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United States District Court
Northern District of California

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

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

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

8 The issues in this case concern whether the National Marine Fisheries Services properly
9 assessed the impact permitting the incidental take of coho salmon would have on the species. This
10 Court must address whether the interests of the permittees, including private entities with
11 commercial interests in the Shasta River¹, were given outsized weight by the National Marine
12 Fisheries Service in light of the statutorily proscribed procedures including whether (1) the
13 National Marine Fisheries Service applied the Safe Harbor Policy lawfully, (2) the biological
14 opinion is subject to vacatur, and (3) National Marine Fisheries Service should have prepared an
15 Environmental Impact Statement.

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

19 **II. PROCEDURAL HISTORY**

20 Plaintiffs Environmental Protection Information Center (“EPIC”) and Friends of the Shasta
21 River brought the present action challenging the administrative process that led to the issuance of
22 permits authorizing the “take” of SONCC coho salmon. Complaint, ECF No. 1. The permits were
23 granted by Defendant National Marine Fisheries Service under the United States Department of
24

25 ¹ The Template Safe Harbor Agreement for Conservation of Coho Salmon in the Shasta River
26 defines Routine Agricultural Activities as, *inter alia*, “cultivation, growing, harvesting, and
27 replanting of pasture and other crops; diversion of water, irrigation, irrigation run-off; preparation
28 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.

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

3 **II. FACTUAL BACKGROUND**

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

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

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

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

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

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

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

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

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

13 Once settlement was reach, under the terms of the agreement, Montague agreed to file for a
14 Clean Water Act permit for the implementation of the Conservation and Habitat Restoration and
15 Enhancement Project (CHERP). AR 2552. The CHERP includes development of a long-term
16 water conservation and flow enhancement program to improve conditions for coho salmon
17 downstream of Dwinnell Dam. AR 68. Under the CHERP, Montague proposes to increase
18 instream environmental releases by an average of 4,400 acre-feet below Dwinnell Dam as a
19 conservation measure to improve conditions for coho salmon using water conserved through
20 lining of up to 8.4 miles of its main irrigation canal. NMFS asserts that “CHERP is an
21 independently required consultation separate from but complementary to the Agreement.” AR
22 161.

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

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

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

3 The Endangered Species Act broadly prohibits the “take” of species that are listed as
4 endangered or threatened. 16 U.S.C. §§ 1533(d), 1538(a)(1)(B); 50 C.F.R. § 223.203; see also 16
5 U.S.C. §§ 1532(6), 1532(20). “Take” is defined to mean “to harass, harm, pursue, hunt, shoot,
6 wound, kill, trap, capture, collect, or attempt to engage in any such conduct.” 16 U.S.C. §
7 1532(19). Though, the ESA authorizes NMFS to permit take under certain circumstances,
8 including, “to enhance the propagation or survival of the affected species.” 16 U.S.C. §
9 1539(a)(1)(A).

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

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

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

1 into the Template Safe Harbor Agreement for Conservation of Coho Salmon in the Shasta River
2 (“Agreement”) and associated Site Plan Agreement as well as Enhancement of Survival Permits
3 (“Permits”) under ESA Section 10(a)(1)(A). The Permits authorized the incidental take of
4 SONCC coho salmon in exchange for permittees commitment to voluntary conservation measures
5 designed to benefit SONCC coho. AR 373. To enter into a Safe Harbor Agreement under the
6 Safe Harbor Policy, NMFS must find a “net conservation benefit” to the species. 64 Fed. Reg. at
7 32,717. A “net conservation benefit” is

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

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

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

28 **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

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

5 **E. Status Review of SONCC ESU**

6 In 2016, NMFS issued a five-year Status Review of the SONCC coho ESU. AR 2060-
7 2129. The Status Review states that for the Shasta River Coho population, “[t]he lack of water for
8 summer rearing juveniles has worsened since the previous status review and is a primary factor
9 inhibiting recovery of the ESU.” AR 2093.

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

24 The Status Review notes that among the rivers in the SONCC ESU, only the Shasta has a
25 video fish counting weir able to measure “actual numbers of fish” instead of estimates. AR 2081.
26 Based on adult coho returns to the Shasta, the Status Review confirms that the coho population
27 remains at a “high” risk of extinction. AR 2089.
28

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. §

1 706(2). “Under the APA, we may overturn an agency’s conclusions when they are ‘arbitrary,
2 capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Bark v. United*
3 *States Forest Serv.*, 958 F.3d 865, 869 (9th Cir. 2020).

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

12 Courts must defer to an agency’s scientific expertise and decisions that are “fully informed
13 and well-considered.” *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir.1988); *see*
14 *Native Ecosystem Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012). Courts need not
15 forgive a “clear error of judgment.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360,
16 378 (1989).

17 **V. DISCUSSION**

18 **A. Standing**

19 Article III of the Constitution gives federal courts the power to decide only “Cases” and
20 “Controversies.” U.S. Const. art. III, § 2. Courts have “long understood that constitutional phrase
21 to require that a case embody a genuine, live dispute between adverse parties.” *Carney v. Adams*,
22 141 S. Ct. 493, 498 (2020). To establish Article III standing, “a plaintiff must show (1) it has
23 suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not
24 conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the
25 defendant; and (3) it is likely as opposed to merely speculative, that the injury will be redressed by
26 a favorable decision.” *Association of Irrigated Residents v. EPA*, 10 F.4th 937, 943 (9th Cir. 2021)
27 (quoting *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180-81
28

1 (2000); *see California v. Texas*, 141 S. Ct. 2104, 2113 (2021). If at least one plaintiff has
 2 standing, the suit may proceed. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,
 3 547 U. S. 47, 52, n. 2 (2006).

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

7 1. Standing for Organizations

8 An organization has standing to sue on behalf of its members if: “(a) its members would
 9 otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane
 10 to the organization’s purpose; and (c) neither the claim asserted, nor the relief requested, requires
 11 the participation of individual members in the lawsuit.” *Ecological Rights Found v. Pac. Lumber*
 12 *Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (quoting *Hunt v. Wash. State Apple Advert. Comm’n*,
 13 432 U.S. 333, 343 (1977)).

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

24 2. Plaintiff’s Alleged Procedural Injuries Threaten a Concrete Interest

25 To seek injunctive relief, Plaintiff must show that they are under threat of suffering an
 26 injury in fact that is concrete and particularized; the threat must be actual and imminent, not
 27 conjectural or hypothetical.” *Summer v. Earth Island Inc.*, 555 U.S. 488, 493 (2009). Plaintiffs
 28

1 allege that NMFS’s decision to issue take permits and enter Agreements with third parties was
 2 inconsistent with the National Environmental Policy Act and based on an inadequate assessment
 3 of the impact such authorization would have on the environment and coho salmon population.
 4 Thus, Plaintiffs assert procedural injuries. When plaintiffs assert a violation of a procedural right,
 5 “the normal standards for redressability and immediacy” do not apply. *Lujan*, 504 U.S. at 572 n.7.
 6 To establish an injury in fact resulting from a procedural error in an agency’s decision-making
 7 process, a plaintiff must show that “(1) the agency violated certain procedural rules; (2) these rules
 8 protected [the] plaintiff’s concrete interests; and (3) it is reasonably probable that the challenged
 9 action will threaten their concrete interest.” *Friends of Santa Clara River v. U.S. Army Corps of*
 10 *Eng’rs*, 887 F.3d 906, 918 (9th Cir. 2018) (internal citation omitted). “But deprivation of a
 11 procedural right without some concrete interest that is affected by the deprivation—a procedural
 12 right *in vacuo*—is insufficient to create Article III standing.” *Summers v. Earth Island Institute*,
 13 555 U.S. 488, 496 (2009).

14 Plaintiffs allege that by failing to follow the law, the NMFS’s issuance of incidental take
 15 permits may adversely affect the population of SONCC coho salmon. Plts.’s Mot. Summ J. 47.
 16 Plaintiffs’ members claim aesthetic, personal, ancestral, scientific, and professional interests in the
 17 current and historic coho population in the Shasta River and the Klamath Basin. Norris. Decl. ¶
 18 12; Gensaw III Decl. ¶ 2, 9, 12. The Court has held that “the desire to use or observe an animal
 19 species, even for purely esthetic purposed is undeniably a cognizable interest for purpose of
 20 standing.” *Lujan*, 504 U.S. at 562-63. Defendants argue that the NMFS’s Recovery Plan,
 21 Agreements, and Permits will improve conditions for the coho salmon and ensure the survival of
 22 the species. *See* Defs.’s Cross Mot. Summ. J., ECF. No. 41. They argue that Plaintiffs claim that
 23 the Agreement and Permits are killing the species is too speculative to establish injury-in-fact and
 24 are contradicted by the NMFS’s finding that there would be “net conservation benefit” to the
 25 affected species. *Id.* at 6. However, if NMFS neglected its statutory obligation to form its
 26 conclusions, then their decision-making procedure likely would harm the coho salmon, and this is
 27 the standard Plaintiff must satisfy. If based on improper assessments and an inadequate evaluation
 28 on their impact on the water quality, the issuance of the Permits would be a “reasonably probable”

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

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

4 Federal courts may "act only to redress injury that fairly can be traced to the challenged
5 action of the defendant, and not injury that results from the independent action of some third party
6 not before the court." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

7 Causation and redressability requirements are "relaxed" for procedural claims only in the sense
8 that a plaintiff "need not establish the likelihood that the agency would render a different decision
9 after going through the proper procedural steps." *Export-Import Bank*, 894 F. 3d 1005, 1012 (9th
10 Cir. 2018).

11 During oral arguments, Defendant drew the courts attention to the Ninth Circuit's decision
12 in *WildEarth Guardians v. U.S. Forest Service* to argue that Plaintiffs are unable to demonstrate
13 causation. 70 4th 1212 (9th Cir. 2023). In *WildEarch Guardians*, the plaintiffs sued the United
14 States Forest Services ("Forest Services") claiming their injury arose from the Forest Services'
15 livestock grazing decision. The decision, they argued, would lead to an increase in the number of
16 wolf attacks on livestock which in turn would cause the Washington Department of Fish and
17 Wildlife to kill more wolves as authorized under Washington law for wildlife management. *Id.* at
18 1218. The appellate court held that the plaintiffs lacked standing to sue the Forest Services
19 because the plaintiffs had not shown that the Forest Services had the authority to alter the
20 Washington Department of Fish and Wildlife's lethal removal practices. *Id.* at 1215. Thus, the
21 actions of the Washington Department of Fish and Wildlife were not fairly traceable to or
22 redressable by the Forest Services. *Id.* at 1218.

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

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

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

15 4. Plaintiff's Alleged Injury Is Redressable by Vacatur

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

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

4 At oral argument, both parties conceded that the Court lacks the authority to direct NMFS
 5 to initiate administrative or judicial proceedings under ESA Section 9 against the permittees as
 6 articulated in *Heckler v. Cheney*. 470 U.S. 821, 831 (1985). However, Plaintiff is not asking for
 7 NMFS to initiate Section 9 proceedings against the permittees for the unlawful take of coho
 8 salmon. Plts.’s Mot Summ. J., 14-15. Plaintiffs request a remedy of vacating the Biological
 9 Opinion and Environmental Assessment. *Id.* At 47. Defendant argues that vacating the NMFS’s
 10 BiOp, resultant Permits, and EA would contribute to rather than alleviate or redress harm being
 11 done to the coho salmon. Defs.’s Cross Mot. Summ. J. 20. However, Plaintiffs need not
 12 demonstrate that the ultimate outcome following proper procedures will benefit them. *Cantrell*,
 13 241 F.3d at 682. A plaintiff has established redressability if they show that the agency, following
 14 correct procedures, “may” or “could” have decided differently. *Friends of Santa Clara River*, 887
 15 F.3d at 920. Thus, Plaintiffs need only show that a reassessment of the environmental impact of
 16 the permits *could* result in a different decision by NMFS. Vacatur of NMFS’s existing BiOp and
 17 EA could trigger a reassessment of the environmental impact of the Permits. Upon reevaluation,
 18 the NMFS could conclude that it needed to provide an Environmental Impact Statement, that their
 19 Biological Opinion did not accurately define the Action Area, or that the Safe Harbor Policy does
 20 not provide authority for NMFS to issue take permits. Because the NMFS could render a different
 21 decision regarding the issuance of the permits after considering the alleged procedural errors (a
 22 decision that would further enhance the survival of the coho salmon), Plaintiffs injury is
 23 redressable.

24 **B. NMFS’s Application of the Safe Harbor Policy was Lawful.**

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

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

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

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

20 64 Fed. Reg. at 32,718.

21 At oral argument, Defendants’ counsel stated that there was no evidence of take prior to
22 NMFS’ issuance of the permits with respect to one of the permittees, Montague Water
23 Conservation District which operates Dwinnell Dam. The administrative record reflects that
24 Defendants had actual or constructive notice that take may have occurred by Montague Water
25 Conservation District prior to their consultation with NMFS. *See, e.g., Environmental*
26 *Assessment*, Comment 158, AR 926; AR 2552; AR 28636; AR 69418; *see also Minute Order,*
27 *Klamath Riverkeeper v. Montague Water Conservation District*, Case No. 2:12-cv-1330, Dkt. No.
28 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.*

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

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

14 C. Biological Opinion

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

20 The agency will determine if the proposed action jeopardizes a threatened species or
 21 critical habitat by considering (1) “the current status and environmental baseline”, (2) “the effects
 22 of the action and cumulative effects”, and (3) “the effects of the action and cumulative effects to
 23 the environmental baseline in light of the status of the species and critical habitat”. 50 C.F.R. §
 24 402.14(g).

25 “The issuance of a biological opinion is considered a final agency action, and therefore
 26 subject to judicial review.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 925
 27 (9th Cir. 2008) citing *Bennett v. Spear*, 520 U.S. 154, 178, (1997).

28 //

1 1. The Action Area Is Improperly Limited

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

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

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

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

18 The record reflects that, Montague Water Conservation District’s CHERP obligations
19 provide for the release of water to the areas below Dwinell Dam which Plaintiff argues have been
20 excluded. Plts.’s Mot. Summ. J. 22; *see, e.g.*, AR 163-164. However, the areas below Dwinell
21 Dam, including critical habitat, are not included within the biological opinion’s action area despite
22 that those areas will be directly or indirectly affected. *Designated Critical Habitat, Coho Salmon*,
23 64 Fed Reg. 24,049-02; 50 C.F.R. § 402.02; AR 63.

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

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

1 Fed Reg. at 24, 050. More to the point, the ESA’s definition of “critical habitat” includes “the
2 specific areas within the geographical area occupied by the species... essential to the conservation
3 of the species ...*which may require special management considerations or protection*”. 16 U.S.C.
4 § 1532(5)(A) (emphasis added).

5 At the same time, in it’s Recovery Plan, NMFS recognizes the geographic boundaries of
6 the Shasta River coho salmon population which extend much further than the action area.
7 *Compare* AR 16828 with AR 12. The Recovery Plan also acknowledges the impact that Dwinnell
8 Dam and Parks Creek diversion has had on the hydrology of Shasta River and “altered the natural
9 flow and sediment transport regime in both the upper Shasta River and lower Parks Creek.” AR
10 16827.

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

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

25 //

26 _____
27 ² Though not directly before the Court, the CHERP biological opinion also does not include within
28 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.

1 NMFS argues that the action area is defined by the extent of the impacts of the action, not
 2 the species migratory range, citing to *Oceana, Inc. v. Evans*, 384 F.Supp.2d 203, 229 (D. D.C.
 3 2005) *order clarified*, 389 F.Supp. 2d 4 (D.D.C. 2005). Defs.’s Cross-Mot. Summ. J. 27-28.
 4 *Oceana, Inc.* is not binding authority and it is factually distinguishable. *Oceana* involved the
 5 potential impact on loggerhead turtles from trawling operations at the Mid–Atlantic scallop
 6 fishery. The “action area” was limited to the area where the scallop trawling occurred. Here, the
 7 contemplated actions include the release of reservoir water which may have direct and indirect
 8 effects beyond where it is released.

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

12 2. Conditions Not Reasonably Certain to Occur³

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

20 Defendants assert that in reaching the no jeopardy finding, NMFS identified 19 activities
 21 that will occur as a result of the Safe Harbor Agreement. Defs.’s Cross-Mot. Summ. J. 31-32.
 22 Out of 19, NMFS relied on six activities with the “greatest contributions to improved” habitat. The
 23 BiOp states that if at the five-year checkpoint at least 80% that proposed project that provides the
 24 //

25
 26 _____
 27 ³ Since the Court has found the Safe Harbor Agreement BiOp, not reasonably certain to occur, the
 28 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.

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

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

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

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

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

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

4 **D. Environmental Assessment**

5 The National Environmental Policy Act (“NEPA”) is a procedural statute that requires
 6 federal agencies to “consider every significant aspect of the environmental impact of a proposed
 7 action” and “inform the public” of their analysis. 42 U.S.C. § 4332; 40 C.F.R. § 1500.1. NEPA
 8 requires an Environmental Impact Statement (“EIS”) for any major federal action “significantly
 9 affecting the quality of the human environment.” 42 U.S.C. § 4332(C); *see also* 40 C.F.R. §
 10 1502.4(a). If the significance of an action is not evident on its face, an agency may prepare an
 11 Environmental Assessment (“EA”) to determine if the proposal’s effects would be significant. *See*
 12 40 C.F.R. § 1501.5(b)-(d). If in its EA the agency finds that the proposed action will not
 13 significantly affect the human environment, the agency may issue a finding of no significant
 14 impact (“FONSI”) in lieu of an EIS. *Id.* § 1501.6. The FONSI must be accompanied by “a
 15 convincing statement of reasons’ to explain why a project’s impacts are insignificant.” *Blue*
 16 *Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

17 In determining whether a proposed action has a “significant” effect on the environment,
 18 federal courts must consider both the context and intensity of the action. 40 C.F.R. § 1508.27
 19 (2019).⁴ “Context” involves analysis of the significance of the action in the short term and long
 20 term within “several contexts such as society as a whole (human, national), the affected interests,
 21 and the locality[.]” *Id.* at § 1508.27(a).

22 “Intensity” refers to the “severity of the impact.” *Id.* at § 1508.27(b). The NEPA
 23 regulations provide a non-exhaustive list of factors an agency must consider in weighing the
 24 severity of the impact. § 1508.27(b)(1)-(10). The four factors relevant here include, “[t]he degree
 25 to which the effects of the quality of the human environmental are likely to be highly
 26

27 _____
 28 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.

1 controversial” (§ 1508.27(b)(4)), “[t]he degree to which the possible effects on the human
2 environment are highly uncertain or involve unique or unknown risks” (§ 1508.27(b)(5)),
3 “[w]hether the action is related to other actions with individually insignificant but cumulatively
4 significant impacts” (§ 1508.27(b)(7)), and “[t]he degree to which the action may adversely affect
5 an endangered or threatened species or its habitat that has been determined to be critical under the
6 Endangered Species Action of 1973” (§ 1508.27(b)(9)).

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

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

19 However, under the deferential arbitrary and capricious standard, courts must defer to an
20 agency’s decision that is “fully informed and well-considered.” *Save the Yaak Committee v. Block*,
21 840 F.2d 714, 717 (9th Cir.1988). Deference is not owed to “clear error of judgment.” *Marsh v.*
22 *Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

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

24 1. Effects of Flows

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

28 //

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

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

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

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

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

1 A project is “highly controversial” if there is a substantial dispute
2 [about] the size, nature, or effect of the major Federal action rather
3 than the existence of opposition to a use. A substantial dispute exists
4 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.)

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

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

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

21 NMFS made efforts to work collaboratively with other stakeholders through the Technical
22 Advisory Committee which included members of the Yurok Tribe and CalTrout. AR 818-819.
23 However, even after their participation, the Yurok Tribe⁵ and expert CalTrout expressed concern
24 that NMFS’s agreement with the Montague Water District to use Level 1 water flows would
25 accomplish the stated purpose of the Environmental Assessment. The Karuk Tribe, Yurok Tribe,
26 Quartz Valley Rancheria, and other experts called into question whether the proposed action

27 _____
28 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.

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

4 The record reflects that the Shasta River population is in swift decline. During the late
 5 1950s, coho salmon runs averaged 1,000 fish annually, already suggesting a depressed population.
 6 AR 16829. That figure has fallen to approximately 151 in 2013—well below the depensation
 7 threshold. *Id.* The “depensation threshold” for SONCC coho salmon in the Shasta River—
 8 meaning “the minimum number of adults needed for survival of a population”—is 144 returning
 9 adults. AR 60; AR 2089. “An independent population with spawner numbers below the
 10 depensation threshold is at high risk of extinction.” AR 15325.

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

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

21 Water conservation projects proposed under the Agreement are
 22 designed to reduce diversion volumes and improve irrigation
 23 management resulting in improved flow conditions in the Shasta
 24 River and Parks Creek. In some cases, historic irrigation practices
 25 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.

26 AR 27,219.

27 //

28 //

1 Without providing the amount of water currently diverted and then using the lowest level
2 of waterflow to maintain individual fish, may lead to the eradication of the population. As such,
3 the FONSI was not a reasonable conclusion. *In Def. of Animals v. U.S. Dep't of Interior*, 751 F.3d
4 1054, 1069 (9th Cir. 2014).

5 2. Cumulative Effects

6 Second, the cumulative impacts analysis is insufficient.

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

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

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

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

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

11 VI. CONCLUSION

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

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

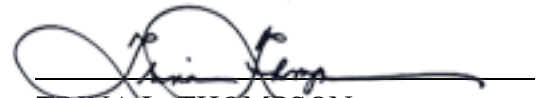
1 an Environmental Impact Statement was arbitrary and capricious. Accordingly, these issues are
2 **REMANDED** to the National Marine Fisheries Services with instruction to prepare a biological
3 opinion that's action area accounts for the direct or indirect effects of the operation of Dwinnell
4 Dam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

5
6 *When the last tree is cut down, the last fish eaten and the last stream
poisoned, you will realize that you cannot eat money.*

7 *-Cree Tribe Proverb*

8 **IT IS SO ORDERED.**

9 Dated: July 10, 2023

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13 TRINA L. THOMPSON
14 United States District Judge
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United States District Court
Northern District of California