uncertain benefits from habitat actions and other measures that the Court has determined were arbitrary and capricious. *NWF v. NMFS*, 184 F. Supp. 3d at 895, 901-27. Notwithstanding the Court's decision to leave the illegal 2014 BiOp in place during a remand to avoid the risk of even greater harm, *id.* at 949, FCRPS operations under the 2014 BiOp will continue to cause irreparable harm to ESA-listed salmon and steelhead in a variety of ways.

Of particular relevance to this motion, these operations do so in part by failing to provide improved passage conditions consistent with the relevant scientific information, applicable state water quality standards for total dissolved gas super-saturation, and other biological constraints at each dam, thereby reducing the survival of juveniles attempting to pass these dams during the spring migration season. *See* 2016 Bowles Inj. Dec. at ¶ 3 (explaining that the Corps is not currently spilling to the state spill caps during the spring juvenile migration season), ¶¶ 29-32 (explaining the studies demonstrating that increased spill above the 2014 BiOp spill operations during the spring migration would improve the SARs for ESA-listed spring migrating salmon and steelhead). While measurable improvements in fish survival are available from increased spill, it is not possible to achieve the fish passage conditions necessary to avoid jeopardy within the confines of the existing configuration of the FCRPS dams and existing state water quality standards. The degree to which significant changes to these constraints are necessary, however, is not the subject of this motion. Instead, the Court's Summary Judgment Opinion assigns the agencies the task of analyzing and implementing the "major overhaul" required to comply with

the law. NWF and Oregon simply seek additional spill in the short-term and in a manner that can be implemented immediately to alleviate some of the harm from existing dam operations.

As the Court has observed of operations under a prior biological opinion:

I find that the DAMS strongly contribute to the endangerment of the listed species and irreparable injury will result if changes are not made. . . . Ample evidence in the record indicates that operation of the DAMS causes a substantial level of mortality to migrating juvenile salmon and steelhead. Indeed, in the 2004BiOp itself, NOAA noted that while ‘a non-trivial level of mortality would likely occur even under free-flowing river conditions . . . , the existence and operations of the dams and reservoirs . . . account[s] for most of the mortality of juvenile migration through the FCRPS’ 2004BiOp at 5-29 I find that irreparable harm results to listed species as a result of the action agencies’ implementation of the updated proposed action.

NWF v. NMFS, No. 01-640-RE, Opinion and Order at 8-9 (June 10, 2005) (Docket #1015), *aff’d in part, remanded in part*, 422 F.3d at 795 (“we cannot say that the district court’s factual finding concerning irreparable harm was clearly erroneous”); *see also id.* at 795 & n.9 (“FCRPS operations account for most of the mortality” to ESA-listed salmon and steelhead). Likewise, after invalidating the 2008/2010 BiOp, the Court found:

NOAA Fisheries acknowledges that the existence and operation of the dams accounts for most of the mortality of juveniles migrating through the FCRPS. As in the past, I find that irreparable harm will result to listed species as a result of the operation of the FCRPS. Accordingly, I grant Plaintiffs’ motion with respect to spring and summer spill. After many years of resistance, NOAA Fisheries now acknowledges that spring and summer spill is necessary to avoid excessive juvenile salmon mortality. . . . In light of the clear survival benefits associated with spill and Federal Defendants’ history of attempting to curtail spill without adequate justification, I order them to continue to spill in a manner consistent with this court’s annual spill orders.

NWF v. NMFS, 839 F. Supp. 2d at 1131.

Nothing in the 2014 BiOp alters the Court’s previous conclusions that “irreparable harm will result to listed species as a result of the operation of the FCRPS,” *id.*, and nothing in the 2014 BiOp contradicts these findings or suggests that additional spill to the spill caps will not further reduce juvenile mortality and increase survival. Indeed, NOAA reconfirms in the

2008/10/14 BiOps its finding (initially made in the 2000 BiOp) that operation of the FCRPS will jeopardize the continued existence of at least eight of the listed salmon and steelhead runs in the Columbia and Snake Rivers. 2008 BiOp at 1-6 to 1-7 (stating that the starting place for the 2008 BiOp was NOAA's determination in 2000 that FCRPS operations would cause jeopardy); 2014 BiOp at 31-32 (reaffirming findings of 2008 BiOp and continued need for an RPA to avoid jeopardy); *NWF v. NMFS*, 184 F. Supp. 3d at 879 ("Recent data shows that the listed species remain in a precarious state"); *id.* at 949 (holding that the 2014 BiOp's no jeopardy conclusion is arbitrary and capricious). *See generally* 2008 SCA at 5-4 to 5-25 (summarizing direct harm caused by the hydrosystem, including mortality caused by dam passage, migration delays, flow depletions, and water quality). Though some of these factors account for greater harm than others, *see, e.g., id.* at 5-8 (finding that "about half of the mortality of in-river migrating juvenile spring Chinook and steelhead" occurs in the reservoirs), they combine to cause high levels of mortality to salmon and steelhead as they migrate to and from the ocean. *See, e.g.,* 2008 NOAA AR B143 at 32 (Fig. 8A) (graph showing FCRPS responsible for 43-74% of human-caused mortality for overall Snake River spring/summer Chinook populations); *id.* (up to 87% for populations with low habitat improvement potential).

The extraordinary levels of permitted "incidental take" for hydrosystem operations under the failed 2008/2010/2014 RPA also reflect the massive impact of the dams on these fish. *See* 2014 BiOp at 551 (stating that take levels detailed in the 2008 BiOp at 14-24 to 14-29 "continue unchanged"). For some populations, hydrosystem operations under the RPA are legally permitted to take up to 90.2% of smolts that migrate in-river under some conditions. 2008 BiOp at 14-27, Table 14.3 (estimating average of up to 90.2 % mortality under the RPA for juvenile Snake River sockeye migrating in-river and 63-87% for transported fish); *see also id.* (estimating

average of 54.7% to 76.1% take for Snake River steelhead). In short, there is nothing about hydrosystem operations under the 2014 BiOp that would change the Court’s previous conclusion that “irreparable harm results to listed species as a result of the action agencies’ implementation of the [RPA].” *NWF v. NMFS*, No. 01-640-RE, Opinion and Order at 9 (June 10, 2005) (Docket #1015); *see also NWF v. NMFS*, 839 F. Supp. 2d at 1131 (same conclusion for 2008/2010 BiOps).

C. The Court Should Grant NWF and Oregon the Injunctive Relief They Seek for the Corps’ Violation of the ESA.

1. *The Corps Has Violated the ESA.*

The Court has concluded that the 2008/2010/2014 BiOps are arbitrary, capricious, and contrary to law. The Corps relied on these invalid BiOps to establish its compliance with the ESA in its record of decision (“ROD”). *See* Corps 2014 AR 1 at 2, 10-11 (“Corps 2014 ROD”). Although the Court has not explicitly ruled on NWF’s ESA claims against the Corps, the agency unequivocally violated the ESA by relying on the invalid BiOps.

In its complaint, NWF claimed that the Corps violated Sections 7 and 9 of the ESA by relying on invalid biological opinions in its ROD. *NWF v. NMFS*, No. 01-640-SI, NWF’s 7th Amended Complaint at 60-62 (July 9, 2014) (ECF 1928). NWF subsequently moved for summary judgment on these claims. *Id.*, NWF Mot. S.J. at vii (Dec. 16, 2014) (ECF 1976). While the Court granted NWF summary judgment on its claim that the 2014 BiOp violated the ESA, *NWF v. NMFS*, 184 F. Supp. 3d at 950, the Court did not also explicitly conclude that the Corps had violated the ESA by improperly relying on the invalid BiOp. However, the basis for NWF’s claim against the Corps for violation of section 7 of the ESA—the invalidity of the 2014 BiOp—has been decided, and the agency has no independent basis or analysis to support an

assertion that its actions nonetheless comply with the ESA.⁴

Indeed, the Court has ruled previously that the Corps violates the ESA by relying on an invalid BiOp. *NWF v. NMFS*, 422 F.3d at 793 (noting that the district court found BOR and the Corps violated the ESA when they adopted the invalid 2004 BiOp): after invalidating the 2004 BiOp, the Court held that the Corps and BOR had also violated the ESA, explaining:

In my May 2005 opinion, I found the 2004BiOp violates the ESA. I now conclude that, in light of their reliance on the 2004BiOp, the Record of Consultation and Statement of Decision (ROD) issued by the Corps on January 3, 2005, and the ROD issued by the BOR on January 12, 2005, also violate the ESA . . . The RODs provide no specific analysis nor point to any record evidence to support the assertion that the action agencies conducted independent assessments and reached independent and rational conclusions in adopting them. The RODS reveal that these agencies embraced the same fundamental legal flaws that NOAA attempted to use to justify its circumscription of the action subjected to jeopardy analysis. I find, therefore, that in substance the RODs relied on the no-jeopardy finding of the 2004BiOp without an independent rational basis for doing so.

NWF v. NMFS, No. 01-640-RE, Opinion and Order at 3 (June 10, 2005) (Docket #1015).⁵ The Corps has committed the same error by relying on the invalid 2014 BiOp and its predecessor 2008 and 2010 BiOps.⁶

⁴ The Corps explicitly relied only on the failed 2008/10/14 BiOps in its 2014 ROD to establish its compliance with the ESA. The agency was also intimately involved at every step of the preparation and development of these BiOps, and conducted no other independent analysis to support its ROD. As a result, the no-jeopardy conclusion in the ROD is unavoidably anchored to the fate of the BiOp. *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1305 (9th Cir. 1993) (finding that the “Forest Service’s reliance on FWS’s opinion was not justified in light of its failure to provide the FWS with all of the data and information...”). Because the 2014 BiOp violates the ESA, the Corps’ decision adopting the BiOp also runs afoul of the law. *See Florida Key Deer v. FEMA*, 364 F. Supp. 2d 1345, 1359 (S.D. Fla. 2005) (action agency’s failure to “engage in any independent consideration of the sufficiency of the 2003 RPAs renders its actions arbitrary and capricious.”); *Hawaii Longline Ass’n. v. NMFS*, 281 F. Supp. 2d 1, 26-27 (D.D.C. 2003) (same).

⁵ The Court’s grant of injunctive relief requiring the Corps to continue annual spill operations after invalidating the 2008/2010 BiOps is necessarily based on the conclusion that the action agencies had violated the ESA by relying on the invalid BiOps. *See NWF v. NMFS*, 839 F. Supp. 2d at 1131 (ordering action agencies to continue spill injunctions issued in 2005).

⁶ Courts in this circuit have made clear that action agencies have an independent and continuing legal duty to avoid any action that would jeopardize a listed species, regardless of the contents of

2. *The Corps' ESA Violations Require Injunctive Relief.*

Where, as here, NWF has succeeded on the merits of its ESA claims against the 2008/10/14 BiOp, and by clear implication the Corps' ROD, and has established a likelihood of irreparable harm from the Corps' planned actions, an injunction is necessary to reduce and minimize the harm listed species would otherwise face. As the Ninth Circuit explained in affirming the Court's injunction for 2005 summer operations, where the Court

had rejected the biological opinion upon which the summer operations were premised, and it had concluded that continuation of the status quo could result in irreparable harm to a threatened species[,] [t]hose are precisely the circumstances in which our precedent indicates that the issuance of an injunction is appropriate.

NWF v. NMFS, 422 F.3d at 796; *see also PCFFA v. BOR*, 426 F.3d 1082, 1095 (9th Cir. 2005) (remanding for entry of injunctive relief following determination that biological opinion was arbitrary). In short, the relevant question in this motion is whether the relief NWF seeks for the Corps' violations of the ESA will likely reduce the risk of harm to the listed species and improve their survival as compared to operations under the failed 2008/10/14 BiOp.

As NWF has explained above, on-going hydrosystem operations under the failed 2008/10/14 BiOps will kill and injure thousands of ESA-listed salmon and steelhead. *See* 2008 BiOp, Chpt. 14, Tables 14.2 and 14.3 (summarizing incidental take); AR Doc. B.124 (NOAA Technical Memorandum "Passage of Adult and Juvenile Salmon Through Federal Columbia River Power System Dams"). As the Court has said before in granting a spill injunction, increased spill is "necessary to avoid irreparable harm." *NWF v. NMFS*, 01-640-RE, Opinion and Order at 10 (June 10, 2005) (Docket #1015); *see also NWF v. NMFS*, 839 F. Supp. 2d at

a biological opinion. *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) ("while consultation with the FWS may have satisfied the Navy's *procedural* obligations under the ESA, the Navy may not rely solely on a FWS biological opinion to establish conclusively its compliance with its *substantive* obligations under section 7(a)(2)") (citing *Stop H-3 Ass'n. v. Dole*, 740 F.2d 1442, 1459-60 (9th Cir. 1984) (emphasis in original)).

1131 (“[a]fter many years of resistance, NOAA Fisheries now acknowledges that spring and summer spill is necessary to avoid excessive juvenile salmon mortality”). The same finding is warranted for continued operations under the 2008/10/14 BiOp.

In addition, NWF and Oregon have submitted clear evidence in support of this injunction motion to confirm this harm. *See supra* at 3-12 (citing 2016 Bowles Inj. Dec. and other materials). The increased spring spill we seek as a remedial measure is constrained by both biological limits (the current and any future spill caps) and will be further adjusted by the salmon managers if necessary. *Id.* Accordingly, this spill will both reduce the harm of operations under the invalid 2014 BiOp and reduce avoidable mortality to ESA-listed spring migrating juvenile salmon and steelhead. Based on these facts and the relevant case law, the Court should grant NWF’s and Oregon’s motions for an injunction under the ESA.

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

NWF seeks to enjoin continued spending on 11 specific, large capital investment projects at the four lower Snake River dams and also seeks an order requiring the Corps to obtain permission from the Court before beginning any new capital projects or expanding existing capital projects at these dams, pending compliance with NEPA. *See* NWF Injunction Motion & Att. A; *see also infra* at 22-24 (describing projects). NWF seeks this relief because this large and continuing commitment of financial resources would cause irreparable harm by undermining the core purposes of NEPA – ensuring an unbiased and thorough examination of all reasonable alternatives, including the alternative of removing one or more of the Snake River dams, and would also lead to future, avoidable harm to ESA-listed salmon and steelhead. Both harms arise from unabated investments in upgrading these dams, investments that total approximately \$110,000,000 for the 11 large projects alone and likely will be even larger in light of planned future projects. Once invested, the Corps will be more likely to decide to continue status quo

dam configuration and operation, with its attendant harm to salmon and steelhead, and far less likely to decide to waste this very substantial sum through a decision to remove these dams.

In addition, as explained below, both the public interest and the balance of equities favor an injunction, the former because there is a compelling public interest in full and unbiased compliance with NEPA, especially in the context of this case, and the latter because any cost to the Corps from suspending its capital investments would be purely monetary while the harm to the environment and the procedural integrity of the NEPA process cannot be redressed through money damages.

A. The NEPA Injunction Standard.

In a motion for an injunction under NEPA, the Court applies the ordinary four-part injunction standard set out in *Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1088, and discussed above, *see supra* at 1-2. As the First Circuit concluded long ago in applying the injunction standard and vacating a decision not to issue a preliminary injunction for a violation of NEPA:

‘NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. . . . It is far easier to influence an initial choice than to change a mind already made up. It is appropriate for the courts to recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based—a theory aimed at presenting governmental decision-makers with relevant environmental data *before* they commit themselves to a course of action.’

Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989) (quoting *Com. of Mass. v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983)). *See also Friends of the Earth v. Hall*, 693 F. Supp. 904, 913 (W.D. Wash. 1988) (“the risk of bias resulting from the commitment of resources prior to a required thorough environmental review is the type of irreparable harm that results from a NEPA violation”). Avoiding this harm, as well as the future environmental harm that would flow from

it, remains just as important today. *See Sierra Club v. Corps of Engineers*, 645 F.3d 978, 994–95 (8th Cir. 2011) (affirming injunction under NEPA post-*Winter* and *Monsanto*) (observing that the “harm flow[s] from a violation of NEPA itself, in that failure to comply with NEPA requirements caused a risk that ‘real environmental harm will occur through inadequate foresight and deliberation’”) (quoting *Sierra Club v. Marsh*, 872 F.2d at 504).

Simply put, when an agency commits substantial financial resources in a way that advantages or disadvantages the choice among one or more reasonable alternatives, *before* it completes an EIS to evaluate those alternatives, it undermines the fundamental purposes of NEPA and so injures public participation in the NEPA process as well as the quality of government decision-making. And it increases the probability of future, avoidable environmental harm by tilting the scales towards a course of action that may be financially attractive because of a prior commitment of resources, but not environmentally prudent. This risk is especially acute in this case for the alternative of bypassing the lower Snake River dams. As the First Circuit noted, “[t]he difficulty of stopping a bureaucratic steam roller, once started, still seems . . . a perfectly proper factor . . . to take into account in . . . a motion for a preliminary injunction [under NEPA].” *Sierra Club v. Marsh*, 872 F.2d at 504 (internal citations omitted).

B. The Basis for an Injunction Under NEPA.

1. *The Court’s NEPA Ruling*

As the Court noted in its Summary Judgment Opinion and Order:

Congress enacted the National Environmental Policy Act to ensure a process in which all reasonable alternatives are given a “hard look” and all necessary information is provided to the public. In addition, a central purpose of an environmental impact statement is “to force the consideration of environmental impacts in the decisionmaking process.” For example, the option of breaching, bypassing or even removing a dam may be considered more financially prudent and environmentally effective than spending hundreds of millions of dollars more on uncertain habitat restoration and other alternative actions.

NWF v. NMFS, 184 F. Supp. 3d at 875-76 (footnote and citation omitted). The Court subsequently explained that management of the FCRPS required an EIS because:

[i]f one action [that is part of a planned course of action] is replaced with a different action providing greater survival benefits, another ‘independent’ action will not be required. For example, 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], hazing Caspian terns, or improving the estuary habitat.

Id. at 939-40 (footnote omitted). “[T]he purpose of a single EIS is so that the action agencies, the public, and public officials can take a hard look at the programmatic plan to offset the adverse effects of the FCRPS and consider the reasonable alternatives.” *Id.* at 940 (citing 40 C.F.R. § 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken.” (emphasis added))).

Of particular relevance to the EIS the Court has required, the Court also noted, “the history of this case and the fact that the Action Agencies resist preparing a comprehensive NEPA evaluation despite the fact that programmatic EISs for very complex federal actions are regularly prepared raises concerns that the resistance to preparing a single EIS is to avoid the ‘hard look’ and public participation that would be required under NEPA, specifically the “hard look” at *all* reasonable alternatives.” *Id.* at 940 (emphasis in original). The Court elaborated on this point further by observing that an adequate EIS that fully and fairly considers all reasonable alternatives, “may well require consideration of the reasonable alternative of breaching, bypassing or removing one or more of the four lower Snake River Dams. This is an action that NOAA Fisheries and the action agencies have done their utmost to avoid considering for decades. Judge Redden repeatedly and strenuously encouraged the government to at least study the costs, benefits, and feasibility of such action, to no avail.” *Id.* In this same vein, and with

reference to the action agencies' failure so far to fully evaluate the environmental and other costs and benefits of lower Snake River dam removal, the Court noted, "allowing the program [FCRPS operations] to move forward without a comprehensive EIS allows for certain actions to be taken that 'swing[] the balance' in favor of other actions that might have been disfavored had all action been considered together." *Id.* at 940 (quoting 40 C.F.R. § 1501.2).

The Court concluded its discussion of the Corps' violation of NEPA as follows:

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. One of the benefits of a NEPA analysis, which requires that all reasonable alternatives be analyzed, is that it allows innovative solutions to be considered and may finally be able to break through the logjam that maintains the status quo.

Id. at 947-48 (footnote omitted).

2. *The Corps' Actions Following the Court's Decision.*

Notwithstanding the Court's conclusion that the Corps has violated NEPA and must prepare a comprehensive EIS that examines all reasonable alternatives for managing the FCRPS dams to avoid jeopardy to ESA-listed salmon and steelhead, and that the removal of the four lower Snake River dams likely is a reasonable alternative, the Corps has taken no steps, made no adjustments, and announced no pause in any aspect of its plans to continue investing tens of millions of dollars in capital funds in a long list of projects to upgrade and extend the life of these four dams. Instead, its actions evince a "business-as-usual," continuing, and irreversible commitment of significant resources to these projects.

Thus, in June, 2016, the Corps, Bonneville Power Administration (BPA) and BOR published their 2017-2030 Hydro Assets Strategy. *See* Declaration of Todd D. True at ¶ 2 & Ex.

A (filed concurrently herewith) (hereinafter “True Dec.”). This Strategy describes the capital investments “in equipment refurbishment and replacement” these agencies are planning for all of the FCRPS dams between now and 2030. *Id.*, Ex. A at 3. Among other things, the Strategy notes that the “relative cost of unavailability”⁷ for each of the four lower Snake River dams is less than \$10 million per year, the least expensive tier of cost of unavailability for projects in the system. *Id.*, Ex. A at 16. Nonetheless, the Strategy, in Appendix A, lists some 89 capital program investment projects that are planned for the four lower Snake River dams. *Id.*, Ex. A, App. A at 117-118. The Strategy does not spell out the exact schedule or the anticipated capital costs of these 89 projects. Nor does it mention or acknowledge in any way the Court’s Summary Judgment Opinion and NEPA ruling. Instead, it presents a continuing and unchanged course of conduct by these agencies for making the same capital investments in the future operation of the four lower Snake River dams they have always been planning to make.

To understand the scope and nature of these planned capital investments, NWF propounded written discovery to the Corps regarding the capital projects for these dams identified in Appendix A to the Hydro Assets Strategy and any other capital spending or non-routine maintenance spending for these projects. True Dec. at ¶ 4. While the Corps objected to any formal response to this discovery, it agreed to provide some information about each of the currently approved and on-going capital projects at these dams. *Id.* at ¶¶ 5-6 & Exs. B & C. More specifically, the Corps agreed to provide some information about those capital projects on which it will expend funds this fiscal year (i.e., before Sept. 30, 2017) and which each have a total cost in excess of one million dollars.

⁷ As the Hydro Assets Strategy explains, “[t]he relative cost of unavailability is the annual cost of replacing lost generation from the least-used generating unit, or first 20% of lost plant availability, whichever is larger.” True Dec., Ex. A at 15.

The Corps eventually identified 31 such on-going projects, 22 of them part of capital spending under the Hydro Assets Strategy. *See* True Dec. at ¶¶ 7-8 (explaining incomplete Corps response and follow-up to get a complete list of projects); *see also id.* at ¶ 11 (discussing nine of the 31 capital projects that address fish passage or safety issues and that are not part of the Hydro Assets Strategy or this injunction motion). The Corps also indicated that another 34 capital projects at these dams that were listed in Appendix A to the Hydro Assets Strategy had already been completed, and an additional 16 projects had yet to be approved. *Id.* at ¶ 10 & Ex. E. Under the terms of NWF's agreement with the Corps, the agency did not provide any cost information for the 16 capital projects that have not yet been approved. True Dec. at ¶ 10 & Ex. D, D-1.

From the information available to NWF, total capital spending on the 11 largest current and ongoing capital projects at these four dams alone will be approximately \$110,000,000.⁸ These projects include everything from tens of millions of dollars to rewind and upgrade some turbines at two of the dams to extend their operating life, to refurbishing powerhouse cranes and other equipment related to the generation of electricity, to installing new HVAC systems. These 11 projects are addressed in this motion for an injunction. *See* NWF Motion, Att. A; True Dec., Ex. F (same) & Exs. F-1 through F-9 (providing additional information about these projects).⁹ A

⁸ All costs are approximate because the project costs provided by the Corps are estimates, the Corps redacted some project costs from the information it provided, and it has excluded all project costs scheduled to occur after 2017.

⁹ The Corps also provided information about 11 additional ongoing capital projects from the Hydro Assets Strategy at these dams, the costs of which also exceed one million dollars each. *See* True Dec., Ex. G (identifying these projects) & Exs. G-1 to G-9 (providing additional information about them). These projects currently appear to be a smaller investment in these dams (on the order of ten million dollars altogether). However, the costs of some of these projects is likely to rise, perhaps significantly. Because these projected costs may change significantly, NWF has included in its injunction motion a request that the Corps seek leave of the Court before proceeding with a more expensive version of any of these 11 projects.

short description of each of these 11 large capital projects is set out below:

- The “Ice Harbor Units 1-3 Turbine Design and Runner Replacement” project originally aimed only to replace the runner and turbine blades in Unit 2, which had been prone to oil leaking and blade cracking. True Dec., Ex. F-1 at 1-2. The replacement would install an oil-less runner and new turbine blades. *Id.* at 2. More recently, the project was expanded to include a new generator winding for Unit 2, *id.* at 9, and a fixed blade runner and an option for an adjustable runner for Unit 3, *id.* at 13-18. Finally, a new adjustable runner for Unit 1 has been added to the project. *Id.* at 23. According to a news report that appears to describe this project, it is intended to replace aging infrastructure using technology which may be used at other dams in the future. True Dec., Ex. H. This news account indicates total project costs of some \$58,000,000. *Id.*
- The “Little Goose Digital Governor Upgrade” would convert the current electronic governors at Little Goose dam units 1-6 to digital governors that would serve well into the future. True Dec., Ex. F-2 at 1. An appendix to a Corps of Engineers regulation defines governors as: “the turbine control unit and includ[ing] all mechanical and electrical control parts, distributor valve, control valves, oil tanks, piping, pumps, valves, actuator and sump, electronic and digital control systems, transducers, and instrumentation.” Corps of Engineers, Regulation No. ER 10-1-53 (April 30, 2015), Appendix A, HDC’s Hydropower Engineering And Design Mission Responsibility (hereinafter “Corps Regulation Appendix”), at A-3, *available at* http://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_10-1-53.pdf?ver=2015-10-19-114129-017. The existing governors “have been reliable in the past,” but have recently had some component failures and “drifting of the electronics.” True Dec., Ex. F-2 at 1. Information from the Corps indicates that over \$1,000,000 of the project costs may have already been spent. *Id.* at 15. Even excluding this amount, capital costs for this project are projected to exceed \$4,000,000. *Id.*
- The “Little Goose Powerhouse Bridge Crane Rehab” would make improvements to the powerhouse bridge crane. True Dec., Ex. F-3 at 1. These upgrades would aid operability and extend its useful life. *Id.* The crane is used to maintain the turbine-generator units in the powerhouse. *Id.* A Corps document explains that powerhouse cranes “are used for the assembly and disassembly of the main unit generators and turbines and maintenance purposes.” Corps Regulation Appendix, *supra*, at A-4. The project was recently amended to add the installation of new hoist drums. True Dec., Ex. F-3 at 21. Information from the Corps indicates that over \$5,000,000 in project costs may have already been spent. *Id.* at 23. Excluding this amount, and costs that are scheduled to occur after 2017, capital costs for this project are projected at nearly \$3,000,000. *Id.*
- The “Lower Monumental Unit 1 Refurbishment and Units 1 & 2 Cavitation Work” was originally to repair the linkage and cavitation damage to Lower Monumental dam’s Unit 1 from a blade linkage failure in 2005. True Dec., Ex. F-4 at 1-2. The project was amended in 2014 to add a rewind for Unit 1 and cavitation repair for Unit 2. *Id.* at 15. Later in 2014, the project was amended again to include the replacement of air coolers on Unit 1. *Id.* at 19. Information from the Corps indicates that approximately \$2,500,000 of

the project costs may have already been spent. *Id.* at 41. Excluding this amount, capital costs for this project are projected at nearly \$14,000,000. *Id.*

- The “Lower Granite Powerhouse Bridge Crane Rehabilitation” would make improvements to the powerhouse bridge crane at Lower Granite dam. True Dec., Ex. F-5 at 1. Like the Little Goose Bridge Crane project above, these upgrades would aid operability and extend the life of the crane which is used to maintain the turbine-generator units in the powerhouse. *Id.* The project was amended in 2012 to add engineering design necessary to address cracks discovered in the main hoist gear sets. *Id.* at 9. Information from the Corps indicates that approximately \$500,000 of the project costs may have already been spent. *Id.* at 19. Excluding this amount, capital costs for this project are projected at nearly \$6,500,000. *Id.*
- The “Lower Granite Powerhouse HVAC Upgrade” would replace the existing HVAC pneumatic control system with a digital system. True, Dec., Ex. F-6 at 1. The project would also replace existing fans with fans that have a greater capacity to circulate air. *Id.* at 1. Some existing air handlers would also be replaced to improve temperature control and air circulation throughout the powerhouse. *Id.* The upgrades also appear to address changes to the powerhouse layout because the new air handlers are intended to provide “properly conditioned air” to new office and conference room space in the powerhouse. *Id.* at 6. Powerhouse HVAC systems are not directly or indirectly related to power production. Corps Regulation Appendix, *supra*, at A-7. The information provided by the Corps indicates that more than \$500,000 of the project costs may have already been spent. True Dec., Ex. F-6 at 27. Excluding this amount, capital costs for this project are projected at more than \$3,000,000. *Id.*
- The “Ice Harbor Units 1-3 Stator Winding Replacement” would replace the windings at turbine units 1-3 with new stator windings, and install one stator core, at the same time the turbine blades are replaced at these three units. True Dec., Ex. F-7 at 1, 9. Stator windings are part of the turbine generator equipment. Corps Regulation Appendix, *supra*, at A-5. This description covers the two projects in Exhibit F-7. Excluding costs scheduled after 2017, the approximate total capital cost for these two projects exceeds \$11,000,000. True Dec., Ex. F-7 at 10.
- The “Little Goose Station Service Transformers Replacement” would replace two station service transformers at Little Goose dam. True Dec., Ex. F-8 at 1. One of the existing station service transformers was damaged during a switching evolution in 2014. *Id.* Because it is possible that this event also damaged the other service station transformer, and because the other transformer has reached the end of its service life, the project calls for the replacement of both transformers. *Id.* This description covers the two projects in Exhibit F-8. Information from the Corps indicates that approximately \$150,000 of the project costs may have already been spent. *Id.* at 13. Excluding this amount, and excluding costs scheduled after 2017, capital costs for this project are projected at more than \$3,000,000. *Id.*
- The “Lower Granite Unit 1 BLH Linkage Upgrade” would install a set of Kaplan Hub and linkage parts, and refurbishment of associated components affected by disassembly

of this unit at Lower Granite dam. True Dec., Ex. F-9 at 1, 7. The upgrade would allow the unit to return to adjustable service, after operating as a fixed blade unit since a linkage failure in 2012. *Id.* at 1. Information from the Corps indicates that nearly \$400,000 of the project costs may have already been spent. *Id.* at 10. Excluding this amount, capital costs for this project are projected at more than \$7,000,000. *Id.*

As all of this information indicates, the Corps is continuing to commit major capital resources to restoring and extending the useful life of the four lower Snake River dams without hesitation or pause, notwithstanding the Court's observation that allowing current FCRPS operations "to move forward without a comprehensive EIS allows for certain actions to be taken that 'swing[] the balance' in favor of other actions," *NWF v. NMFS*, 184 F.Supp. 3d at 944, and that "[i]t is doubtful the [Corps] could demonstrate that breaching, bypassing or removing one or more of the Snake River dams is not 'reasonable' under NEPA." *Id.* at 943.

These continuing, large-scale, status quo, capital investments in the four lower Snake River dams increase the probability of future environmental harm to salmon, steelhead and other species from a continuing commitment of financial resources to the ongoing, status quo operation of these dams and, as important, these investments are contrary to NEPA's fundamental mandate to objectively and fairly evaluate all reasonable alternatives. *See infra* at 27-29. These actions will thus cause irreparable harm to the environment and to the integrity of the NEPA process the Court has ordered because of the well-recognized "difficulty of stopping a bureaucratic steam roller," *Sierra Club v. Marsh*, 872 F.2d at 504 (internal citations omitted) – a particularly acute risk given the history of this case.

3. *The Corps' NEPA Scoping Process.*

Additional evidence of this steam-roller is easy to find, even beyond the Corps' capital spending plans that show no evidence of change or pause pending compliance with NEPA. Pursuant to the Court's Order of Remand, the Corps, BOR, and BPA have commenced scoping for the EIS the Court has ordered them to prepare. *See NWF v. NMFS*, No. 01-640-SI, Remand

Order at 4-5 (July 6, 2016) (establishing schedule for preparation of an EIS). This scoping process began at the end of September and has included a series of 15 regional public meetings. *See* 81 Fed. Reg. at 67,382-83 (Sept. 30, 2016). The format for each of these meetings has been the same and all of the materials the Corps has presented at these meetings have been the same. These meeting materials are available to the public at www.crso.info.

As explained in Exh. I to the True Declaration and its third attachment, these scoping materials and meetings *never* mention the Court's NEPA ruling or explain why the Corps is preparing an EIS, *never* mention or provide any information about *any* alternative approaches to managing the FCRPS dams to avoid jeopardy to ESA-listed salmon and steelhead, let alone discuss or describe the alternative of breaching one or more of the lower Snake River dams, and do not afford the public a meaningful opportunity to provide the Corps with any input about issues or alternatives it should consider. True Dec., Ex. I & Att. 3 at 12-14. Instead, as discussed in Attachment 3 to Ex. I, which is a letter sent by more than 30 regional and national fishing, clean energy, and conservation groups to the Corps and other action agencies, the meetings appear designed as a public relations tour for status quo dam operations, using many of the same points the Corps and other Federal Defendants have used to support their claims of success for the 2014 BiOp. *See, e.g., id.*, Att. 3 at 13-14 (noting in detail the extent to which these meetings and materials fail to provide the public with useful information and instead recycle arguments that the Corps' management of the FCRPS dams is an unqualified success).

This letter was sent in mid-November, following the first NEPA scoping meetings. It sought an extension of the scoping comment period and significant substantive reform of the scoping meeting information and format to actually describe key issues and alternatives that the Corps may need to address in its EIS. *Id.*, Ex. I, Att. 3 at 15; *see also* Council on Environmental

Quality (“CEQ”), Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263, 34,264 (July 28, 1983) (explaining that CEQ’s “NEPA regulations place a new and significant responsibility on agencies and the public alike during the scoping process to identify all significant issues and reasonable alternatives to be addressed in the EIS”); *id.* at 34,263 (scoping process should “clearly define the environmental issues and alternatives to be examined in the EIS....”). The Corps did not respond to this letter during the remaining scoping meetings, nor did the format or content of these meetings change. While the Corps and the other action agencies recently announced a three-week extension of the scoping comment period and promised unspecified further opportunities for involvement, *see* True Dec. ¶ 19 & Ex. J, these agencies have now conducted their NEPA scoping public meetings without ever having acknowledged – let alone addressed – either the fundamental problems with the meeting format or any of the key issues or alternatives they are likely to consider in an EIS.

Under the circumstances described above, the kind of “bureaucratic steamroller” that would subvert an unbiased and full evaluation of all reasonable alternatives for managing the FCRPS dams and their environmental effects, as NEPA requires, is real and appears to be sustaining its momentum – in fact, it appears to have never lost any momentum – notwithstanding the Court’s Summary Judgment Opinion and Order, the discussion of NEPA and the history of this case in it, and the requirements of NEPA and its implementing regulations. The point is not that the Corps should somehow stop operating the FCRPS, or even some of its dams, during the NEPA process. That it cannot do. But it is eminently feasible – and indeed necessary – for the Corps to at least pause major, current and on-going capital investments in the lower Snake River dams in particular in order to preserve, to the extent possible, a level playing

field for the consideration of alternatives in the forthcoming EIS, including the “reasonable alternative of breaching, bypassing or removing” one or more of these dams. *NWF v. NMFS*, 184 F.Supp. 3d at 943. This is especially true where these major capital investments are being made to extend the operating life of these four dams well beyond the end of the current NEPA process, i.e., these investments are financially prudent only if the Corps assumes these dams will continue to operate and generate power, as they have in the past, for decades to come. Allowing this “steamroller” to continue unchecked would cause irreparable harm to the very purposes of an EIS under NEPA and increases the probability of avoidable future environmental harm.

C. The Facts and the Law Warrant the Injunction Against Continued Capital Investments NWF Seeks.

1. *The Court’s Decision and the Relevant Case Law Support an Injunction.*

As discussed above, the Court has already determined that the Corps must prepare an EIS to examine alternatives for managing the FCRPS in a way that avoids jeopardy to ESA-listed salmon and steelhead. *See supra* at 17-19 (describing and quoting the Court’s NEPA ruling). The central purpose of such an EIS is to ensure full and fair consideration of environmental impacts so they can be addressed and mitigated where possible. This, in turn, requires the unbiased evaluation of all reasonable alternatives, here, for the configuration and operation of the FCRPS. *NWF v. NMFS*, 184 F.Supp. 3d at 940, 943; 40 C.F.R. § 1502.1. As the case law makes clear, when preparing an EIS, an agency is required to take a “hard look” at the full range of reasonable alternatives; the EIS cannot properly be “used to rationalize or justify decisions already made.” *Metcalf v. Daley*, 214 F.3d 1135, 1141-42 (9th Cir. 2000) (internal citations omitted); *see also* 40 C.F.R. § 1502.5. Federal agencies are thus prohibited from “‘irreversibl[y] and irretrievabl[y]’ committing resources before making [a] final decision.” *Wildwest Institute v. Bull*, 547 F.3d 1162, 1166 (9th Cir. 2008) (internal citation omitted); *see also Environmental*

Defense Fund v. Andrus, 596 F.2d 848, 852 (9th Cir. 1979); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1985); 40 C.F.R. § 1502.2(f) (“Agencies shall not commit resources prejudicing selection of alternatives before making a final decision”); 40 C.F.R. § 1506.1 (Until an agency issues a record of decision, no action may be taken which would “limit the choice of reasonable alternatives”). As the Ninth Circuit has said, an agency entering into a contract prior to preparing an EIS “‘might be subject to at least a subtle . . . bias.’” *Metcalfe*, 214 F.3d at 1144 (also noting that “in point of fact [a] decision had already been made in contract form”).¹⁰

Indeed, the ordinary response to an agency’s failure to comply with NEPA before it takes action that may significantly affect the environment is for the agency to stop the non-compliant action altogether until it has followed NEPA’s procedures in order to preserve all options, including the option of not proceeding with the project. *See, e.g., Metcalfe*, 214 F.3d at 1146 (finding a NEPA violation and remanding to the district court with directions to set aside the FONSI, suspend implementation of an agreement for a whale quota, and begin the NEPA process again, after finding NOAA slanted an EA by entering into an agreement for a whale quota prior to completing the EA); *see also* CEQ, Publication of Memorandum to Agencies Containing Answers to 40 Most Asked Questions on NEPA Regulations, 46 Fed. Reg. 18,026 at 18029 (1981) (*available at* <https://ceq.doe.gov/nepa/regs/40/40p3.htm>) (stating in question 11 that injunctive relief could be an appropriate remedy to prevent a premature commitment of resources during a NEPA process).

¹⁰ Of course, not every step an agency takes prior to completion of an EIS constitutes a prejudicial commitment of resources. For example, in *WildWest Inst. v. Bull*, the Ninth Circuit concluded that although a financial commitment can constitute an irretrievable commitment under NEPA, the Forest Service’s expenditure of just \$208,000 to pre-mark trees for potential logging was “not so substantial an investment” that it might affect the choice of reasonable alternatives. *WildWest Inst. v. Bull*, 547 F.3d 1162, 1169 (9th Cir. 2008). This insubstantial investment pales in comparison to the tens of millions of dollars the Corps is spending and plans to spend as permanent, long-term capital investments in the four lower Snake River dams.

Where, as here, the agency action is somehow ongoing, courts have still sought to fashion relief that will preserve an unbiased choice among alternatives. *See, e.g., Conner v. Burford*, 848 F.2d 1441, 1451, 1462 (9th Cir. 1988) (enjoining surface-disturbing activity on leased land and prohibiting additional leases pending compliance with NEPA, after finding that the sale of certain leases on national forest land, which did not allow federal agencies the option of later prohibiting surface-disturbing activities, was an irretrievable commitment of resources which required an EIS prior to the sale); *Metcalf*, 214 F.3d at 1146 (setting aside a FONSI, suspending implementation of an agreement, and ordering a new NEPA process, after finding that the government irretrievably committed resources prior to the completion of a NEPA review); *W. Watersheds Project v. Bureau of Land Mgmt.*, 2009 WL 3335365, at *6-7 (D. Idaho Oct. 14, 2009) (enjoining grazing during a NEPA process analyzing the connection between domestic sheep grazing and big horn sheep die-offs, in part to avoid an irretrievable commitment of resources prior to the completion of a supplemental EIS); *see also Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1189–90 (N.D. Cal. 2009) (enjoining the commencement of construction of a development project for failure to initiate a NEPA review at a time before alternatives would be foreclosed).¹¹

¹¹ This case also is unlike the limited instances where moving ahead with paperwork is not an irreversible commitment of resources because the government retained the ability to decide not to initiate the project. *See, e.g., Ctr. for Env'tl. Law & Policy v. U.S. Bureau of Reclamation*, 715 F. Supp. 2d 1185, 1190 (E.D. Wash. 2010), *aff'd*, 655 F.3d 1000 (9th Cir. 2011) (entering into memorandum of understanding and submitting water rights application before preparing an EA did not irrevocably commit the agency prior to completion of NEPA review because the agency retained the discretion to decide not to follow through with the project). Whether a specific agreement, application, or even contract allows an agency to later back out is a different question than what is at issue here: an agency moving ahead uninhibited with large capital investments that prejudice its consideration of alternatives it should be examining in the NEPA process.

2. *The Injunction NWF Seeks Will Avoid Irreparable Harm and Is Narrowly Tailored.*

In light of the relevant case law, the fundamental purposes of NEPA's procedures, the not so subtle bias that continued capital investment to the tune of tens of millions of dollars in the four lower Snake River dams could have on the comprehensive NEPA analysis the Court has ordered, and the likelihood that this momentum will lead to a decision that continues otherwise avoidable harm to salmon, steelhead and other resources from status quo dam configuration, NWF seeks a narrowly tailored injunction to (1) halt spending on the 11 specific current and ongoing capital projects at these dams identified in Attachment A to its injunction motion; and, (2) an order requiring the Corps to obtain leave of the Court before commencing spending on any new or expanded capital projects, until it completes the EIS the Court has required.

Both components of this relief are especially necessary here to avoid irreparable damage to, and biasing of, the NEPA process given the history of this case and the Corps' current conduct and course of action. As the Court noted in its Summary Judgment Opinion and Order, the agencies have "done their utmost to avoid considering [dam removal] for decades." *NWF v. NMFS*, 184 F.Supp. 3d at 942. And as the Corps' continued and unfazed commitment to the planned, long-term capital investments in the four lower Snake River dams described above, *see supra* at 19-26, evinces, the agency has given no indication that it anticipates anything other than a decision to continue operating and investing in these projects in the future just as it has in the past. Thus far, the NEPA scoping process the agencies have offered the public and the region confirms and corroborates this refusal to take seriously the possibility, let alone the reasonable alternative, of any major modification of the FCRPS and the configuration of its dams, including the four lower Snake River dams. Where, as here, the Corps has a long and documented history of refusing to objectively consider dam removal, an injunction to restore -- to the extent possible

-- a level playing field for the NEPA process and its consideration of all reasonable alternatives is both necessary and appropriate. *See N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (noting that “[b]ureaucratic rationalization and bureaucratic momentum are real dangers to be anticipated and avoided”); *Calvert Cliffs’ Coordinating Comm. v. Atomic Energy Comm’n.*, 449 F.2d 1109, 1128 (D.C. Cir. 1971) (noting that where investments have been made in construction, “the economic cost of any alteration may be very great. . . . Either the licensee will have to undergo a major expense in making alterations in a completed facility or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass,” rendering the NEPA process a “hollow exercise”).

In addition, as explained above in discussing an injunction under the ESA, there can be no doubt that the current configuration and operation of the lower Snake River dams and the other mainstem dams on the Columbia River cause extensive and irreparable harm to ESA-listed salmon and steelhead. *See supra* at 6-12 (describing the precarious status of these species, the extent of take allowed by current dam operations, and some of the adverse effects of these dams on salmon and steelhead); *see also NWF v. NMFS*, 184 F.Supp. 3d at 871 (“NOAA Fisheries acknowledges that the existence and operation of the dams accounts for most of the mortality of juveniles migrating through the FCRPS”) (internal citation omitted). The longer this harm continues unaltered and unabated, the more precarious the status of these species will become. As the Court has recognized, an unbiased NEPA process can break the “bureaucratic logjam,” *id.* at 948, that has perpetuated this ongoing environmental harm. An injunction prohibiting further major capital upgrades to the four lower Snake River dams will reduce the likelihood of a NEPA process biased toward business-as-usual, reflexive continuation of this harm and thus reduce the

risk of future continuing and unnecessary harm to these and other species.¹²

3. *The balance of equities and public interest favor the injunction NWF seeks.*

In assessing the balance of hardship for an injunction under NEPA, the Court must weigh “the competing claims of injury . . . and the effect on each party of the granting or withholding of the requested relief.” *Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (internal quotation marks omitted). The Corps’ continued investment in long-term capital upgrades to the lower Snake River dams while conducting a NEPA analysis that must objectively evaluate their removal harms NWF’s interest in an unbiased NEPA process and risks perpetuating the ongoing harm these dams cause to salmon, steelhead and other resources. *See supra* at 19-24, 30-32.

On the other side of the ledger, the investments NWF seeks to enjoin pending compliance with NEPA are purely monetary and designed to ensure continued operation of these dams far into the future. *See supra* at 22-24 (summarizing projects for which NWF seeks an injunction). Any impact to the Corps – or even to third parties hoping to secure contracts for the work – from an injunction against further spending pending compliance with NEPA would be financial, not irreparable. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” (citation omitted)). In

¹² As the Court has noted, “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 . . . ,” *NWF v. NMFS*, 184 F. Supp. 3d at 940 (footnote omitted), thus continued harm to salmon and steelhead from an EIS biased by ongoing investment in a particular course of action is not the only risk of environmental harm.

contrast, “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Preserving the Corps’ ability to consider and choose removal of the four lower Snake River dams also may save the agency many millions of dollars or more over time, as well as protect ESA-listed salmon and steelhead as the law requires.

Even a likelihood of monetary costs to the Corps cannot outweigh NWF’s interests in ensuring unbiased compliance with NEPA and protecting imperiled salmon and steelhead. Under these circumstances, there is no basis to conclude that deferring capital upgrades to these projects until the Corps complies with NEPA (and then foregoing them altogether if, on-balance, that is the agencies’ decision) will have more than limited economic consequences, and it may save the Corps money in the long run.

Separately, in assessing the public interest prong of the injunction standard, courts have long recognized that ensuring protection of the environment serves an important public purpose. *See Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (*en banc*) (“[P]reserving environmental resources is certainly in the public’s interest.”) (implicitly overruled on other grounds in *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008), as subsequently recognized in *Karuk Tribe v. Stelle*, 2016 WL 7048002, at *1 (9th Cir. Dec. 5, 2016)); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006) (“The preservation of our environment, as required by NEPA . . . is clearly in the public interest.”), *abrogated on other grounds in Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008). The courts also have recognized a public interest of the “highest order” in ensuring that government agencies comply with the law, specifically including NEPA. *Seattle Audubon Soc’y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff’d sub nom. Seattle Audubon Soc’y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

Indeed, the core of any argument that NWF's NEPA injunction would be contrary to the public interest was addressed more than twenty years ago in the face of similar agency intransigence involving a longstanding environmental controversy and multiple agency violations of the law:

The argument that the mightiest economy on earth cannot afford to preserve old growth forests for a short time, while it reaches an overdue decision on how to manage them, is not convincing today. It would be even less so a year or a century from now.

Id. The same is true here. The important public interest in protecting the environment, imperiled species, and in ensuring compliance with the law through an unbiased NEPA process outweigh any limited concerns with a delay in further capital investments in these dams while the Corps completes an EIS to determine whether the dams should be bypassed or removed in order to comply with the ESA and protect these species as the law requires.¹³

Ultimately, the public interest requires intervention by the Court to prevent the preparation of an EIS, at considerable expense, that never fully or seriously examines and considers all reasonable alternatives for configuration and operation of the FCRPS dams and reservoirs to avoid jeopardy to ESA-listed salmon and steelhead, including the reasonable alternative of removing the four lower Snake River dams.

CONCLUSION

For all of the foregoing reasons, NWF respectfully requests that the Court grant it an injunction for the Corps' violations of the ESA and NEPA as requested herein.

Respectfully submitted this 9th day of January, 2017.

/s/ Todd D. True
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¹³ In a time of limited agency budgets, preventing the Corps from sinking additional money into upgrading projects that it may need to retire and remove is itself in the public interest.

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2017, I electronically filed the foregoing *NWF's 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:

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