UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL PROTECTION INFORMATION CENTER, et al.,

Plaintiffs,

v.

ALICIA VAN ATTA, et al.,

Defendants.

Case No. 22-cv-03520-TLT

ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

Re: ECF No. 37 & 41

I. INTRODUCTION

For decades, Tenayah Norris, her family, and members of the Yurok Tribe have enjoyed the presence of coho salmon in the Shasta River for personal, aesthetic, ancestral, and scientific purposes. *See* Plts.'s Mot. Summ. J., ECF No. 37, 12-13; Norris. Decl. ¶ 12. However, worsening conditions in the quantity and quality of the water in the Shasta River has changed Tenayah Norris's relationship with the coho salmon. Norris. Decl. ¶ 6, 7. Some of this aquatic change has occurred because of the diversion of water from the Shasta River, which has had a dramatic impact on the coho salmon species. Administrative Record ("AR") 15329.

Today, the population of adult coho salmon in the Shasta River is below the minimum number needed for the long-term survival of the species (or "depensation threshold"). AR 60, 2089. The decline of the coho salmon population is not new. In 1997, the National Marine Fisheries Service listed the Southern Oregon / Northern California Coast coho salmon as a threatened species under the Endangered Species Act and designated critical habitat for the species in 1999. *Threatened Status for Coho Salmon*, 62 Fed. Reg. 24,588-01 (May 6, 1997); *Designated Critical Habitat, Coho Salmon*, 64 Fed Reg. 24,049 (May 5, 1999). Since 2012, the number of

//

adult coho returning to the counting station near the mouth of the Shasta has remained below the depensation threshold.

In 2021, the National Marine Fisheries Services issued permits to fourteen private landowners authorizing the incidental take of coho salmon in the Shasta River in exchange for their compliance with activities that would benefit the species. *Issuance of 14 Enhancement of Survival Permits*, 86 Fed. Reg. 43,629, 46,630 (Aug. 10, 2021). The permits have 20-year terms and are transferable. AR 817, 1032; 50 C.F.R. § 222.305(a)(3).

The issues in this case concern whether the National Marine Fisheries Services properly assessed the impact permitting the incidental take of coho salmon would have on the species. This Court must address whether the interests of the permittees, including private entities with commercial interests in the Shasta River[1], were given outsized weight by the National Marine Fisheries Service in light of the statutorily proscribed procedures including whether (1) the National Marine Fisheries Service applied the Safe Harbor Policy lawfully, (2) the biological opinion is subject to vacatur, and (3) National Marine Fisheries Service should have prepared an Environmental Impact Statement.

Moreover, this case is about the shared interest of all the parties in preserving the coho salmon species, and the ways in which the various communities benefiting from the Shasta River can meet this moment and collaboratively address the issue of water use in California.

II. PROCEDURAL HISTORY

Plaintiffs Environmental Protection Information Center ("EPIC") and Friends of the Shasta River brought the present action challenging the administrative process that led to the issuance of permits authorizing the "take" of SONCC coho salmon. Complaint, ECF No. 1. The permits were granted by Defendant National Marine Fisheries Service under the United States Department of

[1] The Template Safe Harbor Agreement for Conservation of Coho Salmon in the Shasta River defines Routine Agricultural Activities as, *inter alia*, "cultivation, growing, harvesting, and replanting of pasture and other crops; diversion of water, irrigation, irrigation run-off; preparation for market, vehicle operation, watering, and moving of livestock, and operation and maintenance of facilities associated with the production of livestock, pasture, and hay performed by the Permittees as described in the Permittee's Site Plan Agreement. AR 1018. The permittees' commercial interests must not be prioritized to the detriment of the coho salmon.

Commerce National Oceanic and Atmospheric Administration by way of their employees. *Id*. Plaintiffs and Defendants now cross-move for summary judgment. *See* ECF Nos. 37, 41, 42, 45.

II. FACTUAL BACKGROUND

A. Current State of the Coho Salmon in the Shasta River

In 1997 the National Marine Fisheries Service ("NMFS") listed the Southern Oregon / Northern California Coast coho salmon as a threatened species under the Endangered Species Act ("ESA"). 62 Fed. Reg. at 24,588-01 (May 6, 1997). NMFS designated critical habitat for the species in 1999. 64 Fed Reg. at 24,049 (May 5, 1999).

The Shasta River population of coho salmon is one of forty populations of coho that make up the evolutionarily significant unit ("ESU") of coho in the Southern Oregon / Northern California Coast (SONCC) region. This region extends from the Elk River in Oregon south to the Mattole River in California (including the Shasta River). The Shasta River Coho population is a demographically independent, "core" population within the ESU. Administrative Record ("AR") 76. As a core population, coho in the Shasta River are among the "independent populations [that] must be at low risk of extinction to achieve recovery" for the SONCC ESU as a whole. *Id*.

SONCC coho salmon have experienced a serious decline in abundance, and long-term population trends suggest a negative growth rate. AR 102. Human-induced factors have reduced historical populations and degraded habitat, which in turn has reduced the ESU's resilience to natural occurring events, such as droughts, floods, and variable ocean conditions. *Id.*

The minimum number of adult coho in the Shasta River needed for survival of a population (or "depensation threshold") is 144. AR 60, 2089. Since 2012, the number of adult coho returning to the counting station near the mouth of the Shasta has remained below the depensation threshold: 115 adult coho retuned in 2012, and 39 adult coho returned in 2018. AR 77. By January 2020, 62 adults had returned. AR 39037.

B. *Klamath Riverkeeper v. Montague Water Conservation District*

On May 17, 2012, Klamath Riverkeeper, a nonprofit organization, filed suit against the Montague Water Conservation District ("Montague"). *Klamath Riverkeeper v. Montague Water Conservation District*, Case No. 2:12-cv-1330, Dkt No. 1 (E.D. Cal. May 17, 2012). The

complaint sought relief for the alleged substantial unlawful take of the SONCC coho salmon by way of Montague's operation and maintenance of Dwinnell Dam, Lake Shastina, and its water diversions structures on the Shasta River, Parks Creek, and Little Shasta River. *Id*. Klamath Riverkeeper also alleged that Montague had failed to initiate consultation with NMFS under the ESA. *Id*. The Karuk Tribe also filed a complaint against Montague with similar allegations which was consolidated with the Riverkeeper case. AR 2552; *see Karuk Tribe v. Montague Water Conservation District*, Case No. 2:12-cv-02095 (E.D. Cal. Aug. 9, 2012). The parties settled the case on July 12, 2013. Minute Order, *Klamath Riverkeeper v. Montague Water Conservation District*, Case No. 2:12-cv-1330, Dkt. No. 31 (E.D. Cal.).

Prior to settlement, on February 11, 2013, Montague, amongst other entities and private landowners, commenced the administrative process with NMFS for a safe harbor agreement associated with SONCC coho salmon. AR 8.

Once settlement was reach, under the terms of the agreement, Montague agreed to file for a Clean Water Act permit for the implementation of the Conservation and Habitat Restoration and Enhancement Project (CHERP). AR 2552. The CHERP includes development of a long-term water conservation and flow enhancement program to improve conditions for coho salmon downstream of Dwinnell Dam. AR 68. Under the CHERP, Montague proposes to increase instream environmental releases by an average of 4,400 acre-feet below Dwinnell Dam as a conservation measure to improve conditions for coho salmon using water conserved through lining of up to 8.4 miles of its main irrigation canal. NMFS asserts that "CHERP is an independently required consultation separate from but complementary to the Agreement." AR 161.

C. Template Safe Harbor Agreement for Conservation of Coho Salmon in the Shasta River & Site Plan Agreements

In 1999, National Marine Fisheries Services and the U.S. Fish and Wildlife Service ("FWS") adopted a "Safe Harbor" Policy. *Announcement of Final Safe Harbor Policy*, 64 Fed. Reg. 32,717 (June 17, 1999). The Policy states that some ESA-listed species "occur exclusively, or to a large extent, on non- Federally owned property," and agencies wanted to "provide[]

incentives for private and other non-Federal property owners to restore, enhance, or maintain habitats for listed species." *Id.* The coho salmon are such a species. AR 102.

The Endangered Species Act broadly prohibits the "take" of species that are listed as endangered or threatened. 16 U.S.C. §§ 1533(d), 1538(a)(1)(B); 50 C.F.R. § 223.203; see also 16 U.S.C. §§ 1532(6), 1532(20). "Take" is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Though, the ESA authorizes NMFS to permit take under certain circumstances, including, "to enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A).

Section 10(a)(1)(A) of the ESA establishes a framework for issuing permits for research activities and "Enhancement of Survival" permits ("Permits") under the Safe Harbor Policy. 64 Fed. Reg. 32,717 (June 17, 1999). The Policy provides that if a landowner chooses to adopt "voluntary conservation measures" on its lands that provide a "net conservation benefit" for a listed species, the landowner may enter a Safe Harbor Agreement, and would not be liable for take of the species if it "later become[s] more numerous as a result of the property owner[']s actions." *Id.* at 32,722.

The agency and landowner must agree to a *baseline* as to the number of individual members of the species or their range on the private land when the landowner enters into the agreement. 64 Fed. Reg. 32,717. If its voluntary conservation measures increase the species' number or range, "the landowner would be authorized to [later] incidentally 'take' those [additional] individuals above the baseline without penalty." *Id.* at 32,718. In other words, under the Policy, the status quo of the species' number of individuals or range is preserved, but any increases are not, because the landowner may choose at any time to back out of the agreement and may then take any gain in the number of species or habitat back to the baseline, without violating the ESA. *Id.* at 32,722.

From mid-2013 through 2018, NMFS worked with a group of private, state, and municipal landowners and water districts to develop conservation measures to benefit the SONCC coho salmon in exchange for certain regulatory assurances. AR 8. In 2020, fourteen parties entered

into the Template Safe Harbor Agreement for Conservation of Coho Salmon in the Shasta River ("Agreement") and associated Site Plan Agreement as well as Enhancement of Survival Permits ("Permits") under ESA Section 10(a)(1)(A). The Permits authorized the incidental take of SONCC coho salmon in exchange for permittees commitment to voluntary conservation measures designed to benefit SONCC coho. AR 373. To enter into a Safe Harbor Agreement under the Safe Harbor Policy, NMFS must find a "net conservation benefit" to the species. 64 Fed. Reg. at 32,717. A "net conservation benefit" is

> the cumulative benefits of the Management Activities identified in a Safe Harbor Agreement that provide for an increase in a species' population and/or the enhancement, restoration, or maintenance of Covered Species' suitable habitat within the Enrolled Property, taking into account the length of the Agreement and any off-setting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit.

Id. at 32,722. A net conservation benefit "must be sufficient to contribute, either directly or indirectly, to the recovery of the covered species." *Id.*

Among the habitat improving activities the permittees agree to take are: (1) increasing irrigation efficiency, (2) improving fish passage, (3) improving instream habitat, (4) reducing and/or ceasing diversions, (5) restoring off channel habitat, (6) installing fencing and/or developing grazing plans, and (7) providing cold water from springs. AR 825-26. A permit was given for each individual Agreement that the NMFS expected to result in net conservation benefits for the evolutionarily significant unit of coho salmon. AR 366-67. Each Agreement specified actions required to maintain either baseline or elevated baseline conditions, and additional beneficial management activities. *Id.* Baseline conditions are narrative descriptions of present conditions "mutually agreed upon by the participating landowner" and the agencies. 64 Fed. Reg. at 32,719. Elevated baseline conditions are future conditions, and the permittee may return its enrolled property to those conditions only. AR 13.

D. Recovery Plan for the SONCC ESU

In 2014, NMFS issued a Recovery Plan for the SONCC coho. AR 15301-17141. The Recovery Plan states that to contribute to the viability of the ESU, "the Shasta River core population should have at least 4,700 spawners." AR 16833. The Recovery Plan states that

"[s]ufficient spawner densities are needed to maintain connectivity and diversity with the stratum and continue to represent critical components of the evolutionary legacy of the ESU." *Id.* The Recovery Plan also states that Shasta River coho are at a "high risk of extinction," because of "the unstable and low population size and presumed negative population growth rate." *Id.*

E. Status Review of SONCC ESU

In 2016, NMFS issued a five-year Status Review of the SONCC coho ESU. AR 2060-2129. The Status Review states that for the Shasta River Coho population, "[t]he lack of water for summer rearing juveniles has worsened since the previous status review and is a primary factor inhibiting recovery of the ESU." AR 2093.

As discussed above, NMFS designated critical habitat for the SONCC coho in 1999. 64 Fed Reg. 24,049 (May 5, 1999). Critical habitat is defined as: (1) specific areas within the geographical area occupied by the species at the time of listing, on which are found those physical or biological features essential to the conservation of the species, and those features which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time of listing if the agency determines that the area itself is essential for conservation of the species. AR 2070. Rearing coho salmon require pools of cool water to survive warm summer months, areas with low-velocity flows such as alcoves, side-channels, backwaters, and beaver ponds during the winter to avoid being swept downstream during high flows, and adequate instream flows during the dry months. AR 2095-96. Changes in water temperature and the withdrawal of groundwater and surface water for agricultural and residential purposes contribute to the impairment of water quality for the SONCC coho salmon. *Id.* These conditions influence coho salmon growth and feeding rates, development of embryos and alevins, and migration and spawning patterns. *Id.*

The Status Review notes that among the rivers in the SONCC ESU, only the Shasta has a video fish counting weir able to measure "actual numbers of fish" instead of estimates. AR 2081. Based on adult coho returns to the Shasta, the Status Review confirms that the coho population remains at a "high" risk of extinction. AR 2089.

F. Biological Opinion

As required under ESA section 7(a)(2), on July 28, 2020, the National Marine Fisheries Services initiated intra-agency consultation, pursuant to the Endangered Species Act, to assess the likely effects of approving the Agreement, Site Plan Agreements, and issuing Permits for incidental take of SONCC coho and its "critical habitat." AR 8-9. The consultation resulted in a Biological Opinion ("BiOP") issued by the NMFS, which documented the agency's conclusion that the Agreement and associated actions were not likely to jeopardize the coho's continued existence or destroy or adversely modify its critical habitat. AR 104. It concluded that "the net effects of the proposed action on the Shasta River population of coho salmon will be an overall improvement to population viability." AR 93-4, 103. NMFS found that the proposed action would benefit the core SONCC coho population, thus benefiting the species as a whole. AR 101-4.

G. Issuance of Enhancement of Survival Permits

In 2021, the National Marine Fisheries Services issued Enhancement of Survival Permits based on underlying Safe Harbor Agreements. 86 Fed. Reg. at 46,630 (Aug. 10, 2021). The permits granted immunity for take of coho "associated with covered activities," which includes ongoing "routine agricultural activities," such as the "diversion of water, irrigation, [and] irrigation run-off." (AR 13). Immunity extended to any "take that may occur when a given Site Plan Agreement's Baseline Conditions are met or exceeded and the Permittee complies with all requirements of the Safe Harbor Agreement, Site Plan Agreement, Enhancement of Survival Permit, and BiOp when conducting Covered Activities." *Id*. The permits also grant take immunity for new, ostensibly "beneficial management activities." *Id*. The permits have 20-year terms, but NMFS and the permittees may agree to extend them. AR 817. The permits are also transferable. AR 1032; 50 C.F.R. § 222.305(a)(3).

III. STANDARD OF REVIEW

Federal courts review an agency's compliance with the ESA and NEPA under the "arbitrary and capricious" standard of the Administrative Procedure Act ("APA"). 5 U.S.C. § 706; *Friends of Animals v. United States Fish & Wildlife Serv.*, 28 F.4th 19, 28 (9th Cir. 2022) *citing Native Ecosystems Council v. Marten*, 883 F.3d 783, 788 (9th Cir. 2018); *see also* 5 U.S.C. §

706(2). "Under the APA, we may overturn an agency's conclusions when they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Bark v. United States Forest Serv.*, 958 F.3d 865, 869 (9th Cir. 2020).

An agency's action is arbitrary and capricious if the agency has (1) "relied on factors which Congress has not intended it to consider", (2) "entirely failed to consider a an important aspect of the problem", (3) "offered an explanation for its decision that runs counter to the evidence before the agency", or (4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *WildEarth Guardians v. U.S. EPA*, 759 F.3d 1064, 1069-70 (9th Cir. 2014). "An agency's factual determinations must be supported by substantial evidence." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 759 (9th Cir. 2014).

Courts must defer to an agency's scientific expertise and decisions that are "fully informed and well-considered." *Save the Yaak Committee v. Block,* 840 F.2d 714, 717 (9th Cir.1988); *see Native Ecosystem Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012). Courts need not forgive a "clear error of judgment." *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 378 (1989).

V. DISCUSSION

A. Standing

Article III of the Constitution gives federal courts the power to decide only "Cases" and "Controversies." U.S. Const. art. III, § 2. Courts have "long understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Association of Irritated Residents v. EPA*, 10 F.4th 937, 943 (9th Cir. 2021) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81

(2000); *see California v. Texas*, 141 S. Ct. 2104, 2113 (2021). If at least one plaintiff has standing, the suit may proceed. *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 52, n. 2 (2006).

The plaintiff has the burden of establishing standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

1. Standing for Organizations

An organization has standing to sue on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Ecological Rights Found v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

Here, Plaintiffs' motion is supported by two declarations from members of the Environmental Protection Information Center who, as discussed below, could sue on their own behalf because they would be injured by the alleged procedural violations of the NMFS. Plts.'s Mot Summ. J. 12-13. Second, the interests Plaintiffs seek to protect—that is, the procedural rights provided by the ESA and NEPA—are germane to EPIC's and Friends of the Shasta River's purpose which is to advocate for science-based protection and restoration of Northwest California's forest, rivers, and wildlife and the restoration of Shasta River water quantity and quality for the benefit of wildlife and humanity, respectively. Finally, the individual members of EPIC who provided declarations need not be parties to the lawsuit because their interests are fully represented by the organizations.

2. Plaintiff's Alleged Procedural Injuries Threaten a Concrete Interest

To seek injunctive relief, Plaintiff must show that they are under threat of suffering an injury in fact that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical." *Summer v. Earth Island Inc.*, 555 U.S. 488, 493 (2009). Plaintiffs

allege that NMFS's decision to issue take permits and enter Agreements with third parties was inconsistent with the National Environmental Policy Act and based on an inadequate assessment of the impact such authorization would have on the environment and coho salmon population. Thus, Plaintiffs assert procedural injuries. When plaintiffs assert a violation of a procedural right, "the normal standards for redressability and immediacy" do not apply. *Lujan*, 504 U.S. at 572 n.7. To establish an injury in fact resulting from a procedural error in an agency's decision-making process, a plaintiff must show that "(1) the agency violated certain procedural rules; (2) these rules protected [the] plaintiff's concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interest." *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 918 (9th Cir. 2018) (internal citation omitted). "But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009).

Plaintiffs allege that by failing to follow the law, the NMFS's issuance of incidental take permits may adversely affect the population of SONCC coho salmon. Plts.'s Mot. Summ J. 47. Plaintiffs' members claim aesthetic, personal, ancestral, scientific, and professional interests in the current and historic coho population in the Shasta River and the Klamath Basin. Norris. Decl. ¶ 12; Gensaw III Decl. ¶ 2, 9, 12. The Court has held that "the desire to use or observe an animal species, even for purely esthetic purposed is undeniably a cognizable interest for purpose of standing." *Lujan*, 504 U.S. at 562-63. Defendants argue that the NMFS's Recovery Plan, Agreements, and Permits will improve conditions for the coho salmon and ensure the survival of the species. *See* Defs.'s Cross Mot. Summ. J., ECF. No. 41. They argue that Plaintiffs claim that the Agreement and Permits are killing the species is too speculative to establish injury-in-fact and are contradicted by the NMFS's finding that there would be "net conservation benefit" to the affected species. *Id.* at 6. However, if NMFS neglected its statutory obligation to form its conclusions, then their decision-making procedure likely would harm the coho salmon, and this is the standard Plaintiff must satisfy. If based on improper assessments and an inadequate evaluation on their impact on the water quality, the issuance of the Permits would be a "reasonably probable"

cause of harm to the coho salmon. Thus, Plaintiff has demonstrated an injury for the purpose of standing.

3. Plaintiffs' Alleged Injuries Are Fairly Traceable to NMFS's Conduct

Federal courts may "act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42 (1976). Causation and redressability requirements are "relaxed" for procedural claims only in the sense that a plaintiff "need not establish the likelihood that the agency would render a different decision after going through the proper procedural steps." *Export-Import Bank*, 894 F. 3d 1005, 1012 (9th Cir. 2018).

During oral arguments, Defendant drew the courts attention to the Ninth Circuit's decision in *WildEarth Guardians v. U.S. Forest Service* to argue that Plaintiffs are unable to demonstrate causation. 70 4th 1212 (9th Cir. 2023). In *WildEarch Guardians*, the plaintiffs sued the United States Forest Services ("Forest Services") claiming their injury arose from the Forest Services' livestock grazing decision. The decision, they argued, would lead to an increase in the number of wolf attacks on livestock which in turn would cause the Washington Department of Fish and Wildlife to kill more wolves as authorized under Washington law for wildlife management. *Id.* at 1218. The appellate court held that the plaintiffs lacked standing to sue the Forest Services because the plaintiffs had not shown that the Forest Services had the authority to alter the Washington Department of Fish and Wildlife's lethal removal practices. *Id.* at 1215. Thus, the actions of the Washington Department of Fish and Wildlife were not fairly traceable to or redressable by the Forest Services. *Id.* at 1218.

Here, in contrast, the NMFS's decision has a direct impact on the fish habitat because it could change the water flow and temperature, and the NMFS does regulate the third parties whose activities impact the coho salmon. In *WildEarth Guardians* it was the prerogative of the Washington Department of Fish and Wildlife to remove wolves. *Id.* at 1215. The Forest Services did not remove the wolves nor regulate the agency that did. Granting immunity for the take of coho salmon resulting from a list of protected activities has a direct and determinative effect on

parties' willingness to engage in those activities and, as a result, the coho salmon habitat. That is the point of the Agreements and Permits. Thus, Defendant's contention that Plaintiffs lack standing for failing to show how the NMFS's decisions cause harm to coho is insufficient.

In another context the shortcomings of Defendant's argument become clear. Take, for example, *Center for Biological Diversity v. United States Fish & Wildlife Service*, where the Fish and Wildlife Service executed an agreement with third parties about groundwater pumping. 807 F.3d 1031, 1044 (9th Cir. 2015). The terms of that agreement allegedly injured the plaintiff's concrete interest in an endangered fish. *Id.* Although the injury was caused by the actions of third parties (pumping groundwater), the plaintiffs had standing to sue the Fish and Wildlife Service because the Service had authority to regulate those actions through its agreement with the third parties. *Id.* Here, Plaintiffs can show that the alleged violations of the ESA and NEPA could have influenced NMFS's Biological Opinion and Environmental Assessment in a manner that resulted in the issuance of Permits with terms and conditions that harm the coho salmon. Stricter terms set by the NMFS could, in turn, alleviate further loss the coho population might otherwise incur.

4. Plaintiff's Alleged Injury Is Redressable by Vacatur

"Redressability depends on whether the court has the ability to remedy the alleged harm." *Nuclear Info. & Res. Serv. V.* NRC, 457 F.3d 941, 954 (9th Cir. 2009); *Lujan,* 504 U.S. at 561. A plaintiff "who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). Moreover, a plaintiff does not need to show that the correction of the alleged procedural error would lead to a decision more favorable to plaintiffs' interests. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001). Instead, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts*, 549 U.S. at 518. In the context of NEPA, plaintiffs may demonstrate redressability with a showing that the agency's decision "could be influenced by the

//

//

environmental considerations that NEPA requires an agency to study." *Friends of Santa Clara River v. United States Army Corps of Engineers,* 887 F.3d 906, 918 (9th Cir. 2018); *see Laub v. U.S. Dep't of Interior, 342 F.3d 1080*, 1087 (9th Cir. 2003).

At oral argument, both parties conceded that the Court lacks the authority to direct NMFS to initiate administrative or judicial proceedings under ESA Section 9 against the permittees as articulated in *Heckler v. Cheney*. 470 U.S. 821, 831 (1985). However, Plaintiff is not asking for NMFS to initiate Section 9 proceedings against the permittees for the unlawful take of coho salmon. Plts.'s Mot Summ. J., 14-15. Plaintiffs request a remedy of vacating the Biological Opinion and Environmental Assessment. *Id.* At 47. Defendant argues that vacating the NMFS's BiOp, resultant Permits, and EA would contribute to rather than alleviate or redress harm being done to the coho salmon. Defs.'s Cross Mot. Summ. J. 20. However, Plaintiffs need not demonstrate that the ultimate outcome following proper procedures will benefit them. *Cantrell*, 241 F.3d at 682. A plaintiff has established redressability if they show that the agency, following correct procedures, "may" or "could" have decided differently. *Friends of Santa Clara River*, 887 F.3d at 920. Thus, Plaintiffs need only show that a reassessment of the environmental impact of the permits *could* result in a different decision by NMFS. Vacatur of NMFS's existing BiOp and EA could trigger a reassessment of the environmental impact of the Permits. Upon reevaluation, the NMFS could conclude that it needed to provide an Environmental Impact Statement, that their Biological Opinion did not accurately define the Action Area, or that the Safe Harbor Policy does not provide authority for NMFS to issue take permits. Because the NMFS could render a different decision regarding the issuance of the permits after considering the alleged procedural errors (a decision that would further enhance the survival of the coho salmon), Plaintiffs injury is redressable.

B. NMFS's Application of the Safe Harbor Policy was Lawful.

Under the Endangered Species Act, proactive habitat management cannot be mandated or required. *See* 16 U.S.C. §§ 1531 – 1544. To incentivize private and non-Federal property owners to take voluntary action to restore, enhance, or maintain habitats for "threatened" or "endangered" species, the Fish and Wildlife Service and the National Marine Fisheries Service promulgated the

Safe Harbor Policy. *Announcement of Safe Harbor Policy*, 64 Fed. Reg. 32,717. The Safe Harbor Policy acknowledges that property owners may be reluctant to engage in conservation-oriented property management actions that could result in an abundance of a species on their property, in fear of enforcement of Section 9 of the Act (16 U.S.C. § 1538) which prohibits any "take" of threatened or endangered species. To ameliorate this concern, the Safe Harbor Policy provides that, "[if] the numbers or range of those covered species increases because of voluntary conservation measures conducted in accordance with a Safe Harbor Agreement, the landowner would be authorized to incidentally 'take' those individuals above the baseline without penalty." 64 Fed. Reg. at 32,718.

Plaintiffs assert that Defendants' issuance of Safe Harbor Agreements contradict Defendants' own guidance and is therefore unlawful. Plts.'s Mot. Summ. J. 16–21, ECF No. 37. For example, in considering whether a Safe Harbor Agreement (16 U.S.C. § 1530(a)(1)(A)) or incidental take permit (*Id*. at § 1530(a)(1)(B)) should issue, the Safe Harbor Policy provides that,

> [t]he services agree that Safe Harbor Agreements may not be appropriate for all types of species in all situations. If a property owner is taking a listed species and needs an immediate "incidental take" authorization, application for and development of a Habitat Conservation Plan (HCP) and issuance of an incidental take permit under section 10(1)(1)(B) would be more appropriate.

64 Fed. Reg. at 32,718.

At oral argument, Defendants' counsel stated that there was no evidence of take prior to NMFS' issuance of the permits with respect to one of the permittees, Montague Water Conservation District which operates Dwinnell Dam. The administrative record reflects that Defendants had actual or constructive notice that take may have occurred by Montague Water Conservation District prior to their consultation with NMFS. *See, e.g.,* Environmental Assessment, Comment 158, AR 926; AR 2552; AR 28636; AR 69418; *see also* Minute Order, *Klamath Riverkeeper v. Montague Water Conservation District*, Case No. 2:12-cv-1330, Dkt. No. 31 (E.D. Cal Jul. 12, 2013).

Be that as it may, federal courts "do not review claims of non-compliance with an agency's own pronouncement unless that pronouncement carries the force of law." *Friends of Animals v.*

United States Fish & Wildlife Serv., 28 F.4th 19, 31 n.7 (9th Cir. 2022). "To have the force and effect of law, enforceable against an agency in federal court, the agency pronouncement must (1) prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and (2) conform to certain procedural requirements." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071 (9th Cir. 2010) quoting *United States v. Fifty–Three (53) Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982)).

Here, the Safe Harbor Policy constitutes interpretive rules of the Endangered Species Act which serve as internal guidance to the agency on provisions to incorporate in each Safe Harbor Agreement. The Safe Harbor Policy does not carry the force and effect of law. *Friends of Animals v. Sheehan*, No. 6:17-CV-00860-AA, 2021 WL 150011, at *5 (D. Or. Jan. 15, 2021), *aff'd sub nom. Friends of Animals v. United States Fish & Wildlife Serv.*, 28 F.4th 19 (9th Cir. 2022). Thus, the language of the Safe Harbor Policy may not serve as a statutory basis to vacating the Environmental Assessment and Biological Opinion.

C. Biological Opinion

The Endangered Species Act proscribes any agency action that may "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species". 16 U.S.C. § 1536(a)(2). To evaluate the potential effects of a contemplated action on a threatened species and critical habitat, a consulting agency will prepare a biological opinion (BiOp). 50 C.F.R. § 402.12(a).

The agency will determine if the proposed action jeopardizes a threatened species or critical habitat by considering (1) "the current status and environmental baseline", (2) "the effects of the action and cumulative effects", and (3) "the effects of the action and cumulative effects to the environmental baseline in light of the status of the species and critical habitat". 50 C.F.R. § 402.14(g).

"The issuance of a biological opinion is considered a final agency action, and therefore subject to judicial review." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 925 (9th Cir. 2008) citing *Bennett v. Spear*, 520 U.S. 154, 178, (1997).

//

1. The Action Area Is Improperly Limited

NMFS restricted the action area in its biological opinion in violation of the ESA.

The government agency preparing the biological opinion designates the "action area" within which the effects of the contemplated action will occur. *See* 50 C.F.R. § 402.12(a). "Action area means all areas to be affected directly or indirectly by the Federal action and *not* merely the immediate area involved in the action." 50 C.F.R. § 402.02.

In the present biological opinion, NMFS defined the action area as the "metes and bounds of the permitees' respective properties." Defs.'s Cross-Mot. Summ. J. 27; AR 63. Areas beyond the Permitees's properties were not included in the action area. AR 63. The biological opinion indicates that the scope of the action area was based on NMFS's findings that "[t]he effects of the proposed action on the SONCC coho salmon and their critical habitat, e.g., sediment impacts, improvements to water quality, etc., are expected by NMFS to be insignificant downstream of the most downstream Enrolled Property." AR 63.

Plaintiffs contend that, as a direct result, the biological opinion excludes from the action area approximately 20 miles of the river downstream from the enrolled properties, eight miles of Little Shasta River, and five miles of Yreka Creek. Plts.'s Mot. Summ. J. 22. The areas below Dwinell Dam that Plaintiff references include areas past the Park Creek diversion. *Id*.

The record reflects that, Montague Water Conservation District's CHERP obligations provide for the release of water to the areas below Dwinnell Dam which Plaintiff argues have been excluded. Plts.'s Mot. Summ. J. 22; *see*, *e.g.*, AR 163-164. However, the areas below Dwinnell Dam, including critical habitat, are not included within the biological opinion's action area despite that those areas will be directly or indirectly affected. *Designated Critical Habitat, Coho Salmon*, 64 Fed Reg. 24,049-02; 50 C.F.R. § 402.02; AR 63.

The decision to not to include in the action area locations below Dwinnell Dam designated as critical habitat was arbitrary and capricious considering the evidence. *WildEarth Guardians v. U.S. EPA*, 759 F.3d 1064, 1069-70 (9th Cir. 2014).

NMFS acknowledges that one of the purposes of designating critical habitat, is to detect early on and potentially avoid conflicts between contemplated actions and a threatened species. 64

Fed Reg. at 24, 050. More to the point, the ESA's definition of "critical habitat" includes "the specific areas within the geographical area occupied by the species… essential to the conservation of the species …*which may require special management considerations or protection*". 16 U.S.C. § 1532(5)(A) (emphasis added).

At the same time, in it's Recovery Plan, NMFS recognizes the geographic boundaries of the Shasta River coho salmon population which extend much further than the action area. *Compare* AR 16828 with AR 12. The Recovery Plan also acknowledges the impact that Dwinnell Dam and Parks Creek diversion has had on the hydrology of Shasta River and "altered the natural flow and sediment transport regime in both the upper Shasta River and lower Parks Creek." AR 16827.

Nonetheless, the BiOp states that the "proposed project may result in temporary and minimal adverse effects to [Essential Fish Habitat]" but, is likely to "result in a net improvement to Essential Fish Habitat conditions." AR 109. But that is not the standard. The ESA requires that the action area include "all areas to be affected directly or indirectly by the Federal action and *not merely the immediate area involved in the action*." 50 C.F.R. § 402.02 (emphasis added).

NMFS asserts that the "third-party operation of Dwinnell Dam is not part of the agency action on which NMFS consulted in 2021" which was under a prior consultation concerning the Conservation Habitat Enhancement and Restoration Project." Defs.'s Cross-Mot. Summ. J. 28. The administrative record speaks otherwise. Pursuant to the Site Plan Agreement with Montague, "[t]he projects proposed by [Montague] in the CHERP are complementary and inclusive of the projects identified in this Site Plan Agreement." AR 1456. Thus, the biological opinion—prepared as part of the Safe Harbor Agreement administrative process—should have included an action area that contemplates the direct or indirect effects of the operation of Dwinnell Dam pursuant to CHERP.[2]

//

[2] Though not directly before the Court, the CHERP biological opinion also does not include within the action area, locations below Dwinnell Dam including Little Shasta River and Yreka Creek. The BiOp excludes areas likely to be directly or indirectly affected by the actions contemplated by CHERP. AR 2592, 2593.

NMFS argues that the action area is defined by the extent of the impacts of the action, not the species migratory range, citing to *Oceana, Inc. v. Evans*, 384 F.Supp.2d 203, 229 (D. D.C. 2005) *order clarified*, 389 F.Supp. 2d 4 (D.D.C. 2005). Defs.'s Cross-Mot. Summ. J. 27-28. *Oceana, Inc*. is not binding authority and it is factually distinguishable. *Oceana* involved the potential impact on loggerhead turtles from trawling operations at the Mid–Atlantic scallop fishery. The "action area" was limited to the area where the scallop trawling occurred. Here, the contemplated actions include the release of reservoir water which may have direct and indirect effects beyond where it is released.

The decision to limit the action area to the permittees' respective properties in the biological opinion, although its own guidance provides for the contrary, was arbitrary and capricious in violation of the ESA.

2. Conditions Not Reasonably Certain to Occur[3]

The BiOp relies on conditions not reasonably certain to occur contained in the Template Safe Harbor Agreement and individual Site Plans in violation of the ESA. The Safe Harbor Agreement and Site Plans contain beneficial management activities and avoidance and minimization measures. Plaintiffs argue that, in reaching its conclusion that the Safe Harbor Agreements will not jeopardize SONCC coho salmon or critical habitat, NMFS relied upon the terms in the Safe Harbor Agreement and Site Plans with conditions that are vague and not certain to occur. Plts.'s Mot. Summ. J. 26-29.

Defendants assert that in reaching the no jeopardy finding, NMFS identified 19 activities that will occur as a result of the Safe Harbor Agreement. Defs.'s Cross-Mot. Summ. J. 31-32. Out of 19, NMFS relied on six activities with the "greatest contributions to improved" habitat. The BiOp states that if at the five-year checkpoint at least 80% that proposed project that provides the

//

[3] Since the Court has found the Safe Harbor Agreement BiOp, not reasonably certain to occur, the Court does not address the issue of baseline the best available science related to temperatures. When revising the BiOp, NMFS is urged to consider a more collaborative approach to addressing the arguments raised by Plaintiffs and the public comments to prevent further conflicts and litigation.

greatest contributions to improved conditions, have not been completed, take will be considered exceeded. *Id*.

"Mitigation measures relied upon in a biological opinion must constitute a 'clear, definite commitment of resources,' and be 'under agency control or otherwise reasonably certain to occur.' A "sincere general commitment to future improvements"—without more specificity—is insufficient. *Id.* at 935–36." *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020) *citing Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 & n.17 (9th Cir. 2008).

Moving diversion points is one of the activities that NMFS relied upon in reaching its no jeopardy analysis. The BiOp identifies four Permittees that, under their individual Site Plans, will complete this activity within 3-5 years. AR 54; Defs.'s Cross-Mot. Summ. J. 31-32. It is uncertain whether these activities will in fact occur when only one of the Permittees has defined deadline dates as part of the terms of its Site Plan. Most do not. For example, the Edson-Foulke Site Plan provides for the design and construction of a new diversion facility. AR 1264. While the BiOp indicates this work to be completed in 3-7 years, the timeline is contingent on the Permittee seeking and securing funding, obtaining construction plans and permits, with construction to be completed by the sixth year. AR 54, AR 1257.

As another example, Parks Creek diversion relocation is yet to be confirmed as feasible, yet alone subject to completion. AR 1593-1594. The Parks Creek Site Plan states that "Permittee proposes to assess, design and if mutually agreeable, seek funds to implement, operate, and maintain a combined point of diversion (POD) for diversions points #1, #2 and rights in Edson-Foulke ditch." AR 1593.

These actions reflect that the mitigation measures upon which NMFS relied do not constitute a "clear, definite commitment of resources" that are "under agency control or otherwise reasonably certain to occur." *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020) *citing Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 & n.17 (9th Cir. 2008). Site Plans that require some of the most important contemplated actions that lack funding amount to "generalized contingencies." *Id*. As such, NMFS's reliance on measures

uncertain to occur in concluding no jeopardy to the coho salmon in the biological opinion was arbitrary and capricious." *WildEarth Guardians v. U.S. EPA*, 759 F.3d 1064, 1069-70 (9th Cir. 2014).

D. Environmental Assessment

The National Environmental Policy Act ("NEPA") is a procedural statute that requires federal agencies to "consider every significant aspect of the environmental impact of a proposed action" and "inform the public" of their analysis. 42 U.S.C. § 4332; 40 C.F.R. § 1500.1. NEPA requires an Environmental Impact Statement ("EIS") for any major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); *see also* 40 C.F.R. § 1502.4(a). If the significance of an action is not evident on its face, an agency may prepare an Environmental Assessment ("EA") to determine if the proposal's effects would be significant. *See* 40 C.F.R. § 1501.5(b)-(d). If in its EA the agency finds that the proposed action will not significantly affect the human environment, the agency may issue a finding of no significant impact ("FONSI") in lieu of an EIS. *Id.* § 1501.6. The FONSI must be accompanied by "'a convincing statement of reasons' to explain why a project's impacts are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

In determining whether a proposed action has a "significant" effect on the environment, federal courts must consider both the context and intensity of the action. 40 C.F.R. § 1508.27 (2019).[4] "Context" involves analysis of the significance of the action in the short term and long term within "several contexts such as society as a whole (human, national), the affected interests, and the locality[.]" Id. at § 1508.27(a).

"Intensity" refers to the "severity of the impact." *Id*. at § 1508.27(b). The NEPA regulations provide a non-exhaustive list of factors an agency must consider in weighing the severity of the impact. § 1508.27(b)(1)-(10). The four factors relevant here include, "[t]he degree to which the effects of the quality of the human environmental are likely to be highly

[4] NMFS began the NEPA review process on June 11, 2020 under the Code of Federal Regulations of 2019 which was amended, eliminating this provision, effective on September 14, 2020. *See* AR 810.

controversial" (§ 1508.27(b)(4)), "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks" (§ 1508.27(b)(5)), "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts" (§ 1508.27(b)(7)), and "[t]he 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 Action of 1973" (§ 1508.27(b)(9)).

"We examine the EA with two purposes in mind: to determine whether it has adequately considered and elaborated the possible consequences of the proposed agency action when concluding that it will have no significant impact on the environment, and whether its determination that no EIS is required is a reasonable conclusion." *350 Montana v. Haaland*, 50 F.4th 1254, 1265 (9th Cir. 2022) citing *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1215 (9th Cir. 2008).

"An agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998). For a plaintiff to prevail on a claim that an agency violated its statutory duty to prepare an EIS, she need not show that significant effects will in fact occur. *Id*. "It is enough for the plaintiff to raise substantial questions whether a project may have a significant effect on the environment." *Id*.

However, under the deferential arbitrary and capricious standard, courts must defer to an agency's decision that is "fully informed and well-considered." *Save the Yaak Committee v. Block,* 840 F.2d 714, 717 (9th Cir.1988). Deference is not owed to "clear error of judgment." *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 378 (1989).

NMFS's decision not to prepare an EIS was arbitrary and capricious for two reasons.

1. Effects of Flows

First, in considering the context and intensity of the potential the effects of the action, the Court finds that they are highly controversial and uncertain, mandating the necessity of an EIS. 40 C.F.R. § 1508.27(b)(4)-(5). The selection of the lowest water flow levels draws into question the

//

reasonableness of NMFS finding of no significant impact and its decision to issue the permits without an EIS.

NMFS's stated purpose for entering into the Template Safe Harbor Agreements and Site Plans with the Permittees is to "promote the conservation, enhancement of survival, and recovery of the Southern Oregon and Northern California Coast (SONCC) Evolutionary Significant Unit of coho salmon." AR 816. Yet, NMFS approved the Permittees' guarantee to maintain levels of water already legally mandated for an unlimited take permit for a 20-year term.

In preparing the Environmental Assessment ("EA"), NMFS applied a metrics model designed to determine if fish were in "good condition" for purposes of assessing minimum water flow needs, as mandated by California's Fish and Game Code section 5937. AR 716 n.1. The model encompasses three levels of fish health: (1) individual, (2) population, and (3) community. *Id*. Tier One means that "most individual fish appear to be in good condition…" Peter B. Moyle et al., *Fish Health and Diversity: Justifying Flows for a California Stream*, FISHERIES MANAGEMENT, July 1998, at 10–12. "Good condition" at Tier Two means that "each population must have multiple age classes (evidence of reproduction), a viable population size, and healthy individuals." *Id*. Lastly, at Tier Three, good condition or health at the community level is "dominated by co-evolved species" and "has predictable structure as indicated by limited niche overlap including assemblages made up largely of nonnative species." *Id*. The model was subsequently applied to determine the minimum instream flow needs for salmonoids in the Shasta River Big Springs Complex by McBain & Trush, Inc. AR 840; see AR 848.

Through the Safe Harbor Agreement and Site Plans, NMFS set water flow levels for Tier 1 because "alternative flow scenarios were found by the applicants to be unacceptable due to the impacts they would have on agricultural needs." AR 897. Though adopting Tier 1 levels of water flow is not recommended by its own policies and guidance, NMFS concluded that it would still "provide a net conservation benefit for SONCC coho salmon." *Id*. NMFS did not quantify the amount of water diverted by the permittees. Plts.'s Mot. Summ. J. 42.

There is a substantial dispute about the effect of the water Flow Management Strategy in the EA which is therefore highly controversial.

> A project is "highly controversial" if there is a substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use. A substantial dispute exists when evidence…casts serious doubt upon the reasonableness of an agency's conclusions. [M]ere opposition alone is insufficient to support a finding of controversy. (Internal citations & quotations omitted.)

Bark v. United States Forest Service, 968 F3d 865, 870 citing *Native Ecosystems Council v. U.S. Forest Serv*., 428 F.32d 1233, 1240 (9th Cir. 2005); *In Def. of Animals v. U.S. Dep't of Interior*, 751 F.3d 1054, 1069 (9th Cir. 2014); *WildEarth Guardians v. Provencio*, 923 F.3d 655, 673 (9th Cir. 2019).

During the administrative process, McBain Associates ("McBain") provided comments in response to the proposed Environmental Assessment as to its own findings for the Shasta River Big Springs Complex. Specifically, McBain provided that "meeting Tier 1 criteria alone will likely not achieve the goal of the Safe Harbor Agreement and fish in good condition requirement" below Dwinnell Dam. AR 897. McBain's comment reiterates its findings that "[r]ecovery of fish populations in the Shasta Basin will require more than meeting these Tier No.1 minimums.

In response to McBain's public comments, NMFS provided that, "[w]e understand that the interim minimum instream flow from [your study] may not maintain fish at the population level. We also understand that meeting these targets does not create an expectation for the species to recover fully. Nevertheless, these targets are useful as a point of comparison and to improve conditions for SONCC coho salmon. With respect to future studies assessing Tier 2 and Tier 3 needs, the Agreement should provide useful data that will contribute to future studies." AR 909.

NMFS made efforts to work collaboratively with other stakeholders through the Technical Advisory Committee which included members of the Yurok Tribe and CalTrout. AR 818-819. However, even after their participation, the Yurok Tribe[5] and expert CalTrout expressed concern that NMFS's agreement with the Montague Water District to use Level 1 water flows would accomplish the stated purpose of the Environmental Assessment. The Karuk Tribe, Yurok Tribe, Quartz Valley Rancheria, and other experts called into question whether the proposed action

[5] Plaintiffs' counsel noted during oral arguments that the Yurok Tribe left the Technical Advisory Committee, but it is unclear when in the administrative process the Yurok Tribe disengaged.

would accomplish NMFS's stated purpose or "merely [slow] the rate of extinction." AR 914. CalTrout expressed concern that the "proposed in-stream flow contributions are the same flow contributions as those currently imposed on applicants under CA Fish and Game Code § 5937.6."

The record reflects that the Shasta River population is in swift decline. During the late 1950s, coho salmon runs averaged 1,000 fish annually, already suggesting a depressed population. AR 16829. That figure has fallen to approximately 151 in 2013-well below the depensation threshold. *Id*. The "depensation threshold" for SONCC coho salmon in the Shasta River—meaning "the minimum number of adults needed for survival of a population"—is 144 returning adults. AR 60; AR 2089. "An independent population with spawner numbers below the depensation threshold is at high risk of extinction." AR 15325.

If fish are not maintained at the population level, its chances of conservation are significantly reduced. The Shasta River population of SONCC coho salmon are a core population and the number of spawners needed 4,700. National Marine Fisheries Service, Final Recovery Plan for the Southern Oregon/Northern California Coast Evolutionarily Significant Unit of Coho Salmon (2014) at 4-6. Even NMFS's own recommendations provide that Safe Harbor Agreements should not be used "if a species is so depleted or its habitat is so degraded that considerable improvement over baseline conditions is necessary to result in any net conservation benefit." *Announcement of Safe Harbor Policy*, 64 Fed. Reg. 32,717.

Furthermore, NMFS acknowledged the limitations in what is known about current water flows.

> Water conservation projects proposed under the Agreement are designed to reduce diversion volumes and improve irrigation management resulting in improved flow conditions in the Shasta River and Parks Creek. In some cases, historic irrigation practices resulted in tailwater returns to the stream channel both as surface flow or hyporheic flow. A more detailed analysis would be required to determine the actual volume of consumed water removed from the stream channel for each diversion and ranch to better understand the effects of this Flow Management Strategy to net instream flow.

AR 27,219.

//

//

Without providing the amount of water currently diverted and then using the lowest level of waterflow to maintain individual fish, may lead to the eradication of the population. As such, the FONSI was not a reasonable conclusion. *In Def. of Animals v. U.S. Dep't of Interior*, 751 F.3d 1054, 1069 (9th Cir. 2014).

2. Cumulative Effects

Second, the cumulative impacts analysis is insufficient.

The NEPA regulations mandate that agencies consider whether the proposed action is "related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(7). Cumulative impact is defined as the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" and "can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7 (2019). Proper analysis of the cumulative impact must be more than perfunctory. *Ocean Advocs. v. U.S. Army Corps of Engineers*, 402 F.3d 846, 867 (9th Cir. 2005). The analyses necessitates that the agency provide "some quantified or detailed information" of the cumulative impacts of the past, present, and future projects. *Id*.

The Ninth Circuit has held that "cumulative impact analyses were insufficient 'when they discussed only the direct effects of the project at issue on a small area' and merely 'contemplated' other projects but had 'no quantified assessment' of their combined impacts." *Bark v. United States Forest Service*, 968 F3d 865, 872 citing *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt*., 387 F.3d 989, 994. If an agency's cumulative impact analysis is fully informed and well considered, the court should defer to that finding. "On the other hand, we "need not forgive a clear error in judgment." *Bark v. United States Forest Service*, 968 F3d 865, 872 citing *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002).

Here, the EA does not include quantified or detailed information to consider a cumulative impact. NMFS does not include in its EA, data on water flows prior to implementation of the action. The EA provides that "[t]here is a lack of long-term hydrologic data describing flow characteristics for the stream reaches within and upstream of the Covered Area of the Agreement."

AR 714. It is later conceded that "[a] more detailed analysis would be required to determine the actual volume of consumed water removed from the stream channel for each diversion. Although this analysis would help to better understand the effects of this Flow Management Strategy to net stream flow, it is beyond the scope of this document."

While NMFS went to great lengths to develop the Flow Management Strategy, it is devoid of quantifiable information regarding the cumulative impacts of the past, present, and future, including assessing the impact of CHERP. *Ocean Advocs. v. U.S. Army Corps of Engineers*, 402 F.3d 846, 867 (9th Cir. 2005). Without such data, it is unclear if the Flown Management Strategy will "promote conservation, enhancement of survival, and recovery of the [SONCC coho salmon]."

VI. CONCLUSION

The record reflects that the SONCC coho salmon Shasta River population is in swift decline. The record also suggests there is a shared interest of all parties to promote the long-term survival of the coho salmon species. To address the real threat posed to this species, it is incumbent upon the National Marine Fisheries Services to consider the wholistic effects of their decisions. This might include accounting for the interests, perspectives, and science of Native American tribes, of local residents, educational institutions and academics, community organizations, commercial property owners, as well as others uniquely situated to benefit from the water in the Shasta River. The community members and litigants will be living with each other for the foreseeable future and must find a way to share this region's rich natural resources as one community. Tenayah Norris has experienced first-hand the tragic impact that habitat deprivation for the coho salmon has had on this community. Lest we fail to heed the warning of the Cree Tribe, Tenayah Norris and members of the Yurok Tribe will raise their families with only stories to share about the coho salmon, a species that has been a staple of their culture for centuries.

For the foregoing reasons, this Court **GRANTS** Plaintiffs' motion vacating the Biological Opinion and Environmental Assessment. Restated, this Court finds that the National Marines Fisheries Services applied the Safe Harbor Policy lawfully but violated the Endangered Species Act by improperly restricting the action area in its biological opinion and its decision not to issue

an Environmental Impact Statement was arbitrary and capricious. Accordingly, these issues are **REMANDED** to the National Marine Fisheries Services with instruction to prepare a biological opinion that's action area accounts for the direct or indirect effects of the operation of Dwinnell Dam and prepare an Environmental Impact Statement.

> *When the last tree is cut down, the last fish eaten and the last stream poisoned, you will realize that you cannot eat money.*
>
> *-Cree Tribe Proverb*

IT IS SO ORDERED.

Dated: July 10, 2023

TRINA L. THOMPSON
United States District Judge