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,

and

ROBERT ELOFSON, in his official capacity as the Director of the River Restoration Project for the Lower Elwha Klallam Tribe, *et al.*

Defendants-Appellees.

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' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

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 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 28th day of January, 2015.

s/ Brian A. Knusten
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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
BIA	U.S. Bureau of Indian Affairs
BiOp	Biological Opinion
DOI	U.S. Department of Interior
DPS	Distinct Population Segment
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
ESU	Evolutionary Significant Unit
FONSI	Finding of No Significant Impact
FWS	U.S. Fish and Wildlife Service
HGMP	Hatchery and Genetic Management Plan
HSRG	Hatchery Scientific Review Group
ITS	Incidental Take Statement
MAMP	Monitoring and Adaptive Management Plan
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NPS	U.S. National Park Service
RMP	Resource Management Plan
WDFW	Washington State Department of Fish and Wildlife

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because this is a civil action arising under the following laws of the United States: the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. The federal government waived sovereign immunity through the APA and the ESA. 5 U.S.C. § 702; 16 U.S.C. § 1540(g)(1)(A). The required pre-suit notice was provided for the ESA citizen suit claims. *See* Excerpts of the Record ("ER") 1017-33; *and see* 16 U.S.C. § 1540(g)(2)(A)(i).

Plaintiffs-Appellants/Cross-Appellees Wild Fish Conservancy, Wild Steelhead Coalition, Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d/b/a the Conservation Angler (collectively, the "Conservancy") are organizations whose members are adversely affected by the violations at issue. *See* ER 186-212.[1]

This appeal is from a Judgment that disposes of all claims. ER 1. This Court has jurisdiction under 28 U.S.C. § 1291.

[1] These declarations demonstrate the Conservancy's standing, an issue not challenged below. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

The district court entered Judgment on September 4, 2014. ER 1. The Conservancy filed its notice of appeal on September 18, 2014. ER 65-68. Several defendants are federal agencies and the appeal was therefore timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

ISSUES PRESENTED FOR REVIEW

1. Whether the National Marine Fisheries Service ("NMFS") violated NEPA by failing to prepare an environmental impact statement ("EIS") for its authorization of the release of over 7.5 million hatchery fish annually into the newly-undammed and pristine Elwha River. Issue raised and ruled on at ER 19-22.

2. Whether the district court erred in vacating a deficient environmental assessment ("EA") for NEPA violations instead of the agency actions that required compliance with NEPA procedures. Issue raised and ruled on at ER 7-8.

3. Whether the Department of Interior ("DOI") violated NEPA by funding and implementing massive hatchery programs in the Elwha River without undertaking any NEPA analysis; or, alternatively, whether DOI violated NEPA by failing to supplement an EIS prepared over 15 years before dam removal in the Elwha River began to evaluate large-scale hatchery programs operating in the basin. Issues raised and ruled on at ER 19, 22-23, 59-61.

4. Whether DOI violated the ESA by funding hatchery programs that harm ESA-listed salmonids without consulting with NMFS. Issue raised and ruled on at ER 32.

5. Whether NMFS violated the ESA by consulting on what it deems the beneficial effects of Elwha River hatchery programs but deferring consideration of the adverse effects of hatcheries to a future consultation. Issue raised and ruled on at ER 30-31.

6. Whether the district court erred in finding that it lost subject matter jurisdiction over a claim for take of ESA-protected species when, in the middle of this litigation, NMFS issued a limited exemption to liability for the claim that provides only an affirmative defense. Issue raised and ruled on at ER 43-47.

STATEMENT OF THE CASE

I. Introduction.

Removal of two dams on the Elwha River began in 2011 as the largest dam removal and salmonid restoration project in United States history. These efforts were mandated by an act of Congress directing full restoration of the Elwha River ecosystem and native anadromous fisheries. This project, as envisioned by Congress, affords a unique opportunity for wild salmonids to quickly re-colonize large expanses of pristine habitat.

Massive hatchery programs on the Elwha River threatened to undermine such a recovery. These programs release up to 7.5 million hatchery fish each year, which greatly suppresses recovery of wild fish populations.

The plan to flood the Elwha River with hatchery fish in conjunction with dam removal was developed, funded, and initiated without taking a "hard look" at the effects of the hatchery programs and without evaluating alternatives to the large-scale hatchery strategy as mandated by NEPA. These programs were funded by DOI without consulting with NMFS on effects to protected-species as required by the ESA. Further, hatchery managers for the Lower Elwha Klallam Tribe ("Hatchery Defendants") implemented these programs in a manner that harms and kills ESA-listed fish without any authorization whatsoever. Thus, as dam removal began in 2011, there were no NEPA or ESA analyses on the effects of, or alternatives to, the massive hatchery programs being implemented.

In response to this litigation, NMFS hastily prepared cursory NEPA and ESA documents in an effort to provide *post hoc* justifications for hatchery plans already developed, funded, and being implemented. These belated efforts fall far short of that required for decisions to authorize and fund the release of millions of hatchery fish annually as part of this unparalleled dam removal project. Indeed, NEPA requires preparation of an EIS that will fully inform decision-makers and the public of the effects of the proposed hatchery plan and alternatives thereto

before this opportunity for salmonid restoration is squandered. Despite having more than two decades to comply with NEPA, such an EIS has yet to be prepared.

II. Regulatory Framework.

A. The National Environmental Policy Act.

NEPA directs 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).

This detailed statement, or EIS, serves two important purposes: 1) "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and 2) "it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Therefore, "NEPA procedures must insure that environmental information is available…*before* decisions are made and *before* actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added).

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 v. Evans*, 371 F.3d 475, 488 (9th Cir. 2002) (citation omitted); *and see* 40 C.F.R. §§ 1501.4(e), 1508.13.

NEPA also required that agencies "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988).

B. The Endangered Species Act.

Section 9 of the ESA makes it unlawful to "take" endangered species. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined broadly to include harass, harm, pursue, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532 (19). "Harm" includes "significant habitat modification…which actually kills or injures fish…by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102; *and see* 50 C.F.R. § 17.3.

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(e), 223.203(a). The 4(d) Rule includes exemptions from the take prohibition, referred to as the "4(d) Limits." *Id.* at § 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 approved. *Id.* at § 223.203(b)(6)(i).

Section 7 of the ESA requires federal agencies planning any action that "may affect" ESA-listed species (the "action agencies") to consult with NMFS and/or the United States Fish and Wildlife Service ("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 the proposed action is not likely to jeopardize species, 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); 50 C.F.R. § 402.14(i). 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).

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. ER

1296; ER 1146. The river's watershed encompasses 321 square miles, of which approximately 267 square miles are within the Olympic National Park. ER 1296; ER 1146. Nearly all of the Olympic National Park is designated a wilderness area under the Wilderness Act. *See* Washington Park Wilderness Act of 1988, Pub. L. No. 100-668, 102 Stat. 3961 (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 United States. ER 489; ER 1160, 1222; ER 1296. Areas above the dams are particularly pristine because they "have not been altered by anthropogenic activities and have no ongoing hatchery supplementation activities." ER 1160. The Olympic National Park is also an International Biosphere Reserve and a World Heritage Site. ER 1372.

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* ER 488; *and* ER 1266, 1283. The river was "legendary" for large Chinook salmon, known to weigh in excess of 100 pounds. ER 1283.

The Elwha and Glines Canyon Dams were constructed without fish passage structures and therefore blocked upstream fish passage to more than 70 miles of mainstem and tributary habitat since 1911. ER 1146. Salmonids returning to spawn were confined to the lower 4.9 miles of the river, without access to the vast majority of the river's spawning habitat. *See id.*; *and* ER 1272. 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." ER 1266, 1281.

B. The Elwha River Ecosystem and Fisheries Restoration Project.

Congress mandated full restoration of the Elwha River ecosystem and native anadromous fisheries in the Elwha River Ecosystem and Fisheries Restoration Act ("Elwha Act"), Pub. L. No. 102-495, 106 Stat. 3173 (1992). The Elwha Act authorized the Secretary of Interior to acquire and remove the Elwha River dams upon a finding that removal is necessary to achieve this objective. Elwha Act, Pub. L. No. 102-495, § 3(a), 106 Stat. 3173, 3174.

DOI submitted the Elwha Report to Congress in 1994 determining that dam removal was feasible and necessary to achieve full ecosystem restoration. ER 1414. Dam removal began in September of 2011. *See* ER 417.

The project "will constitute the single largest salmon restoration project ever undertaken." ER 1298. This scale of dam removal is unprecedented. ER 415-16,

494, 575. 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* ER 416, 467-69, 477, 494, 575. NMFS experts nonetheless predict that salmonids would respond naturally to dam removal rapidly, establishing persistent, self-sustaining populations within two to twenty years. ER 468, 478. 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* ER 1298.

C. Threatened salmonids in the Elwha River.

Several extant populations of salmonids in the Elwha River watershed are protected under the ESA.

The Puget Sound distinct population segment ("DPS") of steelhead was listed as a threatened species in 2007. 72 Fed. Reg. 26,722 (May 11, 2007). This species has shown wide-spread declining abundance trends and the long-term extinction risk for most populations is moderate to high. *See* ER 1051-53, 1057; ER 478. Recovery of the Elwha River steelhead population is critical to recovery of the species. *See* ER 312.

The Puget Sound Chinook salmon evolutionary significant unit ("ESU") is listed as a threatened species. 64 Fed. Reg. 14,308 (March 24, 1999); 70 Fed. Reg. 37,160 (June 28, 2005). Abundance of this species has declined substantially from

historical levels and many populations are small enough that genetic and demographic risks are high. ER 458. The Elwha River Chinook salmon population is a key population that must be restored for recovery of the species. ER 471; ER 605.

Bull trout throughout the coterminous United States are listed as threatened under ESA. 64 Fed. Reg. 58,910 (Nov. 1, 1999). Bull trout have been documented in all reaches of the Elwha River. ER 611-12.

D. The Elwha River hatchery programs.

The Washington Department of Fish and Wildlife ("WDFW") and the Hatchery Defendants operate hatchery programs in the lower Elwha River. *See* ER 1152-53.

The Hatchery Defendants target annual releases of 175,000 steelhead, 425,000 coho salmon, 1,025,000 chum salmon, and 3,000,000 pink salmon. *See* ER 281. The current steelhead program began in 2005 and uses local Elwha River steelhead. ER 822-25. WDFW's Chinook salmon hatchery program targets annual releases of 2,500,000 sub-yearling fish and 400,000 yearling fish. *See* ER 281.

The Hatchery Defendants operated a non-native steelhead program using a highly-domesticated stock known as "Chambers Creek steelhead" for over three decades. *See* ER 1045-46; ER 1096, 1098-99, 1112; ER 1073, 1076-80. This

stock is considered a risk to the recovery of Puget Sound steelhead. 72 Fed. Reg. at 26,728; *and see* ER 1099, 1112. The Hatchery Defendants entered a stipulated order to avoid a preliminary injunction that prevented the release of Chambers Creek steelhead in 2012, and this stock has not been released into the Elwha River since. *See* ER 967-71; *and* ER 433.

E. The hatchery programs harm wild Elwha River salmonids.

The Elwha River hatchery programs harm wild fish through a variety of mechanisms, including through genetic and ecological interactions.

Salmonids become domesticated in hatchery environments because the artificial conditions imposed differ from those fish encounter in the wild. ER772-73; ER 1061; ER 1099-1108. This causes the fish to become less fit to survive and reproduce in the wild. ER772; ER 1060. These fitness reductions can be quick and substantial. ER 772-74; *and see* ER 1119. Such genetic effects harm wild fish populations when hatchery fish released *en masse* spawn with wild fish and thereby transfer maladapted genes to the wild population. ER 773; ER 1008-1111.

The Elwha River programs harm ESA-listed fish through such genetic interactions. *See* ER 687, 777-85; *and see* ER 515, 589-90. NMFS found that "[t]ake of listed Chinook salmon and steelhead is expected to occur" through genetic interactions. ER 589-90. The "reduction in reproductive success" expected to result from introgression of domesticated genes will likely "have

serious and long-lasting harmful effects" on the productivity of the wild steelhead population. ER 778.

Hatchery fish also harm and kill ESA-listed salmonids through ecological interactions with wild fish. Such interactions include increased competition for resources, including spawning and rearing territory and food, and increased competition for mates. ER 1062-65; ER 702. Hatchery fish can also prey on wild salmonids. ER 1066-70; ER 702. The Elwha River hatchery programs harm and kill protected species through such interactions. ER 687-88, 705-06, 712-13; *and see* ER 541-51, 590-91; *and* ER 616-17.

The Chambers Creek steelhead program continues to harm ESA-listed steelhead. That program likely resulted in genetic introgression of maladapted genes into the wild steelhead population. *See* ER 1420 (the "wild" steelhead are a "mixed" stock with commingled native and non-native parents); *and see* ER 710-11. Such genetic introgression continues to adversely affect the fitness of wild populations for many generations. *See* ER 785; *and see* ER 1111. Additionally, although these fish are not currently released from the hatchery, Chambers Creek steelhead may persist and spawn in the Elwha River for some time. ER 614-15.

These hatchery programs harm the recovery of wild salmonids and may even prevent ever fully realizing the watershed's recovery potential. ER 682-83, 688-89, 707, 713, 777-78, 785. Leading experts have therefore criticized the use of

these massive hatchery programs in a supposed effort to restore wild salmonid populations. ER 679-797. James Lichatowich, the special consultant to the Hatchery Scientific Review Group ("HSRG")[2] for its review of the Elwha River hatchery plans, remarked:

> The evidence has been accumulating and today the weight of that evidence is clear: hatcheries are part of the salmon's problem. The myth that hatcheries are the solution to the problem of the salmon's declining abundance is still strong and it is a formidable impediment to the incorporation of our current scientific understandings of the effects of hatcheries into salmon management and recovery programs. A situation clearly exemplified by the Elwha recovery program.

ER 684.

While NMFS posits that the hatcheries will increase fish abundance 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." ER 559, 565. It is undisputed that restoration of fish populations would occur without the hatcheries. ER 1151; ER 415. The large-scale hatchery programs are an effort to expedite harvests. *See* ER 1049.

[2] "The HSRG is a congressionally chartered independent scientific panel charged with evaluating hatchery programs and their impacts on wild salmonids." ER 681.

F. The NEPA and ESA documents associated with the Elwha River Ecosystem Restoration Project.

There have been several NEPA and ESA documents for the Elwha River Ecosystem Restoration Project. Those documents, with minor exceptions, did not address the hatchery programs.

The National Park Service ("NPS") prepared an EIS in 1995 evaluating whether to remove the dams ("Programmatic EIS"). ER 1374-78. Fish restoration options were not evaluated whatsoever. *See id.*

A second EIS was prepared in 1996 evaluating how to remove the dams ("Implementation EIS"). ER 1319-20. The Implementation EIS indicated that there would be some supplementation with hatchery fish under either alternative as described in the appended Fish Restoration Plan. ER 1323-27. The appended version of the Fish Restoration Plan[3] identified several options for recovering most stocks, including natural re-colonization as the primary strategy for steelhead. ER 1348-63. The plan stated that all fish restoration options would continue to be investigated. ER 1348. Neither the Implementation EIS nor the appended Fish Restoration Plan discussed the adverse effects of hatchery programs or provided an alternatives analysis for fish restoration options. *See* ER 1319-20, 1328-63.

[3] The first version of the Fish Restoration Plan was appended to the 1994 Elwha Report. *See* ER 1416-43.

A supplemental EIS ("Implementation SEIS") was prepared in 2005 to address changes to several mitigation measures. ER 1265-67. It did not evaluate the adverse effects of the hatchery strategy or alternatives thereto. *See* ER 1281-82.

The final Fish Restoration Plan was published in 2008 without any NEPA process, and describes, in detail, the hatchery plans for implementation in conjunction with dam removal—including the stocks to be used and the location, age, and number of fish to be released. *See* ER 1156-1201.

NMFS issued its first BiOp evaluating the effects of dam removal on Chinook salmon in 2006 ("2006 BiOp"). ER 1255. The activities consulted on included dam removal and related actions, including two limited hatchery activities—collection of adult Chinook salmon for broodstock and out-planting of juvenile hatchery fish into the upper watershed. ER 1261. The BiOp did not consult on the lower river hatchery programs. *See id.*

A new BiOp for dam removal was issued on July 2, 2012 ("July 2012 BiOp")—after dam removal and this litigation began—replacing the 2006 BiOp. ER 914-63. The July 2012 BiOp consulted on the same activities as the 2006 BiOp, including the two hatchery-related activities (*i.e.*, collection of adult Chinook salmon for broodstock and outplanting of juvenile fish into the middle and upper watershed). ER 921-22. The BiOp explicitly acknowledged that,

beyond those two limited hatchery activities, the actions consulted on did not include the Elwha River hatcheries. ER 922. The July 2012 BiOp included an ITS for take of Chinook salmon and steelhead for hatchery broodstock. ER 957.

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

The Puget Sound Treaty Tribes and WDFW submitted two RMPs, along with approximately 114 Hatchery and Genetic Management Plans ("HGMPs"), to NMFS in 2004 seeking approval under Limit 6 of the 4(d) Rule for take caused by Puget Sound area hatchery programs, including those in the Elwha River. ER 413-14; ER 1153-54. NMFS announced its intent to prepare an EIS under NEPA evaluating the effects of and alternatives to these 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* ER 414.

In response to this litigation, the Hatchery Defendants and WDFW submitted updated HGMPs to NMFS and requested prompt approval outside of the Puget Sound programmatic EIS. *See* ER 1048; *and see, e.g.*, ER 819. NMFS approved the Elwha River HGMPs under Limit 6 of the 4(d) Rule on December 10, 2012 ("Limit 6 Approval"). ER 260-68.

NMFS issued a BiOp consulting on the effects of its own Limit 6 Approval on December 10, 2012 ("December 2012 BiOp"). ER 404-600. NMFS further issued on that date an EA and FONSI under NEPA determining that there is no

significant environmental impact from its approval of the hatchery programs. ER 269-403.[4]

IV. Procedural History.

When dam removal began in September 2011, the Elwha River hatchery programs had operated for over a decade without the reviews and authorizations required under the ESA.[5] There had been no evaluation of the effects of the hatchery programs or alternatives thereto under NEPA. The Hatchery Defendants were continuing to implement the Chambers Creek steelhead program despite requests from WDFW, NPS, and NMFS for its termination. *See* ER 1071-92. The Conservancy commenced this lawsuit on February 9, 2012, in an effort to bring the programs into compliance with the ESA and NEPA before they cause irreparable injury to wild Elwha River salmonids and their ability to recover.

The Federal Defendants filed a motion arguing, *inter alia*, that the Fish Restoration Plan is not a final agency action and the APA therefore does not provide subject matter jurisdiction for claims alleging a failure to comply with NEPA for the activities described in the plan. *See* ER 59-61. The district court granted that motion. *See id.*

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[4] The Conservancy provided extensive public comments on the draft EA. ER 645-809.

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

The Conservancy filed a motion for a preliminary injunction on November 21, 2012, seeking to prevent or reduce the spring 2013 releases of hatchery steelhead and coho salmon. *See* ER 1458. NMFS' Limit 6 Approval was issued while that motion was pending. The Conservancy withdrew its motion on December 20, 2012, with the stated intent of filing a revised motion addressing NMFS' new approval documents. *See* ER 1460.

The Hatchery Defendants filed a motion that same day arguing that NMFS' approval of the hatchery programs moots the claim against them alleging the programs cause take of ESA-listed. *See* ER 40, 44. The Conservancy then supplemented 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. ER 239-56.

The district court granted the Hatchery Defendants' motion to dismiss on February 12, 2013, finding the Limit 6 Approval rendered moot the ESA section 9 claim. ER 43-45. The district court found that new pre-suit notice is required under the ESA to pursue issues related to the Limit 6 Approval and therefore denied the Conservancy's request for discovery on such matters. ER 45-47.

The Conservancy and Federal Defendants filed cross-motions for summary judgment on liability issues, which were fully briefed on August 27, 2013. *See* ER 213-14; *and* ER 1465. The Conservancy also filed a motion to include within the

administrative record, *inter alia*, agreements under which the Secretary of Interior committed to fund the Hatchery Defendants' programs, which the district court denied. *See* ER 36.

The district court entered its order on the summary judgment motions on March 26, 2014. ER 9-34. The district court struck materials that the Conservancy submitted in support of its ESA citizen suit claim. *See* ER 16-17. The district court rejected arguments that Federal Defendants violated NEPA by not preparing an EIS or a supplemental EIS for their authorization and funding of the Elwha River hatchery programs. ER 19-23. The district court further rejected challenges to the July 2012 BiOp and the claim that DOI violated the ESA by failing to consult for its funding of the hatchery programs. ER 30-32.

The district court found, however, that NMFS violated NEPA by approving the hatchery programs without adequately considering reasonable alternatives—specifically, for failing to meaningfully consider smaller hatchery releases. ER 25-29. The district court voiced concern for the then-imminent 2014 releases, directed the parties to "immediately…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." ER 33. The Hatchery Defendants refused to confer and released all available smolts. *See* ER 70, 73; *and* ER 6-7 (The district court subsequently noted that "[t]he 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's subsequent motion on relief sought partial vacatur of the Limit 6 Approval and the December 2012 BiOp's ITS—requesting the 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. *See* ER 7. The district court found that the NEPA violation "is a serious agency error" that "weighs in favor of vacating the agency's action." ER 6. 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." ER 7.

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, refusing to partially vacate the Limit 6 Approval or ITS. ER 7-8. Judgment was entered on September 4, 2014. ER 1.

The Conservancy filed a motion for an injunction pending appeal with this Court on December 1, 2014, seeking to reduce the steelhead and coho salmon releases. Dkt. 15. The Federal Defendants notified the Court while that motion was pending that NMFS had prepared a supplemental EA in an effort to address the district court's ruling that that NMFS failed to adequately evaluate smaller hatchery programs. Dkt. 20-1.

SUMMARY OF THE ARGUMENT

NMFS' authorization of programs that release over 7.5 million hatchery fish annually into the newly-undammed Elwha River *may* have a significant effect on the environment. NMFS therefore violated NEPA by failing to prepare an EIS. This violation is not excused by "tiering" to prior NEPA documents that do not actually evaluate the effects of the hatchery programs or alternatives thereto.

The district court erred when it vacated NMFS' EA—a document prepared to comply with the procedural requirements of NEPA—and not the underlying agency actions for which NMFS was required to comply with NEPA.

DOI violated NEPA by funding and implementing the Elwha River hatchery programs without preparing an EIS (or even an EA) to evaluate the effects of the programs or alternatives thereto. To the extent the 1996 Implementation EIS constitutes a NEPA analysis of the hatchery programs, DOI violated NEPA by

failing to supplement the EIS to fully evaluate the effects of the hatchery strategy and its alternatives.

DOI violated section 7 of the ESA by funding the Hatchery Defendants' programs without consulting with NMFS on effects to threatened salmonids. This violation is not rendered moot by a *post hoc* consultation that does not even address ongoing harm from the Chambers Creek steelhead program.

The July 2012 BiOp violates the ESA by failing to consult on the effects of the entire action. NMFS consulted on what it deems the beneficial aspects of the hatchery programs but deferred consideration of the harmful effects of the hatcheries to a future consultation.

The district court erred in finding that the claim against the Hatchery Defendants was rendered moot by the mere issuance of the Limit 6 Approval and ITS and that the Conservancy must send a new pre-suit notice letter to address those new agency actions. NMFS' approval provides only limited defenses to an ESA section 9 claim and therefore does not automatically moot the claim. New notice is not required because these agency actions provide only defenses, not new claims, and because new notice is not required to address a defendant's post notice compliance efforts.

STANDARD OF REVIEW

Review of a district court's rulings on cross-motions for summary judgment and motions to dismiss is de novo. *Guatay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011); *Arrington v. Wong*, 237 F.3d 1066, 1069 (9th Cir. 2001). "De novo review of a…judgment concerning a decision of an administrative agency means [the Court] view[s] the case from the same position as the district court." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9th Cir. 1995).

NEPA claims are reviewed under the APA. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011). ESA violations are reviewed under the ESA citizen suit provision or, when that provision is unavailable, under the APA; however, the APA's *standard of review* applies in either instance. *See id.* The APA's *scope of review*—limited to an administrative record—does not apply to ESA citizen suit claims. *Id.* at 497. Jurisdiction for claims challenging a regulated party's compliance with its substantive obligations under the ESA, such as an action agency's duty to consult with NMFS, is provided by the ESA citizen suit provision. *See Bennett v. Spear*, 520 U.S. 154, 172-73 (1997); *and Wash. Toxics Coalition v. Envtl. Prot. Agency*, 413 F.3d 1024, 1029, 1034 (9th Cir. 2005). Jurisdiction for challenges to NMFS' implementation of the ESA—such as its issuance of a BiOp—is generally provided by the APA. *See Bennett*, 520 U.S. at 174-79.

The APA directs courts to set aside agency actions that are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under this standard is narrow and deferential, but also requires a searching and careful inquiry. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1022 (9th Cir. 2007).

Agency action is arbitrary if "the agency relied on factors Congress did not intend…, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence…, or…is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* at 1022-23 (internal citation omitted). Agency action is also arbitrary if there is no rational connection between the facts found and the choice made. *Id.*

A district court's orders on remedies and on whether to admit extra-record evidence are reviewed for an abuse of discretion. *Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, 537 F.3d 1006, 1015 (9th Cir. 2008); *Lands Council v. Forester of Region One of the U.S. Forest Serv.*, 395 F.3d 1019, 1030 n.11 (9th Cir. 2004). "[A] district court abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous findings of fact, or when [the Court is] left with a definite and firm conviction that the district court committed a clear error of judgment." *United States v. Ressam*, 679 F.3d 1069, 1086 (9th Cir. 2012) (quotations omitted).

ARGUMENT

I. NMFS Violated NEPA by Approving the Hatchery Programs without Preparing an EIS.

NMFS authorized under the ESA the release of over 7.5 million hatchery fish each year into a pristine newly-opened watershed. *See* ER 281. These hatchery programs threatened to undermine efforts to fully restore wild salmonid populations to the Elwha River. An EIS is requirements because NMFS' decision, at a minimum, *may* significantly affect the environment. This NEPA violation is not absolved by prior NEPA documents that do not acknowledge adverse effects from hatchery programs or evaluate alternative restoration strategies.

A. An EIS is required where there may be significant effects.

An EIS is required if substantial questions are raised as to whether a proposed action *may* have a significant effect on the environment. *E.g.*, *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864-865 (9th Cir. 2005). "This is a low standard." *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

"Significantly" is defined to require consideration of the "context" and the "intensity" of effects from a proposed project. 40 C.F.R. § 1508.27. The context of the action includes "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). There are ten non-exclusive factors to be considered in evaluating

the "intensity" of effects. *Id*. § 1508.27(b). The potential presence of even one intensity factor may require the preparation of an EIS. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1220 (9th Cir. 2008). Both beneficial and adverse impacts must be considered and a significant impact may exist where the agency believes that, on balance, the effect 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).

"If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons"' explaining why there will not be significant environmental impacts. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). The Court defers to such a decision only when it is "fully informed and well considered." *Id.* at 1211.

B. NMFS' approval significantly affects the environment.

1. The context of NMFS' approval is extraordinary.

The location, multitude of affected interests, and broad temporal and spatial impacts magnify the significance of NMFS' action. Restoration of the Elwha River is unparalleled in the world. *See, e.g.*, ER 1298; ER 415-16, 494, 575. There is immense scientific, cultural, and recreational interest in restoration of the river's historic salmon runs, as well as immense taxpayer investment. *See* ER 1298. The watershed is one of the largest and mostly intact in the conterminous

United States. ER 489; ER 1160, 1222; ER 1296. The basin and nearshore waters provide habitat for numerous species of concern. ER 309, 312, 322. Recovery of the Elwha River Chinook salmon and steelhead populations is essential to recovery of the ESA-listed species to which they belong. ER 309, 312. There is also international interest in the project, as most of the watershed is within an International Biosphere Reserve and a World Heritage Site. *See* ER 1372. The intensity factors must be considered in light of this context. *See* 40 C.F.R. § 1508.27.

2. NMFS' approval will have significant effects on unique characteristics of the geographic area.

The intensity analysis requires a consideration of effects to "[u]nique characteristics of the geographic area such as proximity to…park lands, … or ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). NMFS' approval will have a significant effect on such areas that requires an EIS.

The Elwha River basin is located largely in the Olympic National Park and Olympic Wilderness Area. ER 613; *and see* ER 1146; *and* ER 1296; *and* ER 489. The park is an International Biosphere Reserve and a World Heritage Site. *See* ER 1372. The areas of the watershed above the dam sites are "pristine habitats because they have not been altered by anthropogenic activities *and have no ongoing hatchery supplementation activities*." ER 1160 (emphasis added).

The hatchery programs are *designed* to produce large numbers of returning adult hatchery fish that will pass (or be transported) above the dam sites to spawn in these protected pristine environments. *See, e.g.*, ER 603, 607; *and* ER 436-37. The actions therefore destroy one of the most significant unique attributes of the upper Elwha River—the absence of hatchery fish. There are healthy populations of wild resident rainbow trout in the upper watershed that produce steelhead capable of recolonizing the river. *See* ER 772; *and* ER 476. Hatchery steelhead will now have access to these rainbow trout populations, with unknown harmful genetic consequences. *See* ER 777. The loss of one of the most significant characteristics of these unique geographic areas—the absence of hatchery fish—is a significant effect requiring an EIS. *See Ocean Advocates*, 402 F.3d at 865; *and see also Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 978-79 (D. Haw. 2008).

NMFS concluded that no significant impacts will result because the actions themselves do not occur within unique geographic areas. ER 398. This is inaccurate, as the plans include physically transporting hatchery fish above the dam sites within the unique geographic areas discussed above. *See* ER 821; *and* ER 848; ER 621. Further, the programs are designed to generate hatchery fish spawning in the upper basin.

3. The actions may establish a precedent.

The intensity factors require consideration of the "degree to which the action may establish a precedent for future actions with significant effects." 40 C.F.R. § 1508.27(b)(6). Consideration of this factor dictates preparation of an EIS.

Removal of the dams on the Elwha Rivers is unprecedented. *E.g.*, ER 415; ER 1298. "There is no template available for a similarly scaled dam removal project…" ER 494. NMFS' approval of large scale hatchery programs to flood the newly-opened river with hatchery fish therefore has the potential to establish a precedent for future dam removal projects.

Furthermore, NMFS is currently reviewing over 100 HGMPs for Puget Sound hatcheries—including those for the Elwha River—for approval under the ESA 4(d) Rule. ER 413-14. The Elwha River programs were the first of these HGMPs NMFS approved. *See* ER 414. This action therefore required an EIS because it may establish a precedent for NMFS' approval of the other HGMPs that NMFS has already determined have cumulatively significant effects that require evaluation in an EIS. *See* 69 Fed. Reg. 26,364; *and see* 76 Fed. Reg. 45,515; *and see Anderson*, 371 F.3d at 493.

NMFS discounted the precedential nature of its decision in stating that it has approved two other hatchery programs through similar ESA and NEPA processes.

ER 400.[6] That conclusory statement ignores the context of the Elwha River, the dam removal project, and the 100 Puget Sound HGMPs currently awaiting approval.

4. The effects of the action are uncertain.

The extent to which the effects of an action are highly uncertain or involve unique or unknown risks must be considered in determining whether to prepare an EIS. 40 C.F.R. § 1508.27(5). An EIS was required because the harm posed and the supposed benefits supplied by the hatcheries are uncertain. *See Cal. State Grange v. Nat'l Marine Fisheries Serv.*, 620 F. Supp. 2d 1111, 1157-58 (E.D. Cal. 2008) (discussing science surrounding hatchery programs).

The hatchery programs will harm wild salmonids by reducing the productivity of the wild populations, but there are uncertainties regarding these effects. ER 515, 520, 589; ER 777-85. For example, NMFS cannot predict the *magnitude or duration* of such fitness loss and it considers the collection and analysis of fitness data for some programs a high priority. ER 307; ER 534. Additionally, the HSRG found that pro-longed hatchery influence could reduce or delay restoration. ER 539. Yet, the duration of the approved plans is dependent

[6] There is nothing in the record demonstrating that these programs underwent "similar" processes. One of the programs was apparently approved over ten years ago and, unlike here, there is no indication that a NEPA process occurred. *See* 66 Fed. Reg. 17,684 (April 3, 2001).

upon achievement of abundance and productivity thresholds and is "highly uncertain." *See* ER 494. There are significant uncertainties regarding the effects the hatchery programs will have on the Elwha River Restoration Project's objective of self-sustaining natural populations. *See, e.g.*, ER 559 ("…the track record of supportive breeding in producing natural-origin adult fish returns is unproven"); ER 307 (genetic harm *may* be outweighed by benefits).

NMFS relied on monitoring and adaptive management to mitigate against uncertainties concerning the extent of harm caused by the hatcheries. ER 398. Such reliance is not supported by the record as those measures are themselves uncertain. Indeed, the HSRG identified deficiencies in monitoring and adaptive management for these programs as a key concern—deficiencies which persist. ER 1036, 1039, 1042; *and see* ER 685-86. For example, the HGMPs rely on an incomplete monitoring and adaptive management plan ("MAMP"). *E.g.*, ER 826-27; *and ee, e.g.*, ER 635-44.

Further, "no long-term funding is established for these…[monitoring and evaluation] needs." ER 628; *and see, e.g.*, ER 827. A total of $16.8 million is needed to fully implement the MAMP over ten years; the "most basic monitoring and adaptive management activities would cost $725,000 to $1 million per year." ER 643-44. The *total* funding available for these essential activities is $650,000.

ER 643. NMFS thus admits that many actions described in the MAMP "are not reasonably certain to occur." ER 287.[7]

5. The effects of the actions are controversial.

An EIS is required if the effects are controversial—*i.e.*, if there is "a substantial dispute [about] the size, nature, or effect" of the action. *See Blue Mountains*, 161 F.3d at 1212 (quotations omitted); *and* 40 C.F.R. § 1508.27(b)(4). Where "conservationists, biologists, and other experts" are "highly critical of the EAs" and dispute the agency's conclusions regarding effects, an EIS must follow. *See Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193-94 (9th Cir.1988). The effects are controversial.

NMFS received technical comments and declarations from leading salmonid and genetic scientists—including one by the special consultant to the congressionally-chartered HSRG for its review of these hatchery programs—that were highly critical of the approved programs and raised numerous disputes over the size of the programs, the extent of harm they will cause, the benefits they supposedly provide, and the effectiveness of monitoring and adaptive management.

[7] The EA states that the MAMP is not "self-implementing," but that portions of the MAMP that have been incorporated into the HGMPs are reasonably certain to occur. ER 287. The HGMPs, on the other hand, incorporate and rely on the MAMP, indicating that the MAMP "creates and implements monitoring and management strategies" to minimize risks to salmonids. *E.g.*, ER 827. These circular and contradictory statements make it entirely unclear what portions of the MAMP will actually be implemented.

See, e.g., ER 685-89, 705-09, 712-14, 777-86. These scientists refute NMFS' determination that the programs will not have a significant impact, raising a substantial dispute warranting an EIS. *See Sierra Club v. U.S. Forest Serv.*, 843 F.2d at 1193.

NMFS acknowledges controversies surrounding hatcheries but inappropriately dismisses it as an issue raised by only one comment letter. ER 398; *see Sierra Club v. U.S. Forest Serv.*, 843 F.2d at 1193 (relevant inquiry is not the extent of opposition); *and see* ER 1058 (NMFS' Regional Administrator acknowledging *broad* attention to the hatchery issues).

6. <u>There are significant adverse impacts on protected species</u>.

Agencies must consider the degree to which the action *may* adversely affect ESA-listed species or their critical habitat when determining whether an EIS is required. 40 C.F.R. § 1508.27(b)(9). NMFS' approval has significant adverse effects on threatened salmonids.

NMFS determined that the hatchery programs are "likely to adversely affect" and cause take of ESA-listed Chinook salmon and steelhead. ER 404, 588-92. "Standing alone, this suggests the need for an EIS." *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1080 (E.D. Cal. 2004). Further, the programs threatened to delay, and even prevent, full recovery of Elwha River salmonid populations. ER 688-89, 707, 713, 785; *and see* ER 1036.

Recovery of these populations is critical to the recovery of the Puget Sound Chinook salmon ESU and the Puget Sound steelhead DPS to which they belong. ER 309, 312; ER 471, 482.

NMFS relies on the conclusion in its December 2012 BiOp that the actions are not likely to jeopardize the continued existence of threatened species. ER 396. An action need not jeopardize an entire species to rise to the level of "significant." *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 692 (9th Cir. 2008), *rev'd on other grounds*, 555 U.S. 7 (2008); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d at 1080.

NMFS incorrectly states that there are "no expected impacts on critical habitat." *See* ER 397. The Elwha River watershed and adjacent marine waters are critical habitat for Puget Sound Chinook salmon and elements essential for such habitat include rearing sites free from excessive predation. *See* ER 451, 484; ER 308. The actions will reduce space for rearing and cause predation of wild salmonids. *See* ER 590; ER 705-06, 712-13.

An EIS is required because, *at a minimum*, there are substantial questions regarding whether there will be a significant impact given the known adverse effects to threatened salmonids, uncertainties regarding the magnitude and duration of those effects, and uncertainties regarding adaptive management necessary to

mitigate such effects. *See Cascadia Wildlands v. U.S. Forest Serv.*, 937 F. Supp. 2d 1271, 1282-83 (D. Or. 2013).

7. There are cumulatively significant impacts.

Agencies must consider "[w]hether the action is related to other actions with…cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). "Significance exists [requiring an EIS] if it is reasonable to anticipate a cumulatively significant impact on the environment" and an EIS cannot be avoided by "breaking it down into small component parts." *Id.* An EIS was required because NMFS' pending review and approval of approximately 114 hatchery programs that release tens of millions of hatchery fish into Puget Sound each year has cumulatively significant effects. *See* ER 414; *and* ER 1302. NMFS violated NEPA by breaking the Elwha River hatchery programs out of that process.

a. A single NEPA document was required for NMFS' action on Puget Sound hatcheries under the 4(d) Rule.

The cumulative effects of actions must be considered in a single NEPA document "when there is a single proposal governing the projects or when the projects are…cumulative." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1304 (9th Cir. 2003) (citation omitted).

NMFS received a request in 2004 to approve two RMPs and appended HGMPs for approximately 114 hatchery programs in Puget Sound, including those on the Elwha River, under the ESA 4(d) Rule. *See* ER 1153-54; ER 413-14.

Because there is a single proposal governing the projects, a single NEPA document is required. *See Earth Island Inst.*, 351 F.3d at 1304.

A single NEPA document is also required for NMFS' approvals of the Puget Sound programs because they are cumulative actions—"they formed part of a single… project, were announced simultaneously, were reasonably forseeable, and were located in the same watershed." *See id.* at 1305. NMFS has twice announced its intent to simultaneously act on this submission through preparation of an EIS and its action is therefore reasonably foreseeable. 69 Fed. Reg. 26,364; 76 Fed. Reg. 45,515; *and see* ER 414. These hatchery programs operate in the same watershed, flooding Puget Sound tributaries with millions of hatchery fish every year. *See* ER 1302; *and* ER 1038.

This is precisely the type of action that requires a single NEPA evaluation:

> when several proposals…that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. **Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.**

Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976) (emphasis added). A comprehensive analysis is required because, while any single hatchery program may not jeopardize Puget Sound salmonids, the cumulative effects of all hatchery releases into this watershed may. *See Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 893 (9th Cir. 2007).

b. An EIS is required because the Puget Sound hatchery programs have cumulatively significant effects.

A cumulative impact "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . ." 40 C.F.R. § 1508.7. NMFS' approval of the Elwha River programs and its pending review of the other Puget Sound hatchery programs constitute past, present, and reasonably foreseeable actions with cumulatively significant impacts. *See* ER 414; *and see* ER 399; *and see* ER 1153-54. Accordingly, an EIS was required. 40 C.F.R. § 1508.27(b)(7).

There are approximately 114 hatchery programs releasing tens of millions of hatchery fish into Puget Sound each year—a geographic area that is coextensive with the range of the ESA-listed Puget Sound Chinook salmon ESU and the Puget Sound steelhead DPS. *See* ER 414; *and* ER 1302. Recognizing the cumulatively significant impacts on these species, the HSRG noted:

> Hatchery fish released in each subbasin will interact with wild and hatchery fish from other subbasins as they migrate through the downstream corridor, estuary and ocean. The effects of these interactions are heightened as the cumulative number of hatchery fish released into the Puget Sound for harvest increases. Therefore….the cumulative natural and hatchery production should take into account the carrying capacity of the migratory corridor, estuary and ocean.

ER 1038.

NMFS admits that the Elwha River hatcheries are "related to other hatchery…programs," but then summarily states that "[a]ny cumulative impacts

are not expected to rise to the level of significance." ER 399. These "generalized conclusory assertions...[without] the underlying data supporting the assertion" about the effects of Puget Sound hatcheries are insufficient. *See Or. Natural Res. Council Fund*, 505 F.3d at 893. Rather, an EIS is required because, at a minimum, there are "substantial questions" as to whether NMFS' pending approval of Puget Sound programs will have significant cumulative effects. *See Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985). NMFS violated NEPA by breaking the Elwha River programs out of that process to support a cursory FONSI designed to supply a defense in this lawsuit. *See* 40 C.F.R. § 1508.27(b)(7).

8. The action causes a significant loss of scientific resources.

Agencies must consider the extent to which a project may cause the loss of significant scientific resources. 40 C.F.R. § 1508.27(b)(8). An EIS is warranted because NMFS' approval of the hatchery programs will cause the loss of the first opportunity to further scientific understanding of how salmonids naturally recolonize a watershed in response to large scale dam removal. *See* ER 1037 (HSRG noted the "unique opportunity to learn about watershed restoration processes" and the possibility of rapid spontaneous colonization); *and see* ER 1298; *cf. Puerto Rico Conservation Found. v. Larson*, 797 F. Supp. 1066, 1071 (D.P.R. 1992) (project that could taint rainforest research likely significant).

C. NMFS' tiering does not justify its failure to prepare an EIS.

NMFS' failure to prepare an EIS is not excused by "tiering" to older NEPA documents as the district court found. *See* ER 20-21. "Tiering" merely 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. It does not allow NMFS to avoid preparing an EIS for its approval of the hatchery programs where the older EIS does not actually evaluate the effects of those programs and alternatives thereto. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 781-84 (9th Cir. 2006) (EIS required for new agency action where prior NEPA documents did not adequately consider impacts of the project); *see also S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) ("previous document must actually discuss the impacts").

The Implementation EIS does not include *any* discussion of the adverse effects of hatchery programs, the significance of approving massive hatchery programs in conjunction with dam removal, or alternatives to the hatchery strategy. *See* ER 1303-63. Instead, the appended 1996 Fish Restoration Plan merely identified options for fish restoration and stated that all would continue to be investigated. ER 1338. The actual hatchery plans now being implemented were developed in the following decade and published in the final 2008 Fish Restoration

Plan without any NEPA process. The ***only*** NEPA document that that even acknowledges the adverse effects of the hatchery programs is the EA prepared in the middle of this litigation. The mere fact that the 1996 Implementation EIS contemplated some use of hatcheries does not relieve NMFS of its NEPA obligation to prepare an EIS. *See Blue Mountains*, 161 F. 3d at 1214.

D. Conclusion on NMFS' Failure to Prepare an EIS.

Given the context and intensity of its action, NMFS violated NEPA by approving the Elwha River hatchery plans without preparing an EIS. *See Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, No. 3:12-CV-00431-HA, 2013 U.S. Dist. LEXIS 111505, at *52 (D. Or. May 16, 2013) (failure to prepare an EIS for Sandy River hatchery in Oregon was "somewhat baffling"). While NMFS contends that the risks of the hatchery programs are outweighed by their benefits, such balancing cannot be done in an EA, but rather requires an EIS. *See Anderson*, 371 F.3d at 494. NMFS' failure to prepare an EIS is not cured by its lengthy[8] EA:

> 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.

[8] An EA should typically not be more than 10 to 15 pages—"[i]n most cases…, a lengthy EA indicates that an EIS is needed." 46 Fed. Reg. 18,026 (March 23, 1981). NMFS' EA is 124 pages. ER 269-403.

Id. (internal citations omitted).

II. The District Court Erred in Not Vacating NMFS' Agency Actions.

The district court found that NMFS' failure to meaningfully consider smaller hatchery programs in violation of NEPA warranted vacatur under APA standards. ER 4-7. However, the district court erred in vacating the EA and not the Limit 6 Approval and December 2012 BiOp's ITS. *See* ER 7-8.

"NEPA is primarily a procedural statute…, [t]herefore, agency action taken without observance of the procedure required by law will be set aside." *See Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). An EA is a document prepared to fulfill such procedural requirements and does not have any other legal significance. The remedy for a NEPA violation is vacatur of the agency action for which compliance with NEPA was required. *See, e.g., Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1106-07 (9th Cir. 2011); *Anderson*, 371 F.3d at 494. NMFS' ESA authorizations—the Limit 6 Approval and December 2012 BiOp's ITS—are the agency actions subject to NEPA. *See* 76 Fed. Reg. 45,515 ("NMFS's action of evaluating…[hatchery] Plans for ESA compliance is…subject to…review under NEPA."); *and see Ramsey v. Kantor*, 96 F.3d 434, 442-44 (9th Cir. 1996). The district court committed an error of law in refusing to vacate these actions.

III. DOI Violated NEPA in Funding and Implementing the Hatcheries.

DOI violated NEPA by funding and implementing the hatchery programs without undertaking any NEPA process. To the extent that the Implementation EIS constituted a NEPA document for DOI's involvement in those programs, DOI violated NEPA by failing to supplement that document to address the hatcheries.

A. DOI's funding agreements should be included in the record.

The district court improperly refused to include in the administrative record contracts under which DOI committed to fund the hatchery. *See* ER 36; *and see* ER 81-93.

The record for review of APA claims is not necessarily those documents the agency submits as "the" record. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The "whole" record consists of all materials directly or indirectly considered by the decision-makers. *Id.* at 555-56; *Portland Audubon Soc'y v. The Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) ("everything that was before the agency pertaining to the merits of its decision").

NMFS' decisions at issue state that the actions analyzed include the Bureau of Indian Affair's ("BIA") funding of hatchery operations. ER 418; ER 602. The documents explain that "NMFS finds that the…effects of Federal funding are coextensive with the proposed HGMPs." ER 418; *and see* ER 602. The

agreements are part of the "whole" record because, not only did NMFS considered funding under them, but such funding is actually part of the "actions" analyzed.

B. DOI was required to comply with NEPA for the hatcheries.

DOI—including NPS and FWS[9]—have been substantially involved in the development, funding, and implementation of the Elwha River hatchery plans. DOI was required to comply with NEPA for these efforts.

NEPA applies to "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a). Significant federal funding of an otherwise non-federal project can trigger NEPA requirements. *See Ka Makani 'O Kohala Ohana, Inc. v. Dept. of Water Supply*, 295 F.3d 955, 960 (9th Cir. 2002).

The Hatchery Defendants' operations budget is provided by DOI under agreements with its Secretary that cover programs for which funds "flow through" BIA."[10] *See* ER 81, 89; ER 820, 831, 838, 846; *see also* ER 902, ¶ 103 (admitting ER 993-94, ¶ 103, sixth sentence). The current contract, signed in 2010, funds operations through 2015. ER 81. WDFW's Chinook salmon program is funded by the National Park Foundation, which administers gifts for NPS. ER 620; National Park Foundation Act, Pub. L. No. 90-209, 81 Stat. 656 (1967). DOI is required to

[9] NPS and FWS are services within DOI. *See* 16 U.S.C. §§ 1, 742b(b).

[10] The BIA is a bureau within DOI. *See* 25 U.S.C. § 2a.

comply with NEPA for its funding of the hatcheries. *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 235 F. Supp. 2d 1109, 1120-22 (D. Or. 2002).[11]

DOI is also required to comply with NEPA because it included the hatchery programs as part of its Elwha River Ecosystem Restoration Project that it is legally obligated to implement. The Elwha Act directed the Secretary of Interior to submit a report to Congress detailing plans for "the full restoration of the Elwha River ecosystem and the native anadromous fisheries" and mandated that the Secretary implement the plan. Pub. L. No. 102-495, §§ 3(c), 4(a)(1), 106 Stat. 3173, 3174-76. The Elwha Report was submitted to Congress in 1994 and included an early version of the Fish Restoration Plan. ER 1416-43. The final Fish Restoration Plan issued under the Elwha Act in 2008 describes the hatchery plans that will be implemented as part of the dam removal project. *See* ER 1130-31, 1142-45. DOI is required to comply with NEPA for the hatchery programs because it has incorporated them into a federal project that it must implement.

C. DOI failed to complete NEPA procedures on the hatcheries.

DOI violated NEPA by developing and entering into contracts to fund and implement the Elwha River hatchery strategy without undertaking any NEPA processes. *See Metcalf v. Daley*, 214 F.3d 1135, 1143-45 (9th Cir. 2000) (entering

[11] NPS and FWS also assist in program planning, guidance, and implementation. *See* ER 820, 831, 837-38.

into contracts to support whaling proposal *before* analyzing environmental consequences violated NEPA). The final 2008 Fish Restoration Plan explains that "[s]ince 1995 the DOI has worked to identify the…strategies for fisheries restoration" and that "developing the preferred role of hatcheries…occurred following extensive consultation with…scientists and political leaders." ER 1131, 1151. Those decisions, along with DOI's decision to fund the hatchery programs, occurred without processes mandated by NEPA. *See Pit River Tribe*, 469 F.3d at 781-87 (EIS required for new agency action where effects not analyzed in project's prior NEPA documents).[12]

The First and Third Claims alleged that DOI violated NEPA by, *inter alia*, authorizing, funding, and implementing the hatchery programs described in the Fish Restoration Plan without preparing an EIS (or an EA) and without completing an alternatives analysis. ER 1001-03. The district court improperly dismissed these claims under Rule 12(b)(1) based upon a finding that the Fish Restoration Plan is not a final agency action subject to APA review. ER 59-61.

1. "Final agency action" under the APA.

The APA provides for judicial review of a "final agency action." 5 U.S.C. § 704. This requires satisfaction of two conditions:

[12] As discussed, the NEPA documents prepared before this litigation did not discuss the impacts of the hatchery programs. *See supra*, pp. 40-41.

> First, the action must mark the consummation of the agency's decisionmaking process…it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Bennett, 520 U.S. at 177-78 (internal citations omitted).

"[T]he finality element must be interpreted in a pragmatic and flexible manner." *Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1503 (9th Cir.1995) (internal quotation omitted). The label an agency gives to an action and whether the agency followed conventional procedures are irrelevant. *Abramowitz v. U. S. Envtl. Prot. Agency*, 832 F.2d 1071, 1075 (9th Cir. 1987); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478-79 (2001).

When assessing the second element, courts look to "whether the action amounts to a definitive statement of the agency's position or has a direct and immediate effect on the day-to-day operations of the subject party, or if immediate compliance [with the terms] is expected." *Or. Natural Desert Ass'n v. U. S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (internal quotations omitted, alteration in the original). Overall, "[t]he core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

2. The Conservancy's uncontroverted allegations establish jurisdiction.

In reviewing the Rule 12(b)(1) motion, the district court was to "accept all uncontroverted factual assertions regarding jurisdiction as true." *McGraw v. United States*, 281 F.3d 997 (9th Cir. 2002), *as amended at*, No. 00-35514, 2002 U.S. App. LEXIS 15774, at *6 (9th Cir. 2002).[13] DOI did not refute the Complaint's allegations that the agency had authorized, funded, and implemented the activities described in the Fish Restoration Plan and was continuing to do so. *See* ER 993-94, 1001-03.

Those allegations establish that there was a final agency decision over which the district court had jurisdiction. Allegations that DOI has authorized and is funding and implementing the hatchery activities reflects a consummation of the decision-making process that determined the course of action. *See* ER 993-94; *and see Rattlesnake Coal. v. U.S. Envtl. Prot. Agency*, 509 F.3d 1095, 1103-04 (9th Cir. 2007) (decision to disperse appropriated funds is a final agency action). DOI's *decision* to authorize, fund, and implement the Fish Restoration Plan is a final agency action regardless of whether that plan is itself a final agency action. *See Her Majesty the Queen v. U.S. Envtl. Prot. Agency*, 912 F.2d 1525, 1531 (D.C. Cir.

[13] *See also Cedars-Sinai Medical Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (even with Rule 12(b)(1) factual attack on jurisdiction, "uncontroverted factual allegations are accepted as true").

1990) ("the absence of a formal statement of the agency's position…is not dispositive").

Moreover, the Fish Restoration Plan is a final agency action. The plan is not tentative; rather, it constitutes a finite and certain plan that will be implemented. *See, e.g.*, ER 1131, 1142, 1153; *and see Cent. Delta Water Agency v. U. S. Fish & Wildlife Serv*, 653 F. Supp. 2d 1066, 1092 (E.D. Cal. 2009); *and see Natural Res. Def. Council, Inc. v. Thomas*, 845 F.2d 1088, 1094 (D.C. Cir. 1988). The Fish Restoration Plan has legal consequences because it was issued under the Elwha Act as part of the "definite plan" that DOI is legally required to implement. *See* Pub. L. No. 102-495, § 4(a)(1), 106 Stat. 3173, 3176; *and see* ER 1130, 1142. The plan is a final agency action because it replaced previous versions attached to the Elwha Report and the 1996 Implementation EIS. *See* ER 1142; *and see Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1110 (D. Ariz. 2009) (plan that supersedes previous final agency action can be nothing less than its predecessor).

Finally, to the extent DOI refuted allegations demonstrating it undertook final agency action, the district court should have granted the Conservancy's request for discovery on this jurisdictional issue. *See Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003); *and* ER 965-66. Such discovery would have revealed DOI's contract that funds the hatchery through 2015, which provides jurisdiction and required NEPA compliance. *See Pit River Tribe*, 469

F.3d at 781-84. The district court erred in rejecting that request and dismissing claims alleging that DOI violated NEPA in funding and implementing the hatchery activities without first preparing an EIS (or even an EA) and without undertaking an alternatives analysis. *See* ER 61, 63-64.

D. Alternatively, DOI failed to timely supplement its NEPA efforts.

To the extent that the 1996 Implementation EIS constituted a NEPA document on DOI's decision to fund and implement the hatchery programs, DOI nonetheless violated NEPA by failing to prepare a supplemental EIS.

"NEPA…require[s] that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989). A supplemental EIS is required if "[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 Klamath Siskiyou Wildlands Ctr.*, 468 F.3d at 560-62. Supplementation is required where new information indicates that the remaining action will affect the environment in a significant manner or to a significant extent not already considered. *Marsh*, 490 U.S. at 374. "[I]f the proposal has not yet been implemented, or if the EIS concerns an ongoing problem, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in [40

C.F.R. § 1502.9] compel preparation of an EIS supplement." 46 Fed. Reg. at 18036.

Significant changes to the fish restoration strategy since the Implementation EIS warrant a supplemental EIS. Notably, the 1996 Fish Restoration Plan stated that all options for fish restoration would continue to be investigated, while the final 2008 plan describes in detail the actual strategies to be implemented. *See* ER 1348; *and* ER 1156-1201. The older plan identified natural recolonization as the primary strategy for steelhead, while the current plan abandoned that option in favor of hatchery supplementation. ER 1351; ER 1179; ER 821. Moreover, the current steelhead program was developed beginning in 2005 through a "captive brood" program. *See* ER 823-25. This "captive rearing of juveniles to adulthood and the subsequent rearing of their offspring… poses significant risks of domestication" that was not contemplated in the 1996 documents. *See* ER 777. Supplementation was required, especially given that steelhead became a threatened species in 2007.

Supplementation was further required because there have been significant developments in fisheries science since the 1996 Implementation EIS that indicate that the hatchery programs *may* have significant effects not previously considered. *See Klamath Siskiyou Wildlands Ctr.*, 468 F.3d at 561-62. Numerous studies have greatly advanced scientific understandings regarding the extent of adverse fitness

effects that result from genetic introgression of genes from hatchery fish into wild populations. *See* ER 773-74; *and* ER 532-33. Given that the 1996 Implementation EIS did not even acknowledge these effects, a supplemental EIS was required.

IV. DOI Violated the ESA by Failing to Consult.

DOI violated section 7 of the ESA by funding the hatchery programs without consulting with NMFS on the effects of the programs.

A. The district court improperly struck material submitted in support of the ESA citizen suit claim.

The district court improperly applied the APA's record review limitation to strike materials submitted in support of an ESA citizen suit claim. *See* ER 16-17. This Court has rejected such an application—extra record evidence may be considered in reviewing the claim alleging a failure to consult under section 7 of the ESA. *See Kraayenbrink*, 632 F.3d at 476-77, 497; *Wash. Toxics Coalition*, 413 F.3d at 1030, 1034.

B. DOI failed to consult under section 7 of the ESA.

The consultation requirements of section 7 of the ESA apply to any action "authorized, funded, or carried out" by a federal agency that "may affect" ESA-listed species. *See* 16 U.S.C. § 1536(a)(2); *and* 50 C.F.R. § 402.14(a)-(b). This is a low threshold. *Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (*en banc*). Consultation is to occur *before* the agency engages in activities that may affect protected-species. *Id.* at 1020. Once consultation has

been initiated, section 7(d) of the ESA prohibits the commitment of irreversible or irretrievable resources until consultation is completed. 16 U.S.C. § 1536(d).

DOI has funded operations of the hatchery for many years under a series of contracts, including one signed in 2010 that provides funding through 2015. *See* ER 81-93. The hatchery programs plainly "may affect" protected species. *See* ER 139-40, 145-56; *and* ER 175-77, 181-84; *and* ER 588-90; *and* ER 687-88, 705-06, 712-13, 777-85. Consultation was therefore required.

DOI did not even initiate consultation on its funding of the hatchery until 2012. ER 117. DOI thus violated the ESA by funding these programs for years without consulting and by making irreversible contractual commitments of resources before consultation was completed. *See* 16 U.S.C. § 1536(d); *and Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1126-28 (9th Cir. 1998).

The belated consultation that culminated in the December 2012 BiOp does not render these violations moot—"[t]he failure to respect the process mandated by law cannot be corrected with post-hoc assessments of a done deal." *See Houston*, 146 F.3d at 1129 (rescinding contracts entered before consultation); *and see Forest Guardians v. Johanns*, 450 F.3d 455, 461-63 (9th Cir. 2006) (relief may be entered to prevent future violations).

Relief is necessary to counteract the ongoing harmful effects of the Chambers Creek steelhead program that DOI funded for many years and which

was not addressed in the December 2012 BiOp. *See Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988); *and see* ER 115-17. This program likely resulted in genetic introgression into wild steelhead that will continue to harm the population for many years. ER 156; 162; ER 181-82. Further, Chambers Creek steelhead may persist in the wild for some time. ER 614-15; ER 154; ER 182.

V. The July 2012 BiOp is Not in Accordance with Law.

NMFS' July 2012 BiOp is arbitrary because it fails to consult on the effects of the entire agency action.

A BiOp must evaluate "how the agency action affects the species" using the "best scientific and commercial data available." 16 U.S.C. §§ 1536(a)(2), (b)(3)(A). The "effects of the action" include the effects of actions that are interrelated to and/or interdependent with the agency action under review. 50 C.F.R. § 402.02. "Thus, the scope of the agency action is crucial because the ESA requires the biological opinion to analyze the effect of the *entire* agency action." *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988) (emphasis in original). The term "agency action" is interpreted broadly. *Id.*

Courts ultimately decide the meaning of "agency action" as a matter of statutory interpretation. *See Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053-54 (9th Cir. 1994). "[A]n agency may not unilaterally relieve itself of its full legal

obligations…by narrowly describing the agency action at issue in a biological opinion." *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1146 (W.D. Wash. 2000).

The July 2012 BiOp is unlawful because it consults on and authorizes hatchery broodstock collection activities that NMFS deems beneficial in protecting fish stocks from the effects of dam removal but defers consideration of the harmful effects of releasing those same fish to a future consultation. *See* ER 921-22, 955, 957 ("beyond the [limited] measures above, the proposed action does not include ongoing salmon and steelhead programs" in the Elwha River). This segmented consultation violates the requirement for a "comprehensive" BiOp that evaluates the effects of the entire action. *See Conner*, 848 F.2d at 1452-54 ("incremental-step consultation" that considered lease sale but not post leasing activities was "not in accordance with the law"). The hatchery releases are, at a minimum, interrelated actions that must be evaluated in the consultation because, "but for" the collection of broodstock authorized by the July 2012 BiOp, the subsequent releases of those hatchery fish would not occur.[14] *See* ER 131-32; *and Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987).

[14] The district court concluded that the actions were not interrelated because the "releases have been on hold." ER 30. This is entirely inaccurate, as releases have occurred each and every spring.

To the extent NMFS argues that the July 2012 BiOp did consult on the effects of releasing hatchery fish, the BiOp is unlawful because that analysis was plainly insufficient. The BiOp does not actually analyze the effects to ESA-listed species from releasing hatchery fish; it merely provides a list of the categories of harm associated with hatcheries in general. *See* ER 943-44, 947. This is not the "detailed discussion of the effects of the action on listed species" required by the ESA. *See* 50 C.F.R. § 402.14(h)(2); *and Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, 855 F. Supp. 2d 1199, 1226 (D. Or. 2012) (merely identifying impacts was arbitrary). Further, the ITS does not describe the extent of take expected to result from hatchery releases as required. *See* ER 134; *and* ER 956-57.

VI. The Claim Against the Hatchery Defendants is not Moot.

The district court erred in finding that the claim against the Hatchery Defendants was mooted by the Limit 6 Approval and that new pre-suit notice under the ESA is necessary to pursue arguments related to that document. *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 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. ER 1010. The Hatchery Defendants have a "heavy burden" in

asserting that their post-Complaint efforts rendered this claim moot, met 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 meet this standard. Rather, these documents create conditional exemptions to liability under section 9 of the ESA, thereby providing the Hatchery Defendants only with limited defenses.

The 4(d) Rule defines the legal effect of the Limit 6 Approval as providing "an affirmative defense that must be raised, pleaded, and proven by the proponent" in a case "alleging a violation of the prohibitions of paragraph (a) of this section;" *i.e.*, the "take" prohibition. 50 C.F.R. §§ 223.203(a), (c). The proponent must "demonstrate…that the person fully complied with the limit at the time of the alleged violation." *Id.* at § 223.203(c). The Limit 6 Approval itself explains that it is applicable only where the hatchery programs are in compliance with the HGMPs and "implemented in accordance with the implementation terms and reporting requirements…" ER 266. The ESA places a similar burden on a person claiming the benefit on an ITS. 16 U.S.C. § 1539(g); *and see*. ER 592-93 (the ITS provides it is only effective if there is compliance with numerous "terms and conditions").

Thus, parties remain subject to liability under section 9 of the ESA despite issuance of an exemption to liability because the exemption is only effective where

there is compliance with its terms. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1239 (9th Cir. 2001). Mere issuance of such a limited exemption does not make it absolutely clear that violations will not recur. *See Native Fish Soc'y*, 2013 U.S. Dist. LEXIS 111505, at *24-33.

B. The Hatchery Defendants did not prove compliance with the Limit 6 Approval or the ITS.

The Hatchery Defendants did not prove compliance with the Limit 6 Approval and ITS[15] in a manner that meets their "heavy burden" in establishing that it is "absolutely clear" that their violations will not recur. *See Friends of the Earth*, 528 U.S. at 189.

The Hatchery Defendants neither pled nor proved compliance with the Limit 6 Approval as required. *See* 50 C.F.R. § 223.203(c). They did not supplement their Answer after the Limit 6 Approval was issued, but instead immediately filed the motion to dismiss. *See* ER 1460. They did not submit *any* evidence with their motion showing compliance with the Limit 6 Approval. *See id.* They submitted with their reply[16] a single declaration stating in conclusory fashion[17] that they are

[15] As explained below, the ITS does not even apply to the Hatchery Defendants.

[16] The district court improperly relied on this declaration submitted with a reply brief. ER 43, 46; *and see Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993).

[17] This declaration is devoid of foundation demonstrating personal knowledge as to compliance with any provision of the HGMPs—it is exceedingly unlikely that the

"currently operating each hatchery program in conformity and compliance with the[] HGMPs, and intend[] to do so in the future." ER 257-58. While the Limit 6 Approval requires compliance with the HGMPs, it also requires compliance with "implementation terms" included in the Limit 6 Approval to minimize harm to wild salmonids. *See* ER 265-66. The declaration did not address these terms whatsoever and therefore did not prove compliance with the Limit 6 Approval. *See* ER 257-59. Similarly, the Hatchery Defendants did not argue or submit any evidence demonstrating compliance with the ITS. *See id.*; *and see* ER 592-99.

The claim is not moot because the Hatchery Defendants did not submit evidence making it is absolutely clear that their violations will not recur. *See Strahan v. Roughead*, 910 F. Supp. 2d 358, 374-77 (D. Mass. 2012) (claim was not moot where defendant did not prove compliance with ITS).

C. New pre-suit notice is not required to address the Limit 6 Approval and ITS.

The district court erred in holding that a new sixty-day pre-suit notice letter is required to address issues related to the Limit 6 Approval or ITS. *See* ER 45-46.

This Court recently considered the ESA notice provision and, starting with the plain language of the statute, refused to create requirements beyond those drafted by Congress. *Alliance for the Wild Rockies v. U.S. Dep't of Agric.*, 772

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declarant has such personal knowledge for *all* such provisions. *See* ER 257-59; *and see Shakur v. Schriro*, 514 F.3d 878, 889-90 (9th Cir. 2008).

F.3d 592, 601-04 (9th Cir. 2014). The ESA requires notice "of the violation," not of defenses. 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* ER 1017-33. It is not a violation of the ESA to disregard the requirements of the Limit 6 Approval or ITS. *See Native Fish Soc'y*, 2013 U.S. Dist. LEXIS 111505, at *30; *and see* 16 U.S.C. 1538; *and see Bennett*, 520 U.S. at 170. Accordingly, the Conservancy is not required to provide notice related to these defenses.

Moreover, 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).[18] 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; *see also Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 307 F.3d 964, 974-75 (9th Cir. 2002)

[18] These cases involved the Clean Water Act, which has substantially similar notice requirements to the ESA that are interpreted consistently. *Compare* 16 U.S.C. § 1540(g)(2)(A)(i) *and* 33 U.S.C. § 1365(b)(1)(A); *and see Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1072-73 (9th Cir. 1996).

(new notice not required to challenge post-notice ESA consultation efforts), *withdrawn as moot*, 355 F.3d 1203 (9th Cir. 2004).

Requiring new notice every time a defendant develops a new defense would undermine the ESA's policy of "institutionalized caution" by obstructing courts' ability to enter urgently needed injunctive relief. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978); *and see Alliance for the Wild Rockies*, 772 F.3d at 604. This is aptly demonstrated here, where the district court dismissed the Hatchery Defendants upon issuance of the Limit 6 Approval 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 provide another 60-days notice and obtain a temporary restraining order. Allowing a defendant to evade injunctive relief 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.

D. The ITS does not apply to the Hatchery Defendants.

The district court erred in finding that the ITS issued with the December 2012 BiOp exempts the Hatchery Defendants from take liability. *See* ER 42-43. NMFS explicitly applies an ITS to the Hatchery Defendants when it so intends, but

the ITS at issue here only applies to the federal "Action Agencies." *Compare* ER 955 *with* ER 418, 593; *c.f.*, *Ramsey*, 96 F.3d at 442 (ITS can apply to non-federal entities where so contemplated). The federal action triggering consultation that resulted in the December 2012 BiOp and ITS was NMFS' issuance of the Limit 6 Approval, which itself provides the Hatchery Defendants a take authorization. It is illogical for the ITS to provide separate authorization to the Hatchery Defendants and such an application could undermine the requirements of the Limit 6 Approval.

CONCLUSION

For the foregoing reasons, the Conservancy respectfully requests the Court reverse the rulings and judgment of the district court described herein and remand this matter for further proceedings with instructions to vacate NMFS' authorization and DOI's funding of the hatchery programs until the agencies comply with NEPA and the ESA.

RESPECTFULLY SUBMITTED this 28th day of January, 2015.

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STATEMENT OF RELATED CASES
REQUIRED BY CIRCUIT RULE 28-2.6

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 state that they are unaware of any related cases pending before this Court.

DATED this 28th day of January, 2015.

s/ Brian A. Knusten
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Attorney for Plaintiffs-Appellants/Cross-Appellees

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing Plaintiffs-Appellants/Cross-Appellees' Opening Brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B). This brief is proportionally spaced and contains 14,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief was created on Microsoft Office Word, using Times New Roman, 14 font.

DATED this 28th day of January, 2015.

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CIRCUIT RULE 28-2.7

ADDENDUM

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40 C.F.R. § 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

40 C.F.R. § 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

50 C.F.R. § 223.203 Anadromous fish.

(a) Prohibitions. The prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) relating to endangered species apply to fish with an intact adipose fin that are part of the threatened West Coast salmon ESUs and steelhead DPSs (of the genus Oncorhynchus) listed in §223.102.

(b) Limits on the prohibitions. The limits to the prohibitions of paragraph (a) of this section relating to threatened West Coast salmon ESUs and steelhead DPSs (of the genus Oncorhynchus) listed in §223.102 are described in the following paragraphs:

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(6) The prohibitions of paragraph (a) of this section relating to the threatened West Coast salmon ESUs and steelhead DPSs (of the genus Oncorhynchus) listed in §223.102 do not apply to actions undertaken in compliance with a resource management plan developed jointly by the States of Washington, Oregon and/or Idaho and the Tribes (joint plan) within the continuing jurisdiction of United States v. Washington or United States v. Oregon, the on-going Federal court proceedings to enforce and implement reserved treaty fishing rights, provided that:

(i) The Secretary has determined pursuant to 50 CFR 223.209 and the government-to-government processes therein that implementing and

enforcing the joint tribal/state plan will not appreciably reduce the likelihood of survival and recovery of affected threatened ESUs.

(ii) The joint plan will be implemented and enforced within the parameters set forth in United States v. Washington or United States v. Oregon.

(iii) In making that determination for a joint plan, the Secretary has taken comment on how any fishery management plan addresses the criteria in §223.203(b)(4), or on how any hatchery and genetic management plan addresses the criteria in §223.203(b)(5).

(iv) The Secretary shall publish notice in the Federal Register of any determination whether or not a joint plan, will appreciably reduce the likelihood of survival and recovery of affected threatened ESUs, together with a discussion of the biological analysis underlying that determination.

(v) On a regular basis, NMFS will evaluate the effectiveness of the joint plan in protecting and achieving a level of salmonid productivity commensurate with conservation of the listed salmonids. If the plan is not effective, then NMFS will identify to the jurisdiction ways in which the joint plan needs to be altered or strengthened. If the responsible agency does not make changes to respond adequately to the new information, NMFS will publish notification in the Federal Register announcing its intention to withdraw the limit on activities associated with that joint plan. Such an announcement will provide for

a comment period of no less than 30 days, after which NMFS will make a final determination whether to withdraw the limit so that take prohibitions would then apply to that joint plan as to all other activity not within a limit.

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(c) Affirmative Defense. In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section with respect to the threatened West Coast salmon ESUs and steelhead DPSs (of the genus Oncorhynchus) listed in §223.102, any person claiming the benefit of any limit listed in paragraph (b) of this section or §223.204(a) shall have a defense where the person can demonstrate that the limit is applicable and was in force, and that the person fully complied with the limit at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent. If proven, this defense will be an absolute defense to liability under section 9(a)(1)(G) of the ESA with respect to the alleged violation.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Plaintiffs-Appellants/Cross-Appellees' Opening Brief 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 January 28, 2015.

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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