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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

**NATIVE FISH SOCIETY,
MCKENZIE FLYFISHERS,**

Plaintiffs,

v.

**NATIONAL MARINE FISHERIES
SERVICE, REBECCA BLANK, Acting
Secretary of Commerce, WILLIAM STELLE,
Regional Administrator, NMFS, OREGON
DEPARTMENT OF FISH & WILDLIFE,
ROY ELICKER, Director, ODFW,
BRUCE McINTOSH, Acting Fish
Division Administrator, ODFW, CHRIS
WHEATON, Northwest Region Manager,
ODFW,**

Case No.: 3:12-cv-431-HA

**REPLY IN SUPPORT OF
MOTION FOR TEMPORARY
RESTRAINING ORDER and/or
PRELIMINARY INJUNCTION**

Defendants.

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GLOSSARY OF ACRONYMS

| | |
|-------|--|
| APA | Administrative Procedure Act |
| BiOp | Biological Opinion |
| BMP | Best Management Practice |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| ESA | Endangered Species Act |
| FONSI | Finding of No Significant Impact |
| HGMP | Hatchery and Genetic Management Plan |
| HSRG | Hatchery Scientific Review Group |
| ITS | Incidental Take Statement |
| NEPA | National Environmental Policy Act |
| NMFS | National Marine Fisheries Service |
| ODFW | Oregon Department of Fish & Wildlife |
| pHOS | Proportion of Hatchery-Origin Spawners |
| USFWS | U.S. Fish & Wildlife Service |

GLOSSARY OF TERMS

Integrated recovery program - An artificial propagation project primarily designed to aid in the recovery, conservation or reintroduction of particular natural population(s), and fish produced are intended to spawn in the wild or be genetically integrated with the targeted natural population(s). Sometimes referred to as “supplementation”. (AR 16413–14 – ODFW Definition)

Isolated harvest program - Project in which artificially propagated fish produced primarily for harvest are not intended to spawn in the wild or be genetically integrated with any specific natural population. (AR 16414 – ODFW Definition)

Hatchery programs are classified as genetically *segregated* if the broodstock is propagated as a reproductively distinct population primarily, if not exclusively, from adult returns back to the hatchery. In segregated programs, little or no gene flow should occur from a naturally spawning population to the hatchery broodstock. (AR 21180 – HSRG Definition)

INTRODUCTION

State defendants, with NMFS's blessing, are creating unnatural wild fish populations in the Sandy River basin that are dependent on human intervention. Their goal is to avoid reducing by even one iota the sport fishery based on artificial propagation. This creates serious risk to wild fish. The reliance on weirs and acclimation facilities and constant human intervention to try to mitigate the evident harm to wild fish from the continued release of hatchery fish leaves some of the few remaining wild populations in the Lower Columbia basin far from the "natural, self-sustaining" state required for species recovery. This grand experiment—trying to figure out whether state defendants can operate such an unnatural system without jeopardizing the survival and recovery of these species—is not permitted under the Endangered Species Act.

Serious genetic and ecological harm has occurred and persists among the wild fish in the Sandy River basin, particularly spring Chinook and winter steelhead. Plaintiffs Native Fish Society and McKenzie Flyfishers (collectively "NFS") have proved their prima facie case that take has occurred. Defendants have not carried their burden, explicit in the ESA, of showing that they have complied with any exemption from take liability. Nor have defendants rebutted NFS's showing that the BiOp and Section 4(d) Decision are arbitrary and capricious and should be set aside. In view of the pervasive damage which hatchery strays have caused to the wild fish populations in the Sandy River, the unknown and uncertain potential for weirs and acclimation to prevent future damage, serious legal deficiencies in the consultation and decision documents, and the paramount principle of institutionalized caution embodied in the ESA, irreparable harm is likely absent injunctive relief from this Court enjoining the release of this year's cohort of hatchery-bred fish.

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ARGUMENT

I. PRELIMINARY CLARIFICATIONS AND CORRECTIONS

A. State defendants and NMFS misconstrue NFS's injunction request.

NFS clarifies that it is not seeking to enjoin the production of fish at the Sandy Hatchery, nor the use of weirs to sort returning hatchery strays from previous years' releases—but only the prohibition of *new releases into the Sandy River basin* of hatchery-bred fish. This type of narrowly tailored injunction will avoid harm to wild fish that will manifest as the hatchery fish prey on juveniles and as they return in a few years. The injunction would not affect fishing this year, since the return of fish released two to four years ago will be unaffected.

The ocean-based phase of the anadromous species' life-cycle illustrates an important fact about the Sandy Hatchery programs, which defendants elide: the cyclical nature of releases and returns is a design feature of the program. State defendants' arguments about wholly past harms miss this important point: the hatchery program is an ongoing cycle, with past actions having present and future effects. Although they disclaim it, *see, e.g.*, State Defs' Opp. at 28–29, state defendants remain responsible for past management decisions and hatchery fish they released into the Sandy River basin in past years when those fish return in 2013 and future years.

The salmonid life-cycle explains why the take of wild fish by the Hatchery's operations—through the harmful genetic and ecological effects from hatchery strays spawning among wild fish, from competition during outmigration, and from impediments to migration as spawners return—has been a constant theme in NFS's pre-lawsuit notice letter, the original complaint which commenced the action, and the supplemental complaint which reflected factual developments since the original complaint. *See infra* at 41–43. Because of the lag time between outmigration and spawning, it is the *whole* of the Hatchery operations which have been and

remain in violation of the prohibition against take in ESA Section 9. And, as discussed below, NFS's take claims are justiciable: they are not moot, adequate notice was provided, and the Section 4(d) Decision does not absolutely immunize state defendants.

NMFS and state defendants take extreme positions. The former avers that it is not authorizing anything related to the operation of the hatchery, while the latter interprets this “non-authorization” as an absolute immunity from liability for the take of wild salmonids. NMFS argues that NFS's dispute is with state defendants, while state defendants say that NFS's dispute is with NMFS. One important aspect of the pending motion is obscured in the defendants' buck passing exercise: the interrelation of the NMFS actions sought to be set aside and the claim that state defendants are engaged in the take of wild fish. If NFS succeeds on the merits of its claims against NMFS (or, at this stage, is deemed likely to succeed), state defendants' exemption from the take prohibition—either through the ITS, or the Section 4(d) Decision—will disappear, justifying an injunction against the release of hatchery fish this year.

B. Defendants misrepresent the nature of the hatchery programs.

It is important to be clear regarding what the hatchery programs are, and are not. All four of the Sandy Hatchery programs are “isolated harvest programs.” AR 16342 (“The primary objective of this program is to augment the Sandy River winter steelhead sport fishery with hatchery reared, basin-origin winter steelhead.”), 16242 (spring Chinook), 16161 (coho); 10638 (summer steelhead). The HGMPs define “isolated harvest program” as a “[p]roject in which artificially propagated fish produced primarily for harvest *are not intended to spawn in the wild or be genetically integrated with any specific natural population.*” AR 16414 (emphasis added). By contrast, an “integrated recovery program” is “[a]n artificial propagation project primarily designed to aid in the recovery, conservation or reintroduction of particular natural population(s),

and fish produced are intended to spawn in the wild or be genetically integrated with the targeted natural population(s). Sometimes referred to as ‘supplementation’.” AR 16413–14. “Isolated” and “integrated” distinguish whether wild fish are used as broodstock to propagate artificial fish.

Important facts flow from these definitions. First, harm to wild fish will manifest at lower hatchery stray rates from isolated programs such as these. Wild broodstock was last used in the Sandy Hatchery programs in 2010, which since then have been isolated programs using only hatchery-bred returning adults. *E.g.*, AR 16339. The best available science shows that deleterious genetic changes can occur within the first generation of hatchery breeding. Frissell Decl. ¶ 13; Second Declaration of Christopher A. Frissell, Ph.D. (filed herewith) ¶¶ 10–14. Defendants are incorrect to say that a 10% stray rate is “conservative” because the “30% threshold” recommendation by the Hatchery Scientific Review Group (“HSRG”) which NMFS cites applies only to *integrated* programs. AR 21323. It pertains only to programs where the natural spawning of hatchery fish “is an intended purpose” of the program—which is not the case here. AR 21324. HSRG’s recommendations for “segregated” (synonymous with “isolated”) programs are that such programs should “[r]elease fish in a manner and/or at locations that ensure hatchery-origin adults constitute no more [than] one to five percent of natural spawners in a watershed.” AR 21326. “Stray rates as low as one to two percent for a large, segregated harvest program may pose unacceptable risks to natural populations.” AR 21266.¹

¹ In a more recent, comprehensive 2009 report, inadvertently omitted from the administrative record, HSRG refined its recommendations for segregated programs, stating that maintaining the recommended stray rate below five percent is the “*minimal* requirement for minimizing the genetic risks of hatchery programs to naturally spawning populations” and that even exceeding that threshold by a single percentage point “should be viewed as posing a significant, long-term genetic risk to the viability of a naturally spawning population if that potential level of gene flow continues unabated for many generations.” Ex. 1 at 3–4 (excerpts from Appendices A, E to HSRG, Columbia River Hatchery Reform System-Wide Report (Feb. 2009)). HSRG also gave

Thus, from a perspective of whether hatchery fish cause *harm* to wild fish, the scientific threshold for significant genetic harm is five percent for the segregated (isolated) programs at the hatchery. And NMFS officials know this. In May 2011, Rob Jones, who oversaw preparation author of the BiOp, wrote to Richard Turner articulating the 5% goal: “[I]f these are Primary [populations] and we are not integrating, then haven’t we been shooting for a 5% pHOS ... I realize that the hatchery fish are derived from the local [populations] but ... I’m certain we can finesse this so let’s talk.” AR 2000. Turner replied that, because populations had been integrated, the pHOS could be “up to 15% hatchery spawners and still meet the low risk criteria,” but “[i]n the new program, without natural fish in the broodstock, the low risk criteria allows 10% for two generations and then limits the proportion of hatchery spawners to 5%.” *Id.* He added that

[r]equiring that the programs meet a 5% pHOS would be one approach but it would be more restrictive than the recovery plan goal which is to have pHOS be less than 10%. Do we want to be more restrictive than the recovery plan? We could say that the 10% goal is OK for winter steelhead and spring Chinook, based on the program history, but they should manage to meet 5% pHOS for all of the programs since the populations in the Sandy River are key to recovering all species.

Id. Yet NMFS approved the programs to be of indefinite duration, with a 10% stray rate, even as the genetic divergence between the hatchery and naturally-spawning fish increases with each generation. AR 21326 (HSRG statement that “[a]fter several generations of artificial propagation, segregated hatchery broodstocks may pose genetic and ecological risks to naturally spawning populations that are not unlike those imposed by exotic or introduced species”).

Second, NMFS claims that it “approved the use of supplementation” as part of the winter steelhead program. NMFS Opp. at 21. That is not true: the final, signed, approved winter steelhead HGMP describes the program as purely an “isolated harvest program.” AR 16342.

an illustration that “the potential for fitness loss when effective pHOS is 5% is significantly greater than it would be at 3%.” Ex. 1 at 8–9.

There is no mention in the approved HGMP of the use of supplementation to avoid extirpation of the sub-population. AR 16338–42; *see also* AR 16706 (response to comment stating that having hatchery fish spawn naturally to supplement wild fish “is not the goal for the proposed hatchery programs”). The HGMP explicitly provides that “the program will be operated as an isolated program using hatchery returning adults,” AR 16339, and that “[b]eginning in 2011, wild winter steelhead arriving at the hatchery will be passed into Cedar Creek upstream of the hatchery *after sorting to exclude hatchery-origin (marked) fish.*” AR 16368 (emphasis added).

The proposed action circulated to the public and ultimately approved contains no mention of a supplementation program. AR 16534 (describing proposed action as approval of hatchery programs “as described in the four HGMPs”). An oblique reference was inserted into the final EA, and another in the BiOp, but neither contains any analysis of a supplementation program or the effects on the wild fish population and the species. AR 16548; AR 16955. The BiOp simply contains a conclusory statement that “NMFS believes the demographic risk outweighs risks to population productivity and diversity posed by hatchery supplementation” without explaining the basis for that belief. AR 16955. The HGMP that NMFS approved does not contain any authorization of an integrated recovery or “supplementation” program. If, in fact, NMFS was proposing *a completely different action* than described in the HGMP circulated for public comment, to include winter steelhead supplementation, NMFS was required under NEPA to conduct a supplemental, public analysis in the form of an EIS.

C. Defendants mischaracterize the contents of the final, approved HGMPs.

Defendants’ repeatedly refer to the “metric” by which compliance with the ITS and Section 4(d) Decision purportedly is to be measured, a 3-year moving mean proportion of hatchery fish on spawning grounds, beginning in 2013. *See, e.g.* State Defs’ Opp. at 2, 12;

NMFS Opp. at 9, 25. However, this metric is only referenced in the ITS section that describes NMFS's consultation reinitiation trigger, not in the section describing the amount or extent of permissible take. AR 16970, 16974. It is not referenced in the Section 4(d) Decision or in the HGMPs. Yet, according to defendants' litigation position, "Oregon's compliance will be evaluated after the adult returns are calculated in 2015. This allows for the HGMPs to produce the anticipated results." NMFS Opp. at 25. This interpretation would provide three years during which the incidental limit for take from hatchery strays is co-extensive with the action and for which there is no reinitiation trigger, in violation of the Ninth Circuit's direction in *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031, 1037–41 (9th Cir. 2007); *see infra* at 24–26.

And, throughout the public process for developing the HGMPs and providing them for public comment, NMFS represented to the public that the proper method for determining permissible stray rates is a nine-year average to be calculated from the *previous* nine years' data. In response to public comments on the draft EA, NMFS stated that the nine-year average "would be calculated annually using escapement data for the past 9 years *and would not require 9 new years of data before the average could be calculated.*" AR 16889 (emphasis added); *see also* AR 16563, 16566, 16570 (NMFS describing the 9-year moving average for spring Chinook, coho, and winter steelhead); AR 17521 (ODFW Recovery Plan stating the 9-year metric). ODFW adopted this same metric in the HGMPs. *See, e.g.*, AR 16311 ("limit straying if the rate exceeds the standard established in the Lower Columbia River Conservation and Recovery Plan").

The Section 4(d) Decision also states that ODFW must "[c]omply with actions necessary to ensure that the proportion of hatchery fish in the naturally spawning population requirements *as described in the HGMPs and the Recovery Plan are met* (i.e., annually less than 10 percent for spring Chinook salmon, coho salmon and winter steelhead.>"). AR 17011 (emphasis added).

ODFW's Recovery Plan, and NMFS's explicit reference to the Recovery Plan "requirements" in the 4(d) Decision and statement to the public that the 9-year average "would not require 9 new years of data"—combined with the lack of any explanation for the 3-year metric tagged onto the end of the reinitiation trigger—make the 3-year, future-only metric arbitrary and capricious.² Because NMFS's 3-year, future-only metric for reinitiation of consultation contradicts, without explanation in its statements in the EA, elsewhere in the BiOp, and in the HGMPs and ODFW Recovery Plan that the proper measure of the stray rate is a *retrospective* nine-year average, defendants' reliance on a metric that would not even begin to measure compliance until 2015 is misplaced. The agency cannot bait-and-switch the public with respect to the critical substance of the proposed action and underlying HGMPs.

II. NFS IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.

A. State defendants and NMFS are in violation of ESA Section 9.

As a threshold matter, state defendants misunderstand the interplay between their violations of the statute and available relief, the nature of the take claim, applicable defenses, and where the burden of proof lies. State defendants "confuse the forward looking nature of the relief offered by the ESA's citizen suit provision and the violation of the Act that justifies the injunction." *Stout v. U.S. Forest Serv.*, 869 F. Supp. 2d 1271, 1280–81 (D. Or. 2012). "While injunctive relief is forward looking, it is often used to remedy past or present harms and the term 'in violation' connotes past, present, or future violations of the ESA." *Id.* at 1281.³

² The BiOp asserts that, to achieve recovery, the proportion of hatchery spring Chinook must be reduced "with the goal of having the nine-year averaged proportion to be less than or equal to 10 percent (ODFW 2010). This corresponds to a pHOS level of 0.10." AR 16929.

³ Plaintiffs here seek prospective declaratory and injunctive relief that will remedy past and ongoing violations of ESA Section 9. Such relief is not barred by sovereign immunity. *Comm. to*

State defendants argue that plaintiffs have not proven that the terms of the ITS or Section 4(d) Decision will not be met. That argument misses the mark because the ESA expressly provides that it is the *defendant's* burden to prove that the conditions of any exemption provided by the ITS or the Section 4(d) Decision are met: “[i]n connection with any action alleging a violation of section 1538 of this title, any person claiming the benefit of any exemption or permit under this chapter shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.” 16 U.S.C. § 1539(g); *see also* H.R. Rep. No. 94-823, at *6 (1976) (“Subsection (g) ... *provided for an affirmative defense where a prima facie violation of the Act is established*”) (emphasis added). This includes any exemption in Chapter 35 of Title 16, “Endangered Species,” including the exemption set out in Section 7 that “any taking that is in compliance with the terms and conditions specified in [an ITS] shall not be considered to be a prohibited taking of the species concerned.” 16 U.S.C. § 1536(o)(2). State defendants consistently misstate this burden of proof on issues related to compliance with the ITS and Section 4(d) Decision.

1. Defendants have taken and continue to take listed wild fish.

Proof of a “take” is independent of whether defendants are in compliance with any take exemption provided by the ITS or Section 4(d) Decision. As this Court has observed, where an ITS uses a proxy for take, “the exceedance of the ITS in and of itself does not establish a violation of § 9. Rather, the exceedance of the ITS abrogates the safe harbor provision of the ITS, but plaintiffs must still demonstrate that take has occurred.” *Or. Natural Desert Ass’n v.*

Save Mokolumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 309–10 (9th Cir. 1993) (Eleventh Amendment does not bar a district court from considering defendants’ past conduct as it relates to ongoing or future violations); *Pac. Rivers Council v. Brown*, No. 02–243–BR, 2002 WL 32356431, at *6 (D. Or. Dec. 23, 2002).

Tidwell, 716 F. Supp. 2d 982, 1005 (D. Or. 2010). Thus NFS must make a prima facie showing that defendants are in violation of Section 9. Whether an exemption then shields defendants from liability turns on whether they can prove the exemption is “valid” and that they are in substantive compliance with it. 16 U.S.C. § 1539(g); *Allen*, 476 F.3d at 1040 (“take must be in compliance with the terms and conditions of the [ITS]”). These questions in turn implicate several issues discussed below regarding whether the BiOp (or its ITS) and the Section 4(d) Decision are valid.

Accordingly, NFS has established a prima facie violation of Section 9 by state defendants and NMFS.⁴ Defendants do not, for the main part, contest the showing of take. Rather, they assert jurisdictional defenses or attempt to show that one of the exemptions to the blanket take prohibition shields their actions from liability. Take from straying hatchery fish among the naturally-spawning populations of spring Chinook, winter steelhead, and coho has occurred and is ongoing. Spring Chinook stray rates have averaged over 50% in the years since the Marmot Dam was removed, remaining at 25–30% in 2012. AR 31748; NFS Memo Ex. 3 at 1, 5; NFS Memo Ex. 4 at 1. Defendants’ declarants recognize that winter steelhead stray rates have reached 27 or 28% in two of the last three years. Lewis Decl. ¶ 59 (28.6% pHOS for winter steelhead in 2010); Turner Decl. ¶ 20 (confirming plaintiffs’ calculation of approximately 27% stray rate in 2012). These are well above the rates at which it is undisputed that genetic and ecological harm to wild fish occurs. Frissell Decl. ¶¶ 12–14, 20–26, 34–37, 39; Second Frissell Decl. ¶¶ 12–13; *see supra* at 4–5.⁵ State defendants cannot run away from the sworn testimony of the ODFW’s

⁴ NMFS disclaims Section 9 liability, but the record is clear that 100% of the funding for the HGMP programs comes from NMFS under the Mitchell Act. AR 15854, 16160, 16239, 16340. NMFS’s funding and approval of the HGMPs are proximate causes of the Section 9 violations. At a minimum, this Court can enjoin NMFS from funding the releases this year.

⁵ The metric used to calculate the stray rate for purposes of the reinitiation of consultation in the ITS, and the 10% incidental take limit, are not the measures of whether take has occurred and is

Fish Division Director before this Court in the Columbia Dams case that genetic risks to wild fish increase substantially when the pHOS exceeds 5% and that ecological risks due to hatchery fish manifest when the pHOS is over 10%. NFS Memo at 12.

Defendants also do not seriously contest that the placement of weirs causes take of wild spring Chinook, opting to defend with a series of contradictory calculations and interpretations of what the cryptic take limit from weir effects might mean. NMFS acknowledges in its BiOp the harmful effects that weirs cause. AR 16589. These harmful effects are further demonstrated in the U.S. Forest Service’s 2012 Salmon River and Zigzag River draft report.⁶ That agency’s objective report reiterates that there was “a shift in the distribution of holding adults upstream and downstream of the weir” and of “a shift in the distribution of spawning location” due to the operation of the weirs, as well as “[e]vidence that fish may have been selecting to spawn downstream of the weirs rather than moving through them.” Sherwood Decl. Ex. 1 at 1–2. Placement of the weirs harasses wild fish by significantly disrupting normal spawning patterns. Frissell Decl. ¶¶ 31–37; Second Frissell Decl. ¶¶ 25–34. Although defendants now argue that the ambiguous take limit should have some other baseline farther back in time, *see, e.g.* Schroeder Decl. ¶¶ 27–28, ODFW’s spawning reports show that there have been significantly more redds in the reaches below the weirs in 2011 and 2012 than in 2010. AR 31747; NFS Memo Ex. 3 at 12.

2. Defendants have not demonstrated that any exemption precludes liability.

State defendants make little effort to prove that the ITS exemption is valid and has been complied with, focusing instead on the procedural aspects of the Section 4(d) Decision. In

occurring, but rather implicate whether the ITS is valid and whether defendants are in compliance with it. *See Tidwell*, 716 F. Supp. 2d at 1005.

⁶ The draft report is attached as Exhibit 1 to the Declaration of Mark Sherwood (filed herewith). NFS included the Forest Service’s spawning survey tables as Exhibits 2 and 6 to its opening brief. These are the subjects of a motion to strike to which NFS will respond separately.

particular, state defendants make no effort to prove that the inclusion in the reinitiation trigger section of the 3-year, future-only metric for evaluating reinitiation is “valid,” as required to establish the affirmative defense, and rely on it despite the fact that it is not included in the take limit set in the ITS nor in the Section 4(d) Decision. Because NMFS represented to the public that the metric for evaluating stray rate compliance would be the retrospective metric described in ODFW’s own Recovery Plan, the future-only metric does not apply to whether defendants are exempt from take liability. *See supra* at 6–8, *infra* at 24–26.

i. HGMP approval does not provide absolute immunity from liability.

State defendants argue that NMFS’s decision approving the HGMPs provides absolute immunity. That argument fails because the regulations establishing Limit 5 expressly contemplate the continued availability of citizen enforcement of Section 9 even after a limit has been approved. Defendants must then prove compliance with the substantive and procedural requirements of the approval decision to take advantage of the affirmative defense to liability “where the person can demonstrate that the limit is applicable and was in force, and that the person *fully complied* with the limit at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent.” 50 C.F.R. § 223.203(c) (emphasis added); *see* 16 U.S.C. § 1539(g) (placing burden on defendant to prove an exemption is valid and that defendant is in compliance with it).

The 2000 Section 4(d) Rule that established Limit 5 and this defense make clear that citizen enforcement for violations of Section 9 is available if the recipient of a limit does not fully comply with its terms. In response to a commenter requesting NMFS to clarify that no state rule would hinder citizens from taking legal actions to ensure salmon recovery, NMFS responded that the “rule does not in any way alter the ESA’s enforcement provisions, *including the rights of third*

parties to enforce under appropriate circumstances.” Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units, 65 Fed. Reg. 42,422, 42,433 (July 10, 2000) (emphasis added). State defendants’ assertion that the issues raised by NFS “are for NMFS, not this Court” thus fails.

The 2000 Section 4(d) Rule also provides that the rule itself (including Limit 5), ESA Section 10 incidental take permits, and ESA Section 7 consultation (including an ITS) provide identical protection for activities that cause take. 65 Fed. Reg. at 42,423–24. Only take that is in substantive compliance with the terms of an ITS is exempt from Section 9 liability. *Ramsey v. Kantor*, 96 F.3d 434, 442 (9th Cir. 1996) (actions “contemplated by an [ITS] and ... conducted in compliance with the requirements of that statement” do not violate Section 9). Given NMFS’s intention to not alter the ESA’s enforcement provisions, whether a defendant “fully complied” with the substance of the authorized Limit is relevant in a citizen enforcement action.⁷

The 2000 Section 4(d) Rule further contemplates that part of NMFS’s responsibility is monitoring “for harmful activities resulting in take *that do not obey the requirements of the limit*” and therefore are subject to enforcement. 65 Fed. Reg. at 42,423 (emphasis added). NMFS in this case argues that the terms of the HGMPs were incorporated into the proposed action, and hence “are enforceable under the ESA.” NMFS Opp. at 24. This reinforces the conclusion that compliance with the substantive terms of the HGMPs and NMFS’s approval of them through the proposed action is required for a defendant to “fully comply” with the limit and obtain the exemption contemplated by the regulatory affirmative defense.

⁷ To be sure, NMFS has an important role in overseeing state defendants’ compliance with the Section 4(d) Limit—but this would be true in the ITS context as well, where NMFS must monitor and report on the impacts of its incidental take, and reinitiate consultation if the amount or extent of take permitted in the ITS is exceeded. *See* 50 C.F.R. §§ 402.14(i)(3)-(4). The availability of agency enforcement does not preclude citizen enforcement.

Contrary to state defendants' assertion that implementation is irrelevant, NMFS's Section 4(d) Decision and related evaluation and determination documents for each program explicitly explain that the Section 9 take prohibitions "will not apply to hatchery activities *conducted in accordance with the HGMP, and with any implementation terms in the NMFS decision memorandum for the HGMP.*" AR 17035–36 (spring Chinook evaluation and determination) (emphasis added); *see* AR 17007 (Section 4(d) Decision concurring in the HGMPs "provided that they are implemented in accordance with the section on implementation terms at the end of this memo"); AR 17011 ("ODFW HGMPs qualify for take limitations under Limit 5 of the 4(d) Rule provided that they are implemented in accordance with the implementation terms and reporting requirements described in [the decision]."). To "fully comply" and be exempt from take liability thus involves substantive compliance with the terms of the Section 4(d) Decision.

ii. Defendants have not proven that the ITS or Section 4(d) Decision is valid or that they are in compliance with either.

Because state defendants misinterpret the affirmative defense as requiring purely procedural compliance and absolute immunity, they fail to prove that the Section 4(d) Decision is valid and that they have fully complied with the limit and the terms of the 4(d) Decision. State defendants do not demonstrate that they are in compliance with the Section 4(d) Decision, including the requirement that stray rates be held below 10% *according to the Recovery Plan* standards, which contemplates a retrospective measurement. *See* discussion *supra* at 7; AR 17011. A metric that would allow three years of unregulated take of wild fish before compliance is measured is unlawful under the ESA because a single year's take could wipe out the species. *See infra* at 24–26.

There is no dispute that spring Chinook stray rates were at least 25–30% in 2012, despite a second year of operation of weirs in the Salmon and Zigzag Rivers. With stray rates ranging from 45% to 78% from 2008 to 2011, AR 31748, the average over the past nine years (the

Recovery Plan standard), is at least 29%, based solely on the last five years' data (45% + 52% + 78% + 61% + 30% divided by 9).⁸ The ITS take limit, which includes no limiting metric, demonstrates that the current take from spring Chinook straying is 25% to 30%. Measured any way that is not arbitrary, state defendants are not in compliance with the ITS or Section 4(d) Decision's 10% limit on the take of spring Chinook.

Because defendants rely on jurisdictional arguments regarding the implications of past management strategies and their ongoing effect as previous years' releases return, they do not acknowledge that the fish returning over the next several years were *not* released under the "new" management strategies. Much is said about how new release strategies may improve future stray rates, but there is no reason to think that stray rates will be better during the next two years compared to the 25–30% rates for spring Chinook and winter steelhead in 2012. State defendants rely primarily on the analysis and conclusions of Kirk Schroeder regarding the likelihood that they will be able to avoid irreparable harm to spring Chinook. State Defs' Opp. at 10, 13–15. Mr. Schroeder relies on three factors to contest that irreparable harm is not likely to occur: the acclimation of hatchery spring Chinook in the Bull Run River and the likelihood that will successfully prevent straying into the rest of the basin; the "33% decrease" in the releases; and the continued, tweaked operation of the weirs, including a new weir in the Bull Run River. Schroeder Decl. ¶¶ 55–59. None of these factors, however, is likely to prevent take and

⁸ An interpretation that the term "beginning in 2013" means that 2013 will be the first year the average is calculated, based on the preceding three years of data, would also show that the spring Chinook and winter steelhead stray rates are far above 10%. AR 16974. This interpretation would avoid a 3-year period in take is not measured. Because Congress "inten[ded] to give the benefit of the doubt to the species," the reinitiation trigger should be read that evaluation will begin in 2013. *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1986).

irreparable harm by reducing spring Chinook stray rates meaningfully below the rates observed in 2012. Second Frissell Decl. ¶¶ 15–23, 31–36.

The warm temperatures and poor habitat conditions in the Bull Run River, and the unlikelihood that acclimation will meaningfully influence the hatchery fishes' homing behavior, make it unlikely that acclimation of spring Chinook there will succeed in preventing straying, with fish staying in the colder mainstem Sandy rather than entering the Bull Run. Second Frissell Decl. ¶¶ 16–19. In previous, candid comments, Mr. Schroeder admitted that “the effectiveness of alternative release will not be known until adults return 4–5 years later.” AR 31747.

Mr. Schroeder describes that the spring Chinook returns in 2012, and the low number of fin-clipped spring Chinook observed last year, “likely reflect the return of a 28% reduction in the number of hatchery fish from the 2008 brood year (207,583 released in 2010).” Schroeder Decl. ¶ 56. Thus, approximately the same number planned for release this year (200,000) still resulted in the 25–30% stray rate observed in 2012. By the terms of ODFW's own expert's testimony, the ostensible “reduction of 33%” to 200,000 cannot meaningfully reduce the stray rate figure.

It is also unlikely that the weir which state defendants promise for the Bull Run River actually will be installed in 2013. The Portland Water Bureau has objected to its installation and controls the property where it would need to be installed. Ex. 2 (Jan. 9, 2013 letter to Todd Alsbury). ODFW is unlikely to be able to meet the strict conditions the Bureau requires for placement of the weir. Second Frissell Decl. ¶ 20.

Defendants also have not shown compliance with the incomprehensible limit for take from weir effects in the ITS. The problem with the “standard” for take from weir effects is illustrated in the wide discrepancy between the figures calculated by Mr. Turner and those calculated by Mr. Schroeder. Turner Decl. ¶¶ 24–25; Schroeder Decl. ¶¶ 28–30. The fact that the

defendants' declarants come up with dramatically different figures related to spawning distribution calls into question the reliability of their statements—particularly when Mr. Schroeder has presented a series of percentages without clearly identifying the source of the underlying figures used in the calculations—and thus illustrate the arbitrary nature of NMFS's limit on take from weir effects. The ITS limit fails to describe clearly how the agencies will calculate what the change actually is, including whether measuring a change in distribution is appropriate at an *absolute* percentage or a *relative change in* percentage. Schroeder Decl. ¶ 27.⁹ The fact that pre-2011 survey reaches do not match up with the post-weir-installation survey reaches makes the metric potentially impossible to calculate with any accuracy. *See* Second Frissell Decl. ¶ 15. Defendants have failed to demonstrate that the ITS is “valid” in this critical respect, and does not provide an exemption from take due to weir effects.

Defendants also have not proved that they can validly refuse to consider the mixing of wild and hatchery winter steelhead in Cedar Creek because it is “supplementation.” The winter steelhead program is an isolated harvest program, not an integrated recovery program. Mr. Lewis states that “[i]n conversations with NMFS it was agreed that ODFW will be reporting the winter steelhead pHOS separately for the area of the reintroduction”—a fact that appears nowhere in the HGMP, EA, or BiOp. That statement reflects that the supposed supplementation plan was not validly part of the HGMP. Lewis Decl. ¶ 52. Because the proportion of hatchery origin spawners among the natural winter steelhead population was at least 28.6% in 2010 and at least 27% in

⁹ Calculating the change in relative terms, NFS Memo at 15, 18, is more protective of wild fish. Table 5 in the 2012 ODFW Spawning Survey which was submitted to NMFS (which presumably is the basis for some of Mr. Schroeder's calculations) does not show the reaches that are demarcated by the weirs, NFS Memo Ex. 3 at 12, whereas the Forest Service survey does. *See* Sherwood Decl. Ex. 1 at 4–8. The Forest Service's data is more precise, and comes from a disinterested source, and therefore is more reliable than the estimates that Mr. Schroeder provides, without reference to source data or support, in his declaration.

2012, defendants are not in compliance with the ITS or Section 4(d) Decision with respect to the winter steelhead stray rate.¹⁰

In addition, state defendants also have not demonstrated that the program “minimizes” the Hatchery’s “genetic and ecological effects on natural populations, including disease transfer, competition, predation, and genetic introgression caused by the straying of hatchery fish” as required by 50 C.F.R. § 223.203(b)(5)(i)(E). Lichatowich Decl. ¶¶ 17, 30–34; Second Declaration of James Lichatowich (filed herewith) ¶ 9. They also have not demonstrated sufficient spawning ground surveys to “verify that the proportion of hatchery fish in the naturally spawning population requirements continue to be met.” AR 17011. State defendants admit that their winter steelhead surveys have been inadequate to verify the proportion of hatchery fish in the naturally spawning population, and that the winter steelhead surveys deliberately omit a significant area of spawning habitat where hatchery and wild fish mix. Lewis Decl. ¶¶ 33, 52. And, to the extent they assert that “supplementation” is allowed as part of the winter steelhead HGMP or that the 3-year metric was validly adopted, these elements are not included in the HGMPs and were not provided for public review and comment as required by 50 C.F.R. § 223.203(b)(5)(iv).

Finally, the inability of state defendants to avoid premature release of smolts this year, notwithstanding this Court’s February 26, 2012 Order—a screen box installed upside down, repaired with a rubber gasket and sand bags—is stark testament to the fallibility of the Rube Goldberg-esque industrial fish segregation system the Sandy Hatchery has superimposed on this last best place for wild fish recovery. Notice (Dkt # 96), Att. 2 at 1. The fact that the Portland Water Bureau had to bring the violation of the Court’s order to defendants’ attention illustrates

¹⁰ The winter steelhead data illustrates the difficulty of using *any* metric other than current-year data to demonstrate compliance. ODFW did not conduct winter steelhead surveys in 2008 and 2009, and other data may be of dubious reliability. AR 16561; Lewis Decl. ¶ 52, 55, 59–60.

that defendants are not conducting *any* monitoring to determine whether smolts are, in fact, leaving the system as quickly as promised. *See* NFS Memo at 24. Beyond the speculative nature of ODFW’s optimistic guesses regarding the effects of weirs and acclimation which NMFS acknowledges will be of “unknown” efficacy, state defendants’ inability to keep fish contained in their artificial holding pen gives no confidence that they can manage the system as promised.

B. NMFS’s BiOp violated ESA Section 7.

NMFS must articulate rational connections between facts and its conclusions, and may not rely on mitigation measures that do not involve “specific and binding plans” or “deadlines or otherwise enforceable obligations.” *Ctr. for Biol. Diversity v. BLM*, 698 F.3d 1101, 1121–22 (9th Cir. 2012); *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 935–36 (9th Cir. 2008); *Ctr. for Biol. Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002). NMFS’ BiOp fails to meaningfully evaluate relevant factors, unreasonably relies on uncertain mitigation and monitoring, and incorporates an ITS that is not rationally explained. The litigation-based interpretation that incidental take from hatchery strays not need be measured until 2015 would leave an unevaluated, 3-year gap in the protection of the species. The BiOp does not evaluate how or why this would avoid jeopardy, further rendering the decision arbitrary and capricious.

1. The BiOp fails to evaluate effects of relevant factors.

A biological opinion must include a meaningful analysis of the environmental baseline together with the impacts of the proposed action. *See, e.g., Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1149–50 (W.D. Wash. 2000). Merely listing stressors or impacts without analyzing their effects or whether they will cause jeopardy does not constitute the analysis required to comply with Section 7(a)(2). *Id.*; *see also Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 127–28 & n.8 (D.D.C. 2001) (rejecting BiOp as arbitrary and capricious where Service listed impacts

from projects but failed to analyze them, because “a mere listing of activities does not constitute an analysis of the *impacts* of these activities, which is what is required by the regulation”).

NMFS’s BiOp fails to provide this crucial analysis with respect to impacts from the weirs and stray rates. It also fails to analyze a significant factor in the state defendants’ plan: whether the planned acclimation of hatchery smolts in the Bull Run River will be effective.

NMFS’s citations to the BiOp and other parts of the record do not show that NMFS actually *evaluated* the effects of the weirs, beyond merely identifying them and stating without explanation that their impacts on spawning distribution and pre-spawning mortality would be minimal. The BiOp lacks a meaningful discussion of *how* and *why* those impacts will not rise to the level of jeopardy, especially in light of data showing high stray rates and a significant shift in redd distribution below the weirs in 2011. NMFS’s lack of analysis of high stray rates fails for the same reason. Collecting data on hatchery escapement in the Sandy Basin and acknowledging potential effects to wild fish does not constitute an analysis of how those documented high stray rates will impact wild fish, nor does it justify—without more—adopting the 10% pHOS rate from ODFW’s Recovery Plan as a limit of lawful take the ITS.

Further, NMFS’s justification for ODFW’s release of winter steelhead into Cedar Creek as “supplementation” is hollow because supplementation is not part of the HGMPs or proposed action. *See supra* at 5–6, 17. The Sandy Hatchery program is *solely* an isolated harvest program (AR 16342); neither the HGMP nor the EA represent otherwise. The BiOp’s reference to a supplementation trigger, AR 16955, contains no analysis, is not a proper evaluation or approval of a supplementation program, and NMFS may not rely on it to downplay existing stray rates.

NMFS asserts that acclimation facilities “will” promote less straying. NMFS Opp. at 9, 21, 33. However, none of the record pages cited contains any evaluation of *whether* the

acclimation of spring Chinook in the Bull Run River actually will succeed in reducing stray rates. *See* AR 16964 (simply identifying acclimation as a BMP without analysis), 16236 (first page of HGMP), 16834 (no discussion of acclimation), 16615 (EA acknowledging that “[i]t would take a number of years to determine whether the acclimation and release of hatchery spring Chinook salmon at the Bull Run acclimation pond would reduce the proportion of hatchery spring Chinook salmon”). ODFW’s Kurt Schroeder acknowledged that that “the effectiveness of alternative release will not be known until adults return 4–5 years later.” AR 31747. High temperatures in the Bull Run River and low flows during spring Chinook migration as reservoirs are drawn down by water consumers mean that the Bull Run acclimation effort almost certainly will fail to affect stray rates. This is a significant factor which NMFS failed to consider in its conclusory evaluation that acclimation in the Bull Run would result in a reduction in the spring Chinook stray rate. Second Frissell Decl. ¶¶ 15–24. No deference is owed when “the agency has completely failed to address some factor consideration of which was essential to [making an] informed decision.” *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001).

2. The BiOp relies on mitigation that is not reasonably certain to occur.

NMFS’s arguments overlook a serious problem with the mitigation and monitoring endorsed in the BiOp: the lack of rational, specific, and binding action criteria to ensure that hatchery operations do not harm wild fish. *See Natural Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 350–57 (E.D. Cal 2007) (invalidating adaptive management plan containing “no quantified objectives or required mitigation measures” and providing no reasonable certainty that mitigation measures would be implemented or adverse impacts mitigated). The Ninth Circuit has expressed skepticism about adaptive management that contains no specific management responses tied to specific triggering criteria. *Greater Yellowstone Coal., Inc. v. Servheen*, 665

F.3d 1015, 1029 (9th Cir. 2011) (citing *Kemphorne* with approval and requiring the agency to do more than just “invoke adaptive management as an answer to scientific uncertainty”).

In *Kemphorne*, the court found fatal defects in a set of adaptive management measures proposed by the U.S. Fish & Wildlife Service to respond to threats to endangered delta smelt from water diversion projects. The flawed management protocol did not contain “defined action criteria, but instead le[ft] any response wholly to the discretion of the [action agency].” 506 F. Supp. 2d at 341. It also lacked an “operating criteria or action schedule, specifying when mitigation actions must be taken.” *Id.*

The adaptive management measures endorsed by NMFS here suffer from the same defects, and one further: implementation discretion is left to a third party, ODFW. The mitigation therefore is not reasonably certain to occur. For example, the spring Chinook HGMP imposes no mandatory steps that ODFW must take if it fails to meet stray rates. *See, e.g.*, AR 16245–49 (performance standards). Similarly, ODFW’s adaptive management “plan” is a short list of possible actions the agency could implement; it is devoid of an action schedule or other defined, action-forcing criteria *Kemphorne* found so crucial. AR 12006–07 (letter describing potential measures to manage spring Chinook program as the agency finds out more about the extent of the stray problem). NMFS may not rely on a non-binding, criteria- and schedule-less plan.¹¹

NMFS’s reliance on *Wild Fish Conservancy v. Salazar* is unavailing. The question in that case was whether the agency could use purported uncertainty about a future project to justify a temporally segmented BiOp—not, as here, whether the agency could rely on future mitigation to

¹¹ *Selkirk Conservation Alliance v. Forsgren* is distinguishable because it involved mitigation to be implemented immediately and whose effects the agency had not characterized as “unknown.” 336 F.3d 944, 949 (9th Cir. 2003). Here, ODFW’s mitigation measures are purely reactive, potentially deferred until after the project causes serious cumulative harm to wild fish.

support its “no jeopardy” finding. 628 F.3d 513, 521–25 (9th Cir. 2010). Regardless, in this case NFMS does not provide enough information in the BiOp to provide a “meaningful analysis” of the mitigation measures on which it relies. This is concerning in light of NMFS’ substantial uncertainty about the effects of the project on wild fish. *See* AR 16956, 16959–61, 16964, 16538 (weir/trap success is “unknown”).¹²

Additionally, the record does not support NMFS’s claimed confidence in the effectiveness of the weirs. While the agency’s studies have examined the *effects* of weir/trap operation on salmon and steelhead, NMFS fails to cite any evidence of its analysis of their *effectiveness*. *See* NMFS Opp. at 24 (citing AR 28789 which describes impacts from weir installation but not analyzing weir effectiveness in reducing hatchery stray rate); AR 28978 (permitting direct take of salmon and steelhead from operation of weirs but not analyzing whether they will effectively reduce stray rates). NMFS’s acknowledgment of weir impacts must not be confused with a scientifically sound analysis of their likely success as a mitigation tool.

3. NMFS’s incidental take statement is unlawful.

Defendants base their support of the 10% pHOS threshold in the ITS on inapplicable and/or outdated science and fail to show that NMFS selected the limit based on rational analysis. As discussed above, the best available science in the 2009 HSRG report prescribes no more than

¹² NFMS’s reliance on *Center for Biological Diversity v. BLM* is similarly misplaced. The question in that case was whether the agency could justify a “no jeopardy” opinion by relying on mitigation under a separate plan that was not included within the proposed action and was thus unenforceable under the ESA. 698 F.3d 1101, 1112–13 (9th Cir. 2012). This case presents a different issue: whether an agency can rely on discretionary measures included within the project plan but devoid of clear metrics, action criteria, or timetables so as to make them “reasonably certain to occur.” *Center for Biological Diversity* does not change earlier law requiring an agency to rely only on mitigation measures if there are “solid guarantees that they will actually occur.” *Nat’l Wildlife Fed’n*, 524 F.3d at 935.

a 5% hatchery stray rate for segregated/isolated programs such as the Sandy Hatchery HGMPs. NMFS officials recognized this. AR 2000–01. Yet there is no explanation or analysis in the BiOp why a 10% pHOS limit is appropriate in isolated programs approved to continue indefinitely. This ignores the genetic risks to wild fish from a higher pHOS rate, without explaining how existing genetic similarity is sufficient to disregard risks from genetic intermingling, or accounting for the fact that, in an isolated program, that genetic similarity will disappear within a generation. The current best available science also demonstrates that a 10% pHOS produces roughly a 25% decline in reproductive success, raising grave doubts about the adequacy of that figure as a conservation benchmark. Second Frissell Decl. ¶¶ 12–13.

The 10% stray rate limit for incidental take also is arbitrary if it is interpreted to be measured only after three more years of accumulated take, as defendants urge. NMFS' Opp. at 24. This assertion perfectly highlights the BiOp's arbitrary, inconsistent, and unexplained statements. First, as described above, NMFS previously stated that the limit of allowable take would *not* require additional years of new data. Second, the 3-year metric is distinct and notably absent from the ITS' 10% take threshold. AR 19670. Third, the BiOp added the future-only metric to the reinitiation of consultation section without any explanation as to why it was appropriate as a reinitiation trigger¹³—much less whether it is an appropriate way of measuring allowable take. AR 16974. Critically, NMFS nowhere explains why compliance should not be based on *each year's* hatchery performance. A single year's spike of take could wipe out a species, and therefore it is illogical and violative of the ESA to not measure take until *three* years

¹³ The reinitiation trigger “consider[s] an increase” in the pHOS above .10 sufficient to justify reinitiation. AR 016974. This implies that the trigger is *above* the take limit, and means that only an increase *over the existing 10%* rate, which is already too high, will trigger reinitiation.

have passed. NMFS' arbitrary selection of a 3-year metric does not satisfy the agency's obligation to draw reasoned connections between facts found and conclusions made. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Under NMFS's interpretation of the take limit for hatchery strays, during the next three years the "permissible level of take is coextensive with the project's own scope." *Allen*, 476 F.3d at 1039. The question "how much take from straying is allowable in 2013?" is answered "however much occurs," because NMFS will not hold ODFW accountable until 2015. An incidental take limit "cannot be so indeterminate as to prevent the [ITS] from contributing to the monitoring of incidental take by eliminating its trigger function." *Id.* at 1041. NMFS's interpretation eliminates any reinitiation trigger for three years as well.¹⁴

NMFS's litigation position creates a 3-year gap in its jeopardy analysis and ignores the immediate harm from the project. Despite recent stray rates of up to 78% for spring Chinook and 28% for winter steelhead, NMFS sets no limit on take from hatchery straying for three years. Although the BiOp's no jeopardy conclusion depends on state defendants' mitigation being successful, the BiOp does not evaluate the effects from the interim period where compliance is *not* required. However, each year is important to a species' survival and recovery, and short-term effects must be evaluated. *Wild Fish Conservancy*, 628 F.3d at 525–28. Allowing three *more* years of limitless harm from the hatchery operations to wild fish while state defendants experiment with controlling stray rates would vitiate the "institutionalized caution mandate" of the ESA." *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1031 (9th Cir. 2005). That NMFS intends

¹⁴ The lack of "concrete" reasonable and prudent measures in the BiOp exacerbates the failure to provide a meaningful take limitation. *Allen*, 476 F.3d at 1039 n.7; AR 16972 (reasonable and prudent measures requiring NMFS to ensure "lowest feasible levels" of hatchery-wild interaction and that take be "inconsequential," without specifying how either might be achieved).

to wait to evaluate compliance until 2015 underscores the need for halt the release of new hatchery smolts *now* until ODFW proves it can limit straying. *See* NMFS Opp. at 25.

Similarly, both NMFS and state defendants’ arguments in support of the 20% spawning distribution standard do not correct—and actually demonstrate—the standard’s *lack* of plain language and resultant, confusing vagueness. Indeed, each describes a different method of measuring the standard. State defendants would require a “greater than 20 *point* change in three areas: below the weirs, above the weirs, and in pre-spawning mortality” (State Defs’ Opp. at 20) (emphasis added), while NMFS would require a “change in the percentage of ‘spawning *distribution* above *and* below the weirs.’” (NMFS Opp. at 27) (emphasis in original).¹⁵

The standard fails to clearly describe how the agencies will calculate what the change actually is; whether measuring a change in distribution is appropriate at an *absolute* percentage or a *relative change in* percentage. Schroeder Decl. ¶ 27. The metric also fails for vagueness regarding the baseline from which change is to be measured.¹⁶ Additionally, the BiOp contains no justification for why all three criteria are combined, and why 20% is the appropriate numerical standard. This take limit also ignores that effects from weirs can cause serious harm to migrating fish without killing them. *See, e.g.*, AR 16954; Frissell Decl. ¶ 31; Second Frissell Decl. ¶¶ 25–34. For this metric to be a valid surrogate for take, the BiOp must clearly describe what measurement and baseline is “appropriate,” and must support that conclusion with reasoned analysis. *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1250–51 (9th Cir. 2001). The BiOp does neither, and is thus arbitrary and capricious.

¹⁵ NMFS claims there must be a “20% change in either spawning distribution or pre-spawning mortality,” Turner Decl. ¶ 46, but ODFW argues both are required. State Defs’ Opp. at 20.

¹⁶ *See* Schroeder Decl. ¶ 28 (suggesting an arbitrary “prior to 2011” baseline of 2002–07); *see also* NFS Memo, Ex. 3 at 6 (compliance report selecting arbitrary year as baseline not in BiOp).

C. NMFS violated NEPA.

1. NMFS failed to consider a reasonable range of alternatives.

The “alternatives” requirement of NEPA applies whether an agency is preparing an EIS or an EA, and requires full and meaningful consideration of all reasonable alternatives. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005). Although an EA’s alternatives discussion may be brief, 40 C.F.R. § 1508.9(b), what is important under NEPA is a breadth of alternatives that allows for meaningful public participation and for the decision-maker to make a reasoned choice among them. *Cal. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). The “reasoned choice” requirement applies to alternatives in an EA under 42 U.S.C. § 4332(2)(E). *Id.*; see *Wilderness Soc’y v. U.S. Forest Serv.*, 850 F. Supp. 2d 1144, 1162–63 (D. Idaho 2012) (applying the “reasoned choice” requirement to alternatives in an EA).

Here, the EA considers only two alternatives: approving the HGMP exactly as proposed by ODFW, or not. AR 16534. This extraordinarily limited range of courses of action prevented NMFS from considering reasonable, alternative ways the Sandy Hatchery could be operated to actually help recover the species and remove them from the endangered species list. See *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004). Contrary to NMFS’s assertions, NMFS Opp. at 28, the Ninth Circuit has upheld EAs with only a no-action and action alternative in cases where the plaintiffs did not challenge the FONSI or assert that an EIS should have been prepared. *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1019–23 (9th Cir. 2012); *N. Idaho Cmty. Action Network v. U.S. Dep’t of Trans.*, 545 F.3d 1147, 1153–54 (9th Cir. 2008). In *Earth Island*, for example, it made little sense for the agency to consider a greater range of alternatives, because it was conceded that the project “will have no significant environmental effects anyway.” 697 F.3d at 1023 (citation omitted). Here, NMFS acknowledges

that hatchery fish can and do have significant adverse impacts on listed wild fish, and NFS has challenged the failure to prepare an EIS.

NMFS incorrectly asserts that its purpose and need does not influence the proper range of alternatives, because that standard does not apply to EAs. NMFS Opp. at 28 n.10. The range of alternatives in an EA *is* judged by the project's stated purpose and need. *Wilderness Soc'y*, 850 F. Supp. 2d at 1163. NMFS does not refute that it could have met all aspects of its general purpose and need statement through other reasonable alternatives, such as reducing instead of just eliminating hatchery fish releases, AR 16552–53, and, independent of how many fish are released, to consider an alternative that includes mandatory, certain-to-occur measures that will trigger specific reductions or halt hatchery releases if standards are not met. AR 16804–05.

NMFS represents that it chose an all-or-nothing approach to ODFW's proposal because the two alternatives then represented essentially the “end[s] of the spectrum of potential effects.” NMFS Opp. at 29 n.11. But that is exactly the problem with the EA. By choosing to portray only the ends of the spectrum of possible effects, NMFS did not consider other reasonable alternative ways the hatchery operations might allow a fishery yet be more protective of wild fish. NMFS dismisses other alternatives on the ground that none would have “allowed for meaningfully different analysis from that of the no-action alternative.” NMFS Opp. at 29. That ignores the breadth of the “spectrum” that NMFS itself defined. It also ignores that an alternative such as further reduced releases would likely produce markedly different effects. For example, where ODFW proposed (and NMFS evaluated) reducing by 33% the release of hatchery Chinook to achieve a corresponding decrease in stray rate, AR 16253, doubling that reduction would correspond to an additional 33% reduction in stray rate. This larger reduction would provide twice the insurance that ODFW might meet the stray rate goal set in the HGMPs, and further

halve the adverse ecological and genetic effects of hatchery fish on wild fish. NMFS cannot credibly claim that such an alternative is not “meaningfully different” from the proposed action.

2. NMFS illegally failed to prepare an EIS.

i. NMFS fails to evaluate the effects of strays in the wild fish sanctuary.

NMFS acknowledges that, since 1999, the Sandy River basin above Cedar Creek has been designated as a “wild fish sanctuary.” NMFS Opp. at 31. NMFS does not dispute that the sanctuary constitutes an “ecologically critical area” and therefore is among the regulatory triggers for preparing an EIS. 40 C.F.R. § 1508.27(b)(3); *see Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 978–79 (D. Haw. 2008). The majority of spawning habitat for wild listed fish is in the sanctuary, AR 16600, and removal of Marmot Dam “created an environment for upstream migration of hatchery [fish] into the natural spawning area.” AR 16254.

NMFS asserts that it “appropriately note[d] the importance of the upper Sandy River basin for wild spawning.” NMFS Opp. at 31–32. None of the examples of “noting” the importance of the upper Sandy includes any mention of the problems of hatchery fish straying into the wild fish sanctuary or the high stray rates in the last five years—only “habitat effects” and “mortality.” Two of the cited pages, AR 16967 and AR 16957, are from the BiOp, not from the EA. And all of the cited pages contain conclusory statements, not analysis. NMFS’s general statements about the importance of the upper Sandy River basin do not constitute a “hard look” at effects of operations that allow hatchery fish to continue intruding into the wild fish sanctuary.

ii. NMFS fails to establish that mitigation will prevent significant effects.

NMFS admits that, to avoid preparing an EIS, it must establish that “significant measures” mitigate the adverse effects of hatchery fish. NMFS Opp. at 34. The EA must provide the court with sufficient information and data to allow it to evaluate the “sufficiency of

mitigation measures” and determine “whether they constitute an adequate buffer against the negative impacts that may result from the authorized activity” so as to “render such impacts so minor as to not warrant an EIS.” *Nat’l Parks Conservation Assn. v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001) (“*NPCA*”). NMFS acknowledges that serious harm to wild fish will result from the hatchery operations, but, with respect to whether that harm can be averted, states “it is unknown if the operation of the weir/traps will be successful in removing enough of the hatchery spring Chinook salmon to meet the 10 percent goal” while minimizing impacts to wild spring Chinook from hatchery operations. AR 16538.

Yet NMFS defends its refusal to prepare an EIS by asserting that it “analyzed the efficacy of the various measures (including the weirs), and determined that they would be expected to be effective.” NMFS Opp. at 35. It cannot be simultaneously “unknown” if the weirs will be successful to meet the stray rate and yet also “expected to be effective” to meet the rate. NMFS does not answer the fact that “the more fish that are handled or delayed during migration” at the weirs, “the greater the threat to the species.” AR 16953. The EA lacks any cogent analysis of the weirs’ prospect of success, or the dangers arising from their operation. Mitigation in an EA “must be developed to a reasonable degree. A perfunctory description, or mere listing of mitigation measures, without supporting analytical data is insufficient.” *NPCA*, 241 F.3d at 734.

The cases NMFS cites do not support the argument that it can forgo analysis of the likely success of mitigation measures.¹⁷ NMFS Opp. at 34–35. *Wetlands Action Network v U.S. Army*

¹⁷ Nothing in *Environmental Protection Information Center v U.S. Forest Service*, 451 F.3d 1005 (9th Cir. 2006) (“*EPIC*”) changes the rule that, to avoid preparing an EA on the basis that mitigation will render significant impacts so minor as to not warrant an EIS, the EA must demonstrate the “sufficiency” of those measures. In *EPIC*, the Ninth Circuit determined that the EA did demonstrate the sufficiency of the measures. *Id.* at 1015-1016. In contrast, here, NMFS admits that the success of the measures meant to ensure insignificant impacts is “unknown.”

Corps of Eng'rs, 222 F.3d 1105, 1121 (9th Cir. 2000) expressly requires evaluation of “whether the mitigation measures constitute an adequate buffer against the negative impacts” and will “render such impacts so minor as to not warrant an EIS.” It is impossible to tell from the EA here whether mitigation measures will render impacts insignificant. The remaining cases are similarly distinguishable. *Friends of the Payette v Horseshoe Bend Hydro. Co.*, 988 F.2d 989, 993 (9th Cir. 1993) (facts allowed a determination that mitigation measures *would be* sufficient, not unknown); *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985) (land conservation and development restriction measures all would in fact “be likely to enhance, not reduce, the chances for survival” of the species); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1992) (“uncertainty” not due to the effects of the mitigation measures being unknown, but rather because cause of the sea lion’s decline was unknown); *Umpqua Watersheds v United States*, 725 F. Supp. 2d 1232, 1240 (D. Or. 2010) (facts showed that the project would improve, not degrade, resources conditions—not have “unknown” effects).

iii. The admitted uncertainty of mitigation requires an EIS.

The parties agree that NEPA requires an EIS for a project “likely to be highly controversial,” as to its effects, or if the “possible effects . . . are highly uncertain or involve unique or unknown risks.” 40 C.F.R. §§ 1508.27(b)(4)–(5). Similarly, an EIS must be prepared “where uncertainty may be resolved by further collection of data or where the collection of such data may prevent speculation on potential effects.” *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 870 (9th Cir. 2005). A “lack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it.” *Id.* at 870–71.

NMFS’s argument (Opp. at 33) ignores the essential connection between fish sorting, stray rates, and effects on wild fish. Fish sorting is a critical component to the HGMPs, and thus critical to evaluating their effects (the word “weir” appears on 55 pages of the 130-page EA). AR

16518–647. Accordingly, the unknown efficacy of weirs by itself raises a substantial question about the environmental effects of approving HGMPs, requiring an EIS. NFS takes issue with the weirs because they are critical to evaluating whether the HGMPs will succeed in reducing stray rates and significant harm to wild fish. NFS Memo at 34. Moreover, the effects of the “equally important measure impacting the effects of the HGMP” that NMFS asserts NFS ignored—acclimation ponds in the Bull Run River—are, just as with weirs, “uncertain.” AR 16615; NMFS Opp. at 33. And, as described above at 20–21, NMFS did not actually evaluate the effectiveness of acclimation in any of its decisionmaking. An agency cannot avoid preparing an EIS in the context of undisputed potential significant adverse impacts to ESA-listed species when the efficacy of the two primary means of mitigation —weirs and acclimation ponds—are, admittedly, “unknown.”

III. IRREPARABLE HARM TO WILD FISH AND PLAINTIFFS’ INTERESTS IS LIKELY ABSENT AN INJUNCTION.

The release of hatchery fish this year, even if the primary harm they cause will occur when they return and spawn in competition with wild fish in the Sandy River basin in a few years, is imminent harm warranting an injunction. *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1064 (9th Cir. 1996); *Pac. Rivers Council*, 2002 WL 32356431, at *3. A plaintiff is not required to prove the likelihood of future take because such a requirement “tips the balance away from the preservation of the species.” *Stout*, 869 F. Supp. 2d at 1281. However, “the likelihood of future harm, as well as the need of a species to recover from past harm, are factors a court should consider in tailoring the scope of injunctive relief.” *Id.*

A. No showing of irreparable harm to the species as a whole is required.

Defendants are wrong that irreparable harm to a species as a whole must be shown to obtain an injunction. The Ninth Circuit has found injunctions warranted under ESA Section 9 if

there is a reasonable certain threat of imminent harm to an individual member of a protected species or as a result of habitat effects on a few individuals, without requiring a showing of harm to the species as a whole. *See, e.g., Marbled Murrelet*, 83 F.3d at 1068 (evidence of likely effect of proposed action on birds' behavioral patterns sufficient to show likely harm, without showing direct effect on any specific bird); *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 787–88 (9th Cir. 1995) (logging that would harm behavioral patterns of two birds sufficient to show irreparable harm). The showing of harm to even a single member of a species would suffice both to prove unlawful take and justify an injunction under the ESA. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000) (“to prevail in this action Defenders had to prove that the School District’s actions would result in an unlawful ‘take’ of a pygmy-owl. An injunction would be appropriate relief.”). Consistent with this precedent, this Court found that “an injunction is the proper remedy” for a Section 9 take without showing harm to specific fish or to the species as a whole. *Or. Natural Desert Ass’n v. Tidwell*, No. 07-1871-HA, 2010 WL 5464269, at *3 (D. Or. Dec. 30, 2010) (citing *Defenders of Wildlife*, 204 F.3d at 925).¹⁸

Even if harm to the species as a whole were required, harm to the Sandy River populations that prevent their recovery *is* harm to their species. NMFS’s Richard Turner has acknowledged as much, stating that “the populations in the Sandy River are key to recovering all species.” AR 2001. NMFS’s 2012 draft Recovery Plan likewise shows that the recovery of LCR Chinook, coho and steelhead cannot occur unless the Sandy populations recover. AR 29019,

¹⁸ Defendants ignore the Ninth Circuit’s controlling precedent in favor of district court and out-of-circuit cases. NMFS Opp. at 37; State Defs’ Opp. at 36. The only Ninth Circuit case cited, *Humane Society v. Gutierrez*, 523 F.3d 990 (9th Cir. 2008) did not involve an injunction under the ESA. Other district courts in the Ninth Circuit have correctly identified that a plaintiff need not show irreparable harm to the species as a whole to obtain an injunction. *See, e.g., Ctr. for Biol. Diversity v. U.S. Fish & Wildlife Serv.*, No. C–08–1278 EMC, 2011 WL 6813200, at *4 (N.D. Cal. Dec. 28, 2011).

29021–22 (describing criteria for recovery); 29034, 29038–39, 29042, 29047–50 (illustrating that LCR species cannot recover unless Sandy populations recover).

B. Irreparable harm is likely in the absence of an injunction.

Because plaintiffs have demonstrated that they are likely to succeed on the merits of their claims and the approval of the HGMPs and BiOp are likely to be set aside, under the ESA the burden shifts and the proponent of an action must demonstrate that it will not cause jeopardy to protected fish before an action may proceed. *Wash. Toxics*, 413 F.3d at 1035. Defendants have not carried that burden here. It is not the plaintiffs’ burden to show what level of activity would be non-jeopardizing or not result in take. The Supreme Court has instructed that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). To show irreparable harm, “[p]ast takings are indeed instructive, especially if there is evidence that future similar takings are likely.” *Nat’l Wildlife Fed’n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1512 (9th Cir. 1994).

Here, irreparable harm stems from the likely adverse effects of continued excessive stray rates if hatchery fish are released this year. It is almost certain that the percentage of hatchery fish spawning among the natural populations of spring Chinook and winter steelhead will be higher than 10%. For the former, ODFW’s optimistic predictions that stray rates can be reduced further are not likely to come to fruition. *See supra* at 15–16; Second Frissell Decl. ¶¶ 15–23. For the latter, ODFW is committed to intermingling wild and hatchery-bred winter steelhead in Cedar Creek at a rate that far exceeds the 10% threshold. *See supra* at 17–18. Long-term genetic and ecological harm from excessive interactions between hatchery and wild fish is essentially undisputed. *See* Second Frissell Decl. ¶¶ 3, 11–14 (“harms to wild fish should reasonably be

considered irreparable, because the losses of genetic integrity and population productivity suffered on an annual or ongoing basis by the wild fish cannot be corrected or mitigated”). The majority of arguments from defendants that irreparable harm is *not* likely stem from a misunderstanding of the applicable legal standard and overly optimistic projections of future success that are based on inappropriate assumptions, faulty analysis, or the invocation of successful acclimation and weir operation in other areas that are not transposable to the conditions in the Sandy River basin. Second Frissell Decl. ¶¶ 3, 9, 15–23, 32–33.

In addition, the wild winter steelhead population has apparently crashed in the past three years. Lewis Decl. ¶ 55 (showing decline in wild winter steelhead redds from 879 in 2010 to a mere 208 in 2012). In the context of a genetically isolated/segregated fishing augmentation program such as approved in the winter steelhead HGMP, preventing the release of additional hatchery fish to allow the wild winter steelhead population to recover is essential.

IV. THE BALANCE OF HARMS TIPS CONCLUSIVELY IN FAVOR OF THE NATIVE FISH.

Defendants ignore established Supreme Court and Ninth Circuit precedent that require a court to forgo a balancing of equities and hardships when take of an ESA-listed species is likely, because “the balance of hardships *always* tips sharply in favor of the endangered or threatened species.” *Wash. Toxics*, 413 F.3d at 1035 (emphasis added). Contrary to state defendants’ suggestion, because the Section 9 take prohibition protects only wild, ad-clipped fish, it is not necessary to balance any harm to hatchery-bred fish against the harm those fish cause to wild fish. State Defs’ Opp. at 33–34. The wild populations of the Sandy River are among a very few populations in each species deemed to not be “extirpated or nearly so.” AR 19541, 19568, 19582. By comparison, there are 17 hatchery programs in the LCR Chinook ESU and 25 hatchery programs in the LCR coho ESU. AR 29061–62. The hatchery fish in the ESUs are not

at risk. Second Frissell Decl. ¶¶ 3–8. And defendants never explain why, given that they are already moving smolts out of the Sandy this year and given that wild fish have been extirpated from almost all other streams in the Lower Columbia Basin, it would be impractical to plant these smolts elsewhere to satisfy the single purpose for their existence.

And that single purpose for the Sandy Hatchery fish *is to be caught*. They are not intended to be part of the gene pool—the HGMPs in this case make explicit that they are “isolated harvest” programs, *not* integrated supplementation programs. AR 16342 (the “objective of this program is to augment the Sandy River winter steelhead sport fishery”), 16242 (same for spring Chinook), 16161 (coho). The hatchery-bred members of the species in the Sandy River may be “listed,” but they are not meant to contribute to the survival and recovery of the species: these fish are “not intended to spawn in the wild.” AR 16414. Euthanizing fish meant to end up on the dinner table does not constitute “harm” to the species. The benefit of the doubt must go to the wild fish. *See Conner*, 848 F.2d at 1454. The relevant members of the species here are the wild fish protected by Section 9, not the hatchery fish whose presence causes irreparable harm to their wild counterparts.

To the extent defendants and *amici curiae* raise the specter of doom if hatchery releases are halted for one year, their arguments are wildly overstated. One example suffices: state defendants state that economic impact of fishing “*that included* the Sandy River Basin was over \$40 million.” State Defs’ Opp. at 36 (emphasis added). However, the EA quantifies the fishery in the Sandy somewhat more precisely: only “several hundred anglers” have participated in the Sandy fishery annually. AR 16581. None of these anglers would be precluded from fishing in 2013 by halting the release of hatchery fish this year; in two or three years, depending on the rate at which prior years’ releases return, fishing opportunities on the Sandy River might be more

limited—but fishing is available close by: the Clackamas River is less than 10 miles from the Sandy, and the fisheries of the Lower Gorge, and the Upper Gorge and Hood River are also within an hour’s drive. AR 17220. Anglers can go elsewhere to practice their sport; commercial fishermen can catch fish—including fish raised at Sandy Hatchery but released elsewhere—from other streams. But the wild fish in the Sandy River basin have nowhere else to go.

Ultimately, state defendants have turned the central principle of the ESA on its head: rather than ensuring the survival and recovery of the species and the recovery of self-sustaining, natural populations, state defendants seek to maintain the fishery, “whatever the cost.” *Cf. TVA v. Hill*, 437 U.S. 153, 184 (1978). The ESA does not permit the sacrifice of wild fish and jeopardy to the species’ recovery so that ODFW need not ever “limit the fishery.” State Defs’ Opp. at 35.

V. THERE ARE NO JURISDICTIONAL BARS TO ISSUING THE INJUNCTION.

Defendants’ arguments that the Court lacks jurisdiction to issue the requested relief are misplaced. The approval of the HGMPs does not confer a defense to take liability unless state defendants prove that they have fully complied with the terms of the approval. Defendants must also prove compliance with the terms of the ITS for its exemptions to shield them from Section 9 liability. They have done neither. NFS’s April 2011 notice letter properly vested jurisdiction in this Court when NFS subsequently commenced this action in March 2012, and no intervening event has divested the Court of its jurisdiction to hear NFS’s Section 9 claims. While this Court may make a preliminary determination on these issues in deciding plaintiffs’ motion for preliminary injunction, because the disputed jurisdictional issue is inextricably intertwined with factual issues going to the merits, the Court should defer a determination of the relevant facts and conclusion regarding jurisdiction to a motion going to the merits or to trial. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039–40 (9th Cir. 2004); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983).

A. Notice of defendants' violations of ESA Section 9 was adequate.

Defendants' arguments that the Court lacks jurisdiction over NFS's supplemented Section 9 claims misses the critical point that subject matter jurisdiction over the Section 9 claims attached when the action was commenced on March 9, 2012 with the filing of NFS's original complaint. That jurisdiction has not been divested by subsequent events. Defendants argue that approval of the HGMPs and the supplementation of NFS's take claims create a new "action" requiring new notice and a new lawsuit. This is incorrect, based on the plain language of the notice provision, the purpose of supplementation of a complaint, the purpose of the ESA, and Ninth Circuit case law holding that a defendant's efforts to comply with a statute *after* an action has been commenced and the parties are engaged in litigation, including challenges to the outcome of consultations, do not require notice beyond adequate notice provided before the action was commenced.

Citizen suits under the ESA carry the limitation that "[n]o *action* may be *commenced* ... prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision." 16 U.S.C. §§ 1540(g)(1)(A), (g)(2)(A)(i) (emphasis added). The provision deliberately tracks the language of Federal Rule of Civil Procedure 3, "Commencing an Action," which provides that "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. An "action" is "commenced" for purposes of jurisdiction on the date the original complaint is filed. *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686–88 (9th Cir. 2005).

The ESA notice provision therefore does not address the situation here, where NFS provided adequate notice of the defendants' take violations at the time the action was commenced, and subsequent events arising out of the same transactions and occurrences warranted supplementation of NFS's complaint and its take claim. "When Congress has not addressed an issue, we must 'find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of

being most harmonious with its scheme and with the general purposes that Congress manifested.” *Forest Conservation Council*, 50 F.3d at 785 (quotation omitted). “Congress’ overriding purpose in enacting the ESA indicates that it intended to allow citizen suits to enjoin an imminent threat of harm to protected wildlife.” *Id.* Requiring plaintiffs in an action already properly noticed and commenced to voluntarily dismiss the suit, notify defendant about the potential availability of an affirmative defense, and wait sixty days before refile while the defendant’s ongoing conduct continues to harm listed species would vitiate the purpose of the ESA. Unambiguous Ninth Circuit precedent precludes this result.

“Subject matter jurisdiction is established by providing notice that is adequate on the date it is given to the defendant.” *Waterkeepers N. Cal. v. AG Indus. Mfg., Inc.*, 375 F.3d 913, 920 (9th Cir. 2004) (quoting *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000)); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 69 (1987) (Scalia, J., concurring) (“Subject-matter jurisdiction ‘depends on the state of things at the time of the action brought’; if it existed when the suit was brought, ‘subsequent events’ cannot ‘ous[t]’ the court of jurisdiction.”).¹⁹

Southwest Marine conclusively refutes defendants’ arguments. There, a proper notice letter alleged that defendants had failed to prepare and implement an adequate plan. Defendants subsequently prepared and began to implement a new plan. The Court asked if the notice letter was “defective for failing to identify and discuss the new plan and its implementation? In those circumstances, must a citizen-plaintiff send a new notice letter? We think not. Subject matter

¹⁹ *Waterkeepers* and *Southwest Marine* involved notice provisions of the Clean Water Act (“CWA”). The language of the ESA and CWA notice requirements is similar. 16 U.S.C. § 1540(g)(2); 33 U.S.C. § 1365(b)(1)(A). “[C]ourts generally interpret similar language in different statutes in a like manner when the two statutes address a similar subject matter.” *U.S. v. Novak*, 476 F.3d 1041, 1051 (9th Cir. 2007).

jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant.” *Sw. Marine*, 236 F.3d at 997. While “[t]he defendant’s later changes to its operations and plans may affect standing ... the question of ongoing violations or remedies ... or mootness such changes do not retroactively divest a district court of jurisdiction under [the citizen suit provision].” *Id.* (citations omitted). Defendants’ efforts in this case to comply with Section 9 do not retroactively divest this Court of jurisdiction over NFS’s Section 9 claims. *Waterkeepers*, 375 F.3d at 920 (plaintiff “not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [defendant’s] post-notice compliance efforts”).

Notice of recurring and likely future violations is adequate where a defendant “obviously understood at least some of the alleged violations” and has acted to “attempt to remedy some of the inadequacies of which Plaintiffs had complained.” *Id.* Claims that logically flow from the actions described in the notice letter also do not require new notice. No additional notice was required in a case where a notice letter requested reinitiation of consultation and plaintiffs later challenged the outcome of that consultation. *Sw. Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 307 F.3d 964, 975 (9th Cir. 2002), *dismissed as moot*, 355 F.3d 1203 (9th Cir. 2004). These were not “new claims” requiring new notice, because they were “based on the process of consultation, and the [action agency’s] alleged errors in completing this process.” *Id.* Here, NMFS and state defendants “would not have reasonably interpreted the initial complaint” as one that sought only compliance with the ESA by obtaining some form of take exemption. Rather, is the *completion* of the “process in accord with the relevant statutes and regulations that give it force and meaning,” and the original notice here put the defendants on notice that their compliance efforts “would be carried out in accordance with the relevant statutes and regulations and would not be flawed.” *Id.*

Defendants thus misconstrue NFS's April 2011 notice letter. *See, e.g.*, State Defs' Opp. at 30. They argue that the notice was of intention to sue for violations of Section 9 "on the grounds that the Sandy Hatchery was operating without an approved HGMP or other exception from take liability." *Id.* But NFS has from the very beginning been concerned with *preventing take*, not with the creation of new paperwork. This is evident from the section of NFS's April 2011 notice letter addressing defendants' violations of Section 9:

NMFS and ODFW are liable for direct and indirect unlawful take of steelhead, chinook, chum and coho in their respective funding and operation of the Sandy Hatchery and associated in-stream and near-stream structures. ODFW's operation of the Sandy Hatchery has violated and is continuing to violate ESA § 9 by trapping, capturing, collecting and otherwise harming listed wild (natural) fish, and by releasing hatchery fish which adversely affect wild fish and harm populations of the four listed species in the Sandy River Basin. The hatchery directly takes threatened wild chinook and steelhead for breeding stock and other natural members of the chinook, steelhead and coho species by collecting fish and impeding fish passage. The hatchery indirectly takes listed fish by releasing hatchery-reared fish which affect wild populations through competition for resources and predation and which cause uncontrollable stray rates that result in crossbreeding between wild and hatchery salmonids and result in a lower reproductive fitness and survival of wild chinook, steelhead, chum and coho in the Sandy River Basin, impeding the recovery of these populations. ODFW and its officials use and are continuing to use in-stream and near-stream structures that harm listed fish, including weirs and acclimation and release facilities. NMFS is liable for take because it funds ODFW's operations that cause take.

First Suppl. & Am. Complaint (Dkt # 46), Ex. 1, at 14.²⁰

In the first two claims in both the Complaint and First Supplemental and Amended Complaint, NFS has carried over the allegations that defendants have violated the *statute*—that they

²⁰ NFS's supplemental letters to defendants served the purpose of adding McKenzie Flyfishers, attempting to influence the forthcoming HGMP decision by alerting key officials of the consequences of an ill-conceived decision to approve the HGMPs, to ensure that the Director of ODFW had a copy of the original notice (which was attached to the second letter), alerting NMFS to its obligation to reinstate consultation, and as a courtesy to defendants. As explained here, they were not required to be sent at all under the prevailing law in this Circuit.

are liable under ESA Section 9 for the take of wild fish by their operation, funding, and authorization of the Sandy Hatchery. Complaint (Dkt # 1) ¶¶ 88–89, 92–93; First Suppl. & Am. Complaint ¶¶ 93–94, 97–98. Both claims are styled “take of threatened species in violation of ESA Section 9.” Paragraph 94 of the supplemental complaint recites that “State Defendants have violated and continue to violate Section 9 of the ESA, 16 U.S.C. § 1538, and the ESA’s implementing regulations, in multiple respects by operations of the Sandy Hatchery which cause unlawful take of listed steelhead and salmon, including but not limited to” releasing hatchery fish which harass or harm listed fish in various ways, capturing and trapping listed fish, and disrupting their spawning behavior by use of weirs. These allegations of the ways in which state defendants are engaged in the take of wild fish did not change. Thus defendants are incorrect that the take claim is “entirely different”: it still asserts that defendants are in violation of Section 9.²¹

Defendants also misconstrue the nature of the Section 9 claim in NFS’s complaint. The ESA requires that plaintiffs provide notice of the “violation.” 16 U.S.C. § 1540(g)(2)(A)(i). It is not necessarily a violation of the ESA to disregard the terms of the incidental take statements or the Section 4(d) Decision—rather, NFS has alleged in its April 2011 notice letter and throughout this case that the *take of listed species* constitutes the violation, acknowledging the limited exemptions from take if defendants comply with the terms of a valid ITS or Section 4(d) Limit. *See Ariz. Cattle Growers*, 273 F.3d at 1239 (describing ITS as “advisory”); *see also* 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 223.203(c).²² NMFS’s own argument that

²¹ This Court’s statement that the supplemented take claim would not be the “same” as the claim in the original complaint was made in the context of whether a stay of proceedings was appropriate to await new decisions from NMFS, not in determining whether the Court would have jurisdiction over the claim after it was supplemented. Order (Dkt # 38) at 6.

²² The structure of the ESA confirms that the non-compliance with an ITS or Section 4(d) Limit is not necessarily a “violation” of Section 9. *See Tidwell*, 716 F. Supp. 2d at 1005 (“exceedance

the ITS and the Section 4(d) Decision are not “permits” that can be violated, but rather “limited exemptions,” defeats its argument that new notice of “violations” is required. NMFS Opp. at 13 n.4. NMFS has argued in in other venues that a claim for failure to comply with the terms of an ITS is not even cognizable under the ESA citizen suit provision. *See, e.g., S. Yuba River Citizens League v. NMFS*, 629 F. Supp. 2d. 1123, 1125, 1130–31 (E.D. Cal. 2009).

In the supplemental complaint, which none of the defendants objected to NFS filing nor raised any jurisdictional objections in lieu of answering, NFS adds allegations that state defendants are not in compliance the Section 4(d) Decision and the ITS. First Suppl. & Am. Complaint ¶ 94(d)-(e). But because these allegations relate to the unavailability of an affirmative defense, the supplemented complaint raises at most a new *issue*: whether the limited exemptions to take shield defendants from the claims that they have violated the statute. Under *Southwest Marine*, so long as the Court “had subject matter jurisdiction over *any part* of Plaintiffs’ action,” the Court also has jurisdiction over “*particular issues* that were not raised in the notice letter.” 236 F.3d at 998 (emphasis in original).

The defendants have had their 60-day litigation free window—indeed, an 11-month litigation-free window—to stop the unlawful take of wild fish in the Sandy Basin before NFS commenced this action in March 2012. Defendants cite no case that has analyzed the plain language of the notice provision and the relevant Ninth Circuit precedent and explained why a subsequent supplementation of a complaint is the same as “commencing” an “action.” The jurisdictional merry-go-round state defendants suggest—where each new set of allegations is met with dismissal of a suit, a new notice letter, and a new 60-day period for defendants to “evaluate” the

of the ITS in and of itself does not establish a violation of § 9”). The exemptions are found in Section 7(o)(2) (ITS), Section 10(a) (Incidental Take Permit), and in the regulations developed under Section 4(d)—not in Section 9. 16 U.S.C. §§ 1536 (o)(2), 1539(a); 50 C.F.R. § 223.203(c).

new notice letter (while continuing to violate the statute) has been rejected by the Ninth Circuit in *Southwest Marine, Waterkeepers, and Center for Biological Diversity*.

B. NFS’s Section 9 claims are not moot.

To carry its burden to show mootness, a defendant must establish that there is no reasonable expectation that violations will occur and that the court cannot grant any effective relief. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). A claim is not moot if any effective relief can be awarded, even if the relief initially sought is unavailable. *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244–45 (9th Cir. 1988). The “burden of demonstrating mootness is a heavy one” because “courts of equity have broad discretion in shaping remedies.” *Id.* at 1244 (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986)). Where past violations have “continuing effects,” the Court retains jurisdiction to enter relief to “counteract the effects of the violation.” *Gordon*, 849 F.2d at 1245.

In the case of a violation of ESA Section 9, prospective relief remains available to address past and current violations of the take prohibition. *See, e.g., Stout*, 869 F. Supp. 2d at 1280–81 (“While injunctive relief is forward looking, it is often used to remedy past or present harms and the term ‘in violation’ connotes past, present, or future violations of the ESA.”). NFS’s claims are not moot because the defendants remain subject to the underlying statutory provision NFS seeks to enforce: ESA Section 9. *See Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1153 (9th Cir. 2000) (issuance of a new CWA permit did not moot claims because the defendant remained subject to the underlying CWA provision that “precludes any discharges except in compliance with an applicable permit”).

Oregon Wild, Wild Equity Institute and *Wild Fish Conservancy* are not persuasive either regarding notice or mootness because they do not address controlling Ninth Circuit precedent on

post-notice compliance efforts and are inconsistent with the Ninth Circuit and Supreme Court precedents addressing mootness, particularly in the context of an action which involves past activities that have continuing and future effects. In a carefully reasoned decision, the District of Massachusetts held that issuance of an ITS does *not* moot a Section 9 claim. *Strahan v. Roughead*, No. 08–10919, 2012 WL 6726519, at *13–*16 (D. Mass. Dec. 26, 2012). Like state defendants here, the *Strahan* defendants argued that the issuance of an ITS provided an “absolute defense” to a Section 9 claim. The court found that an ITS shields an agency from Section 9 liability “only if the ITS and its accompanying biological opinion addresses the agency’s actions and the agency complies with the conditions and take limits established in the ITS.” *Id.* at *13 (citing *Ctr. for Biol. Diversity*, 698 F.3d at 1108 and *Allen*, 476 F.3d at 1034–35).

Defendants have the burden of proving they are entitled to the exemption from take under the ITS. 16 U.S.C. § 1639(g). They have not demonstrated that they are likely to carry that burden, nor the “heavy burden” of showing that *no* effective relief remains available for the past and present actions that have harmed, and continue to harm, wild fish in the Sandy River basin. They have made no showing with respect to possible effective relief. Accordingly, NFS’s take claim is not moot with respect to the past activities that are still having continuing effects.

CONCLUSION

For the reasons stated above, NFS respectfully requests that this Court issue relief as requested in NFS’s Motion for Temporary Restraining Order and/or Preliminary Injunction.

Respectfully submitted this 15th day of March 2013.

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