Appeal Nos. 14-35791, 14-35938

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD FISH CONSERVANCY, *et al.*,

Plaintiffs-Appellants/
Cross-Appellees

vs.

NATIONAL PARK SERVICE, *et al.*,

Defendants-Appellees/
Cross-Appellants.

On Appeal from the United States District Court for the
Western District of Washington Case No. 3:12-CV-05109-BHS

PLAINTIFFS-APPELLANTS/CROSS-APPELLEES' URGENT MOTION UNDER CIRCUIT RULE 27-3(b) FOR INJUNCTION PENDING APPEAL

Injunctive Relief Requested by March 1, 2015

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CIRCUIT RULE 27-3(b) CERTIFICATE

I, Brian A. Knutsen, certify the following facts to be true to the best of my knowledge in accordance with Circuit Rule 27-3(b):

1. I am lead counsel in this matter for plaintiffs-appellants/cross-appellees Wild Fish Conservancy, Wild Steelhead Coalition, Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d/b/a Conservation Angler (collectively, the "Conservancy").

2. I certify that to avoid irreparable harm to threatened salmonids protected under the Endangered Species Act ("ESA") and their ability to fully recover, to the Elwha River Ecosystem Restoration Project, and to the Conservancy and its members, an injunction pending appeal under Federal Rule of Appellate Procedures 8(a)(2) and Circuit Rule 27-3(b) is necessary.

3. The district court below found that the environmental assessment ("EA") prepared by the National Marine Fisheries Service ("NMFS") for its review and approval of hatchery programs on the Elwha River violated the National Environmental Policy Act ("NEPA"). The district court further found that the seriousness of the NEPA violation warrants vacatur of NMFS' action under the Administrative Procedure Act ("APA"). Despite these findings, the district court declined to enjoin the underlying project. This Court should issue an injunction pending appeal to prevent irreparable harm while NMFS complies with NEPA.

4. This matter concerns massive releases of hatchery fish into the Elwha River in conjunction with the Elwha River Ecosystem Restoration Project—the largest dam removal and salmonid recovery project in United States history. This project has been mandated by Congress and will cost taxpayers $325 million.

5. The Conservancy's experts explain that hatchery fish quickly become domesticated in the unnatural conditions of the hatchery environment and thereby less fit for survival and reproduction in the wild. When these fish are released into the wild en masse, they spread maladaptive genes to wild fish, thereby driving down the productivity of the wild populations.

6. Defendants Larry Ward and Doug Morrill, the hatchery manager and the fisheries manager for the Lower Elwha Klallam Tribe (collectively, "Hatchery Defendants"), plan large-scale releases of hatchery fish into the Elwha River beginning as early as March. The Conservancy's experts explain that, with dam removal on the Elwha River recently completed, fish released from the hatchery this spring will return in the coming years and access seventy miles of mainstem and tributary habitat above the former dam sites, most of which lies within the Olympic National Park. These hatchery fish will overwhelm the small fragile wild fish populations that remain in the river, severely impeding or even preventing the full recovery of native anadromous fish.

7. The Hatchery Defendants unlawfully implemented hatchery programs in the Elwha River without any ESA authorization whatsoever for over a decade. After the Conservancy initiated this lawsuit, NMFS hastily approved the hatchery programs under the ESA.

8. The district court found that NMFS violated NEPA by failing to adequately consider reasonable alternatives to the hatchery programs it approved—namely, by failing to consider smaller hatchery releases.[1] The district court then applied this Court's test for relief under the APA and determined that NMFS' violation warrants vacatur of the agency action. However, instead of vacating the final agency actions at issue—NMFS' ESA authorizations—the district court vacated NMFS' EA prepared under NEPA.

9. NEPA requires that the environmental impacts of a proposed project and reasonable alternatives thereto be fully evaluated *before* actions are taken. This has not occurred for the current hatchery strategy proposed to restore salmonid populations to the newly-opened Elwha River watershed. Such an evaluation is essential to inform decision-makers and the public of the risks and

[1] The Conservancy asserts that NMFS committed additional NEPA and ESA violations in authorizing the hatchery programs—including by failing to fully evaluate the Elwha River hatchery programs and their cumulative effects in an Environmental Impact Statement.

benefits associated with the proposed course of action and alternatives thereto *before* this nationally- and internationally-significant project is implemented.

10. The Conservancy respectfully requests the Court issue an order pending appeal directing the Hatchery Defendants to take such actions as are necessary to: (1) ensure that no more than 50,000 hatchery steelhead smolts and 50,000 hatchery coho salmon smolts are released into the Elwha River and its tributaries annually; and (2) ensure that no more than sixty (60) total adult steelhead, no more than thirty (30) of which are female, are removed from the Elwha River and its tributaries annually to supply hatchery broodstock.

11. The annual releases of hatchery fish begin as early as March each year. Accordingly, **the Conservancy respectfully requests resolution of this motion by March 1, 2015**.

NOTIFICATION OF COUNSEL AND POSITION OF THE PARTIES

On November 10, 2014, I notified the following attorneys of the Conservancy's intent to file this motion: Stephen Suagee, Samuel Hough, Cory Albright, John Sledd, and Jane Steadman (attorneys for the Hatchery Defendants) and Maggie Smith, Coby Howell, and Joseph Mathews (attorneys for the Federal Defendants). Counsel for the Hatchery Defendants and for the Federal Defendants have indicated that their clients intend to oppose the relief requested herein.

DISTRICT COURT DISPOSITION

All grounds advanced in support of this motion were submitted to the district court. All materials submitted in support of this motion were before the district court except for the Draft Environmental Impact Statement that is the subject of the Conservancy's request for judicial notice and the Declarations of Dr. Jack Stanford and Dr. Gordon Luikart. Declarations by Dr. Jack Stanford and Dr. Gordon Luikart containing substantially similar information to the declarations presented here were before the district court. The Draft Environmental Impact Statement was not before the district court, as it was issued shortly before the district court entered its order on relief. This motion should not be denied or remanded on such grounds because that document merely provides additional support for arguments already rejected by the district court. The Conservancy filed a motion for an injunction pending appeal with the district court on September 18, 2014, which the district court denied on October 27, 2014.

DATED this 1st of December, 2014.

s/ Brian A. Knutsen
Brian A. Knutsen, WSBA No. 38806
Attorney for Plaintiffs-Appellants/Cross-Appellees

CORPORATE DISCLOSURE STATEMENT

Plaintiffs Wild Fish Conservancy, Wild Steelhead Coalition, Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d/b/a Conservation Angler disclose under Federal Rule of Appellate Procedure 26.1 that they are nongovernmental corporate parties that do not have any parent corporations and that no publically held corporation owns 10% of more of any of their stock.

DATED this 1st day of December, 2014.

s/ Brian A. Knusten
Brian A. Knutsen, WSBA No. 38806
Attorney for Plaintiffs-Appellants/Cross-Appellees

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The Conservancy also submits in support of this motion Declarations from Dr. Jack Stanford and Dr. Gordon Luikart and excerpts of the Draft Environmental

Impact Statement that is the subject of the Conservancy's motion for judicial notice.

I. INTRODUCTION.

This Court should issue an injunction pending appeal to prevent irreparable harm to threatened salmonids and to the Elwha River Ecosystem Restoration Project. The district court found that the NEPA effort undertaken by NMFS for its review and approval of massive hatchery programs on the Elwha River was unlawful and that the significance of the violation warrants vacatur of NMFS' action. This Court should give meaning to these findings and partially enjoin the hatchery programs until NMFS complies with NEPA in determining what scale of hatchery programs should be approved.

The Elwha River dams have recently been removed under direction from Congress and through mammoth taxpayer expenditures. This project is unprecedented as both the largest dam removal project and the largest salmonid restoration project in United States history. Yet, the decision to release millions of hatchery fish into the river annually in a purported effort to restore wild salmonid populations was made without public review of the plan and alternatives thereto as required by NEPA and without the required ESA authorization. This decision will have a devastating effect on wild salmonids—hatchery fish will vastly outnumber wild salmonids in the newly-opened habitat in the Elwha River and will depress and even prevent the recovery of wild fish populations.

In response to this litigation, NMFS hastily prepared cursory NEPA and ESA documents in an effort to provide *post hoc* justifications for hatchery plans that had already been developed, funded, and were being implemented. The decision to release millions of hatchery fish annually as part of this unparalleled dam removal project warrants far more. Indeed, NEPA requires preparation of an environmental impact statement ("EIS") that will fully inform decision-makers and the public of the effects of the proposed hatchery plan and alternatives to that plan before this opportunity for salmonid restoration is squandered.

The district court found that NMFS violated NEPA by failing to give meaningful consideration to smaller hatchery releases when it approved the programs. Ex. 1, pp. 17-21. The parties were therefore ordered to confer on remedy issues, with the district court indicating that reductions in releases to 50,000 coho salmon smolts and 50,000 steelhead smolts annually "would be a good starting point for an agreement." *Id.* at p. 25. The Hatchery Defendants refused to confer because the district court had dismissed the claim against them as moot when NMFS approved the hatchery programs in the middle of the lawsuit. Without an agreement on remedy, the district court found that the significance of the violation warrants partial vacatur as sought by the Conservancy limiting the authorization of releases of steelhead and coho salmon smolts as described above.

Ex. 2, p. 6. However, the district court vacated only the EA and not NMFS' actions actually approving the hatchery programs. *Id.* at pp. 6-7.

The Conservancy requests an injunction to minimize the harm from these hatchery programs while also insuring against any supposed risks associated with dam removal. The Conservancy respectfully requests an order pending appeal directing the Hatchery Defendants to take such actions as are necessary to: (1) ensure that no more than 50,000 hatchery steelhead smolts and 50,000 hatchery coho salmon smolts are released into the Elwha River and its tributaries annually; and (2) ensure that no more than sixty (60) total adult steelhead, no more than thirty (30) of which are female, are removed from the Elwha River and its tributaries annually to supply hatchery broodstock.

Three primary issues are relevant to the requested relief:

1. Did the district court err in dismissing the claim against the Hatchery Defendants as moot when, in the middle of the lawsuit, NMFS issued a decision that provides only a conditional exemption to liability in the form of an affirmative defense?

2. Did the district court err in vacating the EA—a NEPA document—and not the agency actions for which NEPA compliance was required?

3. Will there be irreparable harm in the absence of an injunction?

The first two issues relate to whether the Conservancy is likely to prevail on its claim against the Hatchery Defendants. The district court committed several errors in dismissing this claim as moot—ignoring the plain language of regulations

and precedent from this Court. The district court further erred in vacating the EA and not the actual agency actions subject to NEPA. Accordingly, the Conservancy is likely to prevail because the action exempting the Hatchery Defendants from liability for take caused by their hatchery programs should be vacated.

As to the third issue, severe and enduring harm will result without an injunction. The massive numbers of hatchery fish to be released this spring will return to the Elwha River in the next several years to newly-accessible habitat above the former dam sites. These hatchery fish will have a devastating effect on the wild fish populations that remain and their ability to recolonize the watershed. Genetic introgression of genes from domesticated hatchery fish into the wild fish population will persist for generations, severely impeding the ability of salmonids to survive and reproduce in the wild. An injunction should be issued until NMFS complies with NEPA in determining what size hatchery programs to authorize.

II. REGULATORY FRAMEWORK.

A. The Endangered Species Act.

The ESA contains protections designed to save species from extinction. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 690 (1995). Section 4 of the ESA prescribes mechanisms by which NMFS and the United States Fish and Wildlife Service ("FWS") list species as endangered or

threatened.[1] 16 U.S.C. §§ 1532(16) and 1533(a). Section 9 of the ESA makes it unlawful to "take" endangered species. 16 U.S.C. § 1538(a)(1)(B). The take prohibition has generally been applied to "threatened" species by regulations promulgated under section 4(d) of the ESA.[2] *See* 16 U.S.C. § 1533(d); 50 C.F.R. §§ 17.21 and 17.31(a); 50 C.F.R. § 223.203(a).

"Take" is defined broadly to include kill, harass, and harm. 16 U.S.C. § 1532 (19). "Harass" is defined to include acts that create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include breeding. 50 C.F.R. § 17.3. "Harm" includes significant habitat modification or degradation that actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding or sheltering. *Id.*; 50 C.F.R. § 222.102.

NMFS has promulgated regulations under section 4(d) of the ESA, known as the "4(d) Rule," that apply the take prohibition to several threatened species, including Puget Sound steelhead and Puget Sound Chinook salmon. 50 C.F.R. §§ 223.102(c)(8) and (23), and 223.203(a). The 4(d) Rule includes exemptions,

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[1] An "endangered species" is one "in danger of extinction throughout all or a significant portion of its range," and a "threatened species" is a "species which is likely to become an endangered species within the foreseeable future…" 16 U.S.C. § 1532(6) and (20).

[2] Section 9 of the ESA makes it unlawful to violate any such regulation. 16 U.S.C. § 1538(a)(1)(G).

referred to as the "4(d) Limits." 50 C.F.R. § 223.203(b). One exemption—Limit 6—exempts take resulting from the implementation of a joint tribal/state resource management plan ("RMP") that NMFS has determined "will not appreciably reduce the likelihood of survival and recovery of affected threatened [species]." 50 C.F.R. § 223.203(b)(6)(i). This exemption provides an affirmative defense that the proponent must raise, plead, and prove. 50 C.F.R. § 223.203(c).

Section 7 of the ESA requires federal agencies planning to authorize, fund, or carry out an action that "may affect" ESA-listed species (the "action agencies") consult with NMFS and/or FWS (the "consulting agencies") to "insure that [such] action…is not likely to jeopardize the continued existence" of protected species. *See* 16 U.S.C. § 1536(a)(2); *and* 50 C.F.R. § 402.14(a) and (b). This consultation concludes with the consulting agency's issuance of a biological opinion ("BiOp"). 50 C.F.R. § 402.14(h)(3). If the consulting agency concludes that jeopardy is not likely, the BiOp will include an "incidental take statement" ("ITS") specifying terms under which take of listed species may occur. *See* 16 U.S.C. § 1536(b)(4). Take in compliance with an ITS is exempt from liability under section 9 of the ESA. 16 U.S.C. §§ 1536(b)(4), (o)(2); 50 C.F.R. § 402.14(i)(5). The party claiming to be exempt has the burden of proving the exemption was applicable, valid, and in force when the take occurred. 16 U.S.C. § 1539(g).

B. The National Environmental Policy Act.

NEPA declares a national commitment to promoting environmental quality and seeks to ensure that this commitment is infused into the ongoing programs of the federal government. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). NEPA directs all federal agencies to "include in every recommendation or report on…major Federal actions significantly affecting the quality of the human environment, a detailed statement…on the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C)(i).

Preparation of this EIS ensures the agency will consider detailed information regarding environmental impacts when reaching its decision and it guarantees that information will be made available to the larger audience that may also play a role in the decision making process. *Robertson*, 490 U.S. at 349; *see also Anderson v. Evans*, 371 F.3d 475, 487 (9th Cir. 2002). NEPA procedures therefore must insure that environmental information is available *before* decisions are made and *before* actions are taken. 40 C.F.R. §§ 1500.1(b) and (c).

NEPA requires an EIS for any major federal action having a significant impact on the environment. *See Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 666 (9th Cir. 1998). The agency may prepare a "less formal EA" that "'briefly provides sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact'" ("FONSI"). *Anderson*, 371 F.3d at

488 (quoting *Tillamook County v. U.S. Army Corps of Eng'rs*, 288 F.3d 1140, 1144 (9th Cir. 2002)); *and see* 40 C.F.R. §§ 1501.4(e), 1508.13. If the proposed action *may* have a significant effect upon the environment, an EIS must be prepared. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001).

III. STATEMENT OF FACTS.

A. The Elwha River Watershed.

The Elwha River is approximately forty-five miles in length, flowing north on the Olympic Peninsula in Washington State into the Strait of Juan de Fuca near Port Angeles. Ex. 3, p. 5 (NMFS007171[3]); Ex. 4, p. 307 (1104-FWS). The river's watershed encompasses 321 square miles, of which approximately 267 square miles are within the Olympic National Park. Ex. 3, p. 5 (NMFS007171); Ex. 4, p. 307 (1104-FWS). Nearly all of the Olympic National Park is designated a wilderness area under the Wilderness Act. *See* Pub. L. 100-668, 102 Stat. 3961 (Nov. 16, 1988). Such an area is considered "untrammeled by man…, an area…retaining its primeval character and influence…, [and must be] protected and managed so as to preserve its natural conditions..." 16 U.S.C. § 1131(c).

The Elwha River is uniquely pristine due to the protections afforded these public lands, and is one of the largest, mostly intact watersheds in the coterminous

[3] The Bates number is provided in parentheses for documents contained in the administrative records along with the prefix or suffix used by the agency.

United States. Ex. 5, p. 79 (NMFS015983); Ex. 3, pp. 19, 81 (NMFS007185, 7247); Ex. 4, p. 307 (1104-FWS). Areas above the dams are particularly pristine because they "have not been altered by anthropogenic activities and have no ongoing hatchery supplementation activities." Ex. 3, p. 19 (NMFS007185). The Olympic National Park is also an International Biosphere Reserve and a World Heritage Site. Ex. 6, p. 7 (002407).

The Elwha River was once one of the most productive anadromous fish streams in the Pacific Northwest, believed to have produced nearly 400,000 spawning fish annually. *See* Ex. 5, p. 78 (NMFS015982); *and* Ex. 4, pp. iii, 69 (0774-, 866-FWS). The river was "legendary" for large Chinook salmon, known to weigh in excess of 100 pounds. Ex. 4, p. 69 (0866-FWS).

The Elwha and Glines Canyon Dams were constructed without fish passage structures and have blocked upstream fish passage to more than 70 miles of mainstem and tributary habitat since 1911. Ex. 3, p. 5 (NMFS007171). Salmonids returning to spawn have been confined to the lower 4.9 miles of the river below the Elwha Dam, and have therefore not had access to the vast majority of the river's spawning habitat. *See Id.*; *and* Ex. 4, p. ix (0780-FWS). The result was a "precipitous decline of salmonid populations to fewer than 3,000 naturally spawning fish compared to an estimated 392,000 fish prior to dam construction." Ex. 4, pp. iii, 1 (0774-, 798-FWS).

B. The Elwha River Ecosystem Restoration Project.

Congress mandated full restoration of the Elwha River ecosystem and native anadromous fisheries in the Elwha River Ecosystem and Fisheries Restoration Act, Pub. L. 102-495, 106 Stat. 3173 (Oct. 24, 1992). Dam removal began in September of 2011 and was completed in August of 2014. *See* Ex. 5, p. 7 (NMFS015911); *and Decl. of Dr. Jack Stanford* ("Stanford Decl."), ¶ 50.

This project "will constitute the single largest salmon restoration project ever undertaken." Ex. 7, p. 2 (001210). The scale of this dam removal is unprecedented. Ex. 5, pp. 5-6, 84, 165 (NMFS015909-10, 15988, 16069). There is thus a great deal of uncertainty involved, including the pace that stored sediment will be transported and that fish populations and watershed habitats will recover. *See id.* at pp. 6, 57-59, 67, 84, 165 (NMFS015910, 15961-63, 15971, 15988, 16069). NMFS experts nonetheless predict that salmonids would respond naturally to dam removal rapidly, establishing persistent, self-sustaining populations within two to twenty years. *Id.* at pp. 58, 68 (NMFS015962, 15972). The project provides a once-in-a-life time opportunity to restore salmonids to a pristine watershed while studying ecosystem response to large-scale dam removal. *See* Ex. 7, p. 2 (001210). This project will cost tax-payers nearly $325 million. Ex. 8, p. 2.

C. Threatened Salmonids in the Elwha River.

There are three extant salmonid species in the Elwha River that are listed as threatened under the ESA—Puget Sound steelhead, Puget Sound Chinook salmon, and bull trout. *Stanford Decl.*, ¶¶ 26, 30-32.

The Puget Sound distinct population segment ("DPS") of steelhead was listed as threatened in 2007. 72 Fed. Reg. 26,722 (May 11, 2007). The ESA section 9 take prohibition applies to this species. 50 C.F.R. §§ 223.102(c)(23), 223.203(a). Puget Sound steelhead is currently at only 1 to 4% of its historical abundance. *Stanford Decl.*, ¶ 27. Recovery of the Elwha River steelhead population is critical to the recovery and ESA delisting of the entire Puget Sound steelhead DPS. *See* Ex. 9, p. 34 (NMFS015418); *and Stanford Decl.*, ¶ 29.

NMFS listed the Puget Sound Chinook salmon evolutionary significant unit ("ESU") as threatened and applied the ESA section 9 take prohibition in 1999. 64 Fed. Reg. 14,308 (March 24, 1999); 70 Fed. Reg. 37,160 (June 28, 2005); 50 C.F.R. §§ 223.102(c)(8) and 223.203(a). The Elwha River Chinook salmon population is a key population that must be restored for the recovery and delisting of the Puget Sound Chinook salmon ESU. Ex. 5, p. 61 (NMFS015965).

The coterminous United States bull trout population is listed as threatened and the ESA take prohibition has been applied to the species. 64 Fed. Reg. 58,910 (Nov. 1, 1999); 50 C.F.R. §§ 17.21 and 17.31(a), 17.44(w).

D. The Elwha River Hatchery Programs.

The Hatchery Defendants and the Washington Department of Fish and Wildlife ("WDFW") operate several hatchery programs on the Elwha River that are funded and supported by the Federal Defendants.

The Hatchery Defendants target annual releases of 175,000 steelhead, 425,000 coho salmon, 450,000 chum salmon (this is to increase to 1,025,000), and 3,000,000 pink salmon. *See* Ex. 9, p. 3 (NMFS015387). The steelhead and coho salmon releases at issue here are to begin in March or April. Ex. 10, p. 28 (NMFS024262); Ex. 11, p. 28 (NMFS024299). WDFW operates a Chinook salmon hatchery program that targets annual releases of 2,500,000 sub-yearling fish and 400,000 yearling fish. *See* Ex. 9, p. 3 (NMFS015387).

Hatchery Defendant Larry Ward is responsible for managing operations of the Lower Elwha Klallam Tribe's hatchery. Ex. 12, p. 7; Ex. 13, p. 1. Hatchery Defendant Doug Morrill is the Natural Resources Director for the Lower Elwha Klallam Tribe and is Mr. Ward's supervisor. Ex. 14; Ex. 12, p. 9. The Federal Defendants fund and otherwise support these hatchery programs. Ex. 15, ¶ 103 (admitting Complaint, Ex. 16, ¶ 103, fifth and sixth sentences).

E. The Hatchery Programs Harm Wild Elwha River Salmonids.

In another case addressing hatchery impacts, the district court found that "the underlying science regarding the impact of hatchery fish on natural

populations and the conclusions reached by NMFS based on that science are entirely undisputed…" *Cal. State Grange v. Nat'l Marine Fisheries Serv.*, 620 F. Supp. 2d 1111, 1157-58 (E.D. Cal. 2008). Such scientific conclusions included:

> Hatchery fish are less fit for survival in the wild than genetically similar wild fish… Fish removed from nature to propagate in hatcheries always constitute a loss to the evolutionary significant population… **[N]o one has ever used a salmon hatchery to restore a depressed wild population to a point where it is self-sustaining**… Hatchery releases have a significant negative effect, on the productivity of wild populations by competing with wild fish for food and space; diluting the fitness of wild fish when adult hatchery fish stray and spawn with wild fish; and by potentially spreading disease.

Id. at 1158 (emphasis added, quoting summary provided by Defendant-Intervenor). Hatchery programs harm wild fish through a variety of mechanisms, including through genetic and ecological interactions.

Adverse genetic effects result from the domestication of hatchery fish—through natural selection processes, fish adapt to survive and reproduce under the artificial conditions imposed by a hatchery and thereby become less fit to survive and reproduce in the wild. *Decl. of Dr. Gordon Luikart* ("Luikart Decl."), ¶ 26. Fitness reductions in hatchery fish can be quick and substantial. *Id.* at ¶¶ 26, 28, 41. When hatchery fish are allowed to spawn with wild fish, the hatchery fish transfer maladapted genes to wild fish and thereby reduce the productivity of the wild fish population. *Id.* at ¶¶ 26-30, 41.

The release of hatchery steelhead that is proposed to occur this March or April will result in a significant number of hatchery steelhead returning to the newly opened spawning grounds in the upper Elwha River watershed where they will vastly outnumber the wild steelhead. *Id.* at ¶¶ 44-45, 48-50. The hatchery fish will cross-breed with wild steelhead, transferring domesticated maladapted genes to the wild steelhead population. *Id.* at ¶¶ 38-42, 53. This is expected to significantly lower the reproductive productivity of the wild steelhead population for many generations, severely impairing its ability to recover. *Id.* at ¶¶ 40-44, 53.

The releases of both steelhead and coho salmon to occur this spring will harm and kill wild ESA-listed steelhead, Chinook salmon, and bull trout through ecological interactions. *Stanford Decl.*, ¶¶ 39-40, 44. Hatchery fish are generally larger than their wild counter parts and are therefore able to prey upon and outcompete wild salmonids for food and territory. *Id.* at ¶¶ 39, 44. Threatened salmonids will be killed and injured from the releases of steelhead and coho through such ecological interactions in the Elwha River, estuary and near shore environments. *Id.* at ¶¶ 39-40, 44.

Given the depressed state of wild salmonids in the watershed, harm caused by these genetic and ecological interactions will be significant—hindering and even preventing full recovery of wild Elwha River steelhead and Chinook salmon populations. *Luikart Decl.*, ¶¶ 38, 41, 44-45, 53; *Stanford Decl.*, ¶ 41, 45.

Impairment to these populations and their recovery potential harms the entire Puget Sound steelhead DPS and Puget Sound Chinook ESU because recovery of the Elwha River populations is essential to recovery of these listed species. *Luikart Decl.*, ¶¶ 25, 53; *Stanford Decl.*, ¶¶ 29, 41, 45; Ex. 5, p. 61 (NMFS015965).

While NMFS posits that the hatcheries will increase the abundance of fish in the river during the near-term, it acknowledges that supportive breeding generally "does not benefit natural population productivity" and that "the track record of supportive breeding in producing natural-origin adult fish returns is unproven." Ex. 5, pp. 149, 155 (NMFS016053, 16059). It is undisputed that restoration of fish populations would occur without the hatcheries. *Id.* at p. 5 (NMFS015909).

F. The NEPA and ESA Evaluations for the Elwha River Hatchery Programs.

The Elwha River hatchery programs were unlawfully developed, funded, and initiated without the evaluations and authorizations required by the ESA and NEPA. Federal Defendants have now hastily prepared ESA and NEPA documents in response to this lawsuit—documents that fall far short of legal requirements.

1. The NEPA Documents Associated with the Elwha River Ecosystem Restoration Project.

Federal Defendants prepared several NEPA and ESA documents for the Elwha River Ecosystem Restoration Project. Those documents, with the minor exceptions discussed below, did not discuss the hatchery programs in the lower

Elwha River. None of those documents includes an analysis of the adverse effects of the hatchery plan and alternatives to that plan as required by NEPA.

The Department of Interior ("DOI") prepared an EIS in 1995 evaluating dam removal and alternatives thereto, including retaining the dams and installing fish passage facilities ("Programmatic EIS"). Ex. 6, pp. 11-15 (002413-17). Fish restoration options, such as supplementation with hatchery fish, were not evaluated whatsoever. *See id.* at pp. 45-48 (2449-52) (Programmatic EIS did "not presume any outplanting or hatchery production").

A second EIS was prepared in 1996 evaluating different methods to remove the dams ("Implementation EIS"). Ex. 17 (001840). The Implementation EIS included as an appendix an early version of the Elwha River Fish Restoration Plan ("Fish Restoration Plan"). *Id.* at pp. 436-51 (002278-93). However, that plan merely identified the general options for recovering fish stocks, including natural re-colonization as the primary strategy for steelhead, and stated that all options would continue to be investigated. *Id.* at pp. 436, 438-45 (002278, 2280-87). The Implementation EIS did not include any analysis of the adverse effects of the hatchery programs or of alternatives to those programs. *See id*.

A supplemental EIS ("Implementation SEIS") was prepared in 2005 to address changes to several of the mitigation measures evaluated in the Implementation EIS. Ex. 4 (0770-FWS). It did not evaluate the adverse effects of

the hatchery strategy or alternatives thereto, but instead addressed changes to the dam removal efforts. *See id.* at pp. 1-2 (0798 - 799-FWS).

2. The NEPA and ESA reviews of the Elwha River hatchery programs.

NMFS has repeatedly represented during the last ten years its intent to conduct a comprehensive review of all hatchery programs throughout Puget Sound, including those in the Elwha River, as required under NEPA and the ESA. Having failed to do so, NMFS issued cursory NEPA and ESA documents in the middle of this litigation addressing just the Elwha River hatchery programs in an effort to supply a defense.

WDFW and the Puget Sound Treaty Tribes submitted to NMFS two RMPs and associated hatchery and genetic management plans ("HGMPs") for hatcheries throughout Puget Sound—including those on the Elwha River—in 2004 seeking exemptions from ESA section 9 take liability under Limit 6 of the 4(d) Rule. Ex. 3, pp. 12-13 (NMFS007178-79); Ex. 5, pp. 3-4 (NMFS015907-08). NMFS announced its intent to prepare an EIS under NEPA rigorously evaluating the effects of and alternatives to the Puget Sound hatchery programs in 2004 and again in 2011. 69 Fed. Reg. 26,364 (May 12, 2004); 76 Fed. Reg. 45,515 (July 29, 2011). NMFS has yet to complete that process. *See* Ex. 5, p. 4 (NMFS015908).

The Hatchery Defendants and WDFW submitted updated HGMPs for the Elwha River hatchery programs to NMFS after this lawsuit was filed and requested

prompt review and approval under the ESA 4(d) Rule outside of the Puget Sound programmatic EIS. *See, e.g.*, Ex. 10 (NMFS024235). NMFS issued a decision approving the Elwha River HGMPs under the 4(d) Rule on December 10, 2012 ("Limit 6 Approval"). Ex. 18 (NMFS016205). Further, NMFS issued itself a BiOp with an ITS under section 7 of the ESA because the Limit 6 Approval is a federal action that affects threatened species. *See* Ex. 5 (NMFS015898).[4] NMFS also issued an EA and FONSI under NEPA determining that an EIS is not required for its approval of the hatchery programs. Ex. 9, p. 124 (NMFS015508).

G. Procedural History.

The Hatchery Defendants operated hatchery programs for over a decade without the reviews and authorizations required under the ESA and NEPA.[5, 6] The Conservancy commenced this lawsuit in February, 2012, shortly after dam removal

[4] This was an intra-agency consultation under section 7 of the ESA where NMFS was both the "action agency"—in issuing the Limit 6 Approval—and the "consulting agency" issuing the BiOp on the effects of the Limit 6 Approval.

[5] The hatchery became subject to the ESA by at least 1999 when Puget Sound Chinook salmon and bull trout were listed.

[6] Remarkably, the Hatchery Defendants captured from the Elwha River and killed wild ESA-listed steelhead to develop their hatchery program without any ESA authorization whatsoever for years. The Hatchery Defendants collected wild steelhead eggs and fry from the Elwha River each year from 2005 through 2011. Ex. 10, pp. 21-23 (NMFS024255-57). Puget Sound steelhead were listed as a threatened species under the ESA in 2007. 72 Fed. Reg. 26,722 (May 11, 2007).

began in an effort to bring the hatchery programs into compliance with the ESA and NEPA before they cause irreparable injury to the wild Elwha River salmonids.

The Conservancy filed a motion for a preliminary injunction on November 21, 2012, at which point there was no ESA authorization for the hatchery programs. *See* Ex. 19, p. 15. NMFS then issued its Limit 6 Approval on December 10, 2012, before the district court ruled on that motion. The Conservancy withdrew its preliminary injunction motion on December 20, 2012, and stated that it would file a revised motion that addressed NMFS' new approval documents. *See id.* at p. 17.

The Hatchery Defendants filed a motion to dismiss the only claim asserted against them the same day, arguing that the Limit 6 Approval rendered that claim moot. *See id.* The Conservancy filed a motion on January 3, 2013, seeking to supplement its pleadings to challenge the Limit 6 Approval and associated ESA and NEPA documents and to allege the Hatchery Defendants' non-compliance with the ESA authorization documents. *See id.* The Hatchery Defendants did not oppose that motion, and the Conservancy filed its supplemental complaint on February 11, 2013. *See id.*, p. 18; *and* Ex. 20.

The district court granted the Hatchery Defendants' motion to dismiss on February 12, 2013, finding that the Limit 6 Approval rendered moot the ESA section 9 claim. Ex. 21, pp. 5-7. The district court further found that the

Conservancy must send a new ESA pre-suit notice letter in order to pursue allegations related to the Hatchery Defendants' non-compliance with the Limit 6 Approval, and therefore also denied the Conservancy's request for discovery on such matters. *Id.* at pp. 7-9. The district court thus dismissed the claim against the Hatchery Defendants before the Conservancy was able to file a revised preliminary injunction motion addressing the spring 2013 releases.

The Federal Defendants and the Conservancy agreed to bifurcate briefing on liability and relief issues and then filed cross-motions for summary judgment for liability on the remaining claims.[7] While the district court rejected several of the Conservancy's challenges, it granted summary judgment as to the inadequacy of NMFS' NEPA efforts on March 26, 2014. Ex. 1, pp. 10-24. The district court found the EA deficient for failing to adequately consider reasonable alternatives—specifically, for failing to give meaningful consideration to smaller releases of steelhead and coho salmon. *Id.* at pp. 17-21.[8]

[7] With the summary judgment motions still pending and the spring 2014 hatchery releases approaching, the Conservancy filed a motion for a preliminary injunction on January 23, 2014, seeking to reduce releases of steelhead and coho salmon. *See* Ex. 19, p. 23. The district court denied that motion, refusing to reconsider its finding that the claim against the Hatchery Defendants was moot. *See id*.

[8] The district court rejected NMFS' contention that there is not a viable alternative between the massive hatchery releases approved and no hatchery releases whatsoever. Ex. 1, pp. 18-20.

While noting that the parties had agreed to brief relief issues separately, the district court stated a concern for the then-imminent 2014 releases of hatchery steelhead and coho salmon. *Id.* at p. 25. The district court directed the parties to "immediately meet and confer" regarding relief and stated that the Conservancy's proposed release of 50,000 coho salmon and 50,000 steelhead smolts "would be a good starting point for an agreement." *Id.* The Federal Defendants conferred, merely indicating their inability to control the Hatchery Defendants' releases. The Hatchery Defendants refused to confer and instead released all the hatchery smolts available. *See* Ex. 22, p. 6; *and* Ex. 2, pp. 5-6 ("The meet and confer did not occur because the [Hatchery Defendants] released all of the coho smolt…at least a day and a half after the Court declared inadequate the EA approving such a release.").

The Conservancy then filed is motion on relief requesting partial vacatur of the Limit 6 Approval and the ITS issued with the BiOp NMFS prepared for the Limit 6 Approval—specifically, requesting that these agency decisions be vacated to the extent they authorize: (1) the release of more than 50,000 hatchery steelhead smolts and 50,000 coho smolts annually; and (2) the removal of more than sixty total adult steelhead and thirty adult female steelhead annually for hatchery broodstock purposes. The district court found that NMFS' failure to meaningfully consider reduced hatchery releases "is a serious agency error" that "weighs in favor of vacating the agency's action." Ex. 2, p. 5. The district court rejected

arguments that vacatur would be unduly disruptive, noting that the Hatchery Defendants "operated the hatcheries for years without federal approval and, once they obtained federal approval, it was inadequate." *Id.* at p. 6.

The district court thus found that partial vacatur that would "authorize the release of 50,000 steelhead smolt and 50,000 coho smolt" "provides the most reasonable interim process." *Id.* However, the district court applied such relief only to the EA—relief not even requested by the Conservancy. *See id.* at pp. 6-7. The district court refused to partially vacate the Limit 6 Approval or the ITS—the agency actions that actually authorize the hatchery programs. *Id.* at p. 7.

IV. STANDARD OF REVIEW.

The standard for a motion seeking an injunction pending appeal is similar to that on a motion for a preliminary injunction. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983); *Nken v. Holder*, 556 U.S. 418, 434 (2009). The Court is to consider four factors: "'whether the…applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a[n] [injunction]; (3) whether issuance of the [injunction] will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *See Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors "are the most critical." *Id.*

This Court also continues to apply the "sliding scale" approach. *See The Arc of Cal. v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014); *and see Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011). Under this test, a stronger showing of one element can offset a weaker showing of another. *Cottrell*, 632 F.3d at 1131. Thus, an injunction is warranted where "'serious questions going to the merits [are] raised and the balance of hardships tips sharply in plaintiff's favor,'" provided that the "plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 1131-32, 1135 (citation omitted).

This standard, however, is significantly altered where violations of the ESA are involved. The Supreme Court has held that the "language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities," and that once Congress has so "decided the order of priorities in a given area, it is…for the courts to enforce them when enforcement is sought." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 194 (1978). Traditional equitable balancing therefore does not apply because the "plain intent of Congress in enacting the statute was to halt and reverse the trend

toward species extinction, *whatever the cost.*" *Id.* at 184 (emphasis added); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 793 (9th Cir. 2005).[9]

Courts do not balance equities, hardships, or public interests in considering an injunction under the ESA. *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987); *Nat'l Wildlife Fed'n*, 422 F.3d at 793-94. Congress decided "that…the balance of hardships always tips sharply in favor of the… threatened species." *Wash. Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1035 (9th Cir. 2005).

V. ARGUMENT.

A. The Conservancy is Likely to Succeed on the Merits.

It is beyond dispute that the Elwha River hatchery programs, including the releases of steelhead and coho salmon proposed to occur this March or April and the collection of adult steelhead for broodstock, "take" ESA listed salmonids. The only issues related to the Conservancy's likelihood of success on its claim against the Hatchery Defendants is whether the claim was rendered moot by the Limit 6 Approval and, if not, whether the Hatchery Defendants are exempt from liability.

The district court erroneously determined that the claim asserted against the Hatchery Defendants is moot. The Conservancy is likely to prevail because the

[9] The Supreme Court has reaffirmed its discussion in *Tennessee Valley Authority* on injunctions under the ESA. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496-97 (2001); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 543 n.9 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-14 (1982).

Hatchery Defendants have not and cannot plead and prove compliance with the Limit 6 Approval and ITS and because those documents should be vacated because they were issued in violation of NEPA.[10]

1. The hatchery programs "take" ESA-listed salmonids.

There is no dispute that the Elwha River hatchery programs at issue cause "take" of ESA listed salmonids.[11]

Dr. Gordon Luikart is a wildlife population geneticist, recently recognized by Thomas Reuters as "one of the world's most influential minds." *Luikart Decl.*, ¶ 7. He explains that the steelhead hatchery program provides significant opportunity for domestication and that, given the size of the program, hatchery fish to be released this spring will return in the coming years and greatly outnumber the small wild steelhead population. *Id.* at ¶¶ 38-39, 44-45. Hatchery fish will interact genetically with wild steelhead on the spawning grounds, significantly reducing the reproductive success of the Elwha River steelhead population "through repeated cross-breeding between the remaining wild adults and the domesticated and

[10] The Conservancy has standing because (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged actions of the Defendants; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *and* Ex. 23; *and* Ex. 24.

[11] *See supra* Sec. III.E.

increasingly inbred hatchery fish." *Id.* at ¶¶ 40-42, 45. The introgression of maladapted genes into the wild steelhead population "would likely persist for many generations even after the returns of hatchery fish have ceased, thereby causing substantial and biologically significant long-lasting harm to the population." *Id.* at ¶ 53; *see also id.* at ¶ 41. NMFS has determined that adverse genetic effects of this nature constitute "take" under the ESA and that such take "is expected to occur" with the steelhead program. Ex. 5, pp. 179-80 (NMFS016083-84).

Dr. Jack Stanford is a renowned expert on the ecology of salmonids and recovery ecology. *See Stanford Decl.*, ¶¶ 2-10, Exhibit 1. He explains that the proposed releases of hatchery steelhead and coho salmon will cause take through ecological interactions. *See id.* at ¶¶ 19-20, 39-40, 44. Hatchery smolts tend to be larger than their wild counterparts when released into the wild. *See id.* at ¶¶ 39, 44. Wild ESA-listed Chinook salmon and steelhead smolts and bull trout juveniles will be killed and injured when large numbers of hatchery steelhead and coho salmon smolts are released into the Elwha River where they will prey upon the protected fish and outcompete them for food and territory. *Id.*[12] NMFS has determined that such harm constitutes "take" under the ESA. *See* Ex. 5, pp. 180-81 NMFS016084-

[12] Additionally, some hatchery steelhead released will residualize, meaning that they will not migrate to saltwater, but will instead remain in the river. *Stanford Decl.*, ¶ 40. These residualized hatchery fish will most likely kill and harm ESA listed salmonids through predation and competitive interactions. *Id.*

85). Finally, some wild ESA-listed adult steelhead will be collected and killed to supply the hatchery's broodstock. *Luikart Decl.*, ¶ 62.

2. The ESA section 9 claim is not moot.

The district court erred in finding that the Conservancy's claim against the Hatchery Defendants was mooted by the Limit 6 Approval and that a new notice letter under the ESA is necessary to pursue arguments related to that document. Notably, the only other court to address this issue found that plaintiffs' ESA section 9 claim did not become moot when NMFS approved hatchery programs under the 4(d) Rule and that a new pre-suit notice letter was not required. *See Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, No. 3:12-CV-00431-HA, 2013 U.S. Dist. LEXIS 111505, at *24-33 (D. Or. May 16, 2013).

a. Issuance of the Limit 6 Approval and ITS does not moot the ESA section 9 claim.

The district court dismissed the claim against the Hatchery Defendants as moot when, in the middle of the lawsuit, NMFS issued a decision that provides only a conditional exemption to liability that constitutes an affirmative defense. *See* Ex. 21. This was an error.

The Conservancy alleged one claim against the Hatchery Defendants—that their hatchery programs cause take of ESA-listed salmonids in violation of section 9 of the ESA. Ex. 16, ¶ 183. The Hatchery Defendants have a "heavy burden" in asserting that their post-Complaint efforts rendered this claim moot, only where it

is "absolutely clear" that the violations "could not reasonably be expected to recur." *See Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Mere issuance of the Limit 6 Approval and ITS does not render this ESA section 9 claim moot, as the Hatchery Defendants argued and as the district court found. Rather, these documents create conditional exemptions to liability under section 9 of the ESA, thereby providing the Hatchery Defendants only with limited defenses.

The Limit 6 Approval provides that the exemption is applicable only where the hatchery programs are in compliance with the HGMPs and are "implemented in accordance with the implementation terms and reporting requirements…" Ex. 18, p. 7 (NMFS016211). NMFS' 4(d) Rule states that exemptions such as the Limit 6 Approval provide "**an affirmative defense that must be raised, pleaded, and proven by the proponent**." 50 C.F.R. § 223.203(c) (emphasis added).[13]

Similarly, the ITS provides that the liability exemption is only effective where there is compliance with its numerous non-discretionary "terms and conditions." Ex. 5, pp. 182-83 (NMFS016086-87); *and see Bennett v. Spear*, 520 U.S. 154, 170 (1997); *and Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1239 (9th Cir. 2001). The ESA states that a person claiming the benefit

[13] The district court completely ignored this regulation in finding that the Limit 6 Approval rendered the ESA section 9 claim moot. *See* Ex. 21.

of an exemption issued thereunder—such as the ITS—"shall have the burden of proving that the exemption…is applicable, has been granted, and was valid and in force at the time of the alleged violation." 16 U.S.C. § 1539(g).

The Supreme Court and this Court have made clear that parties remain subject to liability under section 9 of the ESA despite the issuance of an exemption to liability for take, noting that the exemptions are only effective where there is compliance with the terms and conditions. *See Bennett*, 520 U.S. at 170; *and Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1239. Thus, NMFS' mere issuance of exemptions do not make it absolutely clear that the Hatchery Defendants violations of section 9 of the ESA could not reasonably be expected to recur. *See Native Fish Soc'y*, 2013 U.S. Dist. LEXIS 111505, at *24-33. The district court therefore erred in ruling that the Conservancy's claim against the Hatchery Defendants was rendered moot by the mere issuance of the Limit 6 Approval and ITS.

b. <u>The Hatchery Defendants did not prove compliance with the Limit 6 Approval or the ITS</u>.

Further, the Hatchery Defendants did not prove compliance with the Limit 6 Approval and ITS in a manner that meets their "heavy burden" in establishing that it is "absolutely clear" that their violations of ESA section 9 "could not reasonably be expected to recur." *See Friends of the Earth*, 528 U.S. at 189.

As noted, NMFS' 4(d) Rule requires that the Hatchery Defendants plead and prove that they were in compliance with the Limit 6 Approval at the time of any

take. 50 C.F.R. § 223.203(c). The Hatchery Defendants have done neither. The Hatchery Defendants did not supplement their Answer after the Limit 6 Approval was issued, but instead immediately filed the motion to dismiss.[14] *See* Ex. 19, p. 17. They did not submit *any* evidence with their motion showing compliance with the Limit 6 Approval. *See id.* Rather, they submitted with their reply brief[15] a single declaration from Hatchery Defendant Doug Morrill stating in conclusory fashion[16] that they are "currently operating each hatchery program in conformity and compliance with the[] HGMPs, and intend[] to do so in the future." Ex. 25, ¶ 2. While the Limit 6 Approval requires the hatchery operations to comply with the

[14] The Conservancy filed a supplemental pleading to challenge the Limit 6 Approval and to allege the Hatchery Defendants' non-compliance therewith, which the Hatchery Defendants did not oppose.

[15] The district court relied on this declaration in granting the motion to dismiss while refusing to allow the Conservancy an opportunity to conduct discovery on the Hatchery Defendants' compliance with the newly issued approval documents. Ex. 21, pp. 5, 8-9. This constituted error. *See Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (discovery should be allowed before ruling on a motion to dismiss where pertinent facts "are controverted or a more satisfactory showing of the facts is necessary"); *and see Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993) (striking new materials submitted with reply brief).

[16] This declaration lacks foundation demonstrating that the declarant has personal knowledge as to whether the programs are in full compliance with every provision of the HGMPs—and it is exceedingly unlikely that he does given that he does not personally implement most of the activities described in the HGMPs. *See* Ex. 25. This declaration is therefore insufficient even to show compliance with the HGMPs. *Shakur v. Schriro*, 514 F.3d 878, 889-90 (9th Cir. 2008) (affidavit that lacks foundation and may be based on hearsay is inadequate).

HGMPs, it also requires that the Hatchery Defendants "comply with [several] implementation terms" described in the Limit 6 Approval that are specifically designed to minimize harm to wild salmonids. *See* Ex. 18, pp. 6-7 (NMFS016210-11). The Hatchery Defendants' declaration did not address these implementation terms whatsoever and therefore did not prove that the Limit 6 Approval's exemption was effective. *See* Ex. 25.[17]

The district court seemed to find that the ITS provides the Hatchery Defendants with an exemption to liability separate from the Limit 6 Approval. *See* Ex. 21, p. 4.[18] However, the Hatchery Defendants did not argue or submit any evidence whatsoever demonstrating compliance with the ITS. *See* Ex. 25. As discussed above, the ESA places the burden of demonstrating such compliance with the party claiming to be exempt from liability. *See* 16 U.S.C. § 1539(g).

[17] The district court denied the Conservancy's request to conduct discovery on the Hatchery Defendants' compliance with the Limit 6 Approval. Ex. 21, pp. 8-9. However, available information indicates that important requirements are not being fulfilled, including the failure of a weir that was intended as a tool to monitor the number and origin of salmonids moving upstream.

[18] The Conservancy questions whether the ITS applies to the Hatchery Defendants at all. NMFS consulted with itself and prepared the BiOp and ITS under section 7 of the ESA because its approval of the hatchery programs—the Limit 6 Approval—is a federal action affecting threatened salmonids. It would be illogical for an ITS to provide take coverage to a non-federal entity when the federal action triggering the need for the ITS is NMFS' action providing take coverage to the non-federal entity.

In sum, the Hatchery Defendants did not submit evidence proving compliance with the Limit 6 Approval and ITS—much less evidence that makes it is absolutely clear that their violations of section 9 of the ESA will not recur. Accordingly, the district court erred in dismissing the claim against the Hatchery Defendants as moot. *See Strahan v. Roughead*, 910 F. Supp. 2d 358, 374-77 (D. Mass. 2012) (ESA section 9 claim was not moot where defendant did not prove compliance with ITS).

c. The Conservancy is not required to send a new pre-suit notice to address the Limit 6 Approval and ITS.

The district court further erred in its ruling on mootness by holding that the Conservancy must provide a new 60-day pre-suit notice letter in order to address issued related to the newly-issued Limit 6 Approval or ITS. *See* Ex. 21, pp. 7-8.

The ESA requires pre-suit notice "of the violation." 16 U.S.C. § 1540(g)(2)(A)(i). Section 9 of the ESA prohibits take of protected species. 16 U.S.C. § 1538(a)(1)(B). It is undisputed that the Conservancy provided adequate notice of that violation. *See* Ex. 16, pp. 58-62. It is not a violation of the ESA to disregard the requirements of the Limit 6 Approval or ITS.[19] *See Native Fish Soc'y*, 2013 U.S. Dist. LEXIS 111505, at *30; *and see* 16 U.S.C. 1538; *and Bennett*, 520 U.S. at 170. Rather, as discussed above, those NMFS' decisions

[19] This differs from the Clean Water Act, which authorizes enforcement of "a permit or condition thereof." 33 U.S.C. §§ 1365(a)(1), (f).

create defenses to the Conservancy's take claim for which the burden of proof rests with the Hatchery Defendants. The ESA does not require pre-suit notice of a defendant's inability to prove a defense.

More importantly, this Court has twice held that "[s]ubject matter jurisdiction is established by providing notice that is adequate on the date it is given to the defendant." *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000); *Waterkeepers N. Cal. v. AG Indus. Mfg., Inc.*, 375 F.3d 913, 920 (9th Cir. 2004).[20, 21] Plaintiffs are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *Waterkeepers N. Cal.*, 375 F.3d at 920. The Conservancy is not required to provide notice related to documents issued in the middle of litigation more than a year after it provided pre-suit

[20] These cases involved violations of the Clean Water Act, which has substantially similar pre-suit notice requirements to the ESA. *Compare* 16 U.S.C. § 1540(g)(2)(A)(i) *and* 33 U.S.C. § 1365(b)(1)(A). Courts interpret similar statutory provisions contained in federal environmental statutes consistently. *See, e.g.*, *Sackett v. U.S. Envtl. Prot. Agency*, 622 F.3d 1139, 1144 (9th Cir. 2010), *rev'd on other grounds*, 132 S.Ct. 1367 (2012); *and see Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1072-73 (9th Cir. 1996) (citing to opinion on CWA notice requirements in an ESA case).

[21] The district court completely ignored this Court's holdings in these two decisions on the need to send a new notice letter to address post-complaint compliance efforts. *See* Ex. 21.

notice—pre-suit notice need not "refer to provisions of plans that [did] not exist." *See Sw. Marine*, 236 F.3d at 997.[22]

Requiring new notice and a new lawsuit every time a defendant develops a new defense would undermine the ESA's policy of "institutionalized caution" intended to "afford[] endangered species the highest of priorities." *See Tenn. Valley Auth.*, 437 U.S. at 194. This is aptly demonstrated here, where the district court dismissed the Hatchery Defendants when NMFS approved the hatchery programs only to subsequently find that NMFS' approval process violated NEPA. Thus, when the district court ordered the parties to confer on relief and indicated that the reductions sought by the Conservancy are "a good starting point for an agreement," the Hatchery Defendants refused and made their full releases. This occurred well-before the Conservancy could have issued a new 60-day notice letter, filed a new complaint, and obtained a temporary restraining order. Allowing a defendant to evade injunctive relief and continue to harm protected species in this manner "would turn the ESA's statutory and regulatory framework on its head." *See Native Fish Soc'y*, 2013 U.S. Dist. LEXIS 111505, at *33.

[22] *See also See Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 307 F.3d 964, 974-75 (9th Cir. 2002), *withdrawn as moot*, 355 F.3d 1203 (plaintiff that sent pre-suit notice alleging a failure to consult under the ESA was not required to issue a new notice to challenge the inadequacies of the subsequent consultation).

Accordingly, the district court erred in finding that the Conservancy would be required to provide another pre-suit notice before addressing the Hatchery Defendants' arguments related to the newly-issued Limit 6 Approval and ITS.

3. The Hatchery Defendants are not exempt from liability under section 9 of the ESA.

The Conservancy is likely to prevail on its claim against the Hatchery Defendants because NMFS' approvals of the hatchery programs should be vacated, leaving no exemption from liability for the ESA's prohibition on "take." NMFS approved the Elwha River hatchery programs in violation of NEPA. Notably, NMFS has yet to prepare an EIS evaluating the significant and lasting effects of the large-scale hatchery strategy it approved and alternatives to such an approach as required by NEPA.[23] Accordingly, NMFS' decisions authorizing the programs should be vacated. Further, even if vacatur was not warranted, the Hatchery Defendants cannot meet their burden in pleading and proving compliance with NMFS' decisions and are therefore liable under section 9 of the ESA.

a. NMFS violated NEPA in approving the hatchery.

The district court correctly found that NMFS violated NEPA by failing to meaningfully consider reasonable alternatives to the massive hatchery programs it

[23] While the Conservancy will address several deficiencies with the Limit 6 Approval and ITS in its primary briefing in this appeal, only two of the more significant inadequacies are addressed here—NMFS' failure to consider reasonable alternatives and to prepare an EIS.

approved. *See* Ex. 1, pp. 17-21. The EA that NMFS prepared considered alternatives under which annual releases would total either the full 7.5 million hatchery fish proposed or no hatchery fish whatsoever. Ex. 9, p. 3, 15-17 (NMFS015387, 15399-15401). NMFS refused to consider an alternative with smaller releases, finding that such an alternative would "have the same effect as terminating the hatcheries." *Id.* at p. 19 (NMFS015403). The district court rejected this assertion, finding that there is a "viable alternative" between no releases whatsoever and the large-scale releases approved. Ex. 1, pp. 19-20.[24]

More significantly, NMFS violated NEPA by approving the hatchery programs without preparing an EIS. The decision to approve the release of 7.5 million hatchery fish into the Elwha River each year as a supposed strategy to restore wild salmonid populations to the newly-opened watershed is a major federal action significantly affecting the environment. NEPA therefore requires preparation of an EIS *before* these plans are implemented. An EIS is required so that the decision-makers and the public are fully informed of the risks associated with the large scale hatchery releases and of the reasonable alternatives to that

[24] *See also W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050-55 (9th Cir. 2013) (EA was inadequate for failing to consider alternative with reduced grazing); *and Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, 992 F. Supp. 2d 1095, 1110 (D. Or. 2014) (NMFS violated NEPA by approving hatchery programs without considering an alternative between zero and one million hatchery fish released annually).

strategy. Federal Defendants have not prepared such an EIS despite having more than twenty years to do so. Instead, NMFS hastily prepared an EA and FONSI in an effort to defend against this lawsuit, and violated NEPA in the process.

An EIS is required if there are "substantial questions" as to whether a proposed action *may* have a significant effect on the environment. *Anderson*, 371 F.3d at 488; *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 730. "This is a low standard." *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). This determination requires an analysis of both the "context" and "intensity" of effects. 40 C.F.R. § 1508.27. Context looks to "society as a whole (human, national), the affected region, the affected interests, and the locality," as well as short- and long-term effects. *Id*. § 1508.27(a). With regard to the "intensity" of effects, there are ten non-exclusive factors to be considered. *Id*. § 1508.27(b). The presence of just *one* of these factors may be sufficient to require an EIS. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005); *and see Ctr. for Biological Diversity v. Nat'l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1220 (9th Cir. 2008). A significant impact may exist where the agency believes that, on balance, the effects will be beneficial. *See* 40 C.F.R. § 1508.27(b)(1); *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1197 (N.D. Cal. 2004).

Application of these factors here requires preparation of an EIS. *See Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, 992 F. Supp. 2d 1095, 1107-1109 (D. Or. 2014) (NMFS violated NEPA by failing to prepare an EIS for its approval of a hatchery on the Sandy River in Oregon). The "context" is extraordinary—the restoration of salmonid populations to the Elwha River watershed is unparalleled in the world and brings unprecedented opportunities. *E.g.*, Ex. 7, p. 2 (001210). Several of the "intensity" factors are present:

(1) The hatchery programs will have significant effects on unique geographic areas, including a national park, a wilderness area, an International Biosphere Reserve, and a World Heritage Site. *See* 40 C.F.R. § 1508.27(b)(3); *and* Ex. 5, p. 78 (NMFS015982); Ex. 6, p. 7 (002407); Ex. 3, p. 5 (NMFS007171);

(2) NMFS' approval of the hatchery plan has the potential to set a precedent, as this is the largest dam removal and salmon restoration project in the United States to date and because these are the first hatchery programs to be approved of the approximately 100 Puget Sound programs submitted to NMFS in 2004. *See* 40 C.F.R. § 1508.27(b)(6); *and* Ex. 7, p. 2 (001210); *and* Ex. 5, p. 4 (NMFS015908);

(3) The effects of the hatchery programs are uncertain—even NMFS admits that it cannot predict that magnitude or duration of adverse genetic (fitness) effects. *See* 40 C.F.R. § 1508.27(b)(5); *and* Ex. 9, p. 29 (NMFS015413);

(4) There is the potential for significant adverse effects to ESA-listed species. *See* 40 C.F.R. § 1508.27(b)(9); *and Luikart Decl.*, ¶ 53; and *Stanford Decl.*, ¶¶ 41, 45;

(5) There is significant controversy regarding the use of large-scale hatchery programs to restore a wild salmon ecosystem. *See* 40 C.F.R. 1508.27(b)(4); *and see* Ex. 26, p. 1 (NMFS008278) (NMFS Regional Administrator William Steele noting the "broad attention to the hatchery/wild topic");

An additional "intensity" factor is implicated because there are cumulatively significant impacts associated with NMFS' ongoing review of all Puget Sound hatchery programs. An EIS is required where the proposed action is related to other actions with cumulatively significant impacts. *See* 40 C.F.R. § 1508.27(b)(7). NMFS received a request in 2004 to approve approximately 114 hatchery programs operating in Puget Sound, including those on the Elwha River, under the 4(d) Rule. *See* Ex. 3, pp. 12-13 (NMFS007178-79); Ex. 5, pp. 3-4 (NMFS015907-08). NMFS has recognized that its approval of these hatchery programs under the ESA are related actions with cumulatively significant impacts that requires an EIS. *See Pls.-Appellants/Cross-Appellees' Mot. For Judicial Notice*, Ex. 1, pp. 1-3 to 1-4; *see also* 69 Fed. Reg. 26,364 (May 12, 2004); *and* 76

Fed. Reg. 45,515 (July 29, 2011).[25] Having failed to prepare the required EIS and facing this lawsuit, NMFS reviewed the Elwha River hatchery programs outside of the Puget Sound-wide NEPA process by preparing only an EA and FONSI. NMFS thereby violated NEPA by "breaking [the action] down into small component parts" to avoid an EIS. 40 C.F.R. § 1508.27(b)(7).[26]

b. NMFS' inadequate NEPA efforts are not cured by the 1996 Implementation EIS.

Federal Defendants do not seriously dispute that the Elwha River hatchery plans warrant an EIS. Instead, they argued below that these programs were fully

[25] NMFS has essentially admitted that its authorization of hatchery programs throughout Puget Sound under the ESA are related actions with cumulatively significant effects. NMFS recently issued a draft EIS for these related actions that explains "[a] single… [EIS] has been prepared for the two RMPs and the appended HGMPs, because the two RMPs are similar and have related actions within the same action area. Although NEPA compliance exists for the Elwha River hatchery programs…, those programs are included in this EIS because they are included in the RMPs and to allow a comprehensive analysis of all…hatchery programs operating within the geographic boundaries of the Puget Sound Chinook Salmon ESU and the Puget Sound Steelhead DPS." *Pls.-Appellants/Cross-Appellees' Mot. For Judicial Notice*, Ex. 1, pp. 1-3 to 1-4. Similarly, when asked why the Elwha River hatchery programs are being considered in the EIS for all Puget Sound hatcheries, NMFS testified: "Because collectively the Puget Sound programs in total have cumulative effects on listed fish populations, especially in marine areas." Ex. 27, p. 134. Finally, the FONSI NMFS issued for its approval of the Elwha River hatcheries admits that those programs are "related to other hatchery . . . programs." Ex. 9, p. 121 (NMFS015505).

[26] *See also Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) ("when several proposals for…actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together").

evaluated in the earlier Implementation EIS prepared in 1996 for the Elwha River Restoration Project and that the current EA appropriately tiered to that document. That NEPA document did not even mention the adverse effects associated with hatchery programs, much less evaluate the benefits and risks associated with alternatives to the current hatchery strategy. *See* Ex. 17, pp. 5-8 (001860-63).[27] The eighteen year old Implementation EIS merely included, as an appendix, an early and brief version of the Fish Restoration Plan that vaguely described various options for restoring fish populations and stated that "[a]ll [options] will continue to be investigated." *Id.* at p. 436 (002278).[28] The Implementation EIS therefore did not constitute a NEPA evaluation of Federal Defendants' decision to fund and approve the Elwha River hatchery plans.[29]

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[27] The Implementation EIS evaluated two different alternatives for removing the sediment that had accumulated behind the dams. Ex. 17, pp. 5-8 (001860-63).

[28] The Federal Defendants have argued that the time to challenge NEPA compliance for the hatchery plans was with the 1996 Implementation EIS and associated record of decision. However, such a challenge would not have been ripe for judicial review given that those documents merely indicated an intent to continue to investigate all fish restoration options. *See, e.g., Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 780 (9th Cir. 2000) (in evaluating ripeness, the courts consider whether the agency has completed its decisionmaking process).

[29] While Federal Defendants have also vaguely alluded to two other NEPA documents, those provide even less support for their failure to prepare an EIS since neither address the hatchery plans or alternatives thereto. *See* Ex. 6 (002373); Ex. 4 (0770-FWS).

Even if it could be accepted that the 1996 Implementation EIS constituted NEPA compliance for the hatchery plans, Federal Defendants would nonetheless have violated NEPA by not preparing a supplemental EIS for the hatchery strategy. Supplementation is required where "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns" or "there are significant new circumstances or information relevant to environmental concerns…" 40 C.F.R. § 1502.9(c); *and see Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989) (supplemental EIS required where new information indicates significant environment effects not already considered). An EIS that is more than five years old should be carefully reexamined to determine if supplementation is required. 46 Fed. Reg. 18,026, 18,036 (March 23, 1981). The Implementation EIS was prepared eighteen years ago, does not even mention the adverse effects associated with massive hatchery programs, and does not address the current hatchery plans.[30] Thus, to the extent that document was intended to constitute a NEPA evaluation for the hatchery plans, a supplemental EIS was

[30] The fish restoration options described in the appendix to the Implementation EIS generally focused on planting juveniles of some stocks into in the middle and upper watershed. Ex. 17, pp. 438-445 (002280-87). The primary option for winter-run steelhead was to rely on natural recolonization by rainbow trout. *Id.* at p. 439 (002281). These options have been totally abandoned, as the current strategy relies entirely on releases from the hatcheries into the lower river, including for winter steelhead.

required to fully evaluate the risks associated with the current hatchery strategy and alternatives thereto.

Federal Defendants have argued that the EA and FONSI were appropriate because they tiered to the Implementation EIS. Tiering allows an agency to avoid repeating discussions from a previous broader EIS when preparing a new narrower NEPA document by summarizing and incorporating the earlier discussions. 40 C.F.R. § 1502.20; *and see* 40 C.F.R. § 1508.28. The ***only*** NEPA document that Federal Defendants have prepared that even acknowledges the adverse effects associated with the hatchery programs is the EA prepared in the middle of this litigation. Federal Defendants cannot avoid preparing an EIS for the approval of the hatchery programs by tiering to an older EIS that does not actually evaluate the impacts of those programs. *See, e.g., S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) ("the previous document must actually discuss the impacts of the project at issue").[31]

In sum, NMFS violated NEPA by approving the Elwha River hatchery plans without preparing an EIS to fully evaluate and disclose the effects of these

[31] *See also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 997-98 (9th Cir. 2004) (inadequate analysis not saved by tiering to general statements in an EIS); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810-11 (9th Cir. 1999) (deficient NEPA analysis not cured by tiering to an EIS prepared when a project was not developed with any certainty and was only one in a pool of possible projects).

programs and alternatives thereto. NMFS concludes in the EA that the risks from the hatchery programs are outweighed by the supposed advantages. Ex. 9, p. 29 (NMFS015413). Such balancing cannot be done in an EA, but rather must be done in an EIS. *See Anderson*, 371 F.3d at 494.

c. The NEPA violations warrant vacatur.

The Conservancy sought a partial vacatur of NMFS' approvals of the Elwha River hatchery programs that corresponds to the injunctive relief sought here. Specifically, the Conservancy sought vacatur of NMFS' approvals to the extent that they authorize: (1) the release of more than 50,000 hatchery steelhead smolts and 50,000 hatchery coho salmon smolts annually; and (2) the collection of more than sixty (60) total adult steelhead, no more than thirty (30) of which are female, annually. NMFS' NEPA violations warrant such vacatur.

The APA prescribes a statutory remedy under which courts "*shall*…hold unlawful and *set aside* agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (emphasis added).[32] Given this mandatory language, the Supreme Court has explained for decades that "[i]n all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion or otherwise not in

[32] The word "shall" imposes a mandatory duty. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989). "Set aside" means to vacate. *See* Black's Law Dictionary 1404 (8th Ed. 2004).

accordance with law.'" *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-14 (1971); *and see, e.g.*, *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (agency "decision must be vacated"); *Fed. Commc'ns Comm'n v. Nextwave Personal Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) ("The [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law.'").[33]

Nonetheless, there are "rare circumstances" under which a court may exercise its equitable discretion to depart from the presumptive statutory remedy by leaving an action in force or partially in force[34] while the matter is remanded to the agency for reconsideration. *See Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); *and Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). This requires a consideration of the seriousness of the agency's errors and the disruptive consequences of vacating the agency decision. *See Cal. Cmtys. Against Toxics v. U.S. Envtl. Prot. Agency*, 688 F.3d 989, 992 (9th

[33] This Court has repeated this statutory admonition. *E.g.*, *In Def. of Animals v. U.S. Dep't of the Interior*, 751 F.3d 1054, 1061 (9th Cir. 2014) (reviewing court "must set aside" agency actions found unlawful under the APA); *N.W. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 681 (9th Cir. 2008) (same).

[34] Numerous opinions have recognized the availability of partial vacatur. *E.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010) (noting that "partial or complete vacatur" of an agency action under the APA is a "less drastic" remedy than an injunction); *and Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 79-80 (D. D.C. 2010); *and Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, No. 3:12-CV-00431-HA, 2014 U.S. Dist. LEXIS 33365, at *12-14 (D. Or. March 14, 2014) (granting partial vacatur of NMFS' approval of hatchery programs).

Cir. 2012) (citing with approval *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 1050-51 (D.C. Cir. 1993)). The burden should be placed upon the party seeking to invoke the Court's equitable discretion as a defense to the APA's presumptive statutory remedy of vacatur.[35]

NMFS' failure to prepare an EIS is a serious violation. The requirement to prepare an EIS evaluating and disclosing the impacts of a project and alternatives thereto is the central requirement of NEPA. *See Anderson*, 371 F.3d at 494. As this Court has explained:

> No matter how thorough, an EA can never substitute for preparation of an EIS… An EA simply assesses whether there will be a significant impact on the environment. An EIS weighs any significant impacts of the proposed action against the positive objectives of the project. Preparation of an EIS thus ensures that decision-makers know that there *is* a risk of significant environmental impact and take that impact into consideration. As such, an EIS is more likely to attract the time and attention of both policymakers and the public.

Id. (internal citations omitted). Similarly, as the district court found, NMFS' failure to meaningfully consider an alternative with smaller hatchery releases is a serious NEPA violation. *See* Ex. 2, pp. 4-5. Indeed, the "touchstone" for

[35] *See Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1105-06 (9th Cir. 2011) (defendant agency bears the burden of showing that its NEPA violation was harmless error such that its action should not be vacated); *and Locke*, 626 F.3d at 1053 n.7 (appropriate remedy is vacatur where the agency has not specifically requested remand without vacatur); *see also Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, (9th Cir. 2006) (party asserting equitable defense must show its applicability).

evaluating the adequacy of an agency's NEPA efforts is whether the "selection and discussion of alternatives fosters informed decision-making and informed public participation." *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982); *see also Nat'l Highway Traffic Safety Admin.*, 538 F.3d at 1217 (alternatives analysis is the "heart" of a NEPA evaluation).

The requested partial vacatur will not have unduly disruptive consequences such that vacatur is unwarranted. Rather, the relief sought will reduce some of the greatest harm caused by the hatchery programs while leaving in place operations that continue to supply the hatchery with broodstock and thereby protect against any supposed risk of extirpation. *Luikart Decl.*, ¶¶ 55, 57; *Stanford Decl.*, ¶¶ 59, 61.[36] Thus, as the district court found, the Conservancy's requested partial vacatur "provides the most reasonable interim process." Ex. 2, p. 6.

Accordingly, the NEPA violations warrant vacatur of NMFS' decisions authorizing the hatchery programs. Indeed, this Court has "directed or upheld

[36] The Court should reject any argument that the size of the hatchery programs is necessary. Elwha Defendant Larry Ward is the hatchery manager that signed and certified the HGMPs. Ex. 10, p. 37 (NMFS024271) Ex. 11, p. 35 (NMFS024306). Mr. Ward testified that they had not even developed recovery targets for the program and that the annual release of 175,000 steelhead smolts was based upon the number of eggs they were able to capture from wild fish to initiate the program and not on what is necessary to conserve the species. Ex. 12, pp. 24, 29-31. Mr. Ward testified that the size of the coho salmon program is based upon budgetary issues associated with the hatchery's water treatment facility. *Id.* at pp. 41-42.

setting aside agency action pending NEPA compliance on numerous occasions… If courts could not stop the federal government from applying [an agency decision] promulgated without adherence to required procedures, regardless of the equities, both NEPA and the APA would be toothless." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184-85 (9th Cir. 2011) (internal citation omitted).

The district court erred in vacating the **EA**—relief the Conservancy did not request—and not the **agency actions** unlawfully undertaken without fulfillment of the procedures required by NEPA.[37] *See, e.g., Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1106-07 (9th Cir. 2011) (vacating designation of national interest electric transmission corridors for NEPA violations); *Anderson*, 371 F.3d at 494 ("vacat[ing] the approved whaling quota for the Tribe" for NEPA violations); *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1145 (9th Cir. 2008) (vacating land use plan for NEPA violations); *Klamath*

[37] In its order on relief, the district court suggested that the underlying agency actions had "not been found to be arbitrary, capricious, or otherwise not in accordance with law," and that additional dispositive briefing may be necessary to address the Conservancy's request to vacate those actions. Ex. 2, p. 7. As noted, briefing on liability and relief issues was bifurcated. *See* Ex. 1, p. 25. The Conservancy's briefing on liability focused on how the EA was deficient under NEPA and its remedy briefing explained that the appropriate relief for the NEPA violation found by the district court was vacatur of the underlying agency actions. It is unclear why additional dispositive briefing might be necessary to address the requested relief, but the Conservancy nonetheless requested such briefing in the alternative to a request for reconsideration, both of which were denied.

Siskiyou Wildlands Ctr., 468 F.3d at 562-63 (holding species review decisions invalid for inadequate NEPA analysis). The agency actions that should be vacated for NMFS' failure to comply with NEPA in evaluating and approving the hatchery programs are NMFS' decisions authorizing the programs to take threatened salmonids—the Limit 6 Approval and the ITS.[38]

In sum, NMFS' decisions exempting the take caused by the hatchery programs should be vacated for NEPA violations. Accordingly, the Conservancy is likely to prevail on its claim against the Hatchery Defendants for take of threatened salmonids in violation of section 9 of the ESA.

[38] The ITS is an agency action that should be vacated. Where an ITS is issued to another federal agency, NMFS is not required to complete NEPA procedures because the "downstream federal agency" will do so. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 642-45 (9th Cir. 2014). Where there is no such downstream federal agency, NMFS must comply with NEPA in issuing the ITS. *See id.* (explaining *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996)). Here, the federal action for which NMFS prepared the BiOp and ITS under section 7 of the ESA was NMFS' own Limit 6 Approval—in other words, NMFS consulted with itself on its own action. There is no "downstream federal agency" to fulfill NEPA requirements for NMFS' Limit 6 Approval. NMFS' NEPA violations therefore warrant vacatur of the ITS in addition to the Limit 6 Approval. Moreover, an ITS must specify the extent of take anticipated from the action. *See* 50 C.F.R § 402.14(i)(1)(i). If the action for which the ITS is issued is partially vacated—the Limit 6 Approval—the ITS should be similarly vacated so that it does not authorize more harm to the species than the action itself.

d. The Hatchery Defendants cannot prove compliance with the Limit 6 Approval and ITS.

Even if vacatur of NMFS' approval decisions was not warranted, the Conservancy is still likely to prevail on its claim. As discussed above, the Hatchery Defendants must plead and prove compliance with the Limit 6 Approval and the ITS in order to be exempt from liability. They have done neither.

The district court denied the Conservancy's request for discovery on these issues. Ex. 21, pp. 8-9. However, information available to the Conservancy strongly suggests that the Hatchery Defendants are not complying with monitoring, evaluation, and adaptive management requirements. The Hatchery Defendants should be required to plead this defense and the Conservancy should be allowed discovery related thereto before any findings are made regarding its effect.

B. The Conservancy will be irreparably injured without an injunction.

Congress enacted a policy of "institutionalized caution" in the ESA intended to protect species from extinction. *Tenn. Valley Auth.*, 437 U.S. at 194. To fulfill this legislative mandate, the "remedy for a substantial procedural violation of the ESA—a violation that is not technical or de minimis—must…be an injunction of the project pending compliance with the ESA." *Wash. Toxics Coalition*, 413 F.3d at 1029, 1034-35; *see also Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177-78 (9th Cir. 2002) (ESA violation "compelled…injunctive relief"); *and Pac.*

Rivers Council v. Thomas, 30 F.3d 1050, 1056-57 (9th Cir. 1994) (enjoining activities that "may affect" protected fish pending ESA compliance); *and Marsh*, 816 F.2d at 1383-84, 1389.

Accordingly, an injunction should be issued upon a showing of a likelihood that an action will harm animals in violation of the ESA. *See Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511-12 (9th Cir. 1994) (indicating that an injunction would be appropriate where the challenged activity "will result in the deaths of members of a protected species"); *Marbled Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060 (9th Cir.1996) (affirming an injunction imposed to prevent take); *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 1999) (disrupting the normal behavioral patterns of a single pygmy-owl would constitute take requiring an injunction); *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 787-88 (9th Cir. 1995) (significantly impairing the essential behavioral patterns of a single pair of protected owls constituted harm requiring an injunction).

An injunction should be entered under these standards because, as discussed above, the hatchery activities will cause take of ESA-listed salmonids.[39] Moreover, the harm will be on a scale well beyond individual protected fish. The steelhead hatchery program is expected to significantly reduce the productivity of wild steelhead. *See Luikart Decl.*, ¶¶ 41-42, 53. These effects, in combination

[39] *Supra* Sec. V.A.1.

with those resulting from ecological interactions with hatchery steelhead and coho salmon, will harm the currently depressed wild Elwha River steelhead and Chinook salmon populations and their ability to fully recover now that the dams have been removed. *See id.*; *and Stanford Decl.*, ¶¶ 41, 45. Recovery of these populations is essential to the recovery and de-listing under the ESA the Puget Sound steelhead DPS and the Puget Sound Chinook salmon ESU to which they belong—harm is thus likely to result to the entire listed species. *Luikart Decl.*, ¶¶ 25, 53; *Sanford Decl.*, ¶¶ 29, 41, 45; Ex. 5, p. 61 (NMFS015965).

C. The Balance of Equities Favors an Injunction.

The legislative mandates of the ESA preclude traditional equitable balancing. *E.g., Nat'l Wildlife Fed'n*, 422 F.3d at 793-94; *and Wash. Toxics Coalition*, 413 F.3d at 1035. Nonetheless, these factors weigh in favor of an injunction until such time as NMFS determines, in a manner that complies with NEPA, what size of hatchery programs should be approved. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("balance of harms will usually favor…injunction to protect the environment").

The proposed massive releases of hatchery fish in Elwha River represents a tragic lost opportunity. The Elwha River Restoration Project is the largest dam removal and salmon restoration project in United States history, costing tax payers approximately $325 million. This project offers a unique chance to fully restore

anadromous fish populations to a largely pristine ecosystem, while also gaining invaluable knowledge about how large river systems respond to dam removal that will help guide future policy decisions for other dams and rivers. The large-scale hatchery programs undermine these public objectives. The hatchery releases are sized well-beyond what is appropriate for conservation programs intended to preserve stocks during dam removal. *See Luikart Decl.*, ¶¶ 47-50; *and see Stanford Decl.*, ¶ 61. While the programs may produce abundant hatchery fish in the watershed in the short term, they will greatly harm the long-term recovery potential of wild salmonid populations. *See Luikart Decl.*, ¶¶ 41-42, 44-45, 53.

In contrast, harm will not result from the requested injunction. As an initial matter, the hatchery programs are not necessary to ensure that the local salmonid populations are preserved during periods of increased sediment associated with dam removal. *Stanford Decl.*, ¶¶ 46-57. Dam removal is now complete and salmonids are already migrating above the former dam sites; future periods of increased sediment will be episodic and "will not impair the prospects for…survival and recolonization." *Id.* at ¶ 54.

Further, the Conservancy's requested relief would leave in place programs sufficient to continue to supply the hatchery's broodstock. *Id.* at ¶¶ 59, 61; *Luikart Decl.*, ¶¶ 55-59. As Dr. Luikart explains, a full quantitative risk assessment is needed to accurately determine the optimal size of the hatchery program. *Luikart*

Decl., ¶ 56. This has not occurred. *Id.*[40] However, the reductions sought by the Conservancy would greatly reduce the harm to ESA-listed species while also ensuring against any threatened loss of the local stocks while NMFS complies with NEPA in determining what size hatchery programs should be authorized, thus providing "the most reasonable interim process." *See* Ex. 2, p. 6.

D. The Scope of the Requested Injunction is Appropriately Tailored.

The requested relief is appropriately tailored because it seeks to remedy the specific harm at issue. *See Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011). Specifically, the injunction sought focuses only on the steelhead and coho salmon hatchery programs because of the significant and long-lasting harm they pose to ESA-listed salmonids as described herein.

E. No Bond or only a Nominal Bond is Appropriate.

No bond or a nominal bond is appropriate here because the Conservancy are small environmental organizations seeking to enforce public rights through the ESA citizen suit provision, and a substantial bond requirement would effectively deny their access to judicial review. *See Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985); *and see* Exs. 28-31.

[40] As previously discussed, the release numbers for the steelhead and coho salmon programs were arrived at in a manner that has nothing to do with preservation or restoration objectives. *See supra* n. 36.

VI. CONCLUSION.

For the foregoing reasons, the Conservancy respectfully requests the Court issue an injunction pending appeal as requested to prevent irreparable harm to threatened salmonids and the Elwha River Restoration Project.

RESPECTFULLY SUBMITTED this 1st day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Plaintiffs-Appellants/Cross-Appellees' Urgent Motion Under Circuit Rule 27-3(b) for Injunction Pending Appeal in Case Nos. 14-35791 and 14-35938 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on December 1, 2014.

I further certify that counsel for the parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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