Brian A. Knutsen (OSB No. 112266)
KAMPMEIER & KNUTSEN, PLLC
833 S.E. Main Street, No. 318
Portland, Oregon 97214
(503) 841-6515
brian@kampmeierknutsen.com

David H. Becker (OSB No. 081507)
Law Office of David H. Becker, LLC
833 SE Main Street, # 302
Portland, Oregon 97214
(503) 388-9160
davebeckerlaw@gmail.com

Attorneys for Plaintiff Wild Fish Conservancy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

WILD FISH CONSERVANCY,

Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE; **EILEEN SOBECK**, in her official capacity as Assistant Administrator for Fisheries of the National Marine Fisheries Service; **UNITED STATES DEPARTMENT OF COMMERCE**; and **PENNY PRITZKER**, in her official capacity as Secretary of the United States Department of Commerce,

Defendants.

Case No.: 3:16-CV-00553-MO

MOTION FOR TEMPORARY RESTRAINING ORDER and/or PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED
EXPEDITED HEARING REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authorities

GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
BiOp	Biological Opinion
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
ESU	Evolutionarily Significant Unit
FWS	U.S. Fish & Wildlife Service
ITS	Incidental Take Statement
LCR	Lower Columbia River
NEPA	National Environmental Policy Act
NFH	National Fish Hatchery
NMFS	National Marine Fisheries Service
ODFW	Oregon Department of Fish & Wildlife
pHOS	Proportion of Hatchery-Origin Spawners
WDFW	Washington Department of Fish & Wildlife

MOTION

Plaintiff Wild Fish Conservancy (the "Conservancy") moves under Federal Rules of Civil Procedure 65(a) and 65(b) and LR 65 for: (1) an Order temporarily restraining federal defendants National Marine Fisheries Service *et al*. (collectively, "NMFS") from disbursing any funding for the operation of ten federal Mitchell Act hatchery programs—listed in Table 3 on page 18 below—that release hatchery smolts which harm Lower Columbia River ("LCR") Chinook salmon (*Oncorhynchus tshawytscha*) and LCR coho salmon (*Oncorhynchus kisutch*) until the Court can adjudicate the Conservancy's motion for preliminary injunction; and (2) an Order preliminarily enjoining NMFS from disbursing any funding for the operation of the Mitchell Act hatchery programs listed in Table 3 until NMFS has completed consultation required by the Endangered Species Act ("ESA") and analyses and public processes required under the National Environmental Policy Act ("NEPA"), and until the Court has adjudicated the merits of the Conservancy's pending claims and any supplemental claims challenging such ESA and NEPA analyses, when and if they are issued. Pursuant to LR 7-1(a)(1), counsel for the Conservancy conferred with counsel for NMFS, but were unable to resolve the dispute.

INTRODUCTION

The ESA seeks to preserve and recover self-sustaining "wild" populations of species that ultimately are able to survive in the wild without the protections of the ESA. Since 1876, as over-harvest began to devastate the historically abundant wild runs, Pacific Northwest hatcheries have substituted artificially-bred fish for naturally-spawning fish—to the point that more than 80% of the salmon and steelhead in the Columbia River basin are of hatchery, rather than wild, origin. The remaining wild fish—or "natural origin spawners"—hold the promise for recovering the species to self-sustaining levels if factors limiting recovery were better controlled.

High proportions of hatchery fish straying onto spawning grounds pose severe genetic risks to the productivity of wild fish. The best available science confirms that stray rates—measured as the proportion of hatchery-origin spawners within a naturally spawning population, or "pHOS"—in excess of 5% or 10% seriously harm the fitness of wild fish, making hatcheries a primary limiting factor to recovery. Hatchery fish suppress the productivity of wild populations, prey on wild fish, compete with them for resources, and introduce disease and pathogens.

NMFS—the agency charged with implementing the ESA to protect imperiled salmonids—has itself funded extensive hatchery programs that suppress the recovery of Columbia River salmonids without complying with ESA requirements for the last ***seventeen years***. NMFS funds these programs under the federal Mitchell Act, which directs the Secretary of Commerce to establish "salmon-cultural stations"—fish hatcheries—in the Columbia River Basin, to perform all activities necessary for the conservation of salmon and steelhead, and to use the services of state wildlife agencies to achieve these ends. In the past six years, NMFS has disbursed between $13.7 and $22.7 million each year to fund 63 hatchery programs that release more than 50 million hatchery smolts into the Columbia River and its tributaries annually.

Since 1991, NMFS has listed 13 species of salmon and steelhead in the Columbia River basin as threatened or endangered and has designated critical habitat for all these species. NMFS has nonetheless continued to fund hatchery programs that result in more than 50% of the LCR Chinook and LCR coho being of hatchery origin, with pHOS in individual populations as high as 98%—posing significant threats to the species' survival and recovery.

Except for nine programs operated by the United States Fish and Wildlife Service ("FWS") and four by the Oregon Department of Fish and Wildlife ("ODFW") at the Sandy Hatchery, NMFS has not consulted under the ESA since 1999 to determine whether hatchery

programs it funds under the Mitchell Act are jeopardizing the continued existence of salmonids. Since that 1999 consultation, eight new salmonid species have been listed under the ESA that are harmed by NMFS's hatchery programs, including the LCR Chinook and LCR coho sought to be protected with this motion. Further, while NMFS prepared a programmatic Environmental Impact Statement ("EIS") to develop a policy direction to guide its future hatchery funding, it has not prepared an EIS or Environmental Assessment ("EA") under NEPA to evaluate effects and alternatives for its annual funding decisions, except for the Sandy Hatchery programs.

This motion focuses narrowly on NMFS's funding of ten hatchery programs operated on behalf of NMFS by ODFW and the Washington Department of Fish and Wildlife ("WDFW") that harm LCR Chinook salmon and LCR coho salmon. Only two of the 56 historical populations of these species are currently viable, putting both species at a high risk of extinction. Despite the dire condition of these species, about 54 million Chinook and 17 million coho hatchery smolts are planted into the lower Columbia River and its tributaries every year—mostly from Mitchell Act-funded hatcheries. An injunction against funding these programs is necessary to protect wild fish from further harm until NMFS complies with its obligations under the ESA and NEPA.

BACKGROUND

I. THE LEGAL FRAMEWORK

A. The Mitchell Act.

The Mitchell Act directs the Secretary of Commerce "to establish one or more salmon-cultural stations [*i.e.*, fish hatcheries] in the Columbia River Basin in each of the States of Oregon, Washington, and Idaho," to conduct scientific studies "to direct and facilitate conservation of the fishery resources of the Columbia River and its tributaries," to build devices in the Columbia River Basin to improve fish feeding, spawning and migration, and "to perform

all other activities necessary for the conservation of fish in the Columbia River Basin in accordance with law." 16 U.S.C. §§ 755–56. To carry out this directive, the Secretary "is authorized to utilize facilities and services of the [fish and wildlife] agencies of the States of Oregon, Washington, and Idaho," and funds appropriated to carry out the purposes of the Mitchell Act "may be expended for the construction of facilities on and the improvement of lands not owned or controlled by the United States." *Id*. § 757.

B. The Endangered Species Act.

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," intended to "halt and reverse the trend towards species extinction, whatever the cost." *TVA v. Hill*, 437 U.S. 153, 180, 184 (1978). The ESA seeks "to preserve the ability of natural populations to survive in the wild." *Trout Unlimited v. Lohn*, 559 F.3d 946, 957 (9th Cir. 2009). To achieve this goal, the ESA provides for listing species that are in danger of extinction as endangered or threatened, promulgating protective regulations for listed species, insuring that federal agency actions are not likely to jeopardize the continued existence of listed species, and prohibiting the take of listed species.

1. ESA Section 7 consultation.

Section 7(a)(2) of the ESA requires all federal agencies to "insure that any action authorized, *funded*, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species" or result in the adverse modification or destruction of critical habitat. 16 U.S.C. § 1536(a)(2) (emphasis added). If an agency proposing an action (the "action agency") determines that a listed species of anadromous fish is "likely to [be] adversely affect[ed]" by the proposed action, the agency is required to consult with NMFS and/or FWS (the "consulting agency"). *See* 50 C.F.R. § 402.14(a)–(b)(1). In this case, NMFS is

both the action agency, because it funds artificial propagation programs at federal, state, and Tribal hatcheries through its Mitchell Act disbursements, and a consulting agency responsible for producing a biological opinion ("BiOp"). *See Native Fish Soc'y v. NMFS*, 992 F. Supp. 2d 1095, 1102 (D. Or. 2014) (NMFS was both action agency and consulting agency). The "actions" that NMFS funds and for which consultation are required are the juvenile smolt releases, facilities operations, adult collection, monitoring and evaluation, and other projects of 63 hatchery programs operated by FWS, the states, and Tribes, which NMFS uses to fulfill its duties under the Mitchell Act. *See* Ex. 1 at 2; Ex. 2 at 1–3. Because these programs also affect bull trout, an inland fish listed as threatened under the ESA, NMFS is also required to consult with FWS on the effects of the programs' operations and smolt releases on that species. *See* Ex. 3 at 1.

In a BiOp, the consulting agency determines whether the proposed action, together with cumulative effects, is likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. 50 C.F.R. § 402.14(g)(4). To "jeopardize the continued existence" of a species is to "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *Id.* § 402.02. "[T]he jeopardy regulation requires NMFS to consider both recovery and survival impacts." *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 931 (9th Cir. 2008).

If the consulting agency concludes that the proposed action would not result in jeopardy, the BiOp must include an Incidental Take Statement ("ITS") setting limits on the amount of "take" that can occur incidental to the proposed action. 16 U.S.C. § 1536(b)(3). ESA section 9 otherwise prohibits the take of endangered species. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined broadly, and includes "harm" to a species. *Id.* § 1532(19). "Harm" includes "significant habitat

modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3.

An ITS specifies the amount or extent of the impact on listed species of any incidental taking, as well as Reasonable and Prudent Measures to minimize such impact and Terms and Conditions that must be followed. 50 C.F.R. § 402.14(i)(1)(i), (ii), (iv). If the amount or extent of incidental take specified in the ITS is exceeded, the action agency and consulting agency are obligated to reinitiate formal consultation. *Id*. §§ 402.14(i)(4), 402.16(a). Reinitiation also is required when "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered," when the action is "subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion," or when "a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16(b)-(d).

After consultation under section 7(a)(2) of the ESA is initiated, an agency "shall not make any irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." 16 U.S.C. § 1536(d).

2. Listing of salmon and steelhead species under ESA Section 4(d).

Paradoxically, salmon and steelhead species listed under the ESA may be comprised of both naturally-spawning populations and hatchery-bred fish from designated hatchery programs. NMFS lists fish under its 2005 Hatchery Listing Policy. 70 Fed. Reg. 37,204 (June 28, 2005). NMFS must "apply this policy in support of the conservation[1] of naturally-spawning salmon and

[1] "Conservation" means all methods to "bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary." 16 U.S.C. § 1532(3).

the ecosystems upon which they depend." *Id*. at 37,215. Yet, despite the ESA's emphasis on recovery of wild populations, NMFS applied the Hatchery Listing Policy and included hatchery and wild fish in the same designated ESUs[2] for the two threatened species at issue here. 70 Fed. Reg. 37,160, 37,160, 37,175–76 (June 28, 2005) (amending 2000 regulations); *codified at* 50 C.F.R. § 223.203.

In conjunction with the 2005 listings, NMFS amended its ESA section 4(d) regulations for conservation of threatened anadromous fish species. The 2005 amendment applied the ESA section 9 take prohibition only to the naturally-spawning members of the threatened species with an intact adipose fin. 70 Fed. Reg. at 37,167. NMFS determined that—because most hatchery fish are produced for harvest and are adipose fin-clipped ("ad-clipped") to allow anglers to distinguish them—protecting ad-clipped fish from take is not necessary to the conservation of listed species that comprise both hatchery and natural-origin fish. 70 Fed. Reg. at 37,167.

C. The National Environmental Policy Act of 1969.

Environmental review under NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (internal citations and alteration omitted). NEPA "ensures that important effects will not be

[2] The ESA allows for the listing of species, subspecies, or distinct population segments as threatened or endangered. 16 U.S.C. §§ 1532(16), 1533. An "Evolutionarily Significant Unit,"—or "ESU"—is NMFS's interpretation of "distinct population segments" and is used exclusively for salmonids. *See* Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612 (Nov. 20, 1991).

overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Agencies must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. "Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals." *Id*. § 1508.18(a). An EIS involves a scoping process, during which the public can provide input on the issues to be addressed, release of a draft EIS for public comment, followed by the Final EIS, and a Record of Decision. 40 C.F.R. §§ 1501.7, 1502.9, 1505.2. NEPA allows an agency to prepare an EA to determine whether an EIS must be prepared. *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000); 40 C.F.R. § 1501.4.

II. FACTUAL BACKGROUND

A. Harmful Effects That Hatchery-bred Fish Cause to Wild Fish.

Scientific studies of hatchery operations invariably conclude that hatchery fish pose a threat to wild fish, and thus to the survival and recovery of wild fish populations. Gayeski Dec. ¶¶ 13–20; Luikart Dec. ¶¶ 16–18, 25–27, 44–45; *see Native Fish Soc'y*, 992 F. Supp. 2d at 1104 ("it is undisputed that hatchery operations can pose a host of risks to wild fish"). Edward Bowles—ODFW's Fish Division Director—submitted a declaration in the Columbia River dams litigation explaining: "[t]he threats to wild populations caused by stray hatchery fish are well documented in the scientific literature. Among the impacts are substantial genetic risks that affect the fitness, productivity and genetic diversity of wild populations." Amended Dec. of

Edward Bowles ¶ 127, *Nat'l Wildlife Fed'n v. NMFS*, 839 F. Supp. 2d 1117 (D. Or. 2011) (No. 01-cv-640-RE, ECF No. 1633). He further explained that "[g]enetic risks increase substantially when the proportion of the adult population that is hatchery fish increases over 5%." *Id*.

Adverse genetic effects result from domestication of hatchery fish—"a process analogous to natural selection, but occurring under unnatural conditions, where the individual fish (and genes) that are "selected" are those better adapted to life in unnatural conditions (high density, no predators, no disease or different disease, unnatural food, unnatural substrate and water flow, artificial spawning)." Luikart Dec. ¶ 27. "The process results in loss of the ability to avoid predation, loss of disease resistance, [and] loss of ability to forage and spawn efficiently," rapidly causing a "loss of the ability to survive and reproduce effectively in the wild." *Id.* "The genetic changes are heritable and often transmitted to wild fish populations," a process known as genetic introgression. *Id.*

Hatchery programs in the Columbia River basin have an operational strategy of either isolating hatchery-origin fish from natural-origin fish—creating an "isolated" or "segregated" hatchery-origin population and an isolated natural-origin population—or integrating hatchery-origin fish and natural-origin fish so they are genetically similar, creating one "integrated" program. Ex. 4 at 57.[3] Isolated hatchery programs are managed "to minimize reproductive interactions between hatchery-origin and natural-origin fish." *Id*. "However isolation is difficult or impossible to achieve such that gene flow (introgression) often occurs from hatchery fish into the wild fish populations." Luikart Dec. ¶ 25. "[I]solated hatcheries are likely to produce stronger adaptations to captivity and thus more harm to wild populations following gene flow into the

[3] Sixty-three percent of the hatchery programs in the Columbia River basin are "isolated" programs, and these "are the dominant hatchery type in the Columbia Estuary, Lower Columbia, Columbia Gorge, and Mountain Snake Ecological Provinces." Ex. 4 at 57.

wild. *Id.* ¶¶ 30, 44. Isolated programs are primarily intended to provide for harvest, as opposed to conservation programs intended to preserve local populations. *Id.* ¶ 25.

The Hatchery Scientific Review Group ("HSRG"), chartered by Congress to recommend hatchery reforms, developed the pHOS metric. Ex. 5 at 11–12; Luikart Dec. ¶¶ 28–29. pHOS—the "proportion of hatchery-origin salmon"—measures the percentage of adult fish on spawning grounds that are of hatchery origin. *Id.* ¶ 29. The HSRG has developed standards for maximum levels of pHOS to protect wild populations from unacceptable levels of genetic and ecological harm from hatchery strays. *Id.* ¶ 30. pHOS standards vary depending upon the importance of the wild population affected to the species' recovery and whether the hatchery program is isolated or integrated—fish in isolated programs tend to be more genetically diverged from the local wild salmonid populations and therefore warrant a lower pHOS limit. *See id.* ¶ 31.

The HSRG's 2015 Annual Report to Congress estimated the long-term effects to fitness (*i.e.*, survival and reproductive success) of wild salmonid populations as a function of pHOS. *Id.* ¶ 33. A pHOS of only 2% resulted in the long-term fitness of the wild populations being reduced by 15%; pHOS of 5% reduced the fitness of the wild population by 38%; and a pHOS of 10% caused an 80% reduction in the long-term fitness of the wild population compared to the level before hatchery stays. *Id.* ¶ 33; *see also id.* ¶ 44 ("wild fish born with one hatchery parent often have 50% fewer surviving offspring . . . than offspring with wild parents").

In summary, the science regarding harmful impacts of hatchery fish on wild populations is "entirely undisputed," "[h]atchery fish are less fit for survival in the wild than genetically similar wild fish," and "[h]atchery releases have a significant negative effect on the productivity of wild populations by competing with wild fish for food and space; diluting the fitness of wild

fish when adult hatchery fish stray and spawn with wild fish; and by potentially spreading disease." *Cal. State Grange v. NMFS*, 620 F. Supp. 2d 1111, 1158 (E.D. Cal. 2008).

B. LCR Chinook Salmon.

LCR Chinook salmon are classified as spring, fall ("tule"), or late fall ("bright") based on when adults return to fresh water. Ex. 6 at 56–58. Of the 32 historical wild independent populations in this ESU, 21 are fall, two are late-fall, and nine are spring. *Id*. at 59; Ex. 7 at 2 (map of LCR Chinook ESU showing fall run populations). NMFS currently lists the LCR Chinook salmon ESU as including these 32 wild populations as well as the salmon produced by 20 hatchery artificial propagation programs. Ex. 6 at 59.

Of the ESU's 32 wild populations, only the two late fall runs are considered viable. *Id*. at 61. Twenty six of the 32 wild populations have a very low probability of persistence over the next 100 years, and some are extirpated (or nearly so). *Id*. Because populations with a very low probability of persistence are classified as having a very high risk of extinction, the LCR Chinook salmon ESU as a whole is currently at very high risk of extinction. *See id.* at 6, 61.

In 2013, NMFS prepared a Recovery Plan for the LCR salmon and steelhead species. Ex. 6. For the LCR Chinook salmon ESU, it describes that "[m]ost fall Chinook salmon currently returning to lower Columbia tributaries are produced in hatcheries operated to produce fish for harvest," and that hatchery production "continues to threaten the productivity of [LCR] fall Chinook salmon," which "also has likely declined as a result of the influence of hatchery-origin fish." *Id.* at 75–76; *see also* Ex. 8 at 14, 21 (2016 Five-Year Status Review for LCR species describing that, despite various changes and improvements in hatchery practices and reductions in the number of hatchery fish released, "hatchery-produced fish still represent a majority of fish returning to the ESU."). The Recovery Plan explains that "[p]opulation-level effects resulting

from hatchery fish interbreeding with natural-origin fish are a primary limiting factor for all populations" of LCR fall Chinook. Ex. 6 at 75–76.

For fall Chinook, "[h]atchery straying, combined with past stock transfers, has likely altered the genetics of fall Chinook salmon populations and may have reduced diversity within the ESU." *Id*. at 76. Productivity also has likely declined as a result of the influence of hatchery-origin fish, and "many scientists suspect that competition with or predation by hatchery-origin fall Chinook salmon affects natural population productivity." *Id.*

The Recovery Plan identifies three "strata" within the LCR Chinook ESU—Coast, Cascades, and Gorge. *Id*. at 5. Within each stratum, populations are classified as primary, contributing, or stabilizing, depending on their expected contribution to the species' recovery. *Id*. at 7. Primary populations "are targeted to achieve "viability"—meaning high or very high persistence probability—while contributing populations are targeted for improvement in status to achieve a target for stratum-wide average viability. *Id*. Stabilizing populations are those expected to remain at low to very low probability of persistence. *Id*.[4]

Recovery of the LCR Chinook ESU requires that every primary population move to high or very high probability of persistence—meaning a risk of extinction of less than 5%. *Id.* at 6, 30. However, current baseline conditions for LCR Chinook are far below these recovery goals: eight of the spring Chinook populations and 19 of the fall Chinook populations currently have *very low* probability of persistence—meaning each currently has a 60% to 100% risk of extinction. *Id*. at 6, 63, 66–67, 71–72. Eight of the nine LCR fall Chinook primary populations currently have

[4] The Coast stratum of LCR Chinook contains four primary populations, two contributing populations, and one stabilizing population, all fall Chinook. Ex. 6 at 71–72. The Cascade stratum contains ten primary populations (four fall, four spring, two late-fall), six contributing populations (four fall, two spring), and three stabilizing populations (two fall, one spring). *Id*. The Gorge stratum contains only two primary populations (one fall, one spring) and four contributing populations (three fall, one spring). *Id*.

very low probability of persistence, with the ninth being merely "low," and all nine contributing populations of LCR fall Chinook also have very low probability of persistence. *Id.* at 71–72. While some of the LCR fall Chinook populations once held as many as 22,000 to 27,000 wild fish, none currently has more than about 500, and 14 of the 21 populations contain fewer than 50 wild fish. *Id*.

Hatchery programs in the Columbia River basin put substantial pressure on the few remaining wild fish. The HSRG completed a comprehensive review of hatchery programs in the Columbia River basin in 2009 that established maximum pHOS for isolated/segregated hatchery programs based on the affected wild population's designation as "primary" or "contributing." Ex. 5 at 11–12. The HSRG recommended that pHOS should be less than 5% in primary populations affected by isolated hatchery programs and less than 10% in contributing populations affected by such programs. *Id*. NMFS has explained that it "supports the standard that hatchery stray rates should be managed such that less than 5 percent of the naturally spawning population consists of hatchery fish from a different area." Ex. 9 at 8. These recommendations constitute the best current science on the permissible levels of hatchery straying to limit harm from genetic introgression in natural populations. *See* Gayeski Dec. ¶¶ 10–21; Luikart Dec. ¶¶ 24–25, 34–36.

ODFW and WDFW data show that average stray rates (pHOS) over the past five years among the LCR fall Chinook primary populations have ranged from 7.7% to as high as 97%, with nine of these primary populations having at least 39.5% pHOS, as summarized in Table 1 below. Among the contributing populations, pHOS ranged from 25.4% to 97.8%, with five of the contributing populations having pHOS of at least 39.8%. *Id*. These stray rates are far beyond what is safe to prevent genetic risks to the fitness and productivity of LCR fall Chinook and to allow for the species' recovery. Gayeski Dec. ¶¶ 28–45, 50–51; Luikart Dec. ¶¶ 27–43, 48.

Table 1: Fall Chinook Stray Rates, 2010 to 2015

Stratum	Population	State	Designation	pHOS mean 2010-2015 (%)	HSRG Limit (%)	Years with pHOS data
Coast	Elochoman	Wash.	Primary	53.4	5	2010-2015
Coast	Skamokawa	Wash.	Primary	90.8	5	2010-2015
Coast	Mill	Wash.	Primary	88.9	5	2010-2015
Coast	Abernathy	Wash.	Primary	87.5	5	2010-2015
Coast	Germany	Wash.	Primary	89.1	5	2010-2015
Coast	Clatskanie	Or.	Primary	97.0	5	2012-2014
Coast	Grays/Chinook	Wash.	Contributing	75.0	10	2010-2015
Coast	Big Creek	Or.	Contributing	97.8	10	2012-2014
Cascade	Coweeman	Wash.	Primary	14.9	5	2010-2015
Cascade	SF Toutle	Wash.	Primary	65.9	5	2010-2015
Cascade	NF Lewis	Wash.	Primary	39.5	5	2010-2015
Cascade	EF Lewis	Wash.	Primary	7.7	5	2010-2015
Cascade	Washougal	Wash.	Primary	64.9	5	2010-2015
Cascade	Lower Cowlitz	Wash.	Contributing	25.4	10	2010-2013
Cascade	Kalama	Wash.	Contributing	84.7	10	2010-2015
Cascade	Clackamas	Or.	Contributing	39.8	10	2012-2014
Gorge	White Salmon	Wash.	Contributing	20.0	10	2010-2014
Gorge	Upper Gorge	Wash.	Contributing	68.0	10	2010-2014

Source: ODFW and WDFW databases. *See* Gayeski Dec. ¶ 28; Ex 7 at 16.

The most recent chart of NMFS's Mitchell Act funding, from May 2016, shows that over 24.6 million LCR fall Chinook smolts are projected for release from Mitchell Act-funded fall Chinook programs in the lower Columbia River basin. Ex. 2 at 1–3; Ex. 4 at 46 (map of hatchery progams). Straying is highest in populations that receive direct hatchery releases, and "generally not as high in the 17 populations that do not receive direct hatchery releases; however, many of these are small populations, so straying from programs in other watersheds or net-pens still constitutes a significant impact." Ex. 5 at 16. Programs that transport fish by truck for release into streams that are geographically removed from a hatchery—including releases from saltwater net-pens—are prone to higher stray rates than releases "on station" at the hatchery. *Id*. at 72.

//

//

C. LCR Coho Salmon.

The LCR coho salmon ESU also is at very high risk of extinction, with 24 of the historical 27 wild populations considered at very high risk. Ex. 6 at 6, 45. LCR coho are classified in the same three strata—Coast, Cascades, Gorge—as LCR Chinook. *Id*. at 44; Ex. 7 at 21 (map of LCR coho ESU).[5] None of the populations is currently viable, and all three strata fall significantly below viability criteria. Ex. 6 at 45. Extensive and persistent hatchery straying likely have decreased wild population productivity and genetic diversity among coho. *Id*. at 46. Only two of the wild populations—the Clackamas and Sandy—have a history of continuous natural production. *Id*. Twenty three artificial propagation programs in Oregon and Washington are included in the LR coho ESU. *Id*. at 45.

The recovery scenario for the LCR Chinook requires every primary population to move to a high or very high probability of persistence—meaning a risk of extinction of less than 5%. *Id*. at 6, 30. As with LCR Chinook, current baseline conditions for LCR coho are far below these recovery goals: 21 of the LCR coho populations currently have a very low probability of persistence, i.e. a 60% to 100% risk of extinction, including 13 of the 16 primary populations and all four contributing populations. *Id*. at 6, 47–51. While some of the LCR coho populations once held as many as 40,000 to 52,500 wild fish, 18 of the 24 populations now contain fewer than 50 wild fish. *Id*. at 50–51. The 2013 Recovery Plan lists four LCR coho populations in Oregon—Clatskanie, Scappoose, Clackamas, and Sandy—with more than 1,000 wild fish, based on 2010 data from ODFW, *id*., but, since then, these populations have crashed: in 2015, ODFW estimated

[5] The Coast stratum of LCR coho contains four primary populations, one contributing populations, and two stabilizing populations. Ex. 6 at 50–51. The Cascade stratum contains nine primary populations, three contributing populations, and two stabilizing populations. *Id*. The Gorge stratum contains only three populations, all primary populations. *Id*.

a *total* of only 1,378 wild spawners among these four populations, the most being 465 wild spawners in the Scappoose population. Ex. 10.

Stray rates of hatchery coho among the dwindling wild populations in the lower Columbia River are far higher than the 5% HSRG recommendation for primary populations and 10% recommendation for contributing populations. *See* Ex. 5 at 11–12. ODFW and WDFW data show that average pHOS over the past five years among the 12 LCR coho primary populations for which pHOS data exists have ranged from 6.7% to 69.0%, with seven of these primary populations having at least 26.1% pHOS, as summarized in Table 2 below.

Table 2: Coho Stray Rates, 2010 to 2015

Stratum	Population	State	Designation	pHOS mean 2010-2015 (%)	HSRG Limit (%)	Years with pHOS data
Coast	Grays/Chinook	Wash.	Primary	66.6	5	2010-2012
Coast	Elochoman/Skamokawa	Wash.	Primary	52.6	5	2010-2012
Coast	Clatskanie	Or.	Primary	13.5	5	2010-2015
Coast	Abernathy/Germany/Mill	Wash.	Contributing	11.7	10	2010-2012
Cascade	Lower Cowlitz	Wash.	Primary	11.7	5	2010-2011
Cascade	Coweeman	Wash.	Primary	6.7	5	2010-2012
Cascade	SF Toutle	Wash.	Primary	19.2	5	2010-2012
Cascade	NF Toutle	Wash.	Primary	35.2	5	2010-2012
Cascade	Upper Cowlitz	Wash.	Primary	26.1	5	2010-2013
Cascade	EF Lewis	Wash.	Primary	15.9	5	2010-2012
Cascade	Clackamas	Or.	Primary	41.8	5	2010-2015
Cascade	Kalama	Wash.	Contributing	88.7	10	2010-2012
Cascade	Washougal	Wash.	Contributing	21.8	10	2010-2012
Cascade	NF Lewis	Wash.	Contributing	2.8	10	2010-2012
Gorge	Upper Gorge/Hood	Or.	Primary	69.0	5	2010-2014
Gorge	Lower Gorge	(both)	Primary	31.0	5	2010-2014

Source: ODFW and WDFW databases. *See* Gayeski Dec. ¶ 28; Ex. 7 at 31.

Among the four contributing populations, pHOS ranged from 2.8% to 88.7%, with three of the four contributing populations having pHOS of at least 11.7%. *Id*. These stray rates are far beyond what is safe to prevent genetic risks to the fitness and productivity of LCR coho and to allow for the species' recovery. Gayeski Dec. ¶¶ 28, 46–51; Luikart Dec. ¶¶ 27–43, 48. The May

2016 NMFS funding chart shows over 7.4 million LCR coho smolts proposed for release from Mitchell Act-funded coho programs in the lower Columbia River basin. Ex. 2 at 1–3.

D. NMFS's Funding of Hatchery Operations Under the Mitchell Act.

Congress appropriates a specific sum of money each year for NMFS to fulfill its duties under the Mitchell Act. Ex. 4 at 4. NMFS makes decisions annually to allocate the appropriated funds to the operators of 63 hatchery programs that produce 50 to 63 million juvenile fish each year. *Id*. at 4, 23; Ex. 2 at 3. During the past six years, NMFS's funding for Mitchell Act programs has fluctuated from a high of $22.7 million in Fiscal Year ("FY") 2010 to a low of $13,736,623 in FY 2015. Ex. 4 at 31; Ex. 11 at 8 (FY 2015 allocation).

The aggregate awards to each agency operator—ODFW, WDFW, Idaho Department of Fish & Game, FWS, Yakama Nation, and Nez Perce Tribe—are based on budget applications that each operator submits, including a statement of the work to be funded. *See, e.g.*, Ex. 12 (WDFW FY 2013 budget proposal). NMFS makes decisions each year to allocate funding to the state, federal and Tribal hatchery operators in several categories. Ex. 4 at 31. In FY 2010, for example, NMFS disbursed $11,066,000 for Mitchell Act hatchery operations, including juvenile releases and adult collection; $1,678,000 for monitoring, evaluation, and hatchery reform; and $9,972,000 for specific hatchery reform projects and improvements, for the total of $22,716,000. *Id*. Between FY 2010 and FY 2015, funding for operations fell by over 10%, from $11,066,000 to $9,944,335. *See id*.; Ex. 11 at 8. The levels of smolt production and specific programs funded have fluctuated widely during this period, with changes occurring even from month to month in 2016. *Compare* Ex. 4 at 90–95 *with* Ex. 13 *and* Ex. 2.

Despite funding reductions, NMFS's 2016 Status Review noted that "many" hatchery improvements had occurred in the past five years. Ex. 8 at 21. NMFS also has funded a series of

new "hatchery reform" projects over this period. *See, e.g.*, Ex. 14. NMFS retains control over its funding through cooperative agreements with the operators, and has "broad discretion in using the Mitchell Act funds either to prescribe narrowly the way Mitchell Act production programs will be operated or to allow hatchery operators discretion in doing so." Ex. 4 at 36; *see* Ex. 15 (documentation of cooperative agreements between NMFS and hatchery operators).

Most of the Mitchell Act-funded hatchery programs—and all of the ones that are the subject of the motion—are isolated "harvest" (rather than "conservation") programs, designed to provide fishing opportunities rather than maintain natural populations. *See* Ex. 2 at 1–3; Ex. 4 at 90–95; Ex. 5 at 2. Many of the artificial propagation programs produce fish that are "surplus to recovery needs"—even though the hatchery fish they produce are listed as part of an ESU. *See* Ex. 9 at 2. The isolated harvest programs in the lower Columbia River basin are responsible for flooding the lower basin with hatchery fish, swamping native populations that are at high risk of extinction, resulting in the dangerously high stray rates described above. Gayeski Dec. ¶¶ 28–51. Table 3 lists the programs for which the Conservancy seeks an injunction.

Table 3: Hatchery Programs Subject to TRO & Injunction Request

Fall Chinook released in LCR ESU or Willamette	Program Type	Purpose	# released*
Klaskanine Fall Chinook (ODFW)	**isolated**	**harvest**	**2,100,000**
Big Creek tule Chinook (ODFW)	**isolated**	**harvest**	**3,100,000**
Deep River (SAFE) Fall Chinook (WDFW)	**isolated**	**harvest**	**1,000,000**
Washougal Fall Chinook (WDFW)	**integrated/isolated**	**harvest**	**3,000,000**
Bonneville Tule Fall Chinook (ODFW)	**isolated**	**harvest**	**5,000,000**
Coho released in the LCR ESU or Willamette	**Program Type**	**Purpose**	**# released***
Klaskanine Coho (ODFW)	**isolated**	**harvest**	**750,000**
SAFE Coho (ODFW)	**isolated**	**harvest**	**2,385,000**
Deep River (SAFE) Coho (WDFW)	**isolated**	**harvest**	**950,000**
Big Creek Coho (ODFW)	**isolated**	**harvest**	**535,000**
Bonneville Coho (ODFW)	**isolated**	**harvest**	**1,000,000**

***** Source: Ex. 2 (May 12, 2016 NMFS spreadsheet showing Mitchell Act funded programs).

E. Previous Consultations.

In 1994, NMFS consulted on the effects of some hatchery programs it funds under the Mitchell Act on the only three then-listed salmon species, which did not include LCR Chinook or LCR coho. NMFS indicated then that, "[b]ecause of legitimate concerns over carrying capacity of the river, estuary, and ocean, and genetic and ecological interactions between hatchery and wild salmon, allowing hatchery production beyond 1994 is not appropriate at this time." Ex. 16 at 2. The BiOp thus addressed "1994 hatchery actions only." *Id*. In 1995, NMFS issued a new BiOp, covering the effects of hatchery programs from 1995 to 1998, in which it concluded that the hatchery programs were likely to jeopardize the continued existence of the three then-listed salmon species, which did not include LCR Chinook or LCR coho, Ex. 17 at 3, 16.

NMFS issued another BiOp on Columbia River Basin hatchery programs in 1999 evaluating effects of facilities operations, juvenile releases, adult collection, and related monitoring and evaluations to six listed species of salmon and steelhead. Ex. 1 at 2. The 1999 BiOp lists NMFS as the "action agency" for all Mitchell Act funded programs, explaining that "NMFS proposes to continue to fund the operation of 22 hatcheries" under the Mitchell Act and "NMFS proposes to release approximately 59,832,838 anadromous fish from the 22 facilities in 1999," although the facilities themselves are operated by other agencies. *Id*. at 5.

The 1999 BiOp evaluated the incidental take from Columbia River basin hatchery programs on the only six then-listed salmonids, which still did not include LCR Chinook or LCR coho. *Id.* at 3. The ITS set out several reinitiation triggers, including exceedance of a 5% stray rate in one of the affected populations and the listing of new affected species. *Id*. at 23. NMFS issued a letter dated July 27, 1999, requesting reinitiation of the consultation involving the 1999 BiOp to analyze hatchery program effects to six salmonid species recently listed as threatened or

endangered, including the LCR Chinook salmon ESU. Ex. 18. No BiOp was ever prepared from this new consultation.

In 2007, NMFS consulted on the effects of nine hatchery programs operated by FWS on listed species in the Columbia River, now including LCR Chinook and LCR coho. Ex. 9 at 4. NMFS issued another BiOp in 2012 for ODFW's four Sandy Hatchery programs. *Native Fish Soc'y*, 992 F. Supp. 2d at 1105. The proposed action for that BiOp was the operation of the four Mitchell Act programs, expressly providing that "[c]ontinued funding pursuant to these funding sources is part of the proposed action." Ex. 19 at 6. The 2012 Sandy BiOp included an ITS that set a limit of 10% pHOS as the extent of take of listed fish from "interactions on the spawning grounds," *id*. at 12, although this Court later determined that the 10% stray rate was arbitrary in the face of the HSRG's recommendation of a 5% stray rate when isolation of hatchery and natural fish results in genetic divergence. *Native Fish Soc'y*, 992 F. Supp. 2d at 1113.

F. The Mitchell Act EIS.

Between 2004 and 2014, NMFS prepared a programmatic EIS under NEPA in which the proposed action was "to develop a NMFS policy direction that will guide NMFS's annual distribution of Mitchell Act hatchery funds." Ex. 4 at 3, 5, 36–38. NMFS has not issued a Record of Decision adopting any policy direction, but expects to do so sometime this year. Ex. 3 at 1. A "policy direction" guides and shapes decisions NMFS makes related to Mitchell Act hatchery production in the Columbia River Basin, defined by a series of performance goals and/or principles, including "general goals" for NMFS to pursue when it funds those programs. Ex. 4 at 5, 36. The six broad policy directions that are associated with each of the EIS's action alternatives are goal- and objective-oriented. *Id*. at 66.

The performance goals in the alternatives are not intended to infer compliance with any legal standard, but only to aggregate and describe the effects of multiple hatchery programs on natural-origin populations of salmon and steelhead for comparison to the baseline of current hatchery operations. *Id*. at 10. The Mitchell Act EIS is explicit that the "implementation scenario" for each alternative in the Mitchell Act EIS is just a generalized example of how each of the alternative policies could be implemented basinwide. *Id*. at 20, 68. These implementation scenarios do not prescribe preference to the measures implemented. *Id*. at 66.

Significantly, the Mitchell Act EIS does not identify specific actions that would be taken to implement any alternative, *id*., but rather provides that specific hatchery actions would be determined in the future on a hatchery-program-by-hatchery-program basis. *Id*. at 16. It asserts that "[a]nalyses of site-specific effects of hatchery production on listed species are not provided in this EIS." *Id.* at 24. The Mitchell Act EIS contemplates that there will be additional NEPA processes for those case-by-case reviews at some unspecified point in the future. *Id*. at 40. The Mitchell Act EIS does not include any data on funding or proposed funding after 2012, and does not contain any data regarding hatchery releases, or stray rates, after 2010. *Id*. at 21, 31, 107.

G. Procedural History of This Case.

The LCR Chinook salmon was listed under the ESA in 1999 and the LCR coho was listed in 2005. Since then, NMFS—the agency charged with implementing the ESA to protect imperiled salmonids—has itself failed to consult on the massive hatchery programs it funds under the Mitchell Act to ensure that LCR Chinook and coho salmon are not jeopardized. The Conservancy therefore provided notice to NMFS of its intent to sue for the on-going violations of the ESA's consultation requirement and implementing regulations on January 13, 2016. Am. Compl. (Dkt # 10) ¶ 6.

On March 4, 2016, NMFS's Rob Jones responded with a letter ("March 4th Letter") describing that NMFS had begun consultation to prepare a BiOp "which will cover both the [Mitchell Act] FEIS policy direction and the planned distribution of Mitchell Act funds for 2016." Ex. 3 at 1. Mr. Jones promised that the BiOp would be completed by July 2016. *Id*.

The Conservancy had reason to be skeptical of this promise, and filed suit on March 31, 2016. Complaint (Dkt # 1). In *Native Fish Society*, a case involving only four hatchery programs at the Sandy Hatchery—not the 63 requiring coverage by a BiOp on Mitchell Act funding—this Court denied NMFS's motion to stay proceedings because of "ample evidence demonstrating that NMFS has struggled to meet time lines in this very matter in the past." Order at 4, *Native Fish Soc'y*, No. 3:12-cv-431-HA, ECF No. 160 (D. Or. filed Aug. 8, 2013). NMFS there submitted a June 28, 2013 declaration by Mr. Jones that promised NMFS would issue a decision on whether to approve hatchery programs under the ESA by January 13, 2014. Second Declaration of Robert P. Jones, Jr. ¶ 9, *Native Fish Soc'y*, No. 3:12-cv-431-HA (D. Or. filed June 28, 2013). NMFS finally approved the programs on June 9, 2016, nearly *three years* after Mr. Jones promised a decision within seven months.[6]

The Conservancy filed its Amended Complaint on June 27, 2016 (Dkt # 10). The Conservancy's requested injunction is intended to insure that any disbursement of Mitchell Act funds for the isolated hatchery programs that are causing the highest stray rates, and thus the greatest degree of genetic harm, to primary and contributing populations of LCR Chinook and LCR coho, is prohibited until NMFS satisfies the Court that it has complied with its consultation obligations under the ESA and with its public disclosure and analysis duties under NEPA.

//

[6] *See* http://www.westcoast.fisheries.noaa.gov/publications/hatchery/current/Sandy/sandy-hatcheries_4d-decisionmemo_20160617.pdf.

ARGUMENT

I. PRELIMINARY INJUNCTION STANDARD

Generally, to obtain a preliminary injunction, a "plaintiff . . . must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008). The Ninth Circuit continues to apply the "serious questions" version of the "sliding scale" test. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). Under this test, an injunction is appropriate where there are "serious questions going to the merits," a balance of hardships that tips sharply in the plaintiff's favor, and the plaintiff shows that irreparable injury is likely and that the injunction is in the public interest. *Id*. at 1135.

The Ninth Circuit recently reaffirmed that "the ESA strips courts of at least some of their equitable discretion in determining whether injunctive relief is warranted." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1090 (9th Cir. 2015). Courts lack discretion to balance competing interests in ESA cases because Congress "afford[ed] first priority to the declared national policy of saving endangered species" and established an unparalleled public interest in the "incalculable" value of preserving species. *TVA*, 437 U.S. at 185, 187–88; *see also id.* at 194 (Congress struck the balance "in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'"). When a court evaluates "a request for injunctive relief to remedy an ESA procedural violation, the equities and public interest factors always tip in favor of the protected species." *Cottonwood*, 789 F.3d at 1091. And, while a showing of likely irreparable injury is needed, "[i]n light of the stated

purposes of the ESA in conserving endangered and threatened species and the ecosystems that support them, establishing irreparable injury should not be an onerous task for plaintiffs." *Id*.

II. THE CONSERVANCY IS LIKELY TO PREVAIL ON ITS CLAIMS

A. NMFS is in Violation of ESA Section 7 and Implementing Regulations.

It is beyond reasonable dispute that NMFS is in violation of the requirements section 7 of the ESA for its funding of Mitchell Act hatchery programs. Section 7(a)(2) requires all federal agencies consult to insure that an action "funded . . . by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species" or adversely modify or destroy critical habitat. 16 U.S.C. § 1536(a)(2). While NMFS consulted on some hatchery programs *seventeen years ago*, NMFS violated the ESA by failing to reinitiate that consultation when, *inter alia*, species not addressed by the 1999 BiOp were listed under the ESA. For other programs, NMFS violated the ESA by never consulting on the effects to ESA-listed salmonids. Finally, to the extent that NMFS contends that it has been in the process of consulting on Mitchell Act hatchery programs, the agency has nonetheless violated section 7(d) of the ESA by continuing to disburse funds before such consultation has been completed.

1. NMFS is in violation of the ESA for failing to reinitiate consultation on the programs addressed in the 1999 BiOp.

The listing of new species under the ESA not addressed in the 1999 BiOp—including the LCR Chinook and coho salmon—required NMFS to reinitiate that consultation. NMFS is in violation of section 7 of the ESA by funding the Mitchell Act hatchery programs addressed in that BiOp during the last six years without reinitiating consultation. *See Cottonwood*, 789 F.3d at 1088–92 (remanding for a showing of whether projects taken in violation of the duty to reinitiate consultation will cause irreparable injury and should therefore be enjoined).

The 1999 BiOp addressed the effects from smolt releases and other operations of programs at 22 hatcheries NMFS funded under the Mitchell Act on six then-listed species—among them seven of the programs addressed in this motion.[7] Ex. 1 at 3–4. It appears to contemplate remaining in effect for many years, for example setting a reinitiation trigger based on any *future* smolt releases above the level consulted on in 1999. *Id*. at 23.

Since the 1999 BiOp was issued, eight new salmonid species have been listed in the Columbia River basin that may be affected by these hatchery programs, including the LCR Chinook and coho salmon ESUs that the Conservancy seeks to protect with this motion. These listings and the associated designations of critical habitat unambiguously required that NMFS reinitiate consultation on its funding of the hatchery programs addressed in the 1999 BiOp. *See* 50 C.F.R. § 402.16(d); Am. Compl. ¶ 102.

In addition, significant new information regarding the effects of the Mitchell Act hatchery programs has become available—including new scientific studies such as the 2009 HSRG report—that identify the need to maintain hatchery stray rates in isolated programs such as those at issue in this motion to levels below 5% or 10% to avoid serious genetic harm to wild fish. Am. Compl. ¶¶ 103–106; Gayeski Dec. ¶¶ 19–22, 28–51; Luikart Dec. ¶¶ 17–18, 24–31, 44–45. And stray rates over the last five years of between 31% and 98% are occurring in 15 of the 23 isolated, primary wild populations of LCR Chinook and LCR coho as a result of the releases from these programs, a fact not previously considered in the 1999 BiOp. *See supra* Tables 1 & 2. This new information required reinitiation of consultation on these programs, to the extent the 1999 BiOp remains in effect. 50 C.F.R. § 402.16(b).

[7] The programs at issue in this motion addressed in the 1999 BiOp are the Big Creek tule Chinook and Washougal fall Chinook programs, as well as the Big Creek, Deep River SAFE, Klaskanine, SAFE (Youngs Bay), and Bonneville coho program. Ex. 1 at 12–18.

To the extent that NMFS argues that it reinitiated this consultation at any point during the last six years, its funding of Mitchell Act hatchery programs during that time constitutes irreversible and irretrievable commitments of resources made in violation of section 7(d) of the ESA. *See Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1128 (9th Cir. 1998). As NMFS's May 2016 Mitchell Act funding chart illustrates, NMFS has currently completed consultation on only a small fraction of the 63 programs it funds under the Mitchell Act. Ex. 2.

2. NMFS is in violation of section 7 of the ESA for funding Mitchell Act programs without ever consulting.

For Mitchell Act programs not addressed in the 1999 BiOp, NMFS is in violation of section 7 of the ESA by funding the programs during the last six years without first consulting on the effects to salmon and steelhead. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc) ("Section 7 imposes on all agencies a duty to consult with either [FWS or NMFS] before engaging in any discretionary action that may affect a listed species").

Section 7(a)(2) of the ESA requires that NMFS consult on any action it funds. *See* 16 U.S.C. § 1536(a)(2) ; *see also* Ex. 1 at 4; Ex. 9 at 3–4; Ex. 16 at 9–10; Ex. 17 at 4–5; Ex. 19 at 6 (BiOps describing consultation on Mitchell Act funding). At least three of the programs NMFS currently funds under the Mitchell Act have never had consultation on their effects—the Klaskanine fall Chinook, Deep River SAFE fall Chinook, and Bonneville Hatchery tule fall Chinook programs. *See* Ex. 1 at 12, 15–18. NMFS has violated the ESA by funding this program and any others not addressed in the 1999 BiOp without ever consulting under section 7(a)(2).

To the extent that NMFS has finally initiated consultation on any Mitchell Act programs not addressed in 1999 BiOp, NMFS has violated section 7(d) of the ESA because its disbursements of funds constitute irreversible and irretrievable commitments of resources become completion of consultation. *See Houston*, 146 F.3d at 1128.

B. NMFS Has Violated NEPA by Not Preparing NEPA Analyses for the Hatchery Programs it Funds Under the Mitchell Act.

NMFS violated NEPA when it decided to issue funding for hatchery programs under the Mitchell Act in FY 2011, 2012, 2013, 2014, 2015 and 2016 without preparing either an EIS or an EA. An agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).[8] NEPA regulations define "major Federal action" to include "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. "Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." *Id*. § 1508.18(a).

The 1999 BiOp freely acknowledges that the hatchery releases and operation of Mitchell Act programs are *NMFS's* action because of its decisions to fund the programs under the Mitchell Act. Ex. 1 at 2, 5 (describing that "NMFS proposes to continue to fund the operation of 22 hatcheries" and "NMFS proposes to release approximately 59,832,838 anadromous fish from the 22 facilities," and that the action involved is "the effect of facilities operations, juvenile releases, adult collection, and related monitoring and evaluations"). As NMFS acknowledged in the 2012 Sandy BiOp, the effects of the hatchery programs and the effects of NMFS's funding under the Mitchell Act are the same. Ex. 19 at 8.

Although "[t]he standards for 'major federal action' under NEPA and 'agency action' under the ESA are much the same," *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996), the terms are not precisely interchangeable. *Karuk Tribe*, 681 F.3d at 1024. Whether an

[8] NMFS must prepare an EIS if "the agency's action *may* have a significant impact upon the environment." *Nat'l Parks & Conservation Ass'n. v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (emphasis original; internal quotes omitted). "This is a low standard." *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). Stray rates of up to 98% due to the releases from the Mitchell Act programs NMFS funds are indisputably a "significant impact."

agency has undertaken a "major federal action" when it funds an action involves an examination of (1) the amount and nature of the federal agency's funding, and (2) the extent of the federal agency's involvement and control. *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1101 (9th Cir. 2007); 40 C.F.R. § 1508.18. Because NMFS provides virtually all funding for the Mitchell Act hatchery programs, and retains control over their operation and the power to end them, the effects of its decisions to fund the Mitchell Act programs are "major federal action" requiring an EIS under NEPA.

NMFS provides 100% of the funding for almost all of the hatchery programs it funds under the Mitchell Act, and a majority of the funding for the remaining programs. Ex. 2 at 1–3. The Mitchell Act EIS describes that NMFS's congressional authorization to use Mitchell Act funds to conserve fish in the basin and use other agencies' facilities to do so gives it "broad discretion in using the Mitchell Act funds either to prescribe narrowly the way Mitchell Act production programs will be operated or to allow hatchery operators discretion in doing so." Ex. 4 at 36; Ex. 15. And NMFS retains the power to close the hatchery programs it funds: the Mitchell Act EIS asserts that, if NMFS decides to adopt a policy direction to not fund the Mitchell Act-funded hatchery programs, "[a]ll Mitchell Act-funded hatchery programs and facilities would be closed." Ex. 4 at 11. The extent of federal funding, and NMFS's retention of control over the operations of the programs and the power to terminate the programs themselves, make the actions that NMFS has decided to fund "major Federal action" subject to NEPA. *See Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1182–85 (N.D. Cal. 2009) (granting injunction upon showing of "a substantial question regarding whether the federal government exercised decision-making authority and control over the project" where the federal agency was likely to fund and potentially use the project site to relocate its computers).

In this case, NMFS has made decisions to provide new funding for the Mitchell Act hatchery programs each of the last six years, with total disbursements of between $13.7 and $22.7 million each year. Ex. 4 at 31; Ex. 11 at 3, 6, 8. Despite its annual funding of the Mitchell Act hatchery programs in the last six years, and the significant and dangerous stray rates among the natural LCR Chinook and LCR coho populations, NMFS has prepared only one NEPA analysis covering its Mitchell Act funding during that time, related to the four Sandy Hatchery programs. *See Native Fish Soc'y*, 992 F. Supp. 2d at 1105. NMFS candidly acknowledged in its 2012 EA for the four Sandy Hatchery programs that "NMFS' approval of the [programs] *and disbursement of related Mitchell Act funding* constitutes the Federal action that is subject to analysis as required by the [NEPA]." Ex. 20 at 6 (emphasis added).

In addition, the programmatic Mitchell Act EIS does not satisfy NMFS's obligation to perform NEPA analyses on the actions it has funded through its annual Mitchell Act allocation decisions over the past six years. The Mitchell Act EIS is intended only to help set a "policy direction" to "guide[] and shape[]" NMFS's subsequent funding decisions. Ex. 4 at 63. The EIS acknowledges that it is *not* identifying specific actions hatchery programs would take to implement the policy direction, *id*. at 66, but rather that those specific actions would be evaluated in future NEPA processes on a hatchery program-by-hatchery program basis. *Id*. at 16, 40, 105–06. It makes clear that "[a]nalyses of site-specific effects of hatchery production on listed species are not provided in this EIS." *Id.* at 24. It does not discuss the particular effects of any of the programs, but rather describes a hypothetical "implementation scenario" designed to compare the effects in the aggregate of different alternative policy directions. *Id*. at 16, 66, 106. Most significantly, the Mitchell Act EIS contains no information on hatchery releases or stray rates after 2010, and lists no amount of funding (or proposed funding) after 2012, so it lacked the

requisite data to have evaluated the effects of NMFS's decisions to fund the Mitchell Act programs over the last six years. *Id*. at 21, 31, 107.

Finally, the requested injunction against funding the ten isolated harvest programs at issue is necessary because, even if NMFS issues a BiOp on the funding of the programs in the relatively near future, it will be in violation of NEPA when it does so. Although NMFS's March 2, 2016 Letter describes that NMFS intends to prepare a BiOp "to cover both the FEIS policy direction and the planned distribution of Mitchell Act funds for 2016," Ex. 3 at 1, the letter does not describe that NMFS intends either to complete a NEPA analysis for the effects of that funding, or for BiOp it intends to issue.

Nor has NMFS issued any scoping notice to the public regarding a planned evaluation of the effects of its proposed funding in 2016, nor any draft EA or EIS—making it essentially impossible that a NEPA analysis could be completed this year. As discussed, NMFS has a legal obligation to prepare an EIS on the Mitchell Act program actions it funds, but it is also required to prepare an EIS when it issues a BiOp. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 641–42 (9th Cir. 2014); *Nat'l Wildlife Fed'n v. NMFS*, No. 3:01-cv-00640-SI, 2016 WL 2353647, at *65 (D. Or. May 4, 2016). Accordingly, NMFS should be enjoined from funding the challenged programs until such time as it can show that it is in compliance with its obligations under NEPA.

III. A NARROWLY TAILORED INJUNCTION IS NECESSARY TO PREVENT LIKELY IRREPARABLE HARM TO WILD FISH AND PLAINTIFF'S INTERESTS

"[H]abitat modification that is reasonably certain to injure an endangered species by impairing their essential behavioral patterns," such as breeding patterns, constitutes irreparable harm requiring an injunction. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 1999).

While an injunction is warranted for far less, the hatchery programs at issue here threaten the persistence and recovery of two entire species. *See id.* (disrupting behavioral patterns of a single owl would constitute irreparable harm requiring an injunction); *see also Cottonwood*, 789 F.3d at 1091 ("establishing irreparable injury [for ESA violations] should not be an onerous task").

Of the 63 hatchery programs that NMFS funds under the Mitchell Act, the Conservancy seeks an injunction only against the funding of smolt releases and operations at ten isolated harvest programs that are causing stray rates as high as 98% among primary and contributing populations of LCR Chinook and LCR coho, until NMFS complies with its duties to complete ESA consultation and NEPA processes on these programs. Without an injunction, the release of hatchery fish from these programs is likely to cause irreparable harm to the wild LCR Chinook and LCR coho populations, and therefore to the interests of the Conservancy and its members.

Releasing hatchery smolts from these ten programs at the levels contemplated in NMFS's 2016 consultation summary will likely cause irreparable genetic and ecological harm to the wild fish present in the system. Ex. 2 at 1–3; Gayeski Dec. ¶¶ 10, 28–51; Luikart Dec. ¶¶ 27, 30, 37–48. In light of the fact that more than half of all LCR Chinook and LCR coho in the lower Columbia River basin are of hatchery origin, and NMFS's continued funding of hatchery programs with releases of over 50 million smolts, stray rates far above 5% among primary populations and 10% in contributing populations are likely to continue, to the detriment of wild fish. Gayeski Dec. ¶¶ 43–51; Luikart Dec. ¶¶ 43–48. The genetic and ecological effects from hatchery fish interacting with wild fish are harming the wild Chinook and coho and, in turn, the interests of the Conservancy in the protection and recovery of these wild fish populations, and these harms are likely to continue in the future. Gayeski Dec. ¶¶ 29–51; Luikart Dec. ¶¶ 27–33, 38–48; Lichatowich Dec. ¶¶ 16–22, 25–28; Beardslee Dec. ¶¶ 2–4.

There is no dispute that harm from genetic introgression in wild fish becomes a serious risk when pHOS surpasses 5%, at which point the fitness (reproductive success) of a wild population is reduced by 38% compared to the level in the absence of hatchery strays—and a pHOS of 10% reduces wild population fitness by 80%. Luikart Dec. ¶¶ 27, 33. The releases of hatchery fish from programs NMFS funds in the lower Columbia River have caused stray rates to dramatically exceed the levels at which hatchery-wild interaction is harmful to wild fish for each of the last five years, in turn causing harm to remaining wild populations through genetic introgression. *See* Gayeski Dec. ¶¶ 29–51; Luikart Dec. ¶¶ 37–48. Given the proximity of the isolated programs challenged here to the primary and contributing populations suffering astronomical pHOS rates, it is almost certain that these programs are responsible for the stray rates and resulting harm to wild fish. Gayeski Dec. ¶¶ 29–51; *see also* Ex. 5 at 28–71 (maps of LCR Chinook and coho populations). The harmful effects from these high stray rates is likely to continue if NMFS continues funding these programs that produce the fish that stray among the LCR Chinook and coho natural populations. Gayeski Dec. ¶¶ 43–51; Luikart Dec. ¶¶ 43–48.

IV. NO BALANCE OF HARMS ANALYSIS IS NEEDED UNDER THE ESA, AND UNDER NEPA THE BALANCE WEIGHS IN FAVOR OF AN INJUNCTION

Congress has restricted the scope of analysis for injunctions based on the ESA to ensure protection of listed species, and thus the balancing of equities and hardships does not apply because Congress has "decided the order of priorities" and has made "it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." *TVA*, 437 U.S. at 194. On "a request for injunctive relief to remedy an ESA procedural violation, the equities and public interest factors always tip in favor of the protected species." *Cottonwood*, 789 F.3d at 1091. Although both hatchery-bred fish from the programs at issue in this motion and wild fish populations are members of the LCR Chinook and LCR coho species, three factors

require the Court here to find that the balance of hardships tips towards the protection of the *wild* fish in the lower Columbia River.

First, the ESA's primary goal is to "reverse the trend towards species extinction" and "to preserve the ability of natural populations to survive in the wild." *TVA*, 437 U.S. at 184; *Trout Unlimited*, 559 F.3d at 957. NMFS's Recovery Plan recognizes that the recovery of viable, self-sustaining wild fish populations in each stratum of each ESU is necessary for recovery. Ex. 6 at 54–55, 80. NMFS acknowledges that hatchery-bred fish straying among the wild populations are a primary limiting factor to the recovery of the LCR Chinook and LCR coho species, and that both ESUs are currently at a high risk of extinction. *Id.* at 6, 20, 24, 26, 45, 52, 61, 74. But the high pHOS from hatchery strays threaten the prospect for the LCR species' recovery. Luikart Dec. ¶¶ 43, 47–48. It is impermissible for an agency's actions to "tip a species from a state of precarious survival into a state of likely extinction," no matter the countervailing considerations. *Nat'l Wildlife Fed'n*, 524 F.3d at 930.

Second, the hatchery programs at issue in this motion are harvest, rather than conservation programs. *See* Ex. 4 at 90–95. None of them is included in the 2008–2017 *United States v. Oregon* management agreement that divides harvest in the Columbia River between Indian and non-Indian fisheries. *Id*. at 47. The programs at issue in this motion also are *isolated* harvest programs, intended to be kept separate from wild fish populations, but which instead stray among the primary and contributing populations in the lower Columbia River at stray rates as high as 98%. Gayeski Dec. ¶¶ 28–51; Ex. 2 at 1–3. Isolated programs pose a greater risk to wild fish than integrated programs. Luikart Dec. ¶¶ 25–27, 30, 33.

Third, the more than 16 years that NMFS has disbursed money for these hatchery programs without ever consulting on the effects to LCR Chinook and LCR coho, without

undertaking public review of its funding under NEPA, and without regard for the agency's primary obligation to protect and recovery *natural*, self-sustaining populations of these fish, weighs heavily against any interest that NMFS might assert. In the lower Columbia River, NMFS expects that it and other governmental agencies and private enterprises will spend *$2.1 billion* over the next 25 years on actions intended to recover the LCR species and other threatened and endangered fish. Ex. 6 at 9. Yet—without any NEPA review and without engaging in ESA consultation—NMFS spends $14 to $22 million a year on hatchery programs that *undermine* species recovery and, at current hatchery-origin smolt release levels, are likely to cause irreparable harm to LCR Chinook and LCR coho. Because of ongoing harm to wild fish and the likelihood of future harm if funding for these hatchery programs continues, an injunction should issue to protect listed fish.

Beyond the concern for ESA-listed species, the Ninth Circuit has "held time and again that the public interest in preserving nature and avoiding irreparable injury outweighs economic concerns." *Lands Council v. McNair*, 494 F.3d 771, 780 (9th Cir. 2007), *vacated on rehearing en banc on other grounds*, 537 F.3d 981 (9th Cir. 2008). The balance of harms and the public interest support an injunction based on NMFS's violation of NEPA because of "the public interest in careful consideration of environmental impacts before major federal projects go forward." *Alliance for the Wild Rockies*, 632 F.3d at 1138 (quoting *S. Fork Band Council of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009)). "[S]uspending such projects until that consideration occurs 'comports with the public interest'" where NEPA is violated. *Id.*; *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) ("the public interest favor[s] issuance of an injunction because allowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the

mandate of NEPA"). Accordingly, the public interest is furthered by prohibiting further releases of hatchery fish from these ten programs pending compliance with NEPA.

Any economic interest that defendants have in continuing to fund releases of hatchery fish into the lower Columbia River basin for recreational or commercial fishing is outweighed by the harm to wild fish and to the public from NMFS's failure to engage in consultation on the effects of these releases and its failure to ever engage the public in a NEPA process over the harm to wild fish from the public funds it disburses.

V. THE COURT SHOULD WAIVE THE BOND REQUIREMENT

The Conservancy respectfully requests that, if the Court grants the motion for injunctive relief, the Court waive the bond requirement of Rule 65(c). The Court has discretion to waive this requirement or to set nominal security. *See, e.g., Cal. ex rel. Van de Kamp v. Tahoe Reg'l Planning Ag'y*, 766 F.2d 1319, 1325 (9th Cir. 1985); *Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975). It is "well established" that, in cases such as this, no bond or a nominal bond is appropriate because the Conservancy is a small environmental organization seeking to enforce public rights, has no financial state in the litigation, and a substantial bond requirement would effectively deny its access to judicial review and have a chilling effect on its future efforts to vindicate public interests. *See Van De Kamp*, 766 F.2d at 1325–26; *Cent. Or. Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012); Beardslee Dec. ¶¶ 2–8.

CONCLUSION

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

//

//

Respectfully submitted this 13th day of July 2016.

/s Brian A. Knutsen
Brian A. Knutsen (OSB No. 112266)
KAMPMEIER & KNUTSEN, PLLC

/s David H. Becker
David H. Becker (OSB No. 081507)
Law Office of David H. Becker, LLC

Attorneys for Plaintiff Wild Fish Conservancy