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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARK SMITH and WILD FISH CONSERVANCY,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE and U.S. ARMY CORPS OF ENGINEERS,

Defendants.

Case No. 3:26-cv-05775

COMPLAINT

INTRODUCTION

1. This is a civil action for declaratory and equitable relief, which challenges actions of the National Marine Fisheries Service ("NMFS") and U.S. Army Corps of Engineers ("USACE") related to the Mt. St. Helens Sediment Retention Structure ("SRS") spillway crest project ("Project") on the North Fork Toutle River ("NFTR").

2. Plaintiffs Mark Smith and Wild Fish Conservancy (collectively, "Plaintiffs") bring this challenge under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, and Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*

3. The NFTR is habitat for Lower Columbia River Chinook salmon ("LCR Chinook"), Lower Columbia River coho salmon ("LCR coho"), and Lower Columbia River steelhead ("LCR steelhead"), which are listed as threatened with extinction under the ESA.

4. The SRS is a dam without a fish ladder on the NFTR that blocks LCR Chinook, LCR coho, and LCR steelhead from volitionally accessing 50 miles of their historic habitat, harms their offspring, and destroys and adversely modifies their critical habitat.

5. For decades, LCR coho and LCR steelhead have been trapped, hauled, and released into limited habitat above the SRS to spawn, but they have not recovered, in part, because they need access to more habitat above the SRS that cannot be reached by trap and haul.

6. The Project is an endeavor to raise the height of the SRS's spillway crest to temporarily increase the SRS's sediment trapping efficiency.

7. In a 2017 biological opinion ("2017 BiOp") NMFS determined that the Project is likely to jeopardize LCR coho and LCR steelhead and destroy or adversely modify their critical habitat.

8. In 2021, USACE reinitiated consultation of the 2017 BiOp, in part, because it could not comply with the 2017 BiOp's Reasonable and Prudent Alternative ("2017 RPA").

9. In a 2022 biological opinion ("2022 BiOp") NMFS determined that the Project would harm LCR coho and LCR steelhead by, inter alia, creating impoundments, dead-end river channels, and a longer spillway that would kill and/or injure out-migrating juveniles ("smolts").

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10. To attempt to avoid jeopardy, the 2022 BiOp requires USACE to upgrade a Fish Collection Facility ("FCF") to meet 95% adult fish collection efficiency by 2027 and develop a fish release site on a creek above the SRS. NMFS assumes these actions will produce more LCR coho and LCR steelhead smolts than the Project will kill and/or injure, thereby offsetting harm.

11. However, neither the 2022 BiOp nor its incidental take statement ("2022 ITS") establish monitoring or adaptive management requirements to ensure the 95% standard is maintained or that enough smolts survive the Project's gauntlet to avoid jeopardy. Instead, it defers to USACE to develop a plan to "reach" the FCE "goal," without NMFS's concurrence, and without any enforcement mechanisms. The 2022 ITS also recommends, but fails to require, that USACE measure smolt survival, which would reveal if mitigation was, in fact, causing the Project to avoid jeopardy to LCR coho and LCR steelhead.

12. Neither the 2022 BiOp nor the 2022 ITS explain how a plan for reaching the "goal" guarantees USACE will, in fact, meet it. Nor do they identify reasonably certain adaptive management actions, set deadlines for compliance, require NMFS's concurrence on the plan, or demand its implementation.

13. Based on these undefined and unaccountable monitoring and adaptive management measures, jeopardy could go undetected or USACE could experiment on FCF upgrades indefinitely, in the name of adaptive management, without triggering re-consultation.

14. Following the issuance of the 2022 BiOp, LCR Chinook were reintroduced above the SRS, but USACE has not reinitiated consultation. Instead, it is proceeding with the Project.

15. Plaintiffs allege that NMFS and USACE have violated their substantive and procedural duties under Section 7 of the ESA to "insure" that the Project does not jeopardize ESA-listed LCR Chinook, LCR coho, and LCR steelhead. 16 U.S.C. § 1536(a)(2).

16. Plaintiffs allege that NMFS violated the ESA when it issued the "no-jeopardy" 2022 BiOp and 2022 ITS for the Project. The no-jeopardy finding unlawfully relies on uncertain mitigation, and the 2022 ITS fails to explain why a numeric take limit is impractical.

17. Plaintiffs allege that USACE violated the ESA by relying on the legally flawed

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2022 BiOp and 2022 ITS and by failing to reinitiate consultation based on significant new information related to the Project's effects on LCR Chinook.

18. Plaintiffs notified USACE of these allegations in February 2026 and engaged in good faith negotiation with USACE before filing this Complaint.

19. Plaintiffs file this action to compel USACE and NMFS to comply with the ESA.

JURISDICTION

20. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1531 (federal question); 5 U.S.C. §§ 706 *et seq.*, (Administrative Procedure Act); 16 U.S.C. § 1540(g) (Endangered Species Act); and 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgment Act).

21. As required by the ESA, 16 U.S.C. § 1540(g)(2)(A)(i), Plaintiffs provided 60 days' notice of their intent to sue, prior to filing the complaint, to the Defendants through a letter dated and postmarked February 24, 2026 ("Notice Letter"). A copy of that Notice Letter is attached as **Exhibit 1** to this complaint and incorporated herein by this reference.

VENUE

22. Venue is proper in the Western District of Washington under 28 U.S.C. § 1391(e) because this District serves "the county in which the action arises." A civil action arises in the county in which "a substantial part of the events or omissions which give rise to the claim occurred[.]" 28 U.S.C. § 1391(e)(1). The Project is in Cowlitz County, which this District serves.

23. Tacoma is the appropriate division within the Western District of Washington for this suit because the Project will occur in Cowlitz County. LCR 3(e).

PARTIES

24. Plaintiff MARK SMITH is a resident of the State of Washington, who owns, lives, and runs a business on property that the Project will partially inundate. Mark Smith has lived near the NFTR for 60 years. Mark Smith spent his youth fishing recreationally for salmon and steelhead in the upper NFTR (i.e., above the SRS's current location) and its tributaries (e.g., Coldwater, Castle, Deer, Alder, and Hoffstadt/Bear Creeks). Before the 1980 eruption of Mt. St. Helens, Mark Smith scuba-dived in Spirit Lake, the NFTR's historic source, and watched salmon

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and steelhead swim into it from the NFTR. Today, he owns and operates Eco Park Resort, which has hosted international graduate students, professors, and federal and state scientists who come to study the NFTR. Mark Smith frequently visits the NFTR in the sediment plain above the SRS, which borders his property, to observe native fish, wildlife, and plants. He removed a culvert on his property to provide fish passage for steelhead on Pullen Creek, which runs through his property above the SRS. Mark Smith has been a vocal advocate for the Mt. St. Helens' ecosystem for decades. For example, he advocated for funding the Fish Collection Facility on the NFTR and converting Mt. St. Helens National Monument into a National Park. Mark Smith is so well known as an advocate for the NFTR and its fish that he was invited to a June 10, 2026 celebration with U.S. Forest Service, state, and tribal representatives for the release of LCR Chinook into Coldwater Creek. *See* https://www.youtube.com/watch?v=l92r8z-8CkI (KATU News video of LCR Chinook release on Coldwater Creek). During that celebration, his grandson released one of the first LCR Chinook to return to the creek in over four decades. Mark Smith has not fished for salmon and steelhead in the NFTR since the SRS was constructed, but he would do so again if the fish recovered to a level where he was not concerned about his impact on these fish.

25. Plaintiff WILD FISH CONSERVANCY ("WFC") is 501(c)(3) non-profit conservation organization incorporated in the State of Washington and based in Duvall, Washington. WFC is dedicated to the preservation and recovery of the Pacific Northwest's native fish species and the ecosystems upon which those species depend. WFC informs the public on matters affecting water quality, fish, and fish habitat in the region through publications, commentary to the press, and sponsorship of educational programs. WFC also conducts field research on wild fish populations and has designed and implemented habitat restoration projects. WFC advocates and publicly comments on federal and state actions that affect the region's native fish and ecosystems. WFC routinely seeks to compel government agencies to follow the laws designed to protect native fish species, particularly threatened and endangered species.

26. WFC's members and supporters visit and enjoy the NFTR and intend to do so

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again soon. WFC's members and supporters appreciate the aesthetics of the NFTR and use the river and the surrounding area for recreational and spiritual activities, such as hiking, camping, photography, and observing native fish, wildlife, and plants. WFC members have also fished for LCR steelhead on the NFTR and would do so again if the population recovered.

27. WFC has organizational interests in the proper and lawful management of the SRS and ensuring the protection of ESA-listed fish species that occur in the NFTR. WFC's efforts to protect these fish would be undermined by the Project.

28. Plaintiffs and WFC's members would sustain injury to their aesthetic, educational, recreational, spiritual, and scientific interests if the Project continues and if LCR Chinook, LCR coho, and LCR steelhead are harmed by the Project. Plaintiffs and WFC's members have concrete plans to return to the area where the Project is proposed. Unless this Court grants the requested relief, Plaintiffs and WFC's members will be adversely and irreparably harmed by the Project.

29. Defendant NATIONAL MARINE FISHERIES SERVICE ("NMFS") is an agency of the United States within the United States Department of Commerce. NMFS issued the 2022 BiOp and 2022 ITS challenged in this case.

30. Defendant U.S. ARMY CORPS OF ENGINEERS ("USACE") is a branch of the U.S. Army that operates the SRS and is funding, authorizing, carrying out, and/or implementing the Project. USACE's reliance on the 2022 BiOp and failure to reinitiate consultation of the 2022 BiOp are challenged in this case.

LEGAL BACKGROUND

Endangered Species Act

31. Congress enacted the ESA to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species[.]" 16 U.S.C. § 1531(b).

32. An "endangered species" is "any species which is in danger of extinction

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throughout all or a significant portion of its range[.]" 16 U.S.C. § 1532(6). A "threatened species" is any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

33. The Secretaries of Commerce and the Interior are responsible for administering and enforcing the ESA. 16 U.S.C. § 1532(15). The Secretaries of Commerce and the Interior delegated this responsibility to NMFS and the U.S. Fish and Wildlife Service (collectively, the "Services"), respectively. 50 C.F.R. § 402.02(b).[1] NMFS administers the ESA as to marine species, including anadromous fish species, and the U.S. Fish and Wildlife Service administers the ESA as to terrestrial and freshwater species.

34. The ESA seeks to protect and recover imperiled species by first listing them as threatened or endangered based on enumerated statutory factors. 16 U.S.C. § 1533(a)(1)(A)-(E); *see id.* § 1532 (6), (20). The ESA also provides for designation and protection of critical habitat for threatened and endangered species. *Id.* § 1533(a)(3)(A)(i).

35. Section 7 of the ESA imposes substantive and procedural obligations on all federal agencies. Substantively, Section 7 provides that federal agencies must "insure [sic] that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . determined . . . to be critical." 16 U.S.C. § 1536(a)(2).

36. Procedurally, Section 7 requires a federal agency (the "action agency") to engage in consultation with the applicable Service (the "consulting agency") before undertaking a discretionary action that may affect listed species or critical habitat. 16 U.S.C. § 1536(a)(2).

37. Section 7 consultation is either informal or formal. Informal consultation is a process designed to help the action agency determine whether to engage in formal consultation.

[1] The 2022 BiOp states that NMFS applied ESA Section 7 regulations that governed prior to the adoption of the 2019 regulations. Therefore, references to the ESA regulations are to the 2015 regulations, *see* 80 Fed. Reg. 26,832 (Jun. 10, 2015).

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50 C.F.R. § 402.13. If the action agency determines that the proposed action may affect, but is "not likely to adversely affect" a listed species or critical habitat, and the applicable Service concurs in writing, formal consultation is not required. 50 C.F.R. § 402.14(b)(1).

38. If the action agency decides that the action is "likely to adversely affect" a listed species or critical habitat, the action agency must engage in formal consultation with the applicable Service. 50 C.F.R. § 402.14. Formal consultation also is required if the consulting agency does not concur in writing with the action agencies "not likely to adversely affect" determination. 50 C.F.R. § 402.14(b).

39. During formal consultation, the applicable Service must "add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate [its] opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4); *see also* 16 U.S.C. § 1536(a)(2). The BiOp must be based on the best available scientific and commercial data. 16 U.S.C. § 1536(a)(2).

40. The Services define "jeopardize the continued existence of" as engaging "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." 50 C.F.R. § 402.02.

41. If the applicable Service determines that the action is "[l]ikely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat," the BiOp must include "reasonable and prudent alternatives." 50 C.F.R. § 402.14(h)(1), (2).

42. "Reasonable and prudent alternatives" refer to "alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the [Service] believes would avoid the likelihood of jeopardizing the continued existence of listed

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species or resulting in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.02.

43. Section 9 of the ESA prohibits any "person," which includes federal agencies, from "taking" any member of an endangered species or a threatened species for which protective regulations have been promulgated. 16 U.S.C. §§ 1538(a)(1), 1533(d); 50 C.F.R. § 17.31 (extending take prohibition to threatened species).

44. The term "take" is defined broadly: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect[.]" 16 U.S.C. § 1532(19). "Harm" means "an act which actually kills or injures wildlife. Such act may include 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.

45. The applicable Service must issue an "incidental take" statement to the action agency if, after formal consultation, the applicable Service concludes that the proposed action will result in take but is not likely to jeopardize a listed species or adversely modify critical habitat. 16 U.S.C. § 1536(b)(4).

46. The incidental take statement must specify: the impact, i.e., the amount or extent, of the incidental taking on the species; "reasonable and prudent measures" necessary or appropriate to minimize the impact; and terms and conditions that must be complied with by the action agency to implement the specified measures. 16 U.S.C. § 1536(b)(4)(C); 50 C.F.R. § 402.14(i).

47. Following ESA consultation, federal agencies have a continuing duty under Section 7 of the ESA to ensure that their actions will not jeopardize the continued existence of listed species or adversely modify designated critical habitat. Agencies must reinitiate consultation where discretionary Federal involvement or control over the action has been retained or is authorized by law and: the amount or extent of take specified in an incidental take statement is exceeded; new information reveals effects to listed species or critical habitat in a manner or to an extent not previously considered; the action is modified in a manner that causes

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an effect to listed species or critical habitat that was not considered; or where a new species is listed or critical habitat designated that may be affected by the action. 50 C.F.R. § 402.16.

Administrative Procedures Act

48. The APA confers a right of judicial review on any person adversely affected by agency action. 5 U.S.C § 702.

49. The APA provides that a court "shall … hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." *Id.* § 706(2)(A).

FACTS

Affected ESA-Listed Species

50. The Lower Columbia River Chinook salmon ("LCR Chinook") evolutionarily significant unit ("ESU") was listed as a threatened species under the ESA in 1999. 64 Fed. Reg. 14,308 (Mar. 24, 1999); *see also* 70 Fed. Reg. 37,160 (June 28, 2005); 79 Fed. Reg. 20,802 (Apr. 14, 2014); 50 C.F.R. § 223.102(e). NMFS designated critical habitat for this species in 2005. 50 C.F.R. § 226.212; *see also* 70 Fed. Reg. 52,630 (Sept. 2, 2005).

51. LCR Chinook return to freshwater as adults in the spring, fall, and late fall. Spring Chinook enter the Columbia River from March through June and spawn in August and September, primarily in upstream, higher elevation areas. Spring Chinook are "stream-type" salmon, which typically rear for one year before migrating to the Pacific Ocean as smolts during the spring of their second year. Spring Chinook migrate as far north as the Aleutian Islands. Most remain in the ocean for one to five years and, thus, return to spawn at three to six years of age.

52. Most LCR fall Chinook are "tule" Chinook, which enter the Columbia River from August to September and spawn from late September to November. LCR fall Chinook are "ocean-type" salmon that emigrate to the Pacific Ocean as sub-yearlings at one to four months of age. Some sub-yearlings migrate to the ocean during the early spring while others out-migrate in the late spring and early summer. LCR fall Chinook migrate northward as far as Alaska and

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remain at sea for one to five years and, therefore, return to spawn at two to six years of age.

53. The NFTR provides habitat for spring LCR Chinook. Historically, spring LCR Chinook spawned the upper NFTR and its tributaries.

54. The NFTR provides habitat for fall LCR Chinook. Historically, fall LCR Chinook primarily spawned throughout the NFTR, including the upper NFTR and, potentially, its tributaries.

55. Following the May 18, 1980 eruption of Mt. St. Helens, spring and fall LCR Chinook were observed in Alder and Hoffstadt Creeks, which are above the SRS's current location.

56. NMFS's Recovery Plan for Lower Columbia River Coho Salmon, Lower Columbia River Chinook Salmon, Columbia River Chum Salmon, and Lower Columbia River Steelhead ("Recovery Plan") identifies spring LCR Chinook that spawn in the Toutle River basin ("Toutle River spring Chinook"), which includes the NFTR, as a "contributing" population of LCR Chinook, meaning this population must achieve some recovery for the species to recover.

57. The Recovery Plan identifies fall LCR Chinook that spawn in the Toutle River basin ("Toutle River fall Chinook") as a "primary" population of LCR Chinook, meaning that this population must achieve high to very high levels of persistence for the species to recover.

58. The Lower Columbia River coho salmon ("LCR coho") ESU was listed as a threatened species under the ESA in 2005. 70 Fed. Reg. 37,160 (June 28, 2005); *see also* 79 Fed. Reg. 20,802 (Apr. 14, 2014); 50 C.F.R. § 223.102(e). NMFS designated critical habitat for this species in 2016. 50 C.F.R. § 226.212; *see also* 81 Fed. Reg. 9251 (Mar. 25, 2016).

59. LCR coho include early- and late-returning stocks. Early-returning (Type S) adult coho salmon enter the Columbia River in mid-August and begin entering tributaries in early September, with peak spawning from mid-October to early November. Late-returning (Type N) coho enter the Columbia River from late September through December and enter tributaries from October through January. Most spawning occurs from November through January but can occur as late as March. Their eggs incubate in fall and winter for 45-140 days. After hatching in early

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spring to early summer, coho "fry" typically rear in freshwater for more than a year. Most juvenile coho salmon migrate to the Pacific Ocean as "smolts" in April to June during their second year. Most LCR coho salmon range near the continental shelf off Washington and Oregon and sexually mature at age three.

60. The NFTR provides habitat for LCR coho. Historically, LCR coho spawned throughout the NFTR, including the upper NFTR and its tributaries.

61. The Recovery Plan designates LCR coho that spawn in the NFTR ("NFTR coho") as a primary population for LCR coho recovery.

62. The Lower Columbia River steelhead ("LCR steelhead") distinct population segment ("DPS") was listed as a threatened species under the ESA in 1998. 63 Fed. Reg. 13,347 (Mar. 19, 1998); *see also* 71 Fed. Reg. 834 (Jan. 5, 2006); 79 Fed. Reg. 20,802 (Apr. 14, 2014); 50 C.F.R. § 223.102(e). NMFS designated critical habitat for this species in 2005. 50 C.F.R. § 226.212; *see also* 70 Fed. Reg. 52,630 (Sept. 2, 2005).

63. LCR steelhead have two distinct life histories: summer steelhead and winter steelhead. Most summer steelhead enter the Columbia River between May and October and spawn in tributaries between late February and early April. Most winter steelhead enter the Columbia River from December through May, with peak spawning occurring in late April and early May. Steelhead eggs typically incubate for 35 to 50 days before hatching. Early juvenile steelhead ("alevins") remain in gravel for two to three weeks until fully absorbing their yolk-sacs and emerging as fry from March to July. Juvenile steelhead rear in freshwater before migrating to the Pacific Ocean at one to four years of age, but most do so at age two. Juvenile out-migration occurs from March to June, with peak migration in April or May. Summer steelhead are far-ranging ocean travelers, while winter steelhead are typically found off the coast of northern British Columbia and west into the Pacific Ocean.

64. The NFTR provides habitat for LCR winter steelhead. Historically, LCR winter steelhead spawned throughout the NFTR watershed, including the upper NFTR and its tributaries.

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65. The Recovery Plan designates LCR winter steelhead that spawn in the NFTR ("NFTR steelhead") as a "primary" population for LCR steelhead recovery.

The North Fork Toutle River

66. The NFTR originates near Mt. St. Helens and flows westward for 39 miles before joining the South Fork Toutle River near Toutle, Washington to form the Toutle River, which flows 17 miles west before joining the lower Cowlitz River near Castle Rock, Washington.

67. The NFTR and its historic source, Spirit Lake, are legendary waters of the Pacific Northwest. Historically, thousands of LCR Chinook, LCR coho, and LCR steelhead returned to the NFTR, which provided an important food source for the Cowlitz Indian Tribe for generations and supported a nationally famous recreational steelhead fishery.

68. On May 18, 1980, an earthquake caused the entire north face of Mount St. Helens to collapse, resulting in the largest subaerial landslide in recorded history. The landslide allowed high pressure gas, rock, and steam to explode with a force 1,600 times greater than the atomic bomb dropped on Hiroshima. The eruption melted snow and several glaciers, causing volcanic mudflows ("lahars") to torrent down the NFTR, South Fork Toutle River, and Toutle River. *See*, https://www.youtube.com/watch?v=PRSLXgzlFbk. These lahars buried miles of fish habitat in dirt and debris and caused sediment to flow all the way downstream to the Columbia River.

69. Incredibly, the 1980 eruption of Mt. St. Helens and the lahars that ensued did not extinguish the NFTR's Chinook, coho, and steelhead. In fact, only two months after the eruption, adult steelhead were caught near the confluence of the NFTR and Alder Creek, which is above the SRS's current location. By 1984, steelhead, coho, and Chinook had been observed throughout the NFTR, including tributaries upstream of where the SRS was later constructed.

The Sediment Retention Structure and Fish Collection Facility

70. In 1989, USACE completed construction of the SRS near river mile 13 on the NFTR. The purpose of the SRS is to trap sediment from the eruption that would otherwise flow downstream and deposit in the lower Cowlitz River, where it would affect flood risks to the towns of Castle Rock, Kelso, Lexington, and Longview, Washington. The sediment behind the

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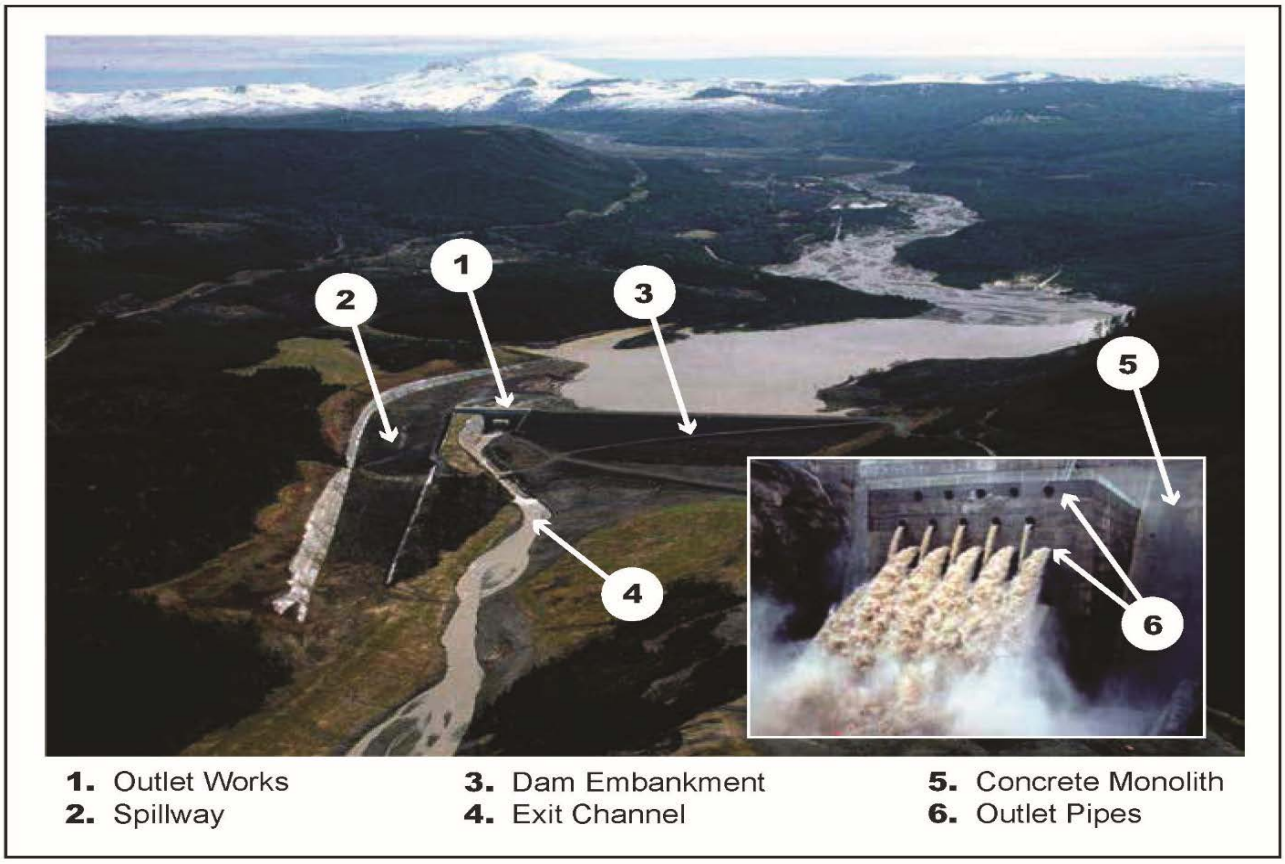
SRS has formed a large sediment plain above the SRS. Below is a photograph of the SRS.

Figure 1: Sediment Retention Structure (U.S. Army Corps of Engineers)



71. The SRS was designed to operate in three phases. During Phase 1, all coarse sediment would be trapped upstream of the SRS while water and fine sediment discharged through the outlet pipes. Phase 2 would begin when sediment accumulation behind the SRS clogged the outlet pipes. During Phase 2, the SRS would operate as a "run-of-the-river" project, meaning that water would pass over the spillway. During Phase 3, USACE would dredge the lower Cowlitz River to remove sediment.

72. In 1989, USACE constructed the Fish Collection Facility ("FCF") approximately one mile downstream of the SRS. The purpose of the FCF was to trap LCR Chinook, LCR coho, and LCR steelhead for transport and release into habitat upstream of the SRS. However, in practice, only LCR coho and LCR steelhead have been trapped and hauled above the SRS.

73. The SRS does not have a fish ladder. Without a fish ladder at the SRS, LCR

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Chinook, LCR coho, and most LCR steelhead are unable to volitionally ascend the SRS. The few LCR steelhead that could volitionally ascend the SRS are prevented from doing so due to the FCF's barrier dam, which blocks fish passage.

74. The FCF is designed to function by stopping fish at a barrier dam and releasing water from a nearby to trap entice the fish to enter it. Those fish that are attracted by the flow swim into the trap and move up a fish ladder into a collection pond. Washington Department of Fish and Wildlife ("WDFW") staff net LCR coho and LCR steelhead out of the pond and place them into a transport tank, which is hauled by truck to one of several release sites on tributaries upstream of the SRS. WDFW releases LCR coho and LCR steelhead into these creeks without knowledge of which tributaries they originated from.

Figures 2 and 3: Fish Collection Facility Barrier Dam (left) and Ladder Leading to Collection Pond (right) (USACE)

75. In 1993, USACE transferred ownership of the FCF to WDFW.

76. In 1998, the impoundment behind the SRS filled in with sediment and, as a result, it began to operate as a run-of-the-river facility. Thus, Phase 2 began in 1998.

77. In 2012, USACE raised the SRS's spillway crest by seven feet to increase sediment trapping efficiency ("2012 Raise"). The 2012 Raise created an impoundment behind the SRS, which filled in with sediment several years later. As a result, the SRS no longer

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efficiently traps sediment and, thus, the SRS has returned to Phase 2.

78. In 2014, USACE started work on a draft supplemental environmental impact statement that evaluated several feasible alternatives for managing flood risks on the lower Cowlitz River, including dredging sediment from the river. USACE selected a "phased construction alternative" as its preferred alternative, which involved two spillway crest raises, installment of grade building structures (e.g., large woody debris in sediment plain to trap sediment), and dredging the lower Cowlitz River, as necessary.

2017 Biological Opinion

79. On August 10, 2017, NMFS issued the Endangered Species Act (ESA) Section 7(a) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the Mt. St. Helens Sediment Retention Structure, Project Phased Construction Alternative (NMFS Consultation Number WCR-2014-1164) (i.e., the "2017 BiOp"), which included an incidental take statement ("2017 ITS").

80. The 2017 BiOp described the Project to include to include, inter alia, raising the spillway crest by 13 feet in 2019 (the "First Raise") and 10 feet in approximately 2035 (the "Second Raise").

81. The 2017 BiOp found the Project would harm LCR coho and LCR steelhead by, inter alia, creating impoundments, braided river channels, and a longer spillway and by potentially, causing the connection between Alder Creek and the NFTR to go subsurface.

82. The 2017 BiOp found the Project would jeopardize LCR coho and LCR steelhead and destroy or adversely modify their critical habitat, but it would not jeopardize LCR Chinook or destroy or adversely modify its critical habitat.

83. To attempt to avoid jeopardy to LCR coho and LCR steelhead, the 2017 BiOp formulated a two-part reasonable and prudent alternative ("2017 RPA"): RPA 1A and RPA 1B.

84. RPA 1A required USACE to upgrade the FCF so that it operates at 95% total passage efficiency ("TPE") (also known as "fish collection efficiency" or "FCE") for LCR coho and LCR steelhead before the First Raise. It defined FCE to mean the proportion of the migrating

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population that successfully passes through the far-field attraction zone, near-field attraction zone, technical fish passage facility, and the release zone. RPA 1A required USACE to conduct biological monitoring to ensure 95% FCE was "being met," and if it was not, to further modify the FCF so that it did so, with NMFS's concurrence on such FCF upgrades.

85. The 2017 BiOp asserted that meeting 95% FCE would result in more LCR coho and LCR steelhead spawning upstream of the SRS and thereby produce enough offspring to offset the Project's effects to avoid jeopardy to these populations and their larger ESU/DPS.

86. The 2017 BiOp explained that 95% FCE is consistent with guidance for numerous other passage designs implemented at dams throughout the LCR recovery domain but did not identify any dams that are meeting 95% FCE in the LCR recovery domain.

87. RPA 1B required, inter alia, USACE to: (1) create a third fish release site on Deer Creek concurrently with the First Raise; (2) investigate the feasibility of a fish release site on the mainstem NFTR above the SRS; and (3) if feasible, to establish a mainstem NFTR fish release site above the SRS concurrently with the Second Raise.

88. The 2017 ITS anticipates that the Project would cause "take" of LCR coho and LCR steelhead due to: (1) construction of the SRS spillway crest raises; (2) heightened spillway crests; and (3) construction of the FCF.

89. The 2017 ITS set the take limit for the First Raise as a 13-foot spillway crest raise. The 2017 ITS set the take limit for the Second Raise as 23 feet minus the actual height of the First Raise.

90. The 2017 ITS asserted that quantifying the actual number of individual LCR coho or LCR steelhead that will be harmed by the Project is not practical because: (1) smolt survival had not been previously monitored in pools behind the SRS or the existing sediment plain; and (2) the surface connection between Alder Creek and the NFTR has never been interrupted.

91. The 2017 ITS included five reasonable and prudent measures ("2017 RPMs") to minimize the impact of incidental take: (1) minimize take as harm to steelhead and coho smolts migrating downstream through the SRS fore bay pool or sediment plain created by each spillway

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crest raise ("2017 RPM 1"); (2) minimize take associated with construction of the spillway crest raise ("2017 RPM 2"); (3) minimize impacts from the construction of the FCF modifications that require in water work ("2017 RPM 3"); (4) minimize harm and mortality associated with fish capture, handling, and release at the FCF ("2017 RPM 4"); and (5) ensure completion of a comprehensive monitoring and reporting program opinion is meeting its objective of minimizing take from the proposed action ("2017 RPM 5").

92. The 2017 ITS included 29 terms and conditions to implement the 2017 RPMs.

93. To implement 2017 RPM 5, the 2017 ITS required USACE to submit annual reports to NMFS that include the number of salmonids collected and/or transported at the FCF.

2018 Supplemental Environmental Impact Statement

94. In 2018, USACE published its final Supplemental Environmental Impact Statement ("2018 SEIS") for the Project.

95. The 2018 SEIS identifies the preferred fish conservation measure to include modifying the FCF to meet 95% FCE and developing the Deer Creek fish release site.

96. The 2018 SEIS states that WDFW would be responsible for annually monitoring FCE by recording the number of adult coho salmon and steelhead captured at the FCF and transported to release sites upstream.

97. The 2018 SEIS states that the number of salmonids collected and transported annually would be reported to NMFS to demonstrate attainment of the RPA requirements.

98. The 2018 SEIS also explains that USACE would conduct post-construction evaluation of the success of the FCF for three to five years.

2022 Biological Opinion

99. On September 22, 2022, NMFS issued the Endangered Species Act (ESA) Section 7(a) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the Re-initiation of Consultation for Mt. St. Helens Sediment Retention Structure, Project Phased Construction Alternative (HUC 1708000505) (NMFS Consultation Number WCR-2021-02739) (i.e., the 2022 BiOp).

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100. The 2022 BiOp states that USACE reinitiated consultation, in part, because USACE determined that meeting 95% FCE would require significantly more work than it anticipated and that it would not complete the FCF upgrades before the First Raise.

101. The 2022 BiOp describes the Project to include, inter alia: (1) the First Raise in 2023; (2) the Second Raise in approximately 2033, depending on sediment accretion rates behind the SRS following the First Raise; and (3) completion of FCF upgrades to meet 95% FCE by 2027.

102. The 2022 BiOp incorporates portions of the 2017 BiOp. Specifically, the 2022 BiOp states that, where NMFS considered the information in the 2017 BiOp to be correct and relevant, NMFS inserted that text into the 2022 BiOp with only necessary updates and edits to ensure its analysis is allegedly consistent with Section 7 of the ESA.

103. The 2022 BiOp does not incorporate the 2017 RPA's requirement that USACE conduct biological monitoring to ensure 95% FCE is "being met."

104. The 2022 BiOp does not incorporate the 2017 RPA's requirement that USACE modify the FCF if 95% FCE is not being met.

105. The 2022 BiOp does not incorporate the 2017 RPA's requirement that NMFS concur on FCF upgrades if 95% FCE is not being met.

106. The 2022 BiOp does not incorporate the 2017 RPA's requirement that USACE study the feasibility of a mainstem NFTR release site and to establish such site if feasible.

107. The 2022 BiOp does not incorporate the 2017 BiOp's explanation that raising the spillway crest will kill more listed salmonids traveling down the spillway. Nor does the 2022 BiOp explain why NMFS no longer believes that the taller spillway will increase mortality rates.

108. Neither the 2022 BiOp nor the 2022 ITS incorporate 2017 RPMs 1-4.

109. Neither the 2022 BiOp nor the 2022 ITS incorporate the 2017 ITS's terms and conditions to meet 2017 RPMs 1-4.

110. The 2022 BiOp states that the 10- and 13-foot spillway crest raises will create temporary impoundments that would fill in with sediment within three years because the

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impoundment created by the 7-foot spillway raise in 2012 filled in within several years. However, the 2022 BiOp does not explain how impoundments created by spillway crest raises that are 30% to 46% higher than the 2012 Raise would fill in with sediment at similar rates.

111. Appendix 1 in the 2022 BiOp ("Appendix 1") asserts that coho spend three to five years in the ocean. However, the Recovery Plan explains that LCR coho typically spend 1.5 years in the ocean.

112. Appendix 1 asserts that steelhead spend three to five years in the ocean. However, the Recovery Plan explains that most winter steelhead spend two years in the ocean. Some steelhead spend one, three, or four years in the ocean, but five years at sea is rare.

113. Appendix 1 does not separately calculate smolt-to-adult survival rates ("SAR") for LCR coho or LCR steelhead, nor does the 2022 BiOp explain how LCR coho and LCR steelhead have the same SARs.

114. NMFS issued the 2022 ITS that anticipates the Project will result in incidental take from: (1) increased suspended sediment during construction; (2) juvenile salmonids migration down the longer spillway; and (3) migration through the impoundment and then the shifting channel formation in the sediment plain that results in low flow velocity, blind channels with no outlet, or sub-surfacing of flowing water, stranding juveniles.

115. The 2022 ITS sets the take limit for the above three sources of take as the height of spillway increases, specifically no more than a 13-foot-increase in 2023 and a 10-foot-increase in or around 2033 (the "Take Surrogate").

116. Neither the 2022 BiOp nor the 2022 ITS explain why a numeric take limit on LCR coho or LCR steelhead juvenile fish mortality would be impractical.

117. The 2022 ITS recommends USACE (in collaboration with the WDFW, Cowlitz Tribe and/or other partners, as appropriate), establish a monitoring plan to assess downstream passage and survival of steelhead and coho smolts to the lower NFTR (the "Conservation Recommendation"). The ITS explains that this monitoring could serve to evaluate the success of adult fish passage (and thus effectiveness of the RPA), as well as identify where further measures

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could be taken to improve juvenile survival through the sediment plain.

118. The 2022 ITS does not include an RPM to minimize take from increased suspended sediment during construction.

119. The 2022 ITS does not include an RPM to minimize take from juvenile salmonids migration down the longer spillway.

120. The 2022 ITS does not include an RPM to minimize take from migration through the impoundment and shifting channel formation in the sediment plain that results in low flow velocity, blind channels with no outlet, or sub-surfacing of flowing water, stranding juveniles.

121. The 2022 ITS does not include an RPM to minimize impacts from the construction of the FCF modifications that require in-water work.

122. The 2022 ITS does not include an RPM to minimize take from fish capture, handling, and release at the FCF.

123. The 2022 ITS does not include any terms and conditions to implement 2017 RPMs 1-4.

124. The 2022 ITS includes one RPM: ensure completion of a comprehensive monitoring and reporting program to confirm if USACE is minimizing take from its proposed action.

125. The 2022 ITS requires USACE to submit a report by December 31, 2024 that describes how the FCE of the reconstructed FCF will be measured.

126. Neither the 2022 BiOp nor the 2022 ITS require NMFS's approval of USACE's FCE measurement plan.

127. Neither the 2022 BiOp nor the 2022 ITS require USACE to measure FCE on an annual basis.

128. Neither the 2022 BiOp not the 2022 ITS states that FCE must be maintained at 95% or higher on an annual basis.

129. Neither the 2022 BiOp nor the 2022 ITS require USACE to measure FCE through 2035.

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130. Neither the 2022 BiOp nor the 2022 ITS require USACE to calculate the proportion of the migrating population that successfully passes through the far-field attraction zone, near-field attraction zone, technical fish passage facility, and the release zone.

131. To calculate the proportion of the migrating population that successfully passes through the far-field attraction zone, near-field attraction zone, technical fish passage facility, and the release zone, USACE would, at least, need to determine the total number of LCR coho and LCR steelhead that reached the FCF barrier dam. However, the 2022 BiOp does not require USACE to determine the total number of LCR coho and LCR steelhead that reached that dam.

132. Based on information and belief, USACE does not intend, nor has any plan, to measure the proportion of the migrating LCR coho, LCR steelhead, or LCR Chinook populations that successfully passes through the far-field attraction zone, near-field attraction zone, technical fish passage facility, and the release zone through 2035.

133. The 2022 ITS does not require USACE to report annual FCE measurements to NMFS.

134. The 2022 ITS does not require USACE to submit annual reports to NMFS that include the number of salmonids collected and/or transported at the FCF.

135. The 2022 ITS does not specify whether FCE must be measured after USACE determines that the FCF has met 95% FCE for LCR coho and LCR steelhead for the first time.

136. The 2022 ITS requires USACE to submit an adaptive management plan to reach the 95% FCE "goal."

137. The 2022 ITS does not set a deadline for USACE to submit an adaptive management plan to NMFS.

138. The 2022 ITS does not require USACE to implement an adaptive management plan.

139. The 2022 ITS does not require NMFS's concurrence on the adaptive management plan.

140. The 2022 ITS does not explain whether 95% FCE must be met every year through

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2035.

141. The 2022 ITS does not set a deadline for adaptive management to "reach" 95% FCE if the standard is not met in 2027.

142. The 2022 ITS does not explain whether adaptive management must occur if FCE drops below 95% FCE after it has been reached (e.g., after 2027, assuming it is reached by then).

143. The 2022 ITS does not identify any adaptive management actions that USACE could implement.

144. The 2022 ITS does not require USACE to report whether any adaptive management actions have been implemented.

145. The 2022 BiOp does not explain whether decreasing fine sediment movement downstream for several years would mitigate harm caused by decades of delayed gravel and large wood movement downstream.

146. The 2022 BiOp does not explain how the FCF upgrades will resolve the lack of maintenance and "manpower constraints" at the FCF that contributed to its historically low FCE.

147. The 2022 BiOp explains that the impoundments and braided river channels will obstruct smolt migration and increase smolt injury and mortality. However, Appendix 1 in the 2022 BiOp states that 100% of smolts "make it" to the SRS, which means that 100% of smolts survive to the SRS. The 2022 BiOp fails to explain this inconsistency.

148. The 2022 BiOp explains that the SRS blocks volitional passage for LCR Chinook, LCR coho, and LCR steelhead. However, the 2022 BiOp also states that the spillway allows fish to ascend, and that it is the sediment plain that provides extremely poor passage upstream. The 2022 BiOp fails to explain this inconsistency.

149. The 2022 BiOp asserts that upstream migration in the sediment plain is extremely poor, but it cites a study which found that 69% of tagged LCR steelhead migrated through the sediment plain. The 2022 BiOp fails to explain this inconsistency.

150. The 2022 BiOp acknowledges that Alder Creek could go subsurface after 2035, which is even more likely due to climate change. But the 2022 BiOp does not explain what is

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likely to occur to LCR coho and LCR steelhead if Alder Creek goes subsurface after 2035 and USACE is not available to restore its surface connection to the NFTR.

151. The analysis in Appendix 1 does not factor in the effects of the second spillway crest raise.

152. Nowhere in the 2022 BiOp does it quantify the effects of the second spillway crest raise.

153. In reaching its "no-jeopardy" determinations for LCR coho and LCR steelhead in the 2022 BiOp, NMFS relied, in part, on USACE complying with the 2022 ITS.

154. The 2022 BiOp explains that, in the future, LCR Chinook may be transported above the SRS and released in the mainstem NFTR or tributaries to spawn. The 2022 BiOp also explains that subyearling LCR Chinook would be exposed to the same stressors as LCR coho and LCR steelhead smolts.

155. The 2022 BiOp does not estimate how many LCR Chinook would be harmed by the Project (e.g., proportion of LCR Chinook smolts killed or injured during downstream migration).

156. Neither the 2022 BiOp nor the 2022 ITS require the FCF to meet 95% FCE for LCR Chinook.

157. Neither the 2022 BiOp nor the 2022 ITS require USACE to monitor FCE for LCR Chinook.

158. Neither the 2022 BiOp nor the 2022 ITS require USACE to explain how FCE for LCR Chinook would be measured in the FCE measurement plan.

159. The 2022 BiOp does not estimate whether 95% FCE would offset the Project's harm to LCR Chinook.

160. In reaching its "no-jeopardy" determination for LCR Chinook, NMFS did not factor in the Project's effects on LCR Chinook migrating from habitat above the SRS to the lower NFTR.

161. In reaching its "no-jeopardy" determination for LCR Chinook, NMFS did not

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factor in the Project's effects on adult LCR Chinook attempting to return to habitat upstream of the SRS.

Lower Columbia River Chinook Reintroduction

162. On December 30, 2024, NMFS issued a biological opinion on NOAA's National Marine Fisheries Service's Continued Implementation of the Mitchell Act FEIS Preferred Alternative and Administration of the Mitchell Act hatchery funding (WCRO-2024-03014) ("Mitchell Act BiOp"). The proposed action in the Mitchell Act BiOp includes, inter alia, an LCR Chinook reintroduction program on the NFTR. The program involves annually releasing up to 300 adult ESA-listed fall Chinook and 300 adult ESA-listed spring Chinook into habitat upstream of the SRS for up to ten years.

163. Based on information and belief, WDFW released LCR Chinook into habitat above the SRS in 2025. The offspring of these Chinook salmon will attempt to migrate to the ocean and return to the upper NFTR as adults to spawn.

164. On June 10, 2026, WDFW released LCR Chinook salmon into Coldwater Creek, which flows into the upper NFTR. The offspring of these Chinook salmon will attempt migrate to the ocean and return to the upper NFTR as adults to spawn.

165. Nothing in the 2022 BiOp nor 2022 ITS requires USACE to upgrade the FCF to ensure 95% FCE for adult LCR Chinook.

166. Based on information and belief, WDFW plans to continue releasing LCR Chinook into habitat above the SRS.

Project Implementation

167. USACE has awarded a contract to construct the First Raise.

168. Based on information and belief, USACE plans to start in-water Project work in July 2026.

169. On February 25, 2026, USACE submitted a water quality certification application ("WQC Application") to the Washington Department of Ecology for the FCF upgrades. The WQC Application explains that FCF construction will not start until June 2027 at the earliest and

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may not be completed until December 2030. USACE certified in the WQC Application that those statements are true. A copy of the WCQ Application is attached as **Exhibit 2** to this complaint and is incorporated herein by this reference.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Against NMFS for Issuing an Arbitrary and Capricious Biological Opinion – Endangered Species Act/Administrative Procedures Act Violation)

170. Plaintiffs re-allege all allegations.

171. When preparing a biological opinion under Section 7(a)(2) of the ESA, NMFS may rely on mitigation in determining that an action is unlikely to jeopardize the continued existence of an ESA-listed species or result in the destruction or adverse modification of critical habitat, only if such mitigation measures are reasonably specific, certain to occur, capable of implementation, subject to deadlines or otherwise-enforceable obligations, and address the threats to the species in a way that satisfies the jeopardy standard.

172. The no-jeopardy opinion is arbitrary and capricious, because it is based on uncertain and speculative mitigation measures related to improving FCE and offsetting increased harm to juvenile LCR coho and LCR steelhead. 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1536(a)(2).

SECOND CLAIM FOR RELIEF

(Against NMFS for Issuing an Unlawful Incidental Take Statement – Endangered Species Act/Administrative Procedures Act Violation)

173. Plaintiffs re-allege all allegations.

174. Section 7 of the ESA, 16 U.S.C. § 1536(b)(4), and its implementing regulations, 50 C.F.R. § 402.14(i), contain requirements for ITSs.

175. An ITS must specify the amount or extent of incidental take. Congress preferred take be computed by the number of individual members of the affected listed species (i.e., numeric take limit).

176. If a surrogate is used instead, the biological opinion or incidental take statement

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must explain why a numeric take limit is impractical. 50 C.F.R. § 402.14(i)(1)(i).

177. Neither the 2022 BiOp nor the 2022 ITS explain why it is impractical to use a numeric take limit for LCR coho or LCR steelhead. *Id.*

178. The Take Surrogate is arbitrary and capricious because neither the 2022 BiOp nor the 2022 ITS rationally explain the causal link between the surrogate and the take of listed species or the clear standard for determining when the level of anticipated take has been exceeded.

179. To the extent NMFS relied on the 2017 ITS's explanation for why a numeric take limit is impractical, NMFS's reliance on that explanation is arbitrary and capricious.

180. By issuing a legally flawed ITS, NFMS has acted arbitrarily, capriciously, and not in accordance with the ESA. 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1536(b)(4).

THIRD CLAIM FOR RELIEF

(Against USACE for Relying on a Legally Flawed Biological Opinion – Endangered Species Act/Administrative Procedures Act Violation)

181. Plaintiffs re-allege all allegations.

182. Section 7 imposes on USACE a substantive duty to "insure" that agency action like the Project is not likely to jeopardize the continued existence of listed species like LCR Chinook, LCR coho, or LCR steelhead or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2).

183. A federal agency cannot meet its Section 7 obligations by relying on a BiOp that is unlawful.

184. For the reasons alleged above, the 2022 BiOp suffers from legal flaws.

185. USACE relied on the 2022 BiOp when authorizing, funding, and carrying out the Project.

186. By relying on the unlawful 2022 BiOp, USACE has violated its duties under Section 7 of the ESA. 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1536(a)(2); 16 U.S.C. § 1540(g)(1)(A).

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FOURTH CLAIM FOR RELIEF

(Against USACE for Failing to Reinitiate Consultation –

Endangered Species Act Violation)

187. Plaintiffs re-allege all allegations.

188. ESA regulations require reinitiation of consultation where new information reveals the effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. 50 C.F.R. § 402.16(b).

189. There is new information that triggers the duty to reinitiate consultation of the 2022 BiOp, including but not limited to: the 2024 Mitchell Act BiOp, showing that WDFW intends to release up to 300 spring LCR Chinook and up to 300 fall LCR Chinook into habitat above SRS as part of ongoing reintroduction effort; the 2025 release of LCR Chinook into habitat above the SRS, which shows WDFW has started the reintroduction program; and the 2026 release of LCR Chinook into Coldwater Creek, which shows WDFW is continuing the reintroduction program.

190. The new information reveals effects of the action that may affect LCR Chinook in a manner or to an extent not previously considered. For example, the 2022 BiOp does not estimate how many adult LCR Chinook may be released to spawn above the SRS and, therefore, the 2022 BiOp does not estimate how many subyearling LCR Chinook would be harmed by the Project. The new information shows that up to 300 spring LCR Chinook and 300 fall LCR Chinook will be released into habitat above the SRS, which should provide NMFS with data from which it could analyze the extent of the Project's harm to LCR Chinook (e.g., estimated number or proportion of LCR Chinook offspring killed or injured by the Project).

191. As a result, based on this new information, USACE is in violation of 50 C.F.R. § 402.16(b) for failing to reinitiate consultation of the 2022 BiOp.

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RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request the following relief from this Court:

(a) DECLARE that the 2022 BiOp and 2022 ITS violate the ESA, its implementing regulations, and the APA;

(b) DECLARE that USACE's reliance on the 2022 BiOp is arbitrary, capricious, and not in accordance with the ESA;

(c) DECLARE USACE's failure to reinitiate consultation violates Section 7 of the ESA, 16 U.S.C. § 1536, and 50 C.F.R. § 402.16.

(d) VACATE the 2022 BiOp;

(e) VACATE the 2022 ITS, in full or in part;

(f) Remand the action to NMFS and order it to prepare a sufficiently protective biological opinion;

(g) Grant any injunctive relief necessary to protect LCR Chinook, LCR coho, and LCR steelhead;

(h) AWARD Plaintiffs their costs, including expenses, expert witness fees, and reasonable attorney's fees under applicable law; and

(i) GRANT Plaintiffs such further relief as this Court deems just and proper.

DATED this 14th day of July, 2026.

Respectfully submitted,

/s/ Oliver J. H. Stiefel
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Complaint

EXHIBIT 1

No. 3:26-cv-05775

CRAG LAW CENTER
LEGAL AID FOR THE ENVIRONMENT SINCE 2001

February 24, 2026

Via Certified Mail, Return Receipt Requested

Lieutenant General William H. Graham Jr.
Chief of Engineers and Commanding Officer
U.S. Army Corps of Engineers
441 G. Street NW
Washington, D.C. 20314-1000

Re: Notice of Intent to Sue for Violations of the Endangered Species Act Associated with Raising the Spillway Crest of the Mount St. Helens Sediment Retention Structure

Dear Lieutenant General William H. Graham Jr:

This letter serves as a 60-day notice on behalf of Mark Smith and Wild Fish Conservancy of their intent to sue the U.S. Army Corps of Engineers and Lieutenant General William H. Graham Jr. (collectively, the "Corps") for violations of Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, related to the Mount St. Helens ("MSH") Sediment Retention Structure ("SRS") on the North Fork Toutle River ("NFTR"). This letter is provided pursuant to the 60-day notice requirement of the ESA's citizen suit provision. *Id*. at § 1540(g).

The Corps is violating Section 7 of the ESA by authorizing, funding, implementing, carrying out, and constructing spillway crest raises at the SRS in reliance on the National Marine Fisheries Service's ("NMFS") Biological Opinion for the Reinitiation of the MSH Project Phased Construction Alternative (NMFS Consultation No. WCR-2021-02739) (the "2022 BiOp").[1] For the reasons described herein, the 2022 BiOp is arbitrary and capricious. As a result, the Corps' reliance on the 2022 BiOp violates the Corps' substantive obligation under Section 7 of the ESA to ensure that its authorization, funding, implementation, carrying out, and construction of the spillway crest raises do not jeopardize Lower Columbia River ("LCR") Chinook salmon, LCR coho salmon, or LCR steelhead or result in the destruction or adverse modification of their critical habitat. 16 U.S.C. § 1536(a)(2).

The Corps is also violating Section 7 of the ESA by failing to reinitiate consultation of the 2022 BiOp based on: (1) new information related to releases of LCR Chinook salmon above the SRS; and (2) delays and changes to the spillway crest raises and improvements to the Fish Collection Facility ("FCF") near the SRS that were not considered in the 2022 BiOp. 50 C.F.R. § 402.16(a) (2024).

[1] As the action agency, the Corps should have a copy of the 2022 BiOp. A copy of the 2022 BiOp is attached as Exhibit 1. An online copy is available at https://repository.library.noaa.gov/view/noaa/45409.

I. Legal Framework

Under Section 7 of the ESA, before taking any action that may affect an ESA-listed species, "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or Interior], insure that any action authorized, funded, or carried out by such [action] agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species which is determined by the Secretary … to be critical …" *Id*. at § 1536(a)(2); 50 C.F.R. § 402.14(a).[2] The Secretary of Commerce has delegated their ESA administration and enforcement duties to NMFS. 50 C.F.R. § 402.01(b). NMFS has authority over anadromous fish species. *See id.* §§ 17.11, 223.102, 224.101.

If the agency action is "likely to adversely affect" a listed species or critical habitat, the agency must engage in "formal consultation," as described in 50 C.F.R. § 402.14. The formal consultation process concludes with the consulting agency issuing a biological opinion that determines whether the agency action is likely to jeopardize[3] a listed species or result in the destruction or adverse modification of critical habitat.[4] 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h). If the consulting agency concludes that an agency action will jeopardize a listed species or result in the destruction or adverse modification of critical habitat, the biological opinion must include a "reasonable and prudent alternative" ("RPA")[5] to the agency action or explain that there are no RPAs. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

If the consulting agency concludes that an agency action is reasonably certain to take members of a listed species but will not jeopardize the species, the biological opinion must include an incidental take statement ("ITS") that specifies the impact of the action. 16 U.S.C. § 1536(b)(4)(C). An ITS must specify the amount or extent of such taking by setting a numeric take limit (or an appropriate surrogate if a numeric limit is impractical to establish). 50 C.F.R. § 402.14(i)(1)(i). An ITS must also identify "reasonable and prudent measures" to minimize impacts to protected species, outline "terms and conditions" to implement these measures, and include monitoring and reporting requirements for the take resulting from the action. *Id.* §

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[2] The U.S. District Court for the Northern District of California vacated the 2019 Section 7 regulations (84 Fed. Reg. 44976, August 27, 2019). Therefore, NMFS applied the 2015 Section 7 regulations when preparing the 2022 BiOp (80 Fed. Reg. 26844, May 11, 2015). 2022 BiOp at 8. Therefore, this 60-day notice letter cites the 2015 version of the Section 7 regulations, unless otherwise noted.

[3] To "jeopardize the continued existence of" means "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." 50 C.F.R. § 402.02.

[4] Destruction or adverse modification of critical habitat includes "a direct or indirect alteration that appreciably reduces the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02.

[5] An RPA must meet four criteria: (1) it can be implemented in a manner consistent with the purpose of the action; (2) it can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction; (3) it is economically and technologically feasible; and (4) it would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.02.

402.14(i)(1), (3); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 531-32 (9th Cir. 2010). Take that occurs in compliance with a valid ITS does not violate Section 9 of the ESA. *Id.* § 1536(o)(2); 50 C.F.R. § 402.14(i)(5).

After a BiOp is issued, federal agencies have a continuing duty under Section 7 of the ESA to ensure that their actions will not jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. *Wild Fish Conservancy*, 628 F.3d at 525. An agency must reinitiate consultation whenever "the amount or extent of taking specified in the incidental take statement is exceeded," "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," the action in question 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 "a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16(a) (2024).

II. Background

A. Affected Species and Critical Habitat

The Lower Columbia River Chinook salmon evolutionarily significant unit ("LCR Chinook") was listed as a threatened species in 1999. 64 Fed. Reg. 14,308 (Mar. 24, 1999); *see also* 70 Fed. Reg. 37,160 (June 28, 2005); 79 Fed. Reg. 20,802 (Apr. 14, 2014); 50 C.F.R. § 223.102(e). Critical habitat has been designated for this species. 50 C.F.R. § 226.212; *see also* 70 Fed. Reg. 52,630 (Sep. 2, 2005).

The Lower Columbia River coho salmon evolutionarily significant unit ("LCR coho") was listed as a threatened species in 2005. 70 Fed. Reg. 37,160 (June 28, 2005); *see also* 79 Fed. Reg. 20,802 (Apr. 14, 2014); 50 C.F.R. § 223.102(e). Critical habitat has been designated for this species. 50 C.F.R. § 226.212; *see also* 81 Fed. Reg. 9252 (Feb. 24, 2016).

The Lower Columbia River steelhead distinct population segment ("LCR steelhead") was listed as a threatened species in 1998. 63 Fed. Reg. 13,347 (Mar. 19, 1998); *see also* 71 Fed. Reg. 834 (Jan. 5, 2006); 79 Fed. Reg. 20,802 (Apr. 14, 2014); 50 C.F.R. § 223.102(e). Critical habitat has been designated for this species. 50 C.F.R. § 226.212; *see also* 70 Fed. Reg. 52,630 (Sep. 2, 2005).

B. The Legacy of the North Fork Toutle River

The North Fork Toutle River is a legendary salmon and steelhead river. Historically, it supported "a nationally famous sport fishery for summer and winter steelhead" and "usually ranked among the top five streams in Washington in total numbers of sport caught steelhead." Ellifrit et al. (1984) at 13.[6] Two tributaries in the upper NFTR (Castle and Marrata Creeks) were

[6] Ellifrit, Nancy J., K. A. Larson, E.J. Rybak. 1984. The Impacts on Fish and Wildlife of Proposed Actions for Controlling Flooding and Navigation Problems Caused by the Eruption of Mount St. Helens. U.S. Fish and Wildlife Service Portland and Olympia Ecological Services Field Offices: Portland, OR and Olympia, WA. Excerpted

the most productive coho streams in the Columbia River Basin. *Id.* at 15. Approximately, six thousand fall Chinook spawned in the Toutle Basin, with most spawning occurring in the NFTR from its mouth all the way upstream to Coldwater Creek. *Id.* And around 400 spring Chinook also spawned in the upper river.[7] *Id.*

On May 18, 1980, Mount St. Helens erupted, sending a catastrophic mudflow down the NFTR that killed Chinook, coho, and steelhead and damaged their habitat. *Id.* at 17. However, just two months later, adult summer steelhead were captured in the river near the mouth of Alder Creek. *Id.* at 20. By 1984, adult steelhead had been found in all accessible tributaries, adult spring Chinook and coho had been observed in Deer and Alder Creeks, adult fall Chinook had been seen in Alder Creek, and juvenile salmonids had been observed below Hoffstadt Creek. *Id*.

C. The Sediment Retention Structure and Fish Collection Facility

In 1984, the Corps published an environmental impact statement ("EIS") on a proposal to construct the SRS to trap sediment that would otherwise flow downstream and affect Cowlitz River flood risks. Corps, Mount St. Helens, Washington Feasibility Report & Environmental Impact Statement (1984) ("EIS") at 160.[8] Because the SRS would block fish migration, the Corps proposed building the FCF downstream of the SRS to trap adult salmon and steelhead for transport and release above the SRS. The EIS predicted that thousands of adult Chinook, coho, and steelhead would return to the NFTR and tributaries upstream of the SRS, including Alder, Hoffstadt, Bear, Deer, Jackson, Castle, Coldwater, and other creeks. EIS Appx. at 513-515.[9]

In 1989, the Corps completed the FCF and the 177-foot-tall SRS. Corps, Mount St. Helens Long-Term Sediment Management Plan, Final Supplemental Environmental Impact

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sections of Ellifrit et al. (1984) are attached as Exhibit 2. A full copy of Ellifrit et al. (1984) is available on the Corps' website at https://usace.contentdm.oclc.org/digital/collection/p16021coll3/id/88 (select "Volume 1" and see pdf pages 250-381) and is incorporated herein.

[7] Spring Chinook likely spawned as far upstream as Coldwater Creek. *See* Bryant, Floyd G. 1949. A Survey of the Columbia River and its Tributaries with Special Reference to its Fisheries. US Department of the Interior; Fish and Wildlife Service Special Scientific Report at 75 ("On September 4, 1940, carcasses of 26 large, spawned-out chinook were found in the lower half-mile of the stream. It is believed that these were either a spring run of fish that had summered in the main Toutle, or were an early summer run of fish that had gone directly onto the spawning grounds. The deterioration of the carcasses found indicated that these fish had completed their spawning and died prior to mid-August, and fall run chinook would not be expected before September."). Excerpted sections of Bryant (1949) are attached Exhibit 3. A full copy of Bryant (1949) is available online at https://docs.streamnetlibrary.org/USFWS/ssrf-036.pdf and is incorporated herein.

[8] The Corps prepared the EIS and, therefore, it has copies of it. A full copy of the EIS is available on the Corps' website at https://usace.contentdm.oclc.org/digital/collection/p16021coll3/id/90/ and is incorporated herein.

[9] The Corps prepared the EIS Appendixes and, therefore, it has copies of them. Excerpted sections of the EIS Appendixes are attached as Exhibit 4. A full copy of the EIS Appendixes is available on the Corps' website at https://usace.contentdm.oclc.org/digital/collection/p16021coll3/id/89 (select "Volume 2") and is incorporated herein.

Statement (2018) ("SEIS")[10] at ES-1, ES-25. In 1993, the Washington Department of Fish and Wildlife ("WDFW") assumed ownership of the FCF. *Id.* at 1-12. WDFW maintains and operates the FCF pursuant to an agreement with the Corps.

In 1998, the reservoir behind the SRS filled in, and, as a result, the SRS trapped less sediment. *Id.* 1-12, 3-19. In 2012, the Corps raised the spillway crest of the SRS by seven feet to trap more sediment. *Id.* at 3-19. However, the reservoir filled in several years later, and, once again, the SRS returned to run-of-river condition. *Id*. at 4-51.

In 2018, the Corps published a supplemental EIS, which evaluates three alternatives to reduce flood risks through year 2035: (1) dredging the Cowlitz River; (2) raising the SRS spillway crest and dam by 43 and 30 feet, respectively; or (3) constructing two spillway crest raises totaling 23 feet, installing grade building structures in the sediment plain behind the SRS, and dredging the Cowlitz River as necessary (i.e., the "phased construction alternative"). *Id.* at ES-2, ES-13. The Corps selected the third option as its preferred alternative. *Id.* at ES-16.

D. The 2017 Biological Opinion

In 2017, NMFS issued a biological opinion ("2017 BiOp") on the phased construction alternative, which determined that it would jeopardize LCR steelhead and LCR coho and destroy or adversely modify their critical habitat. NMFS, Biological Opinion for the Mount St. Helens Sediment Retention Structure, Project Phased Construction Alternative (Consultation No. WCR-2014-1164).[11] However, the 2017 BiOp determined that the agency action would not jeopardize LCR Chinook or Columbia River chum or destroy or adversely modify their critical habitat.

To avoid jeopardy to LCR coho and LCR steelhead, the 2017 BiOp includes a two-part RPA that requires upstream and downstream fish passage measures. Specifically, part one (RPA 1A-Upstream passage) states:

> The Corps will implement measures to achieve a 95 percent passage efficiency for all natural origin LCR steelhead and LCR coho salmon that reach the existing FCF barrier. Total passage efficiency is described as the proportion of the migrating population that successfully passes through the far-field attraction zone, near-field attraction zone, technical fish passage facility, and the release zone. Before the first spillway crest raise is implemented, the Corps must make improvements to the current FCF, which must operate such that 95 percent of returning adult LCR steelhead and LCR coho salmon can safely and effectively access suitable spawning habitat in the upper NFTR watershed above the SRS. The goal of 95 percent total passage efficiency is consistent with NMFS fish passage guidance (NMFS 2011), and with guidance for numerous other passage

[10] The Corps prepared the SEIS and, therefore, it has copies of it. A full copy of the SES is available on the Corps' website at https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/7629 and is incorporated herein.

[11] The 2017 BiOp is in Appendix D to the SEIS and, therefore, the Corps has a copy of it. A full copy of the 2017 BiOp is available on the Corps' website at https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/7634 (select Appendix D). A copy is also attached as Exhibit 5.

> designs implemented at dams throughout the LCR recovery domain.
>
> The Corps needs to coordinate with NMFS at each step of design and receive NMFS' concurrence on the design of the facility improvements and operation.
>
> The Corps will conduct biological monitoring to ensure that the 95 percent total passage efficiency standard is being met. If the standard is not met, the Corps will make further modifications so that it meets the 95 percent passage standard, with NMFS's concurrence of the measures chosen to modify the facility to meet the 95 percent passage efficiency standard.

2017 BiOp at 46.

> Part two of the RPA (RPA 1B – Downstream Passage) states:
>
> Downstream passage will, in part, be addressed by RPA 1A. Specifically, the 95 percent upstream passage efficiency requirement of RPA 1A will deliver more adults to the Upper North Fork Toutle Basin spawning tributaries and will thereby increase numbers of juveniles produced and passed downstream of the SRS. In addition, under RPA 1B, the Corps is required to create a third release site at Deer Creek in the same timeframe as the first spillway raise, in order to accommodate the increase in the overall numbers of adults released in the Upper NFTR as a result of RPA 1A. Although the Corps proposed to establish a new release site at Deer Creek, upstream of the SRS, as part of the proposed action, it proposed to do that during the second spillway crest raise. NMFS anticipates that at 95 total percent passage efficiency, the spawning and rearing carrying capacity of Alder Creek and Bear/Hoffstadt Creek could become filled and a third adult release site could be necessary before a second spillway crest raise. Therefore, this RPA requires that the Corps establish the third adult release site at Deer Creek in conjunction with the first spillway raise. Additionally, the Corps is required to investigate the feasibility of a release site on the mainstem NFTR upstream of the sediment plain, and if feasible, establish this release site during the second spillway raise. The mainstem release site would allow steelhead and coho to access and colonize tributaries in the upper NFTR watershed above the sediment plain that are currently unused.
>
> The third release site needs to be created and operational at the same time as the first spillway raise is completed. The Corps will use this site as well as the other two current sites, for releasing adults trapped at the FCF and transported upstream of the SRS. This measure is intended to increase the production of juveniles above the SRS, and will offset juvenile losses from downstream migration hazards that would be exceptionally challenging to address without foreclosing the opportunity for future volitional passage.

Id. at 48.

The 2017 BiOp determined that the effects of the RPA, combined with the effects of the agency action, would avoid the likelihood of jeopardizing the continued existence of LCR coho, LCR Chinook, LCR steelhead, and Columbia River chum or resulting in the destruction or adverse modification of their critical. *Id.* at 51.

E. Reinitiation of Consultation

In 2020, the Corps informed NMFS that "the complexity of achieving 95 percent passage would require significantly more work at the FCF than anticipated during the original ESA consultation." 2022 BiOp at 7. The Corps estimated that the FCF "would take three years to design and test and two years to construct with a start date of 2021 and an estimated completion date of 2027." *Id.* In 2021, the Corps requested reinitiation of consultation of the 2017 BiOp.

NMFS issued the 2022 BiOp on September 9, 2022. The 2022 BiOp describes the "currently proposed action subject to this reinitiation is to change the order of construction of the spillway crest raise so that it happens first … and then follow that construction by the FCF improvements that were required to avoid jeopardy as part of the previous RPA …" *Id.* at 1. The 2022 BiOp explains that this change in the sequence of the work "is a modification to the RPA …" *Id.* at 1-2. It also explains that NMFS "expect[s] the corrected FCF to achieve 95% collection efficiency by the end of 2027." *Id.* at 56. The 2022 BiOp concludes that the agency action will not jeopardize LCR Chinook, LCR coho, LCR steelhead, or Columbia River chum or destroy or adversely modify their critical habitat. *Id.* at 62-63.

To date, the Corps has not begun construction on the first spillway crest raise or the FCF improvements.[12]

III. The 2022 Biological Opinion is Arbitrary and Capricious

The actions at issue here are the Corps' authorizing, funding, implementing, and carrying out of actions related to raising the spillway crest of the SRS. For example, in January 2026, the Corps announced that it awarded a contract to raise the spillway crest.[13] The Corps is violating the ESA by taking these actions in reliance on the legally deficient 2022 BiOp. The 2022 BiOp the Corps is relying on: (1) unlawfully segments the analysis of the agency action; (2) violates the reinitiation of consultation regulation, 50 C.F.R. § 402.16; (3) fails to coherently describe the agency action; (4) fails to analyze the effects of the agency action on the recovery of LCR Chinook; (5) fails to include relevant jeopardy factors in its jeopardy calculus; (6) fails to

[12] Historically, the first spillway raise at the SRS occurred in 2012. *See* SEIS at 3-19. However, the 2022 BiOp describes the agency action to include the "first" and "second" spillway crest raises, which it estimates would occur in 2023 and 2032-2033, respectively. 2022 BiOp at 4, 54. The Corps prepared the SEIS and, therefore, it has a copy of it. A full copy is available at https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/7629 and is incorporated herein.

[13] *See* Corps, USACE awards $35.9 contract for Mount St. Helens sediment dam improvement (Jan. 15. 2026), https://www.nwp.usace.army.mil/Media/News-Releases/Article/4381242/usace-awards-359m-contract-for-mount-st-helens-sediment-dam-improvement/

consider impacts of the agency action on the spatial structure of LCR steelhead, LCR coho, and LCR Chinook; (7) fails to explain NMFS's change in position regarding the importance of potentially releasing LCR coho and LCR steelhead into the mainstem NFTR above the SRS; (8) ignores the best available scientific data on fish passage in the mainstem NFTR above the SRS and LCR Chinook recovery; (9) fails to consider the effects of the agency action on LCR steelhead kelts and repeat spawning; (10) fails to rationally explain how the agency action does not destroy or adversely modify critical habitat for LCR Chinook; (11) fails to explain why numerous terms and conditions in the 2017 BiOp's ITS are no longer necessary to avoid take; (12) fails to explain why numeric take limits are impractical for measuring incidental take; (13) establishes take limits that are co-extensive with the scope of the agency action; (14) establishes take limits that are inadequate to avoid jeopardy; (15) fails to include adequate monitoring requirements in the ITS; and (16) relies on uncertain mitigation measures. These flaws render the BiOp arbitrary and capricious.

A. Unlawful Segmentation

A biological opinion must analyze "the effect of the *entire* agency action." *Wild Fish Conservancy*, 628 F.3d at 521 (quoting *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1998)) (emphasis in the original). "It is established that segmented analysis is prohibited in an ESA context." *NRDC v. Rogers*, 381 F. Supp. 2d 1212, 1228 fn. 27 (E.D. Cal. 2005) (citing *Connor*, 848 F.2d at 1453-54). Segmentation is prohibited because it prevents consulting agencies from detecting the effects of parts of an agency action that alone may not appreciably reduce the survival or recovery of a listed species, but in combination with other effects of the agency action, would do so. *Wild Fish Conservancy*, 628 F.3d at 522-23. Segmentation essentially resets the environmental baseline, which, "[u]nder that approach, a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This slow slide into oblivion is one of the very ills the ESA seeks to prevent." *Id.* at 523 (quoting *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Service*, 524 F.3d 917, 930 (9th Cir. 2008) ("*NMFS III*").

The 2022 BiOp is arbitrary and capricious because it defines the agency action as the project modification rather than the entire modified project. Specifically, the 2022 BiOp defines the agency action as "to construct the initial SRS increase prior to the passage improvement. This analysis evaluates the effects of the elements in the USACE's proposed sequence." 2022 BiOp at 11. This description of the agency action omits the second spillway crest raise and other project components (e.g., dredging). Because the 2022 BiOp does not include these other components in the definition of the agency action, it unlawfully segments its analysis of the agency action.

Appendix 1 of the 2022 BiOp shows how the BiOp only analyzes some effects of the first spillway crest raise and the 2027 FCF improvements rather than evaluating the effects of these actions *plus* the second spillway crest raise and other project components (e.g., dredging). *Id.* at 78-9. For example, Appendix 1 includes the following graph, which illustrates how the 2022 BiOp fails to consider these other elements of the agency action.

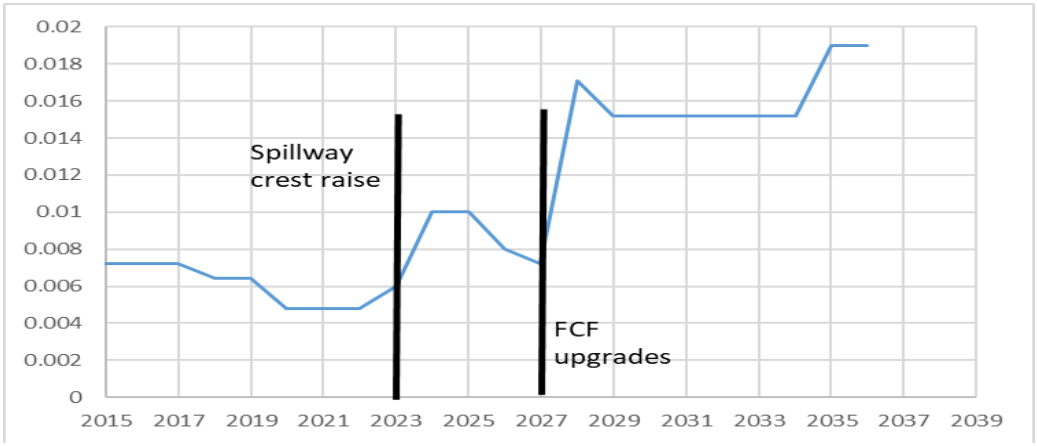

Figure 5. Adults transported around the SRS per smolt leaving its natal tributary.

Id. at 79. Had the 2022 BiOp considered the effects of the second spillway crest raise, the above figure would show: (1) a third bold vertical line to the right of the FCF upgrades (in approx. 2032 or 2033) representing the second spillway crest raise; and (2) likely, a different trend in horizontal line. *See id.* at 4 (estimating that the second spillway crest raise will occur in 2032); *see also id.* at 54 (estimating that the second spillway crest raise would occur roughly ten years after the first spillway crest raise). Additionally, the calculations in Appendix 1 only factor in the effects of: (1) the impoundment created by the first spillway raise; and (2) the FCF upgrades. *Id.* at 78. Nowhere in Appendix 1 nor anywhere else in the 2022 BiOp does NMFS analyze the effects of the second spillway crest raise. Because the analysis of the agency action in the 2022 BiOp is unlawfully segmented, the 2022 BiOp is arbitrary and capricious.

B. The 2022 BiOp Violates the Reinitiation of Consultation Regulation

Reinitiation of consultation is required when, *inter alia*, the action agency retains discretionary involvement or control over the action and the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion. 50 C.F.R. § 402.16(a)(3). "When reinitiation of consultation is required, the original biological opinion loses its validity, as does its accompanying incidental take statement, which then no longer shields the action agency from penalties for takings." *Ctr. for Biological Diversity v. U.S. BLM*, 698 F.3d 1101, 1108 (9th Cir. 2012). Because the original BiOp is no longer valid, the reinitiated BiOp must analyze whether the action subject to the prior consultation and the modifications to that action are likely to jeopardize ESA-listed species or destroy or adversely modify critical habitat.

The 2022 BiOp violates the reinitiation of consultation regulation, 50 C.F.R. § 402.16, because it does not analyze whether the action subject to the prior consultation and the modifications to that action are likely to jeopardize LCR Chinook, LCR coho, and LCR steelhead or destroy or adversely modify critical habitat. Here, the action subject to the prior consultation included, *inter alia*, two spillway crest raises. However, the action subject to the reinitiated consultation, includes, *inter alia*, one spillway crest raise even though the Corps intends to construct two spillway raises. Because the 2022 BiOp does not analyze whether the action subject to the prior consultation as modified is likely to jeopardize ESA-listed fish or

destroy or adversely modify their critical habitat, the 2022 BiOp was not issued in accordance with law. *Mtr. Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (citing 5 U. S. C. § 706 (2)(A); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974)). And, because the 2022 BiOp is unlawful, and, it is arbitrary and capricious for the Corps to rely on it.

C. Failure to Coherently Describe the Agency Action

"It is a basic principle of administrative law that the agency must articulate the reason or reasons for its decision." *Pac. Coast Fed'n of Fishermen's Associations v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005). The agency must articulate these reasons coherently. *Willamette Riverkeeper et al. v. Nat'l Marine Fisheries Serv.*, 763 F. Supp. 3d 1203, 1242 (D. Or. 2025) ("If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable."). Courts "[cannot] be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'" *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) (quoting *U.S. v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935)).

The 2022 BiOp inconsistently describes the agency action and, as a result, the basis upon which its no-jeopardy determination rests is not understandable. For example, the 2022 BiOp describes the agency action as "to construct the initial SRS increase prior to the passage improvement. This analysis evaluates the effects of the elements in the [Corps'] proposed sequence." 2022 BiOp at 11. However, the 2022 BiOp also describes the agency action as "includ[ing] two planned spillway raises, one in 2023, and the second roughly ten years later." *Id.* at 54. Because of these inconsistent descriptions of the agency action, it is unclear whether the no-jeopardy determination is based on one or two spillway crest raises. Because the 2022 BiOp fails to set forth with clarity that which the ESA requires to be precise, the 2022 BiOp is arbitrary and capricious.

D. Failure to Analyze LCR Chinook Recovery

A jeopardy analysis includes two prongs: (1) the survival prong; and (2) the recovery prong. 50 C.F.R. § 402.02; *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 888 (D. Or. 2016) (explaining that 50 C.F.R. § 402.02 requires "[NMFS] consider whether the RPA actions are expected to reduce appreciably the likelihood of recovery of the listed species in the wild."). The recovery prong requires NMFS to "conduct a full analysis of [recovery] risks and their impacts on … listed species' continued existence." *Id.* (quoting *NMFS III*, 524 F.3d at 933; *see also Alaska v. Lubchenko*, 723 F.3d 1043, 1054 (9th Cir. 2013) (holding that "[NMFS] had to consider whether the proposed action, continued fishing, could prevent the species from achieving the [recovery] goals for delisting."). It is recognized that "a species may be jeopardized even if there is no appreciable reduction of survival odds because a species can often cling to survival even when recovery is out of reach." *Nat'l Wildlife Fed'n.*, 184 F. Supp. at 885 (quoting *NWF III*, 524 F.3d at 931).

Numerous courts have invalidated BiOps that failed to adequately evaluate effects on species recovery. *See e.g., Wild Fish Conservancy*, 628 F.3d at 527 (finding the U.S. Fish Wildlife Service's ("FWS") jeopardy analysis inadequate in part because it did not identify a recovery "tipping point" and whether that tipping point would be reached as a result of agency operations); *NMFS III*, 524 F.3d at 936 (finding NMFS's jeopardy analysis contrary to law because it did not address the prospects for recovery of the listed species and NMFS did not know the in-river survival levels necessary to support recovery); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1266-67, 1275 (E.D. Cal. 2010) (finding NMFS's jeopardy analysis inadequate in part because it did not discuss the magnitude of a stressors' impact, the populations' ability to tolerate this impact, and the reason why any decline would not reduce the overall likelihood of survival or recovery); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1122, 1171 (E.D. Cal. 2008) (finding a recovery analysis inadequate because "it does not analyze the effects of Project actions on the recovery of the spring-run Chinook species"); *Natural Res. Def. Council*, 381 F. Supp. 2d at 1233-34 (finding recovery analysis inadequate because it discussed recovery in only a general way and failed to analyze how the action would actually impact the species' critical habitat); *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987 (D. Ariz. 2011) (holding that FWS's no-jeopardy determination was "baseless … insufficient, and unlawful" because it did not analyze the impacts of ongoing operations on the recovery of two species.).

The 2022 BiOp is arbitrary and capricious because it does not evaluate the effects of the agency action on the recovery of Toutle River fall and spring Chinook, which are important to the recovery of LCR Chinook.[14] Incredibly, the 2022 BiOp does not evaluate the effect of continuing to operate the SRS without fish passage for Toutle River fall or spring Chinook even though the applicable ESA recovery plan explains that providing fish passage at the SRS is "key" to recovering both Chinook populations.[15] NMFS, Recovery Plan for Lower Columbia River Coho Salmon, Lower Columbia River Chinook Salmon, Columbia River Chum Salmon, and Lower Columbia River Steelhead (2013) ("Recovery Plan") at 7-36 and 7-68. The 2022 BiOp does not explain how forcing these fish to rely on degraded habitat below the SRS or continuing to block them from accessing as much as 50 miles of habitat above the SRS does not reduce

[14] The Recovery Plan identifies the Toutle River fall Chinook and spring Chinook populations as "primary" and "contributing" populations of LCR Chinook, respectively. Recovery Plan at ES-21. A "primary population" is "[a] population that is targeted for restoration to high or very high persistence probability." *Id.* at xxvi. A "contributing population" is "[a] population for which some restoration will be needed to achieve the stratum-wide average viability recommended by the Washington-Lower Columbia Technical Recovery Team (i.e., 2.25 or higher)." *Id.* at xxiii. The Recovery Plan explains that all populations must achieve some recovery, including "stabilizing" populations. *Id.* at ES-6. However, "'[p]rimary'" populations … are targeted for viability, meaning high or very high persistence probability. 'Contributing' populations fall in the middle; they are targeted for some improvement in status so that the stratum-wide average viability is 2.25 or higher." *Id.* In other words, LCR Chinook will not recover unless, *inter alia*, Toutle River fall Chinook and spring Chinook significantly improve their status. Excerpted sections of the Recovery Plan are attached as Exhibit 6. A full copy of the Recovery Plan is available at https://repository.library.noaa.gov/view/noaa/16002 and is incorporated herein by reference.

[15] *See* Recovery Plan at 7-36 ("For the Toutle [spring Chinook] population, addressing sedimentation and passage issues at the North Fork Toutle sediment retention structure will be key."). *See also id.* at 7-68 ("Addressing passage and sedimentation issues associated with the sediment retention structure on the North Fork Toutle River will be a key component for the Toutle [fall Chinook] population.").

appreciably the likelihood of both the survival and recovery of these populations. *See e.g., id.* at 9-23 ("A unique issue in the Cascade fall Chinook stratum is legacy effects in the Toutle subbasin of the 1980 Mount St. Helen's eruption ... the [SRS] currently blocks access to as many as 50 miles of habitat for anadromous fish.").[16] Because the 2022 BiOp ignores this important part of the problem, the BiOp is arbitrary and capricious. *See City of Los Angeles, California v. Fed. Aviation Admin.*, 63 F.4th 835, 842 (9th Cir. 2023) ("Agency action is arbitrary and capricious if the agency … entirely failed to consider an important aspect of the problem.").

The 2022 BiOp also does not evaluate other effects of the agency action on Toutle River fall Chinook or spring Chinook recovery. For example, the 2022 BiOp explains that raising the spillway crest will delay gravel and wood transport to critical habitat for LCR Chinook below the SRS by "several decades," thereby preventing development of more stable spawning conditions. 2022 BiOp at 49. However, it does not analyze how that delay affects the recovery of Toutle River fall and spring Chinook. As a result, it does not analyze the effects of the agency action on LCR Chinook recovery as required. Therefore, the 2022 BiOp is arbitrary and capricious.

The 2022 BiOp's failure to analyze the effects of the agency action on Toutle River fall Chinook and spring Chinook recovery is especially arbitrary and capricious considering the precarious condition of these populations. For example, the recent status review for LCR Chinook shows that Toutle River fall Chinook had an average annual abundance of 280 fish (2015-2019), which is just 7% of the population's recovery target of 4,000 fish. *Id.* at 29. The 2022 BiOp must analyze the effects of the agency action on these imperiled populations to ensure that they do not "slow[ly] slide into oblivion." *NMFS III*, 524 F.3d at 933. Because the 2022 BiOp fails to do so, it is arbitrary and capricious.

E. Failure to Include Relevant Jeopardy Factors in the Jeopardy Calculus

The ESA requires more than "conclusory" assurances "that the [consulting] agency believes that [an] RPA would avoid jeopardy." *Pac. Coast Fed'n of Fishermen's Ass'ns*, 426 F.3d at 1092-93. Rather, it requires NMFS to "analyze how" the proposed alternative "will avoid jeopardy" to the species. *Id.* at 1093. NMFS must show that analysis in the BiOp. *Id.* at 1091.

The 2022 BiOp is arbitrary and capricious because its jeopardy calculus omits important jeopardy factors and, as a result, the BiOp does not show how the RPA will avoid jeopardy. The 2022 BiOp explains that juvenile LCR coho and LCR steelhead will be killed and/or injured by: (1) the taller spillway, which will be raised twice; and (2) the enlarged impoundment and/or braided channel, which will be enlarged and/or altered twice. The purpose of the RPA is to offset the loss of fish caused by both jeopardy factors. However, the 2022 BiOp's jeopardy calculus only factors in: (1) the loss of fish caused by the first expansion and/or alteration of the

[16] The SRS also blocks Toutle River spring Chinook from a significant portion of their historic habitat. *See* Recovery Plan at 7-19, fn. 12 ("Steel and Sheer (2003) analyzed the number of stream kilometers of potential habitat historically and currently available to salmon populations in the lower Columbia River. For several spring Chinook salmon populations, historical habitat is almost completely blocked … In the Toutle … significant proportions of habitat are blocked (31 percent blocked in the Toutle …").

impoundment and/or braided channel; and (2) the effect of implementing the RPA by 2027. *Id.* at 78-9. As a result, the jeopardy calculation is incomplete.

Specifically, the 2022 BiOp does not include in its jeopardy calculus three other relevant jeopardy factors: (1) the loss of fish caused by migrating down the spillway after the first spillway raise; (2) the loss of fish caused by migrating down the spillway after the second spillway raise; and (3) the loss of fish caused by the second expansion and/or alteration of the impoundment and/or braided channel. Because the 2022 BiOp's jeopardy calculus does not factor in these jeopardy factors, the BiOp does not analyze how the RPA will offset fish loss caused by the entire agency action. *See Conner* 848 F.2d at 1453 (explaining that a biological opinion must "analyze the effect of the *entire* agency action") (emphasis in original); *see also Wild Fish Conservancy*, 628 F.3d at 522 (explaining that "[t]he artificial division of a continuing operation into short terms can undermine the consulting agency's ability to determine accurately the species' likelihood of survival and recovery …"). As a result, the 2022 BiOp fails to show that the RPA will avoid jeopardy and, therefore, it is arbitrary and capricious.

F. Failure to Consider the Effects of the Agency Action on Spatial Structure

A BiOp must include, *inter alia*, a "detailed discussion of the effects of the action on listed species and critical habitat." 50 C.F.R. § 402.14(h)(1)(iii). The effects of an agency action include "the direct and indirect effects of an action on the species or critical habitat." *Id*. at § 402.02. For salmonids, NMFS considers, *inter alia*, effects of an action on critical habitat and on the individuals within a population and how these affect the viable salmonid population ("VSP") parameters (abundance, productivity, spatial structure, diversity) for the natural populations that make up the species.

The 2022 BiOp entirely fails to consider the effects of the agency action on the spatial structure (or "spatial distribution") of the NFTR steelhead, Toutle River coho, and Toutle River Chinook populations. The 2022 BiOp acknowledges the importance of ensuring that "spatial distribution … of LCR steelhead and coho salmon are maintained as a fundamental buffer against extinction risks throughout their respective recovery domains." 2022 BiOp at 62. However, the 2022 BiOp fails to consider how the agency action affects spatial distribution. First, it does not consider whether existing spatial distribution of NFTR steelhead, Toutle River coho, and Toutle River Chinook is sufficient to buffer against extinction or support recovery. Second, it does not consider whether increasing the spatial distribution of NFTR steelhead, Toutle River coho, and Toutle River Chinook above the SRS (i.e., recolonizing more tributaries) is necessary to ensure the survival and recovery of these populations. Third, it ignores whether the agency action appreciably reduces the chances of survival or recovery of these populations by: (1) blocking their natural recolonization into multiple tributaries above the SRS; (2) limiting the distribution of NFTR steelhead and Toutle River coho to just three tributaries above the SRS (Alder, Hoffstadt/Bear, and Deer Creeks) instead of additional tributaries that they would likely recolonize if given the opportunity; and (3) not providing any access above the SRS for Toutle River Chinook. Because the 2022 BiOp ignores these and other important effects of the agency action on the spatial distribution of NFTR steelhead, Toutle River coho, and Toutle River Chinook, the 2022 BiOp is arbitrary and capricious. *See City of Los Angeles, California*, 63 F.4th

at 842 ("Agency action is arbitrary and capricious if the agency … entirely failed to consider an important aspect of the problem.").

G. Failure to Explain the Abandonment of Potential Mainstem Releases

RPA 1B in the 2017 BiOp required, *inter alia*, the Corps "to investigate the feasibility of a release site on the mainstem NFTR upstream of the sediment plain, and if feasible, establish this release site during the second spillway raise." 2017 BiOp at 47. The 2017 BiOp explained that the "mainstem release site would allow steelhead and coho to access and colonize tributaries in the upper NFTR watershed above the sediment plain that are currently unused." *Id.* The 2017 BiOp also explained that the "[c]reation of release sites at Deer Creek and any other additional releases sites (e.g., a mainstem site if feasible) will provide the necessary increased carrying capacity" to: (1) offset losses from the spillway crest raise; and (2) reduce the risk that carrying capacity would be exhausted in Alder and Hoffstadt/Bear Creeks. *Id.* at 48.

However, the 2022 BiOp does not require the Corps to investigate the feasibility of mainstem NFTR releases sites above the SRS and, if feasible, to establish these sites. Nor does the 2022 BiOp explain why establishing these sites are no longer necessary to: (1) offset losses from the spillway crest raises; or (2) reduce the risk that carrying capacity would be exhausted in Alder and Hoffstadt/Bear Creeks. Because the 2022 BiOp does not explain why NMFS apparently no longer believes that mainstem releases site are necessary for those important purposes, the BiOp is arbitrary and capricious. *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("[a]n agency may not . . . depart from a prior policy sub silentio."); *see also Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) ("Unexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedures Act [("APA"].); *see also Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (citing *Fox TV*, 556 U.S. at 515–16) (explaining that a policy change complies with the APA only if the agency (1) displays "awareness that it is changing position," (2) shows that "the new policy is permissible under the statute," (3) "believes" the new policy is better, and (4) provides "good reasons" for the new policy, which, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

H. Failure to Consider the Best Available Science on Fish Passage in the Sediment Plain

To perform consultation under Section 7 of the ESA, federal agencies must "use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). The "failure to do so violates the APA." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014). The ESA includes this standard to ensure that agencies do not act based on "speculation and surmise." *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 176 (1997)). Under this standard, the consulting agency may decide which data and studies are the best available, and its decision is reviewed under a deferential standard. *Miccosukee Tribe of Indians of Fla. v. United States,* 566 F.3d 1257, 1265 (11th Cir. 2009). However, it "cannot ignore available biological information." *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir.2006) (quoting *Conner*, 848 F.2d at 1454). Nor can it "base its conclusions on no evidence." *Pac. Coast Fed'n*

of Fishermen's Ass'ns, 426 F.3d at 1094-95 (quoting *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 847 (9th Cir. 2003)).

1. Failure to Consider the Best Available Science on Sediment Plain Passage

The 2022 BiOp fails to use the best scientific data available on fish passage in the sediment plain above the SRS. The 2022 BiOp asserts that "the NFTR channel across the sediment plain provides extremely poor upstream passage to spawning tributary confluences." 2022 BiOp at 49. However, the BiOp does not cite any evidence to support this theory. Therefore, it is entirely speculative and, in fact, conflicts with the best available scientific data.

Indeed, the 2022 BiOp's assertion about fish passage in the sediment plain conflicts with the best available scientific data that the BiOp cites when discussing adult fish passage at the SRS. *See e.g.*, *id.* at 3 (citing finding in Liedtke et al. (2013) that the current height of the SRS is passable by strong steelhead). For example, Liedtke et al. (2013)[17] found that "sediment plain releases are fairly successful for steelhead." Liedtke et al. (2013) at 11.[18] Specifically, "70 percent of the steelhead that were [tagged and released into] the sediment plain eventually moved upstream and entered a tributary." *Id.* Nowhere in the 2022 BiOp does it explain why the findings in Liedtke et al. (2013) are correct about passage at the SRS but wrong about passage in the sediment plain. Instead, NMFS ignored this evidence regarding fish passage in the sediment plain and based its conclusion on no evidence at all, which is unlawful. *Kern Cnty. Farm Bureau*, 450 F.3d at 1080-81; *Pac Coast Fed'n of Fishermen's Ass'ns*, 426 F.3d at 1094-95. As a result, the BiOp is arbitrary and capricious. *San Luis & Delta-Mendota Water Auth.*, 776 at 995.

2. Failure to Consider the Recovery Plan

The 2022 BiOp is arbitrary and capricious because it ignores the Recovery Plan, which includes the best scientific data available on LCR Chinook recovery. *See Wild Fish Conservancy v. U.S. EPA*, No. C08-01560JCC, 2010 U.S. Dist. LEXIS 41838, at 14-20 (W.D. Wash. Apr. 28, 2010) ("Because the recovery plans constitute the best available science, and because the record demonstrates that the agencies failed to use them in reaching their decision, an obvious conclusion follows: The agencies failed to use the best available science in determining that formal consultation was unnecessary. The agencies thereby ran afoul of the Endangered Species Act."). As stated, the Recovery Plan explains that restoring fish passage for Toutle River fall and spring Chinook is "key" to recovering both of these populations, which is important to recovering LCR Chinook. Recovery Plan at 7-36 and 7-68. Because the 2022 BiOp does not even mention that the Recovery Plan discusses fish passage for these Chinook population, the

[17] Liedtke, T.L., Kock, T.J., and Rondorf, D.W., 2013, Evaluation of the behavior and movement patterns of adult coho salmon and steelhead in the North Fork Toutle River, Washington, 2005–2009: U.S. Geological Survey Open-File Report 2013-1290, 26 p., *http://dx.doi.org/10.3133/ofr20131290*.

[18] The Corps should have a copy of Liedtke et al. (2013) because the SEIS explains that the findings in Liedtke et al. (2013) "indicate that fish passage through the sediment plain was fairly successful for steelhead." SEIS at 3-64 (citing Liedtke et al. (2013)). A copy of Liedtke et al. (2013) is attached as Exhibit 7. An online copy is available at https://pubs.usgs.gov/of/2013/1290/pdf/ofr2013-1290.pdf.

obvious conclusion follows: NMFS failed to use the Recovery Plan in determining that the agency action was not likely to jeopardize LCR Chinook.

I. Failure to Consider Steelhead Kelt Survival and Repeat Spawning

Liedtke et al. (2013) found that the "number of post-spawn steelhead outmigrants [i.e., "kelts"] that successfully moved downstream of the FCF was low." Liedtke et al. (2013) at 11. Specifically, Liedtke found that only 12% of steelhead successfully moved downstream of the SRS after spawning, which "seems low when compared to recollection rates of adult post-spawn wild steelhead at Cowlitz Falls Dam" where "recollection rates of post-spawn steelhead were 34 and 33 percent." *Id.* The 2022 BiOp does not mention anything about this important impact of the SRS on steelhead, which is arbitrary and capricious. *See City of Los Angeles, California*, 63 F.4th at 842 ("Agency action is arbitrary and capricious if the agency … entirely failed to consider an important aspect of the problem.").

The 2022 BiOp also ignores low repeat steelhead spawning rates in the NFTR. Repeat spawning rates for steelhead throughout their entire range is estimated to be 10% and can be as high as 17% for LCR steelhead. Liedtke et al. (2013) at 11 (citing Fleming (1998) and (Leider et al. (1986)). However, Liedtke found that repeat spawning rates were only 5% in the NFTR. *Id.* Liedtke explains that "[m]aximizing respawner rates in the [NFTR] is an important goal given the limited number of adult steelhead that are collected and transported each year." *Id.* The 2022 BiOp says nothing about this impact of the SRS on steelhead, which is arbitrary and capricious.

J. Failure to Rationally Explain the No-Destruction or Adverse Modification Finding

A federal action may not proceed if it is "likely to" result in "destruction or adverse modification of designated critical habitat of the species." *Nat'l Wildlife Fed'n*, 184 F. Supp. 3d at 928-29. Where critical habitat is degraded, maintaining the status quo violates the ESA. *Id.* at 930. If a federal action would destroy or adversely modify critical habitat, NMFS may propose RPAs that avoid such destruction or adverse modification. 16 U.S.C. § 1536(b)(3)(A).

The 2022 BiOp is arbitrary and capricious because NMFS did not rationally explain how worsening already degraded critical habitat for LCR Chinook, LCR coho, and LCR steelhead does not destroy or adversely modify their critical habitat. The 2022 BiOp explains that: the action area below the SRS is critical habitat for Chinook; Chinook spawn, rear, and migrate in that critical habitat;[19] and that large wood, rocks, boulders, and other habitat features in that critical habitat are essential to Chinook migration and rearing. Critical habitat for LCR coho and LCR steelhead also occurs in the mainstem NFTR below the SRS.[20] *See* 70 Fed. Reg. at 52835

[19] *See* 2022 BiOp at 36 ("ESA listed LCR Chinook salmon spawn and rear in and migrate from the NFTR, Toutle River and Cowlitz River action area critical habitat below the SRS …").

[20] The 2022 BiOp obfuscates the extent of critical habitat for LCR coho and LCR steelhead. *See* 2022 BiOp at 12 ("*The action area is occupied by LCR coho salmon and LCR steelhead. Below the SRS the action area is also critical habitat for LCR Chinook, CR chum and the southern DPS of Pacific eulachon. Within the action area, the streams are designated as critical habitat for LCR steelhead. The following stream reaches are also now designated critical habitat for LCR coho salmon: 1) unnamed (referred to here as the NFTR mainstem) to Lat 46.321385, Long

(designating NFTR as critical habitat for LCR steelhead); *see also* 81 Fed. Reg. at 9282 (designating NFTR as critical habitat for LCR coho). Adult and juvenile LCR coho and LCR steelhead migrate in this critical habitat. Large wood, boulders, and other physical habitat conditions are essential to supporting adult and juvenile LCR coho and LCR steelhead migration.

The 2022 BiOp explains how the SRS is already degrading critical habitat by, *inter alia*, preventing the movement of large wood and gravel downstream, and that the agency action will make that degradation worse by delaying transport of courser material to the lower NFTR by several decades.[21] *Id.* at 49. The 2022 BiOp only mentions one potential benefit to critical habitat (reducing fine sediment transport), but it does not explain whether that benefit is offset by worsening habitat degradation (e.g., decades of delayed large wood and gravel transport). Nor could the BiOp rationally reach that conclusion because delayed large wood and gravel transport will last for decades whereas the spillway crest raises will only reduce fine sediment transport for several years, as the impoundment will likely fill in again shortly after the agency action is completed. Because the 2022 BiOp does not rationally explain how the agency action would avoid destroying or adversely modifying critical LCR Chinook, LCR coho, and LCR steelhead habitat considering these effects, the 2022 BiOp is arbitrary and capricious.

K. Failure to Explain Deletion of Reasonable and Prudent Measures and Related Terms and Conditions to Avoid Take

The 2017 BiOp includes several reasonable and prudent measures and related terms and conditions in its ITS that are not included in the 2022 BiOp's ITS. *See* 2017 BiOp at 54-57. For example, the 2017 ITS included terms and conditions necessary to avoid take caused by the construction of the heightened spillway crest. *Id.* at 55-56. These terms and conditions are not included in the 2022 ITS. The 2022 BiOp does not explain why the reasonable and prudent measures and related terms and conditions in the 2017 ITS are no longer necessary to avoid take. Because the 2022 BiOp does not explain NMFS's change in position, the 2022 BiOp is arbitrary and capricious. *See Fox Television Stations, Inc*., 556 U.S. at 515; *Nat'l Cable & Telecommunications Ass'n*, 545 at 981; *Organized Village of Kake*, 795 F.3d at 966.

-122.488684, 2) unnamed (referred to here as Alder Creek) to Lat 46.392893, Long -122.585848 and an unnamed tributary to Alder Creek to Lat 46.294391, Long -122.526416, 3) Hoffstadt Creek to Lat 46.319718, Long -122.325454 and an unnamed tributary to Hoffstadt Creek (referred to here as Cow Creek) to Lat 46.331761, Long -122.316562 and 4) Bear Creek to Lat 46.309744, Long -122.430749.").

[21] *See* 2022 BiOp at 49 ("The SRS spillway crest raises will extend the time that habitat forming bedload gravels and large wood are prevented from moving to the Lower NFTR. These materials sustain and improve spawning and rearing habitat conditions in the Lower NFTR, Toutle River and Cowlitz over the long term. This outcome occurs under the existing conditions and will be worsened by the action by extending the height of the SRS further upstream in the NFTR. Without the proposed action a significant mass of small gravel would be transported over the spillway within a decade. The spillway raises will reset the slope of the sediment plain to essentially zero and will delay the transport of coarser material to the Lower NFTR by several decades. Interrupting this gravel and wood transport downstream below the SRS over the course of decades prevents the development of more stable spawning conditions in the lower river that would develop in a shorter time frame.").

To the extent that NMFS may believe that both ITSs apply (i.e., the 2017 and 2022 ITSs), NMFS failed to explain that is the case. If that is NMFS's intent, the 2022 BiOp is arbitrary and capricious because the 2022 ITS is vague. *See Willamette Riverkeeper et al.*, 763 F. Supp. 3d 1242 (the basis for the agency's decision must be understandable). In any event, NMFS must include one unifying ITS in one biological opinion for this agency action. *See Greenpeace v. Nat'ls Fisheries Serv.*, 80 F. Supp. 2d 1137, 1143 (W.D. Wash. 2000) (quoting *Conner*, 848 F.2d 1441, 1453-55) (explaining that "the ESA provides a clear mandate that a comprehensive biological opinion address[] all phases of the agency action …"). Therefore, the 2022 BiOp is arbitrary and capricious.

L. Failure to Explain Why a Numeric Take Limit is Impractical

Section 7 of the ESA requires an ITS to specify the impact of incidental taking on species. 16 U.S.C. § 1536(b)(4)(C)(i); *see also* 50 C.F.R. § 402.14(i)(1)(i). When enacting this requirement, "Congress clearly declared a preference for expressing take in numerical form." *Or. Natural Resources Council v. Allen*, 476 F.3d 1031, 1038 (9th Cir. 2007). Numeric limits have been expressed as the number of individuals taken and as the percentage of a population taken. *See e.g., Ramsay v. Kantor*, 96 F.3d 434, 441 fn. 12 (9th Cir. 1996) (incidental take trigger set as the percentage of the estimated fish population harvested). An ITS "that utilizes a surrogate instead of a numerical cap on take must explain why it was impracticable to express a numerical measure of take." *Or. Natural Resources Council*, 476 F.3d at 1038; *see also Ariz. Cattle Growers Ass'n*, 273 F.3d 1229, 1249 (9th Cir. 2001).

Here, the ITS explains that "[t]ake in the form of harm, injury or death to juvenile salmonids from the construction and effects of the spillway crests" occurs in three ways: (1) "[t]ake from increased suspended sediment during construction"; (2) "[t]ake from juvenile salmonids migration down the longer spillway"; and (3) "[t]ake from migration through the impoundment and then the shifting channel formation in the sediment plain that results in low flow velocity, blind channels with no outlet, or subsurfacing of flowing water, stranding juveniles." 2022 BiOp at 63. The ITS establishes the following take limit for these forms of take: "[t]he extent of take of these three sources of injury or mortality is the height of the spillway increases, specifically no more than 13 feet increase in 2023 and 10 feet in or around 2033." *Id.*

The 2022 BiOp does not explain why it is impractical to use numeric limits for measuring incidental take (which it is not). Indeed, the 2022 BiOp demonstrates that it is practical to use a numeric limit to determine whether the agency action is causing take because the RPA uses a numeric limit to determine whether the agency action is causing jeopardy (i.e., "95 percent passage efficiency for all natural origin LCR steelhead and LCR coho salmon that reach the existing FCF barrier."). The 2022 BiOp does not explain why the same or similar numeric limit is impractical for measuring take caused by the agency action (e.g., 95 percent passage efficiency for all natural origin LCR steelhead and LCR coho salmon that reach the existing FCF barrier each year). Because the 2022 BiOp does not explain why a numeric limit is impractical (because it is not), the BiOp is arbitrary and capricious.

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M. Failure to Include Adequate Take Limits to Avoid Jeopardy

Incidental take statements must "set forth a trigger that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to reinitiate consultation." *Ariz. Cattle Growers Ass'n*, 273 F.3d at 1249; *see also Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 913 (9th Cir. 2012) ("[A] primary purpose of [an] ITS and its measure of permissible take is to provide a trigger for reinitiating consultation under Section 7(a)(2) of the ESA."). An "ITS serves as a check on the agency's original decision that the incidental take of listed species resulting from the proposed action will not violate section 7(a)(2) of the ESA." *NRDC v. Evans*, 364 F. Supp. 2d 1083, 1133 (N.D. Cal. 2003).

The 2022 BiOp fails to set forth a trigger that serves as a check on NMFS's determination that raising the spillway crest will not violate Section 7(a)(2) of the ESA. Here, the ITS uses the height of the spillway crest raises as the trigger: "specifically no more than 13 feet increase in 2023 and 10 feet in or around 2033." 2022 BiOp at 63. As a result, so long as the project does not go an inch over these height limits, the Corps could construct the SRS spillway raises and fail to meet the 95 percent passage standard without needing to reinitiate consultation to check NMFS's decision that the agency action will not jeopardize LCR coho or LCR steelhead. In other words, it entirely fails to meet the purpose of a trigger. Therefore, the ITS it is arbitrary and capricious.

To the extent that NMFS believes that the reference in the ITS to the "95 percent collection efficiency goal" is an adequate trigger, the ITS fails to make that clear and, therefore, it is impermissibly vague. *Id.* at 64; *see Willamette Riverkeeper et al.*, 763 F.Supp. 3d at 1242 ("If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.").

N. Failure to Include Adequate Monitoring Requirements

The Ninth Circuit has explained that "[t]he regulations governing Incidental Take Statements … provide for ongoing monitoring of incidental take by the action agency and the [consulting agency]." *Or. Natural Resources Council*, 476 F.3d at 1040. Specifically, "50 C.F.R. § 402.14(i)(3) instructs the action agency or applicant to monitor the impacts of incidental take by reporting on the project's impact on the species as specified in the incidental take statement." *Id.* This "regulation makes clear that the Service is responsible for specifying in the statement how the action agency is to monitor and report the effects of the action on listed species." *Wild Fish Conservancy*, 628 F.3d at 531-32.

Here, the ITS requires, *inter alia*, that the Corps "[p]repare and submit … an adaptive management plan to reach the 95 percent collection efficiency goal." 2022 BiOp at 64. This adaptive management provision inherently requires a method for monitoring whether the RPA is achieving the 95 percent efficiency goal – if it did not, the Corps would not know whether adaptive management was necessary. Instead of specifying that monitoring method in the ITS, NMFS unlawfully delegates its duty to specify that method to the Corps. The ITS does not even require NMFS's approval of the monitoring method even though it is NMFS's responsibility to specify it. *See id.* Because NMFS did not specify in the ITS how the Corps must monitor fish collection efficiency, the ITS is arbitrary and capricious.

O. Establishment of Take Limits that are Coextensive with the Proposed Action

Take limits that are coextensive with the scope of agency actions are unlawful. *See e.g.*, *Or. Natural Resources Council*, 476 F.3d at 1039 (invalidating an ITS that was coextensive with the scope of the project, rendering the ITS and biological opinion tautological and reinitiation of consultation impossible). Here, the ITS sets the following take limit: "[t]he extent of take of these three sources of injury or mortality is the height of the spillway increases, specifically no more than 13 feet increase in 2023 and 10 feet in or around 2033." 2022 BiOp at 63. These limits are coextensive with the agency action – specifically, raising the SRS by 13 feet in 2023 and by 10 feet in or around 2033. As a result, the ITS is unlawful.

P. The BiOp Relies on Mitigation Measures that are not Reasonably Certain to Occur

A BiOp may rely on mitigation measures to support a no-jeopardy finding if those measures involve "clear, definite commitment of resources" that are "under agency control or otherwise reasonably certain to occur." *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020) (quoting *NMFS III*, 524 F.3d at 936 & n.17; *see Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 254 F. Supp. 2d 1196, 1214-15(D. Or. 2003) (holding that NMFS's reliance on state mitigation measures that were not reasonably certain to occur was improper). Such mitigation measures "must be subject to deadlines or otherwise enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." *Ctr. for Biological Diversity*, 982 F.3d at 743. NMFS may not rely on proposed future improvements in its analysis unless there are "solid guarantees" that the improvements will actually occur. *See NMFS III*, 524 F.3d at 935-36; *see also Ctr. for Biological Diversity*, 982 F.3d at 743 (explaining that "mitigation measures cannot refer only to generalized contingencies or gesture at hopeful plans; they must describe, in detail, the action agency's plan to offset the environmental damage caused by the project."). Indeed, "[a]t a minimum, a mitigation strategy must have some form of measurable goals, action measures, and a certain implementation schedule; i.e., that mitigation measures must incorporate some definite and certain requirements that ensure needed mitigation measures will be implemented." *NRDC v. Kempthorne*, 506 F. Supp. 2d 322, 355 (E.D. Cal. 2007). Reliance on "unapproved and undefined mitigation measures" is not sufficient. See e.g., *Ctr. for Biological Diversity*, 982 F.3d at 745-46.

1. Achieving the 95% Standard by 2027 is Not Reasonably Certain to Occur

NMFS' no-jeopardy determination is arbitrary and capricious because it relies on achieving the 95% standard by 2027, which is not reasonably certain to occur under the terms of the 2022 BiOp. To avoid jeopardy, the 2022 BiOp requires the Corps to complete the FCF upgrades by 2027 and achieve the 95% standard the same year. *See* 2022 BiOp at 11 (showing that construction must be completed by 2027) and 56 (explaining that NMFS "expect[s] the corrected FCF to achieve 95% collection efficiency by 2027."). However, the ITS requires the Corps to prepare and submit an adaptive management plan for achieving the 95% standard without setting any deadline for achieving the standard or reinitiating consultation if it is not met by 2027. *Id.* at 64. Because the RPA schedule in the BiOp includes no time gap between

completing the FCF upgrades and achieving the 95% standard (i.e., both must occur by 2027), the ITS appears to extend the timeline for achieving the 95% standard. Adding to the uncertainty, the ITS does not require the Corps to actually implement the adaptive management plan, much less require NMFS's approval of whatever measures the non-fish expert agency (i.e., the Corps) deems helpful for achieving the 95% standard. *Id.* Because the terms of the 2022 BiOp itself makes it uncertain that the Corps will achieve the 95% standard by 2027 as NMFS deemed necessary to avoid jeopardy, NMFS improperly relied on uncertain mitigation measures. Therefore, NMFS's no-jeopardy determination is arbitrary and capricious.

2. The BiOp Relies on Uncertain Mitigation Measures to Be Designed by the Corps

The ITS requires the Corps to develop an adaptive management plan for meeting the 95% standard without NMFS's approval of that plan. *See id.* (requiring the Corps to prepare and submit – but not implement – an adaptive management plan to achieve the 95% standard by some uncertain date, but not requiring NMFS's approval of that plan). Thus, instead of requiring reinitiation of consultation to determine if several species are jeopardized by missing the 2027 deadline – as the ESA requires – NMFS leaves it up to the non-fish expert agency (the Corps) to determine what should happen next, if anything, to avoid jeopardy. Indeed, nothing in the ITS specifies what must be included in that plan, when it must be implemented, who is responsible for what actions, or how the effects of those actions will be monitored. Leaving it to the action agency to determine the details of how and when it will implement undefined and unapproved mitigation measures to avoid jeopardy is nothing more than a vague, general commitment to future improvements that NMFS may not rely on in making its jeopardy determination. *Ctr for Biological Diversity*, 982 F.3d at 744-46. Therefore, NMFS's no-jeopardy determination is arbitrary and capricious.

3. NMFS Did Not Explain How Missing the 2027 Deadline Avoids Jeopardy

To the extent that NMFS determined that not meeting the 95% standard by 2027 would not cause jeopardy, NMFS did not explain that analysis in the 2022 BiOp. Assuming that is NMFS's opinion, NMFS's no-jeopardy determination is arbitrary and capricious because NMFS did not explain how achieving the 95% standard after 2027 avoids jeopardy. *See Pac. Coast Fed'n of Fishermen's Associations*, 426 F.3d at 1091.

IV. The Corps' Reliance on the 2022 BiOp is Arbitrary and Capricious

For all the reasons explained in Part III above, the 2022 BiOp does not comply with the ESA. The Corps cannot rely on the legally deficient 2022 BiOp to meet its obligations under the ESA. *See e.g., Wild Fish Conservancy,* 628 F.3d at 532 (explaining that where the flaws in the consulting agency's analysis are legal in nature, "discerning them requires no technical or scientific expertise, and the failure to do so may result in an action based on reasoning not in accordance with the law and thus arbitrary and capricious."); *see also Ctr for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1010 (D. Ariz. 2011) (action agency's reliance on a legally flawed BiOp was arbitrary and capricious and thus it violated its substantive Section 7 duty). Therefore, by authorizing, funding, implementing, carrying out, and constructing the SRS spillway crest raises in reliance on the 2022 BiOp the Corps is violating its substantive duty

under Section 7 to ensure that actions it authorizes, funds, implements, and carries out do not jeopardize ESA-listed species or destroy or adversely modify their critical habitat.

V. The Corps Has Failed to Reinitiate Consultation

Action agencies must reinitiate consultation when they retain discretionary involvement or control over the action and "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." *NRDC v. Haaland*, 102 F.4th 1045, 1055 (9th Cir. 2024) (quoting 50 C.F.R. § 402.16(a)(2)). "That is, an agency's duty to reinitiate consultation is triggered if it retains some discretion to take measures that would 'inure to the benefit of a protected species.'" *Id.* (quoting *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 975 (9th Cir. 2003)).

The Corps retains discretionary control over the SRS, and it must reinitiate consultation based on new information related to WDFW releasing ESA-protected Chinook salmon above the SRS. 50 C.F.R. § 402.16(a) (2024). Specifically, for up to ten years, WDFW will release above the SRS up to 300 hatchery fall Chinook salmon collected at the North Toutle Hatchery or FCF and up to 300 hatchery spring Chinook from the Kalama Hatchery. Mitchell Act Biological Opinion (NMFS Consultation No. WCRO-2024-03014) ("Mitchell Act BiOp") at 313-14, 316.[22] These hatchery Chinook are included in the LCR Chinook salmon ESU and, therefore, they are protected under the ESA. 70 Fed. Reg. 37160, 37175 (Jun. 28, 2005). Neither the 2022 BiOp nor the Mitchell Act BiOp analyze the effects of the SRS on the downstream or upstream migrations of these Chinook. The Corps retains discretion to take measures that would inure to the benefit of these Chinook salmon. For example, the Corps could ensure that the FCF also achieves a 95 percent passage efficiency for LCR Chinook that reach the existing FCF barrier. The Corps could also release Toutle River Chinook into the mainstem NFTR above the SRS, which would allow for natural recolonization, local adaptation, expression of natural homing behavior, and increased spatial structure, diversity, productivity, and abundance of these populations. Therefore, the Corps must reinitiate consultation based on this new information. 50 C.F.R. § 402.16(a) (2024).

The Corps must reinitiate consultation because the agency action has been modified in a manner that the 2022 BiOp did not consider. An action agency must reinitiate consultation "[i]f the [agency] 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 ..." 50 C.F.R. § 402.16(a)(3) (2024). Here, the 2022 BiOp considered that the first spillway crest raise would occur in 2023, which would do two things: (1) increase fish collection efficiency by decreasing turbidity in the FCF; and (2) increase fish production above the SRS by increasing fish collection efficiency at the FCF. 2022 BiOp at 56.

> Because the existing FCF is expected to improve function (trap more adults) as more sediment is retained behind the raised spillway, we expect additional spawners to be transported and released in spawning streams in each year between

[22] Excerpted sections of the Mitchell Act BiOp are attached as Exhibit 8. A full copy of the Mitchell Act BiOp is available at https://wdfw.wa.gov/sites/default/files/2025-04/noaa-mitchell-act-biological-opinion-2024.pdf and is incorporated herein.

> the crest increase and the time that the FCF is modified, and that additional redds and progeny will result (see Appendix 1).

Id. However, the first spillway crest raise has not occurred and, therefore, neither increased fish collection efficiency nor increased fish production above the SRS has occurred. The Corps must reinitiate consultation to ensure that this delay in increasing fish passage and production pending completion of the FCF does not jeopardize LCR steelhead, LCR coho, or LCR Chinook.

VI. The Corps Has Failed to Supplement the SEIS Based on New Information and New Circumstances

The National Environmental Policy Act ("NEPA") requires a federal agency to prepare and publish an environmental impact statement ("EIS") reviewing the environmental impact of any major federal action that would have a reasonably foreseeable effect on the quality of the human environment. 42 U.S.C. § 4332(C). This procedural requirement serves dual purposes: it ensures that federal agencies consider the environmental consequences of their actions before deciding to undertake them, and it holds them publicly accountable for their decisions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).

After issuing an EIS, "an agency … cannot simply rest on the original document; instead, it must be alert to new information that may alter the results of its original environmental analysis, and continue to take a hard look at the environmental effects of [its] planned action." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 1989) (internal quotations omitted). An agency must issue a supplemental EIS if new information or new circumstances show that the action will affect the quality of the human environment in a significant manner or to an extent not already considered. *Marsh*, 490 U.S. at 376. "New circumstances are circumstances which significantly change the underlying project, and new information is intervening information not already considered." *Earth Island Inst. v. U.S. Forest Serv.*, 87 F.4th 1054, 1069 (9th Cir. 2023) (quoting *Prot. Our Cmtys. Found. v. LaCounte*, 939 F.3d 1029, 1041 (9th Cir. 2019) (internal quotations omitted).

The Corps' NEPA regulations require it to prepare a supplemental EIS "if a major federal action remains to occur, and … [t]he District Engineer decides, in their discretion, that there are substantial significant new circumstances or information about the significance of the adverse effects that bear on the proposed action or its effects." 33 C.F.R. § 333.34(b). The District Engineer must make its significance determination in accordance with 33 C.F.R. § 333.12(b), which, among other things, may involve consideration of beneficial and adverse effects to fish.

Although this factual inquiry implicates the Corps' technical expertise, the Corps must still show that it considered the relevant factors and did not make a clear error in judgment in deciding whether supplementing an EIS is required. *Marsh*, 490 U.S. at 376-78. The Corps must employ a "rule of reason" when making that determination. *Seven Cnty. Infrastructure Coal v. Eagle Cnty*, 605 U.S. 168, 183 (2025) ("As the Court has emphasized on several occasions, and we doubly underscore again today, inherent in NEPA … is a rule of reason, which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness on any new potential information to the decision-making process."). For example, the Ninth Circuit held

that the Forest Service's decision not to supplement an environmental assessment after the discovery of 1900 acres of nesting habitat for sage grouse did not comply with the agency's obligations to supplement an environmental assessment when there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact. *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010) (citing *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 550 (9th Cir. 2006)).

Here, the Corps knows or should know about a Chinook reintroduction program in the NFTR above the SRS. *See Friends of the Clearwater*, 222 F.3d at 557 (an action agency must stay alert to new information.). Specifically, in 2024, NMFS issued the Mitchell Act BiOp, which authorizes WDFW to release into habitat above the SRS adult Chinook from the Kalama spring Chinook and North Fork Toutle tule Chinook hatchery programs for up to ten years. Mitchell Act BiOp at 313-16. The current SEIS does not evaluate the impacts of raising the spillway crest on LCR Chinook released above the SRS. For example, it does not evaluate the effects of the SRS on the downstream or upstream migrations of the offspring of adult Chinook released above the SRS. Therefore, just as the Forest Service was required to supplement its EA based on the discovery of 1900 acres of nesting habitat, so, too, must the Corps supplement its SEIS based on the new information that WDFW will annually release adult Chinook into habitat above the SRS. *Native Ecosystems Council*, 599 F.3d at 937. Because the Corps has failed to supplement the SEIS based on new information regarding these Chinook releases, NMFS is violating NEPA.

The Corps must also supplement the SEIS because the project has significantly changed. 33 C.F.R. § 333.34(b). The current SEIS analyzes the effects of modifying the FCF before constructing the first spillway crest raise in 2023. Now, the Corps intends to: (1) construct the first spillway crest in 2026-2027; and (2) construct the FCF and meet the 95% standard by the end 2027, which seems unlikely to occur. These changes in the construction schedule are significant new circumstances that require the Corps to supplement the SEIS before constructing the first spillway raise. Because the Corps has failed to do so, it is violating NEPA.

VII. Parties Giving Notice of Intent to Sue

Mark Smith
14000 Spirit Lake Hwy
Toutle, WA 98649-4103
Tel: (360) 749-4050

Wild Fish Conservancy
15269 Main Street N.E.
Duvall, WA 98019
Tel: (425) 788-1167

VIII. Attorneys Representing Mark Smith and Wild Fish Conservancy

Robert Kirschner Jr.
Crag Law Center
3141 E. Burnside Street
Portland, OR 97214
Tel: (503) 894-0439
rob@crag.org

Oliver Stiefel
Crag Law Center
3141 E. Burnside Street
Portland, OR 97214
Tel: (503) 227-2212
oliver@crag.org

/ / /

IX. Conclusion

Unless the ongoing and imminent ESA violations described herein are corrected within 60 days, Mark Smith and Wild Fish Conservancy intend to file suit against the Corps to enforce the ESA. Mark Smith and Wild Fish Conservancy are available during the 60-day notice period to discuss effective remedies and actions that will assure future compliance with the ESA. Please note that the 60-day period does not apply to the NEPA violations described herein, nor does it apply to Administrative Procedures Act, 5 U.S.C. §§ 551-559 claims against NMFS. Thank you.

Sincerely,

Robert Kirschner Jr.

Robert Kirschner Jr., Staff Attorney
rob@crag.org | 503-894-0439
Oliver Stiefel, Senior Staff Attorney
oliver@crag.org | 503.227.2212

Attorneys for Mark Smith and Wild Fish Conservancy

Cc:

Secretary Howard Lutnick
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230

Assistant Administrator Eugenio Piñeiro Soler
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910

National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910

CERTIFICATE OF SERVICE

I, Robert Kirschner Jr., declare under penalty of perjury of the laws of the United States that I am counsel for Mark Smith and Wild Fish Conservancy and that on February 24, 2026, I caused copies of the foregoing Notice of Intent to Sue for Violations of Section 7 of the Endangered Species Act associated with Mount St. Helens Sediment Retention Structure to be served on the following by depositing it with the U.S. Postal Service, postage prepaid, via certified mail, return receipt requested:

Lieutenant General William H. Graham, Jr.
Chief of Engineers and Commanding Officer
U.S. Army Corps of Engineers
441 G. Street NW
Washington, D.C. 20314-1000

Secretary Howard Lutnick
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230

Assistant Administrator Eugenio Piñeiro Soler
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910

National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910

EXECUTED this 24th day of February 2026

By: Robert Kirschner Jr.
Robert Kirschner Jr.

Complaint

EXHIBIT 2

No. 3:26-cv-05775

Request for Clean Water Act
Section 401 Water Quality Certification
Washington State Department of Ecology
Phone: (360) 407-6076 or E-mail: ecyrefedpermits@ecy.wa.gov

AGENCY USE ONLY
Date Received: 2/25/2026
Aquatics ID No.:146319
County: Cowlitz
Complete Request: 2/25/2026

This Section 401 Water Quality Certification (WQC) request form must be submitted as part of a WQC request and identifies information needed for review. Please see Department of Ecology's (Ecology) webpage[1] for more information about the WQC request process and additional information regarding the request requirements. Contact Ecology if an example plan or template would be helpful in preparing your WQC request.

Submit this WQC Request form along with the supporting information identified below to ecyrefedpermits@ecy.wa.gov.

Request packages must be sent in by email. Mail submissions will not be accepted. Supporting information should not be consolidated into one large file, if your documents are consolidated into one file, please separate them before submitting[2].

Per the 2023 EPA Water Quality Certification rule, Ecology, as the certifying authority,[3] may identify the contents of a request for certification relevant to water quality related impacts from the activity. Items listed in Section D are always required for a complete application. If notified by Ecology prior to submittal of this request, items listed in Section E are also required. If this information has been provided to Ecology as part of your federal permit application, you do not need to submit them again. However, please indicate in Section D how they were provided. Ecology will provide acknowledgement of receipt of a complete WQC request to the project proponent. Once Ecology confirms we have received all the required information, our review time will begin.

A. Project Information

Project Name: Toutle River Fish Collection Facility Modifications

Ecology Aquatics ID Number: 146319

Project Location (Please attach a project location map when submitting this form):

Project Address: 11285 Spirit Lake Highway County: Cowlitz

[1] https://ecology.wa.gov/Regulations-Permits/Permits-certifications/401-Water-quality-certification
[2] To submit documents over 25MB, e-mail ecyrefedpermits@ecy.wa.gov to request a secure link. Ecology does not accept outside links. Please include the Aquatics ID and project name when requesting a link.
[3] If the proposed work is on federal or Tribal land, it is up to the project proponent to confirm land ownership and provide the federal agency with a WQC from the appropriate Section 401 certifying authority. Ecology will proceed with processing your request unless we are notified that we are not the certifying authority.

To request an ADA accommodation, contact Ecology by phone at (360) 407-6076 or email at ecyrefedpermits@ecy.wa.gov, or visit https://ecology.wa.gov/accessibility.
For Relay Service or TTY call 711 or 877-833-6341.

Si necesita este formulario en español, por favor, llámenos a (360) 407-6076
o envíenos un correo electrónico a: ecyrefedpermits@ecy.wa.gov

B. Federal Permit Application

A copy of the federal permit application must be submitted with your request (40 CFR 121.5(a)(1)(i)). This can be done by copying Ecology (ecyrefedpermits@ecy.wa.gov) when you submit your application to the federal agency or forwarding the confirmation email from the federal agency with a copy of your application.

☐ I have copied Ecology on my federal permit application submitted on date: _____ or,
☐ I forwarded the confirmation email from the federal agency along with a copy of my application, or
☑ Other, please explain.

Federal Permit or License Reference Number, if known: N/A to the Corps

Federal Agency:
☐ U.S. Army Corps of Engineers (Corps)
☐ Federal Energy Regulatory Commission
☑ Other:
☐ U.S. Coast Guard
☐ Environmental Protection Agency (EPA)

Identify the U.S. Army Corps permit, if applicable: ☐ Nationwide Permit ☐ Individual ☑ Other: N/A
If Nationwide Permit which one(s)? NWP(s) # _____

C. A Pre-Filing Meeting Request must be submitted to Ecology at least 30-days prior to submitting a WQC request unless otherwise approved.

☑ A pre-filing meeting request was submitted on date: 12/10/2025

D. Supporting information required for all projects. Please indicate where the following documents or information can be found within this WQC request or if it was submitted previously to Ecology. If not a specific plan or report, indicate the name and page number of the document where the information can be found.

	Within this WQC request	Previously submitted to Ecology and is still up to date	Indicate where the information can be found within the submission
Complete up to date JARPA or other accepted application form	☑	☐ Date:	JARPA
Status of State Environmental Policy Act (SEPA) determination and/or exemption	☐	☐ Date:	N/A to the Corps
Project location map and drawings	☑	☐ Date:	Figure 2-1 Project Location, Figure 2-2 Aerial View of the FCF, Figure 2-4 Existing Site Conditions, Toutle FCF Proposed Action
Best management practices (BMPs)	☑	☐ Date:	Toutle FCF Water Quality Monitoring Plan
Construction methodologies	☑	☐ Date:	JARPA
Requirements for In-Water Work			
Water quality monitoring plan **or** Water Quality Monitoring Protection Plan	☑	☐ Date:	Toutle FCF Water Quality Monitoring Plan
Aquatic resource avoidance and minimization identified (e.g. eelgrass)	☑	☐ Date:	2018 SEIS and JARPA

Riparian revegetation, restoration, and management measures	☑	☐ Date:	2018 SEIS and JARPA
Requirements for Work in Wetlands			
Wetland delineation report with data sheets	☑	☐ Date:	Attachment A
Wetland ratings	☐	☐ Date:	Wetlands are not rated
Wetland mitigation plan, including avoidance and minimization measures, for wetland, stream, and/or other aquatic resources	☑	☐ Date:	JARPA. Wetland impacts do not exceed 1/10 acre. No mitigation is proposed. Proposed action avoids and minimizes impacts to wetlands to the maximum extent practicable.
Riparian planting and monitoring and measures	☑	☐ Date:	JARPA

E. Required by project type or when identified as needed by Ecology. Please indicate where the following documents or information can be found within this WQC request or if it was submitted previously to Ecology. If not a specific plan or report, indicate the name and page number of the document where the information can be found.

	Within this WQC request	**Previously submitted to Ecology and is still up to date**	**Indicate where the information can be found within the submission**
Mitigation			
Wetland mitigation bank use plan	☐	☐ Date:	
In-lieu (ILF) use plan	☐	☐ Date:	
Upland Work			
Erosion and sediment control plan	☐	☐ Date:	
Stormwater pollution prevention plan	☐	☐ Date:	
De-Watering			
Flow diversion, cofferdam, and dewatering system plan	☐	☐ Date:	
Stream bypass plan	☐	☐ Date:	
Water dispersion/infiltration plan	☐	☐ Date:	
Water treatment plan (Chitosan, aeration, dry ice, etc.)	☐	☐ Date:	
Culverts and Bridges			
Bridge demolition and construction plans	☐	☐ Date:	
Culvert removal and replacement plans	☐	☐ Date:	
Dredging			
Dredging and excavation plans	☐	☐ Date:	

Status of Suitability determination	☐	☐ Date:	
Sediment testing and characterization reports	☐	☐ Date:	
Other			
Stone column installation plan	☐	☐ Date:	
Horizontal direction drill (HDD) inadvertent return plan	☐	☐ Date:	
Spill prevention control and countermeasures plan	☐	☐ Date:	
Levee repair and bank stabilization plan	☐	☐ Date:	
Piling removal and installation plan	☐	☐ Date:	
Wastewater servicing for marina operations	☐	☐ Date:	
Aquatic invasive species management plan	☐	☐ Date:	
Engineer Design Report for cleanup projects	☐	☐ Date:	

F. Project Proponent Information

Project Proponent

First/Last Name: Gibbons/Amy

Organization: USACE

Phone #: 503-808-4708 E-mail: amy.c.gibbons@usace.army.mil

Agent/Consultant

First/Last Name: Murray/Audrey

Organization: USACE

Phone #: 503-333-6795 E-mail: audrey.n.murray@usace.army.mil

G. Required Certification Statements:

The project proponent hereby certifies that all information contained herein is true, accurate, and complete, to the best of my knowledge and belief.

The project proponent hereby requests that the certifying authority review and act on this WQC request within the applicable reasonable period of time.

Signature: DORSEY.GARRETT.LIONEL.1287031943 Digitally signed by DORSEY.GARRETT.LIONEL.1287031943 Date: 2026.02.25 09:05:19 -08'00' Date:_____

Print Name:_____

WASHINGTON STATE
Joint Aquatic Resources Permit Application (JARPA) Form[1,2] [help]

US Army Corps of Engineers ® Seattle District

USE BLACK OR BLUE INK TO ENTER ANSWERS IN THE WHITE SPACES BELOW.

AGENCY USE ONLY

Date received: 2/25/2026 edoc
Received WQC Request Form

Agency reference #: _____

Tax Parcel #(s): _____

_____

Part 1–Project Identification

1. Project Name (A name for your project that you create. Examples: Smith's Dock or Seabrook Lane Development) [help]
Toutle River Fish Collection Facility Modifications

Part 2–Applicant

The person and/or organization responsible for the project. [help]

2a. Name (Last, First, Middle)			
Amy C Gibbons			
2b. Organization (If applicable)			
United States Army Corps of Engineers			
2c. Mailing Address (Street or PO Box)			
333 SW 1st Avenue			
2d. City, State, Zip			
Portland, OR, 97204			
2e. Phone (1)	**2f.** Phone (2)	**2g.** Fax	**2h.** E-mail
(503) 808-4708			amy.c.gibbons@usace.army.mil

[1]Additional forms may be required for the following permits:
- If your project may qualify for Department of the Army authorization through a Regional General Permit (RGP), contact the U.S. Army Corps of Engineers for application information (206) 764-3495.
- Not all cities and counties accept the JARPA for their local Shoreline permits. If you need a Shoreline permit, contact the appropriate city or county government to make sure they accept the JARPA.

[2]To access an online JARPA form with [help] screens, go to http://www.epermitting.wa.gov/site/alias__resourcecenter/jarpa_jarpa_form/9984/jarpa_form.aspx.

For other help, contact the Governor's Office for Regulatory Innovation and Assistance at (800) 917-0043 or help@oria.wa.gov.

Part 3–Authorized Agent or Contact

Person authorized to represent the applicant about the project. (Note: Authorized agent(s) must sign 11b of this application.) [help]

3a. Name (Last, First, Middle)			
Audrey Murray			
3b. Organization (If applicable)			
United States Army Corps of Engineers			
3c. Mailing Address (Street or PO Box)			
333 SW 1st Avenue			
3d. City, State, Zip			
Portland, OR, 97204			
3e. Phone (1)	**3f.** Phone (2)	**3g.** Fax	**3h.** E-mail
503-333-6795			Audrey.N.Murray@usace.army.mil

Part 4–Property Owner(s)

Contact information for people or organizations owning the property(ies) where the project will occur. Consider both **upland and aquatic** ownership because the upland owners may not own the adjacent aquatic land. [help]

☐ Same as applicant. (Skip to Part 5.)

☐ Repair or maintenance activities on existing rights-of-way or easements. (Skip to Part 5.)

☐ There are multiple upland property owners. Complete the section below and fill out JARPA Attachment A for each additional property owner.

☐ Your project is on Department of Natural Resources (DNR)-managed aquatic lands. If you don't know, contact the DNR at (360) 902-1100 to determine aquatic land ownership. If yes, complete JARPA Attachment E to apply for the Aquatic Use Authorization.

4a. Name (Last, First, Middle)			
Frank P Stevick, Authorized Agent / Contact			
4b. Organization (If applicable)			
Washington Department of Fish & Wildlife			
4c. Mailing Address (Street or PO Box)			
1111 Washington St SE			
4d. City, State, Zip			
Olympia, WA 98501			
4e. Phone (1)	**4f.** Phone (2)	**4g.** Fax	**4h.** E-mail
(360) 902-2200			

Part 5–Project Location(s)

Identifying information about the property or properties where the project will occur. [help]

☐ There are multiple project locations (e.g. linear projects). Complete the section below and use JARPA Attachment B for each additional project location.

5a. Indicate the type of ownership of the property. (Check all that apply.) [help]

☐ Private
☐ Federal
☒ Publicly owned (**state**, county, city, special districts like schools, ports, etc.)
☐ Tribal
☐ Department of Natural Resources (DNR) – managed aquatic lands (Complete JARPA Attachment E)

5b. Street Address (Cannot be a PO Box. If there is no address, provide other location information in 5p.) [help]

11285 Spirit Lake Highway

5c. City, State, Zip (If the project is not in a city or town, provide the name of the nearest city or town.) [help]

Toutle, WA 98649

5d. County [help]

Cowlitz

5e. Provide the section, township, and range for the project location. [help]

¼ Section	Section	Township	Range
	05, 08, 09	10 North	02 East

5f. Provide the latitude and longitude of the project location. [help]

- Example: 47.03922 N lat. / -122.89142 W long. (Use decimal degrees - NAD 83)

46.372 N lat. / -122.577 W long.

5g. List the tax parcel number(s) for the project location. [help]

- The local county assessor's office can provide this information.

EL0801004, EL0901004

5h. Contact information for all adjoining property owners. (If you need more space, use JARPA Attachment C.) [help]

Name	Mailing Address	Tax Parcel # (if known)
WA State Dept Fish/Wildlife	210 11th Ave Se Olympia, WA 98501	EL0801004, EL0901004
Weyerhauser Timber Holdings	PO Box 190 Castle Rock, WA 98611	EL0401001, EL0501001, EL0801001, EL0901001

5i. List all wetlands on or adjacent to the project location. [help]

There are 2 wetlands on or adjacent to the Project Area. Their characteristics are listed in the table below.

Name	Associated Surface Water	Latitude1	Longitude1	Type2	Size (square feet)	Size (acres)
WL-1	North Fork Toutle River	46.372878	-122.578217	PEM	169	0.004
WL-2	N/A	46.372690	-122.578179	PEM	560	0.013
Total	--	--	--	--	**729**	**0.017**

Additional details regarding these wetlands are provided in Attachment A – Wetland and Ordinary High Water Mark Delineation Report.

5j. List all waterbodies (other than wetlands) on or adjacent to the project location. [help]

North Fork Toutle River

5k. Is any part of the project area within a 100-year floodplain? [help]

☒ Yes ☐ No ☐ Don't know

5l. Briefly describe the vegetation and habitat conditions on the property. [help]

The Project Area includes the North Fork Toutle River and other non-wetland waters (including one drainage pond and four unnamed ponds), and surrounding wetland, riparian, and upland habitats. The river ranges between 150 and 250 feet wide in the Project Area, with primarily sand-sized or smaller substrate. Fringe wetland vegetation lines both banks of the river. Vegetation frequently noted along wetlands in the Project Area include:

- Bentgrass
- California blackberry (*Rubus ursinus*)
- Common Rush (*Juncus effusus*)
- Common Spikerush (*Eleocharis palustris*)
- Field Horsetail
- Red Alder
- Reed Canary Grass (*Phalaris arundinacea*)
- Sitka Willow (*Salix sitchensis*)
- Slough Sedge

5m. Describe how the property is currently used. [help]

The property is currently used as a trap and haul fish collection facility (FCF), where adult fish, migrating upstream, are blocked from further upstream travel by a fish barrier, diverted into the FCF, and are collected at the site and transported further upstream to release sites in tributaries. Current features at the site include:

- A fish barrier and overflow spillway with associated stilling basins and upstream revetments. (Active)
- A water supply system including an intake with trashrack, weir box, sediment sluice, and associated gates and piping to deliver water to the fish ladder, collection pool, and attraction water diffuser. (Out of commission)
- A weir and orifice fish ladder with three entrances. (Out of commission)
- Fish collection facilities, including a collection pool and fish lock with crowders, truck fill and associated motors, pumps, gates, and hoists. (Active)
- An electrical system for facility operation. (Out of commission)
- A residence for the FCF operator. (Active)

5n. Describe how the adjacent properties are currently used. [help]

Otto Cook Road connects the FCF to State Route 504, Spirit Lake Highway, to the south of the Project Area. The parcels to the north and west of the Project Area are owned by Weyerhauser Timber Holdings. Three of these four parcels owned by Weyerhauser have logging planned in the next one to five years. To the east, and further upstream of the Project Area, the United States Army Corps of Engineers constructed and owns the North Fork Toutle River Sediment Retention Structure.

5o. Describe the structures (above and below ground) on the property, including their purpose(s) and current condition. [help]

As mentioned within the response to 5m, current structures within the Project Area include a water supply system, a weir and fish ladder, fish collection facilities, an electrical system, and a residence. While some of these facilities remain in working condition, the FCF currently does not effectively collect and safely pass returning adult fishes. Poor fish collection and passage efficiency are due to:

- Only a fraction of the design flow discharging from ladder entrances because the attraction water supply is no longer used due to routine plugging from sediment and debris. The lack of attraction water also causes sub-optimal conditions within the ladder.
- Mechanical fish collection and sorting systems which are not in usable working condition, leading to hand sorting which can result in stress, injury, and mortality to fish.

The structural features of the FCF are in good working condition. These include the fish barrier structure, spillway and fish collection facilities. Civil features such as the access road and perimeter fencing also remain in good working condition.

The mechanical and electrical systems are in poor or inoperable condition. These include the components impacted by sediment build-up like the water supply and discharge systems, sediment sluice and the weir and fish ladder, as well as components that have been seldomly used for 15+ years like the electrical equipment, control panels and sensors.

5p. Provide driving directions from the closest highway to the project location, and attach a map. [help]

From Castle Rock, follow WA-504 E/Mt. St. Helens Way NE/Spirit Lake Highway east for approximately 20 miles. Turn left onto Otto Cook Road.

Part 6–Project Description

6a. Briefly summarize the overall project. You can provide more detail in 6b. [help]

The Proposed Action proposes the following upgrades to the FCF:

- A lowered notch with a gate at the barrier to provide sufficient head for gravity water supply to the FCF without trapping bedload.
- Provide underflow gate, 8 feet wide by 4 feet tall
- Provide piers to support the control structure
- An expanded intake and a weir box with:
  - A coarse trashrack at the intake.
  - A fine trashrack upstream of the auxiliary water supply (AWS) channel.
  - Juvenile fish exclusion screens upstream of the fish ladder water supply channel.
  - Equipment for debris management at the trashracks and screens.
  - Sediment sluicing capability upstream of the fine trashrack.
  - Provide porosity control panels just downstream of the juvenile exclusion screens
  - Provide automated trash rake for coarse and fine trashracks
  - Provide automated cleaner for juvenile fish exclusion screen
  - Replace all water control gates in the weir box
  - Provide new sluice pipe from weir box; assume open channel with grating above for landward side, connect to old pipe on riverward side if condition allows.
- A modified diffuser with new, Pacific lamprey-compliant spaced bars, dedicated hoists, a header pipe and dedicated flushing channels.
- A new false floor presort pool, crowder, and Archimedes screw lift (ASL) to collect and lift fish to an elevated sorting and truck transfer facility.
- A lowered entrance pool, narrowed fishway entrance slots to achieve criteria head drop, and additional weirs in the fish ladder.
- Removal of the actively failing remnant shotcrete in the downstream channel and channel grading associated with the pilot channel grading.
- Dedicated air supply at the trashracks, fish screens, presort pool and diffuser, plus air attachment ports throughout the facility.
- Features for ease of operations and maintenance, e.g., a new maintenance building with on-site toilet.
- Stormwater upgrades, passive treatment then connect to existing onsite discharge pipe to Toutle River. Upgrades include Bioswale/Rain garden creation for stormwater infiltration from newly paved surfaces and potential future disposal of spent fish anesthetic water (anesthetic discharge to be permitted separately by FCF operator, Washington Department of Fish and Wildlife (WDFW), as required).

6b. Describe the purpose of the project and why you want or need to perform it. [help]

The primary purpose of the Proposed Action is to implement upgrades to the Toutle River FCF that would achieve 95 percent fish passage efficiency for all natural-origin steelhead and coho salmon that reach the existing FCF fish barrier. As discussed in the response to 5o above, the Proposed Action is needed to address inadequacies in the current fish collection and passage efficiency. The secondary purpose is to modify the FCF so that it can handle the large volume of sediment that passes from the river into the FCF.

To reach necessary fish collection and handling requirements, measures that would allow the FCF to function in the existing sediment environment are necessary. These measures aim to improve efficiency for the operators as well as reduce stress, injury and mortality for collection and transportation of fish.

The Proposed Action intends to address the following existing problems:

- Sediment accumulation which restricts intake flow during low flow periods.
- Blockage of intake trashrack by debris which restricts necessary flow rate.
- Inability to sluice sediment upstream of the water supply and attraction water diffuser channels, leading to excess sediment flowing through the FCF.
- Excessive sediment passage through the FCF, leading to excess wear and tear on mechanical and electrical equipment.
- Sediment deposition within the FCF, impacting the ability to crowd fish and supply adequate attraction water.
- Blockage of diffuser panels by sediment and debris, leading to lowered attraction water supply.

- Lack of auxiliary water impacting hydraulic conditions within entrance pool and causing poor fish attraction.
- Poor fishway entrance conditions due to degradation of the tailwater beyond the existing design's capacity.
- Partial failure of a downstream shotcrete channel liner, which skews flow exiting the stilling basin to the north, forcing fish to swim across the stilling basin to find the entrances.

6c. Indicate the project category. (Check all that apply) [help]

☐ Commercial ☐ Residential ☐ Institutional ☐ Transportation ☐ Recreational

☒ Maintenance ☒ Environmental Enhancement

6d. Indicate the major elements of your project. (Check all that apply) [help]

☐ Aquaculture	☐ Culvert	☐ Float	☐ Retaining Wall (upland)
☐ Bank Stabilization	☐ Dam / Weir	☐ Floating Home	☐ Road
☐ Boat House	☐ Dike / Levee / Jetty	☐ Geotechnical Survey	☐ Scientific Measurement Device
☐ Boat Launch	☐ Ditch	☐ Land Clearing	☐ Stairs
☐ Boat Lift	☐ Dock / Pier	☐ Marina / Moorage	☐ Stormwater facility
☐ Bridge	☐ Dredging	☐ Mining	☐ Swimming Pool
☐ Bulkhead	☐ Fence	☐ Outfall Structure	☐ Utility Line
☐ Buoy	☐ Ferry Terminal	☐ Piling/Dolphin	
☐ Channel Modification	☒ Fishway	☐ Raft	

☒ Other: Modifications to an existing FCF, including an expanded intake and weir box, upgrades to the diffuser, upgrades and replacements at the sorting handling and truck transfer, modifications to the entrance pool and fish ladder, removal of shotcrete and regrading in the downstream channel, construction of a new maintenance building, and onshore access improvements.

6e. Describe how you plan to construct each project element checked in 6d. Include specific construction methods and equipment to be used. [help]

- Identify where each element will occur in relation to the nearest waterbody.
- Indicate which activities are within the 100-year floodplain.

All elements of the Proposed Action are at least partially located within the 100-year floodplain.

Elements of the Proposed Action are broken out into the following subsections (See Figure 2-5):

Intake and Weir: The weir box is located on the south side of the North Fork Toutle River and is upstream of the spillway. The Proposed Action proposes to expand intake and a weir box with:

- A coarse trashrack at the intake.
- A fine trashrack upstream of the AWS channel.
- Juvenile fish exclusion screens upstream of the fish ladder water supply channel.
- Equipment for debris management at the trashracks and screens.
- Sediment sluicing capability upstream of the fine trashrack.
- Angled weir

Diffuser Upgrades: The Proposed Action proposes to replace the existing diffuser with a new diffuser having a clearing space of 0.75 inches between bars. This would provide porosity panels just upstream of the diffuser bars, add a new dedicated hoist for each diffuser panel, provide vanes to separate the diffuser into 4 channels, and provide air supply lines to the diffuser chamber floor.

Sorting Handling and Truck Transfer: The Proposed Action proposes a raised and covered platform for sorting and handling equipment, the replacement of the existing collection pool with pre-sort pool with a finger weir, false-floor and crowder, and gated sediment drainage pipe outlets from the lower chamber of false-floor crowder. Other proposed elements include:

- Sorting and Handling Equipment.
- Anesthetic tank (and associated bioswale for potential future spent anesthetic discharge see Stormwater section below).
- Sorting table.
- Recovery tank.
- Post-sort pool.
- Flumes and false weirs.
- Return to river pipe.
- Up to two Pacific lamprey ramps and collection boxes and associated water and power supply.
- Variable height truck loading flume which can interface with WDFW truck tanks.

The maximum depth of the excavation necessary to construct the improvements appears to be on the order of 30 feet below existing grade. The method of excavation and design of excavation support are the responsibilities of the contractor and shall conform to applicable local, state, and federal regulations. Positive control of water will be necessary to maintain stable excavations below the groundwater level. Control of groundwater is the responsibility of the contractor. The appropriate method of control will depend on actual water levels and soil types encountered as discussed in this DDR. USACE shall review / approve the contractor's proposed dewatering system prior to mobilization to the site.

Stormwater: Rain gardens are the proposed solution for water quality and flow control requirements utilizing NMFS Standard Local Operating Procedures for Endangered Species (SLOPES) requirements and adherence to applicable state, federal, and local regulations. Due to high groundwater and low infiltration rate of the existing soils, a flow through style planter (concrete non-permeable) is the preferred alternative instead of infiltrating stormwater. The planter will contain growing medium and plants to passively treat the runoff. Stormwater will then filter down to the outlet which empties directly to the Toutle River. Fish anesthetic discharge to be permitted separately by FCF operator, WDFW, as required.

Entrance Pool and Fish Ladder: The Proposed Action proposes to lower the elevation of the entrance pool and entrance pool sill. New weirs would be added, and the height of the invert of ladder and the existing weirs would be adjusted to match the new entrance pool. Finally, the entrance pool would be channelized at approach to each fish ladder entrance.

Downstream Channel: The Proposed Action proposes to remove remnant downstream shotcrete liner and regrade the river channel in the immediate vicinity. Construction activities to demolish and remove remnant shotcrete liner would follow National Marine Fisheries Service (NMFS) Reasonable and Prudent Measures (RPMs) as required per WCR-20214-1164 (NMFS BiOP for MSH SRS Project as signed Aug 2017) to "Minimize impacts from the construction of FCF modifications that require in water work." such as: use of NMFS approved (summer) in-water work windows (periods of lowest fish passage), cofferdam only the minimum area necessary, and usage of NMFS guidelines for fish capture, dewatering, fish screening, and rewatering. In addition, the construction contractor will be directed to adhere closely as feasible to the NMFS general design guidance as contained in the 2017 *Fish Habitat Response for the Seattle District Corps of Engineers Permitting of Fish Passage and Restoration action Permits in Washington State (FPRP III),* for Debris and Structure Removal as: *"..*generally removed using land-based equipment and taken to an upland disposal site… removed by lifting individual structure elements with a crane and loading them onto …trucks…For work that will be conducted from the upland, heavy equipment is used to create access routes, demolish the structures, and transport the debris to a suitable [upland] disposal site…The removal of riparian vegetation for access will be minimized.. number of temporary access roads will be minimized and roads will be designed to avoid adverse effects like creating excessive erosion…roads and trails across slopes greater than 30 percent will be avoided when feasible… No permanent roads and trails will be built. All temporary access will be removed (including gravel surfaces) and planted after project completion…Temporary Erosion and Sediment Control plan and a Spill Prevention Control and Containment plan, commensurate with the size of the project, must be prepared and carried out to prevent pollution caused by surveying or construction operations...Existing roadways or travel paths will be used whenever possible…The site will be stabilized during any significant break in work…Heavy equipment will be limited to that with the least adverse effects on the environment (e.g. minimally-sized, low ground pressure equipment, use of matting, etc.). When not in use, vehicles and equipment containing oil, fuel, and/or chemicals will be stored in a staging area located at least 150 feet from the Corps' jurisdictional boundary of wetlands and waterbodies…When conducting in-water or bank work, machine hydraulic lines will be filled with vegetable oil for the duration of the project to minimize impacts of potential spills and leaks…Spill prevention and clean-up kits will be on site when heavy equipment is operating within 25 feet of the water…To the extent feasible, work requiring use of heavy equipment will be completed by working from the top of the bank (i.e. landward of the OHWM or extreme high tide line)…Equipment shall be checked daily for leaks…Within 7 calendar days from project completion, any disturbed bank and riparian areas shall be protected using native vegetation or other erosion control measures as appropriate.. If native riparian vegetation is disturbed it will be replanted with native herbaceous and/or woody vegetation after project completion… Fencing will be installed as necessary to prevent access to revegetated sites by livestock, beavers or unauthorized persons. Measures shall be taken to ensure that no petroleum products, hydraulic fluid, fresh cement, sediments, sediment-laden water, chemicals, or any other toxic or deleterious materials are allowed to enter or leach into waters of the U.S…When working in-water, some turbidity monitoring may be required, subject to the [Corps permit requirements via pending] CWA section 401 certification.

The existing shotcrete apron will be demolished in-place to break concrete pieces to have maximum particle dimensions of about 6-inches. Then, the broken shotcrete will be covered with supplemental subgrade-stabilizing quarry spalls. The quarry spalls will be compacted into the broken concrete with several passes of a mid- to large sized roller compactor, and the quarry spalls will be overlain by well-graded crushed rock sized to bridge the mixture of quarry spalls. The surficial well-graded crushed rock will be moisture conditioned and compacted in lifts with several passes of a roller compactor using static rolling to create a stable, level surface for sorting, loading, and transportation operations.

New Maintenance Building with On-site Toilet

A Maintenance Building will be provided. The Maintenance Building is 20'x36' (nominal) and is a pre-engineered metal building on a concrete slab. The wall panels and roof panels are insulated metal panels (IMPs), with a thickness of 4" each. The building has two personnel doors and one 8'x10' overhead door. A single-occupancy bathroom is located within the building, with access only from the outside. The bathroom is fully accessible, with a toilet and sink. Domestic water and sanitary sewer pipes will need to be constructed to the facility. Domestic water will be obtained via the existing potable wellhead onsite. Due to the grade difference, a sewage pump will need to be installed so the sewer line can connect to the existing septic tank and drain field adjacent to the existing residence onsite.

Temporary Fish Collection Facility

To collect fish during construction, a temporary fish collection facility (TFCF) will be installed. It is anticipated that the TFCF will be constructed from a combination of concrete foundation elements and a structural steel superstructure for the collection box. This structure will be designed to resist a combination of operational live loads (occupancy and mechanical system loads) natural hazard loadings such as hydrodynamic loadings, hydrostatic loadings, debris impact loads, and seismic loadings. The concrete foundation elements will be precast concrete sections to facilitate installation into the river via crane. These elements will be anchored to the stilling basin concrete apron with grouted threaded rods. These rods will be removed above the apron surface with the portion below abandoned in place. The structural steel superstructure will be pre-fabricated and craned in place to minimize the required in water work. It will be coated with a system that is:appropriate for in water use, compatible with the sediment load in the river, and appropriate for the anticipated duration of use. The structural steel superstructure will include locations to mount mechanical systems (gates, davit cranes, ladders, etc). It will also include a wrap-around access platform for staff operating the facility. Access to the collection box will be provided by a floating platform spanning from the collection box to the existing shotcrete apron. A steel cable system will support the guide net across the river. This cable will be anchored on the north side of the river with either dead man anchors or pile supports. The cable will be attached to the collection box at its other end. The cable will support a pulley system that allows the guide nets coverage of the river to be adjusted.

Cofferdam

A cofferdam will be constructed to complete construction elements. Location and size of cofferdam is not known at this time and will be determined by the contractor. Approximate locations are included in the figures. Cofferdam will be the minimum size necessary to complete construction activities.

6f. What are the anticipated start and end dates for project construction? (Month/Year) [help]

- If the project will be constructed in phases or stages, use JARPA Attachment D to list the start and end dates of each phase or stage.

Start Date: June 2027 End Date: December 2030 ☐ See JARPA Attachment D

6g. Fair market value of the project, including materials, labor, machine rentals, etc. [help]

The total cost of the Proposed Action is estimated at $74 million.

6h. Will any portion of the project receive federal funding? [help]

- **If yes**, list each agency providing funds.

☒ Yes ☐ No ☐ Don't know

Part 7–Wetlands: Impacts and Mitigation

☒ Check here if there are wetlands or wetland buffers on or adjacent to the project area.
(If there are none, skip to Part 8.) [help]

7a. Describe how the project has been designed to avoid and minimize adverse impacts to wetlands. [help]

☐ Not applicable

Project elements have been designed to avoid wetlands. The USACE would seek and obtain a 401 Water Quality Certification, which includes a wetland impact assessment, prior to any ground disturbance activity that may result in a discharge. No wetlands will be filled as part of the proposed action, therefore, no mitigation is currently proposed. Should onsite conditions require adjustments to the proposed action that could impact wetlands, the USACE would evaluate the mitigation sequence of avoidance, minimization, and compensation. If significant changes to the proposed action are anticipated that could cause effects to water quality or wetlands that have not been disclosed, USACE will contact the State as soon as possible.

7b. Will the project impact wetlands? [help]

☐ Yes ☒ No ☐ Don't know

7c. Will the project impact wetland buffers? [help]

☐ Yes ☒ No ☐ Don't know

7d. Has a wetland delineation report been prepared? [help]

- **If Yes**, submit the report, including data sheets, with the JARPA package.

☒ Yes ☐ No See Attachment B

7e. Have the wetlands been rated using the Western Washington or Eastern Washington Wetland Rating System? [help]

- **If Yes**, submit the wetland rating forms and figures with the JARPA package.

☐ Yes ☒ No ☐ Don't know

7f. Have you prepared a mitigation plan to compensate for any adverse impacts to wetlands? [help]

- **If Yes**, submit the plan with the JARPA package and answer 7g.
- **If No, or Not applicable**, explain below why a mitigation plan should not be required.

☐ Yes ☒ No ☐ Don't know

No wetlands or wetland buffers will be impacted by the proposed action. The proposed action provides fish passage benefits to ESA species and the federal portion of the FCF improvements would not require wetland mitigation based on the current designs.

7g. Summarize what the mitigation plan is meant to accomplish, and describe how a watershed approach was used to design the plan. [help]

No wetland mitigation is proposed as no wetlands will be impacted by the proposed action.

7h. Use the table below to list the type and rating of each wetland impacted, the extent and duration of the impact, and the type and amount of mitigation proposed. Or if you are submitting a mitigation plan with a similar table, you can state (below) where we can find this information in the plan. [help]

Activity (fill, drain, excavate, flood, etc.)	Wetland Name[1]	Wetland type and rating category[2]	Impact area (sq. ft. or Acres)	Duration of impact[3]	Proposed mitigation type[4]	Wetland mitigation area (sq. ft. or acres)

[1] If no official name for the wetland exists, create a unique name (such as "Wetland 1"). The name should be consistent with other project documents, such as a wetland delineation report.
[2] Ecology wetland category based on current Western Washington or Eastern Washington Wetland Rating System. Provide the wetland rating forms with the JARPA package.
[3] Indicate the days, months or years the wetland will be measurably impacted by the activity. Enter "permanent" if applicable.
[4] Creation (C), Re-establishment/Rehabilitation (R), Enhancement (E), Preservation (P), Mitigation Bank/In-lieu fee (B)

Page number(s) for similar information in the mitigation plan, if available: _____

7i. For all filling activities identified in 7h, describe the source and nature of the fill material, the amount in cubic yards that will be used, and how and where it will be placed into the wetland. [help]

No wetlands within the Project Area will be filled as part of the proposed action.

7j. For all excavating activities identified in 7h, describe the excavation method, type and amount of material in cubic yards you will remove, and where the material will be disposed. [help]

No excavation of wetlands within the Project Area is proposed.

Part 8–Waterbodies (other than wetlands): Impacts and Mitigation

In Part 8, "waterbodies" refers to non-wetland waterbodies. (See Part 7 for information related to wetlands.) [help]

☒ Check here if there are waterbodies on or adjacent to the project area. (If there are none, skip to Part 9.)

8a. Describe how the project is designed to avoid and minimize adverse impacts to the aquatic environment. [help]

☐ Not applicable

To minimize impacts to the aquatic environment, the USACE has incorporated best management practices, including avoidance and minimization, into the design considerations for proposed improvements. USACE will seek and obtain a 401 Water Quality Certification prior to any ground disturbance activity that may result in a discharge. During the Proposed Action, BMPs would be implemented to avoid and minimize adverse impacts to waterbodies. These include dewatering through cofferdams. These cofferdams would be isolated features on the southern bank of the river, while migrating fish and the river could bypass them to the north. In addition, when conducting in-water or bank work, machine hydraulic lines will be filled with vegetable oil for the duration of the project to minimize impacts of potential spills and leaks; Spill prevention and erosion control plans to be required, limited or no heavy equipment usage below OHWM, limited riparian disturbances, use of erosion control BMPs, etc.

8b. Will your project impact a waterbody or the area around a waterbody? [help]

☒ Yes ☐ No

8c. Have you prepared a mitigation plan to compensate for the project's adverse impacts to non-wetland waterbodies? [help]

- **If Yes**, submit the plan with the JARPA package and answer 8d.
- **If No, or Not applicable,** explain below why a mitigation plan should not be required.

☐ Yes ☒ No ☐ Don't know

The Proposed Action would not result in permanent fill in the North Fork Toutle River.

8d. Summarize what the mitigation plan is meant to accomplish. Describe how a watershed approach was used to design the plan.

- If you already completed 7g you do not need to restate your answer here. [help]

N/A

8e. Summarize impact(s) to each waterbody in the table below. [help]

Activity (clear, dredge, fill, pile drive, etc.)	Waterbody name[1]	Impact location[2]	Duration of impact[3]	Amount of material (cubic yards) to be placed in or removed from waterbody	Area (sq. ft. or linear ft.) of waterbody directly affected
Fill and removal	North Fork Toutle River	Shotcrete liner and channel in vicinity	Permanent	2,525 cubic yards *overestimated to account for dynamic sediment conditions at the action location	0.18 acres *overestimated to account dynamic sediment conditions at the action location
Fill	North Fork Toutle River	Shotcrete liner and temporary road	Temporary	2375 *fill at shotcrete location to install temporary access road, overestimated as final design will be determined by contractor	.18 acres
Fill	North Fork Toutle River	Shotcrete liner	Permanent	2200 *fill at shotcrete location, overestimated as final design will be determined by contractor	.18 acres

Removal and subsequent fill	North Fork Toutle River	FCF weirbox	Permanent	24025 *material to be excavated and subsequently refilled. Overestimated to account for unknown existing conditions and possible need for deeper excavation. Value also includes areas to be excavated outside of the OHWM, but adjacent to the river.	.3 acres *value is only for activities below OHWM
Cofferdams	North Fork Toutle River	In-water in the stilling basin, at the shotcrete removal site	Temporary	To be determined by construction contractor	To be determined by construction contractor
Temporary Fish Collection Facility	North Fork Toutle River	Stilling basin	Temporary	To be determined by contractor	To be determined by contractor

[1] If no official name for the waterbody exists, create a unique name (such as "Stream 1") The name should be consistent with other documents provided.
[2] Indicate whether the impact will occur in or adjacent to the waterbody. If adjacent, provide the distance between the impact and the waterbody and indicate whether the impact will occur within the 100-year flood plain.
[3] Indicate the days, months or years the waterbody will be measurably impacted by the work. Enter "permanent" if applicable.

8f. For all activities identified in 8e, describe the source and nature of the fill material, amount (in cubic yards) you will use, and how and where it will be placed into the waterbody. [help]

Cofferdams will be made of metal sheeting, or approved construction contractor paneling, and will be installed where in-water construction takes place at the intake and the stilling basin. These materials will be temporary, and the size of the cofferdams will be determined on-site to safely execute the Proposed Action while minimizing impacts to habitat/species/water quality. No loose fill material is to be introduced into the waterway.

Temporary fish collection facility materials will be temporary. It is anticipated that the temporary FCF will be constructed from a combination of concrete foundation elements and a structural steel superstructure for the collection box. This structure will be designed to resist a combination of operational live loads (occupancy and mechanical system loads) natural hazard loadings such as hydrodynamic loadings, hydrostatic loadings, debris impact loads, and seismic loadings. The concrete foundation elements will be precast concrete sections to facilitate installation into the river via crane. These elements will be anchored to the stilling basin concrete apron with grouted threaded rods. These rods will be removed above the apron surface with the portion below abandoned in place. The structural steel superstructure will be pre-fabricated and craned in place to minimize the required in water work. It will be coated with a system that is: appropriate for in water use, compatible with the sediment load in the river, and appropriate for the anticipated duration of use. The structural steel superstructure will include locations to mount mechanical systems (gates, davit cranes, ladders, etc). It will also include a wrap-around access platform for staff operating the facility. Access to the collection box will be provided by a floating platform spanning from the collection box to the existing shotcrete apron. A steel cable system will support the guide net across the river. This cable will be anchored on the north side of the river with either dead man anchors or pile supports. The cable will be attached to the collection box at its other end. The cable will support a pulley system that allows the guide nets coverage of the river to be adjusted.

Fill material at the shotcrete and subsequent temporary road as well as at the FCF weirbox will be native material that was excavated or clean material certified for use. Material will include material of similar attributes as native soils (similar size and type), quarry spalls, and crushed rock.

8g. For all excavating or dredging activities identified in 8e, describe the method for excavating or dredging, type and amount of material you will remove, and where the material will be disposed. [help]

Dredge material consists of 2,525 cubic yards of lahar and sediments over a 0.18-acre area which would be disposed of at a designated dredged material storage facility along the Toutle River. This material would be dredged by isolating the features with cofferdams and with shoreline equipment. If affected by construction of the Proposed Action, the shoreline, bank wetlands, riffle and pool complexes would be rehabilitated. Removal of material at the FCF weirbox consists of 24,025 cubic yards of lahar and sediments and will be either disposed of at a designated facility or reused for backfill at the same location. material to be excavated and subsequently refilled near the weirbox structure. Fill is overestimated as it includes areas to be excavated outside of the OHWM, but adjacent to the river and structures that have wetted flow.

8h. Have you prepared a Water Quality Monitoring Plan (WQMP) for all in-water work (below ordinary high water), over water work or discharges to waters of the state?

☒ Yes ☐ No

If NO describe the monitoring that you will be conducting including parameters, equipment and locations, or explain why monitoring will not be necessary. [help]

A Water Quality Monitoring Plan (WQMP) is included in the attachments. Discharges to state waters are expected to be minimal and are accounted for within the WQMP.

Part 9–Additional Information

Any additional information you can provide helps the reviewer(s) understand your project. Complete as much of this section as you can. It is ok if you cannot answer a question.

9a. If you have already worked with any government agencies on this project, list them below. [help]

Agency Name	Contact Name	Phone	Most Recent Date of Contact
Washington Department of Fish and Wildlife	P. Frank Stevick, Environmental Planner;	(360)-742-7550	4 Dec 2025
Washington Department of Fish and Wildlife	Tom Sun, EIT, CESCL, Environmental Engineer II, Capital and Asset Management Program	360-972-5342	4 Dec 2025
Washington Department of Fish and Wildlife	George Fornes, Habitat Biologist	(360) 623-0651	28 May 2025
Washington Department of Ecology	Laurie Niewolny, Aquaculture NPDES Permit and Water Quality Specialist	360-584-8852	4 Nov 2024
Washington Department of Ecology	Loree' Randall, Federal Permitting Section Manager	360-485-2796	4 Nov 2024
Washington Department of Ecology	Blake Nelson, Solid Waste Management;	360-791-4755	25 Feb 2025
Cowlitz County Building & Planning	Cody Crytzer, CFM | Senior Environmental Planner	(360) 577-3052 x6676	24 July 2025
National Marine Fisheries Service	Tom Hausmann, Biologist, Washington Coast, Lower Columbia River Branch	503-231-2315 or tom.hausmann@noaa.gov	14 May 2025

9b. Are any of the wetlands or waterbodies identified in Part 7 or Part 8 of this JARPA on the Washington Department of Ecology's 303(d) List? [help]

- **If Yes,** list the parameter(s) below.
- If you don't know, use Washington Department of Ecology's Water Quality Assessment tools at: https://ecology.wa.gov/Water-Shorelines/Water-quality/Water-improvement/Assessment-of-state-waters-303d.

☒ Yes ☐ No

According to the Washington Department of Ecology, the Project Area contains portions of the North Fork Toutle River listed as a Category 5 303(d) waterbody. The parameter listed for this segment is temperature, and the Listing ID is 93975 (WDOE, 2018).

9c. What U.S. Geological Survey Hydrological Unit Code (HUC) is the project in? [help]

- Go to http://cfpub.epa.gov/surf/locate/index.cfm to help identify the HUC.

The Proposed Project is located in the Middle North Fork Toutle River, with a HUC code of 170800050504.

9d. What Water Resource Inventory Area Number (WRIA #) is the project in? [help]

- Go to https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-availability/Watershed-look-up to find the WRIA #.

The Proposed Project is located in WRIA #26.

9e. Will the in-water construction work comply with the State of Washington water quality standards for turbidity? [help]

- Go to https://ecology.wa.gov/Water-Shorelines/Water-quality/Freshwater/Surface-water-quality-standards/Criteria for the standards.

☒ Yes ☐ No ☐ Not applicable

9f. If the project is within the jurisdiction of the Shoreline Management Act, what is the local shoreline environment designation? [help]

- If you don't know, contact the local planning department.
- For more information, go to: https://ecology.wa.gov/Water-Shorelines/Shoreline-coastal-management/Shoreline-coastal-planning/Shoreline-laws-rules-and-cases.

☐ Urban ☐ Natural ☐ Aquatic ☐ Conservancy ☒ Other: The SMA does not apply to the USACE construction activity.

9g. What is the Washington Department of Natural Resources Water Type? [help]

- Go to http://www.dnr.wa.gov/forest-practices-water-typing for the Forest Practices Water Typing System.

☒ Shoreline ☐ Fish ☐ Non-Fish Perennial ☐ Non-Fish Seasonal

9h. Will this project be designed to meet the Washington Department of Ecology's most current stormwater manual? [help]

- **If No**, provide the name of the manual your project is designed to meet.

☒ Yes ☐ No

Name of manual: 2024 Stormwater Management Manual for Western Washington

9i. Does the project site have known contaminated sediment? [help]

- **If Yes**, please describe below.

☐ Yes ☒ No

9j. If you know what the property was used for in the past, describe below. [help]

The Toutle River FCF was constructed in 1989. Prior to 1989, the North Fork Toutle River flowed without the FCF, and no ancillary support facilities existed alongside the river.

9k. Is the project located in or adjacent to a designated state or federal contaminated site or clean-up site. (e.g. MTCA or CERCLA)?

- **If Yes**, provide any additional details below.

☐ Yes ☒ No

9l. Has a cultural resource (archaeological) survey been performed on the project area? [help]

- **If Yes**, attach it to your JARPA package.

☒ Yes ☐ No

9m. Name each species listed under the federal Endangered Species Act that occurs in the vicinity of the project area or might be affected by the proposed work. [help]

USFWS:

Endangered Species:

- Gray Wolf (*Canis lupus*)

Threatened Species:

- Marbled Murrelet (*Brachyramphus marmoratus*)
- Yellow-billed Cuckoo (*Coccyzus americanus*)
- Bull Trout (*Salvelinus confluentus*)

Proposed Species:

- Monarch Butterfly (*Danaus plexippus*)
- Suckley's Cuckoo Bumble Bee (*Bombus suckleyi*)

NMFS:

Threatened Species:

- Lower Columbia River steelhead (*Oncorhynchus mykiss*)
- Lower Columbia River coho salmon (*O. kisutch*)
- Lower Columbia River Chinook (*O. tshawytscha)*
- Columbia River chum salmon (*O. keta*)

9n. Name each species or habitat on the Washington Department of Fish and Wildlife's Priority Habitats and Species List that might be affected by the proposed work. [help]

Species:

- Chinook
- Coho
- Cutthroat
- Fall Chinook
- Fall Chum
- Northern Spotted Owl
- Rainbow Trout
- Resident Coastal Cutthroat
- Rocky Mountain Elk
- Spring Chinook
- Steelhead
- Summer Steelhead
- Western Toad
- Winter Steelhead

Habitat

- Riverine

Part 10–SEPA Compliance and Permits

Use the resources and checklist below to identify the permits you are applying for.

- Online Project Questionnaire at http://apps.oria.wa.gov/opas/.
- Governor's Office for Regulatory Innovation and Assistance at (800) 917-0043 or help@oria.wa.gov.
- For a list of addresses to send your JARPA to, click on agency addresses for completed JARPA.

10a. Compliance with the State Environmental Policy Act (SEPA). (Check all that apply.) [help] **N/A – Federal project subject to NEPA.**

- For more information about SEPA, go to **Error! Hyperlink reference not valid.**https://ecology.wa.gov/regulations-permits/SEPA-environmental-review.

☐ A copy of the SEPA determination or letter of exemption is included with this application.

☐ A SEPA determination is pending with ___ (lead agency). The expected decision date is ___.

☐ I am applying for a Fish Habitat Enhancement Exemption. (Check the box below in 10b.) [help]

☐ This project is exempt (choose type of exemption below).

☐ Categorical Exemption. Under what section of the SEPA administrative code (WAC) is it exempt? _____

☐ Other: _____

☒ SEPA is pre-empted by federal law.

10b. Indicate the permits you are applying for. (Check all that apply.) [help]

LOCAL GOVERNMENT

Local Government Shoreline permits: N/A

☐ Substantial Development ☐ Conditional Use ☐ Variance

☐ Shoreline Exemption Type (explain): The local government is not authorized to impose shoreline permit requirements on USACE. Concurrence from Cowlitz County Building & Planning Planner, Cody Crytzer, via email coordination that no shoreline review is required.

Other City/County permits:

☐ Floodplain Development Permit ☐ Critical Areas Ordinance

STATE GOVERNMENT

Washington Department of Fish and Wildlife: N/A

☐ Hydraulic Project Approval (HPA) ☐ Fish Habitat Enhancement Exemption – Attach Exemption Form

The state Hydraulic Code, and HPA requirements do not apply to the USACE construction activity. Concurrence from WDFW Habitat Biologist, George Fornes, via email coordination that no HPA is required.

Washington Department of Natural Resources: N/A

☐ Aquatic Use Authorization

Complete JARPA Attachment E and submit a check for $25 payable to the Washington Department of Natural Resources. **Do not send cash.**

Washington Department of Ecology:

☒ Section 401 Water Quality Certification

☐ Authorization to impact waters of the state, including wetlands (Check this box if the proposed impacts are to waters not subject to the federal Clean Water Act)

FEDERAL AND TRIBAL GOVERNMENT

United States Department of the Army (U.S. Army Corps of Engineers): N/A

☐ Section 404 (discharges into waters of the U.S.) ☐ Section 10 (work in navigable waters)

United States Coast Guard: N/A

For projects or bridges over waters of the United States, contact the U.S. Coast Guard at:

☐ Bridge Permit: D13-SMB-D13-BRIDGES@uscg.mil

☐ Private Aids to Navigation (or other non-bridge permits): D13-SMB-D13-PATON@uscg.mil

United States Environmental Protection Agency: N/A

☐ Section 401 Water Quality Certification (discharges into waters of the U.S.) on tribal lands where tribes do not have treatment as a state (TAS)

Tribal Permits: (Check with the tribe to see if there are other tribal permits, e.g., Tribal Environmental Protection Act, Shoreline Permits, Hydraulic Project Permits, or other in addition to CWA Section 401 WQC) **N/A**

☐ Section 401 Water Quality Certification (discharges into waters of the U.S.) where the tribe has treatment as a state (TAS).

Part 11–Authorizing Signatures

Signatures are required before submitting the JARPA package. The JARPA package includes the JARPA form, project plans, photos, etc. [help]

11a. Applicant Signature (required) [help]

I certify that to the best of my knowledge and belief, the information provided in this application is true, complete, and accurate. I also certify that I have the authority to carry out the proposed activities, and I agree to start work only after I have received all necessary permits.

I hereby authorize the agent named in Part 3 of this application to act on my behalf in matters related to this application. JE (on behalf of AG (initial)

By initialing here, I state that I have the authority to grant access to the property. I also give my consent to the permitting agencies entering the property where the project is located to inspect the project site or any work related to the project. JE (on behalf of AG (initial)

Jennifer Elsken (on behalf of Amy Gibbons)	ELSKEN.JENNIFER.LYNN.1284448614 Digitally signed by ELSKEN.JENNIFER.LYNN.1284448614 Date: 2026.02.24 15:29:47 -08'00'	2/24/2026
Applicant Printed Name	Applicant Signature	Date

11b. Authorized Agent Signature [help]

I certify that to the best of my knowledge and belief, the information provided in this application is true, complete, and accurate. I also certify that I have the authority to carry out the proposed activities and I agree to start work only after all necessary permits have been issued.

Audrey Murray		2/24/2026
Authorized Agent Printed Name	Authorized Agent Signature	Date

11c. Property Owner Signature (if not applicant) [help]

Not required if project is on existing rights-of-way or easements (provide copy of easement with JARPA).

I consent to the permitting agencies entering the property where the project is located to inspect the project site or any work. These inspections shall occur at reasonable times and, if practical, with prior notice to the landowner.

Property Owner Printed Name	Property Owner Signature	Date

18 U.S.C §1001 provides that: Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly falsifies, conceals, or covers up by any trick, scheme, or device a material fact or makes any false, fictitious, or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years or both.

If you require this document in another format, contact the Governor's Office for Regulatory Innovation and Assistance (ORIA) at (800) 917-0043. People with hearing loss can call 711 for Washington Relay Service. People with a speech disability can call (877) 833-6341. ORIA publication number: ORIA-16-011 rev. 09/2018

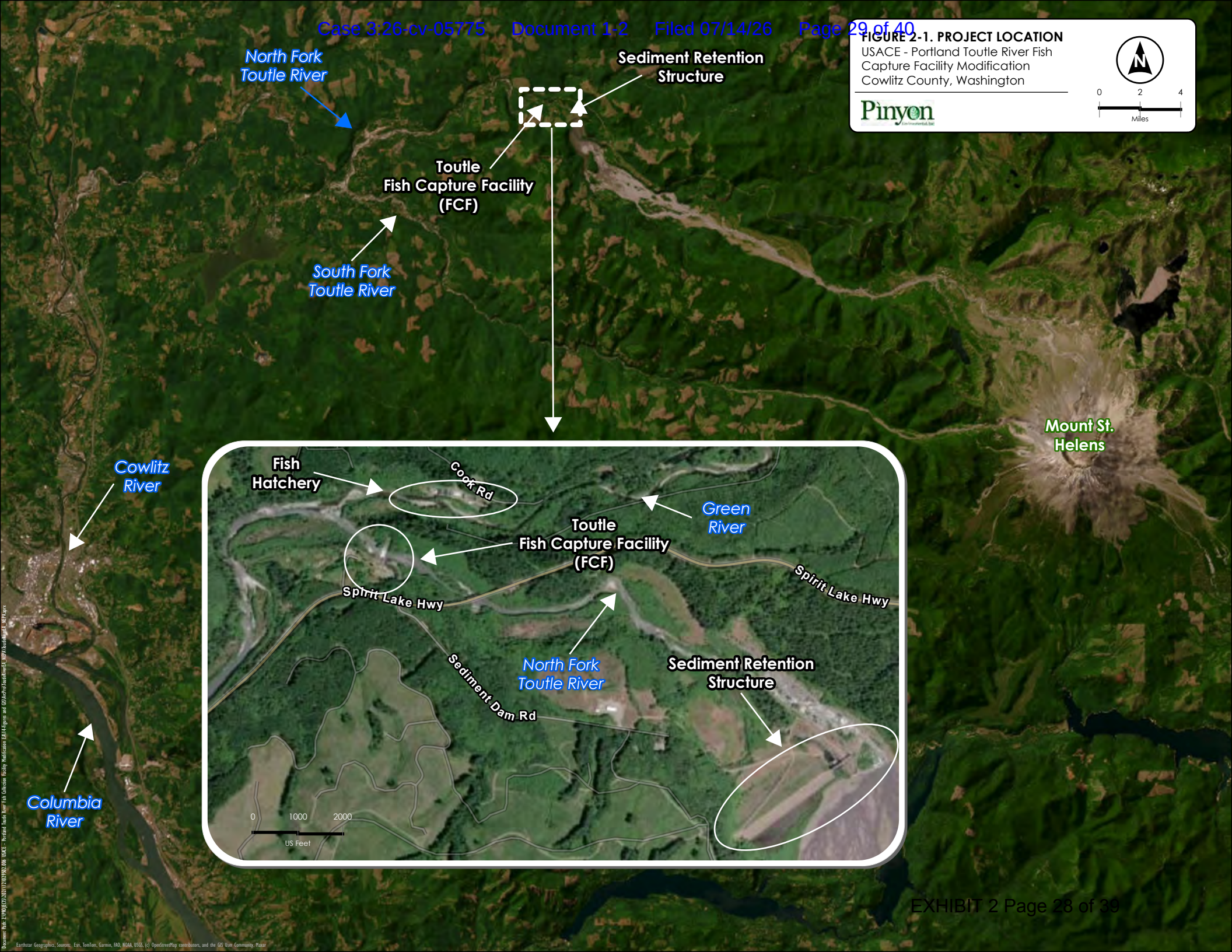


FIGURE 2-1. PROJECT LOCATION
USACE - Portland Toutle River Fish Capture Facility Modification
Cowlitz County, Washington

Pinyon

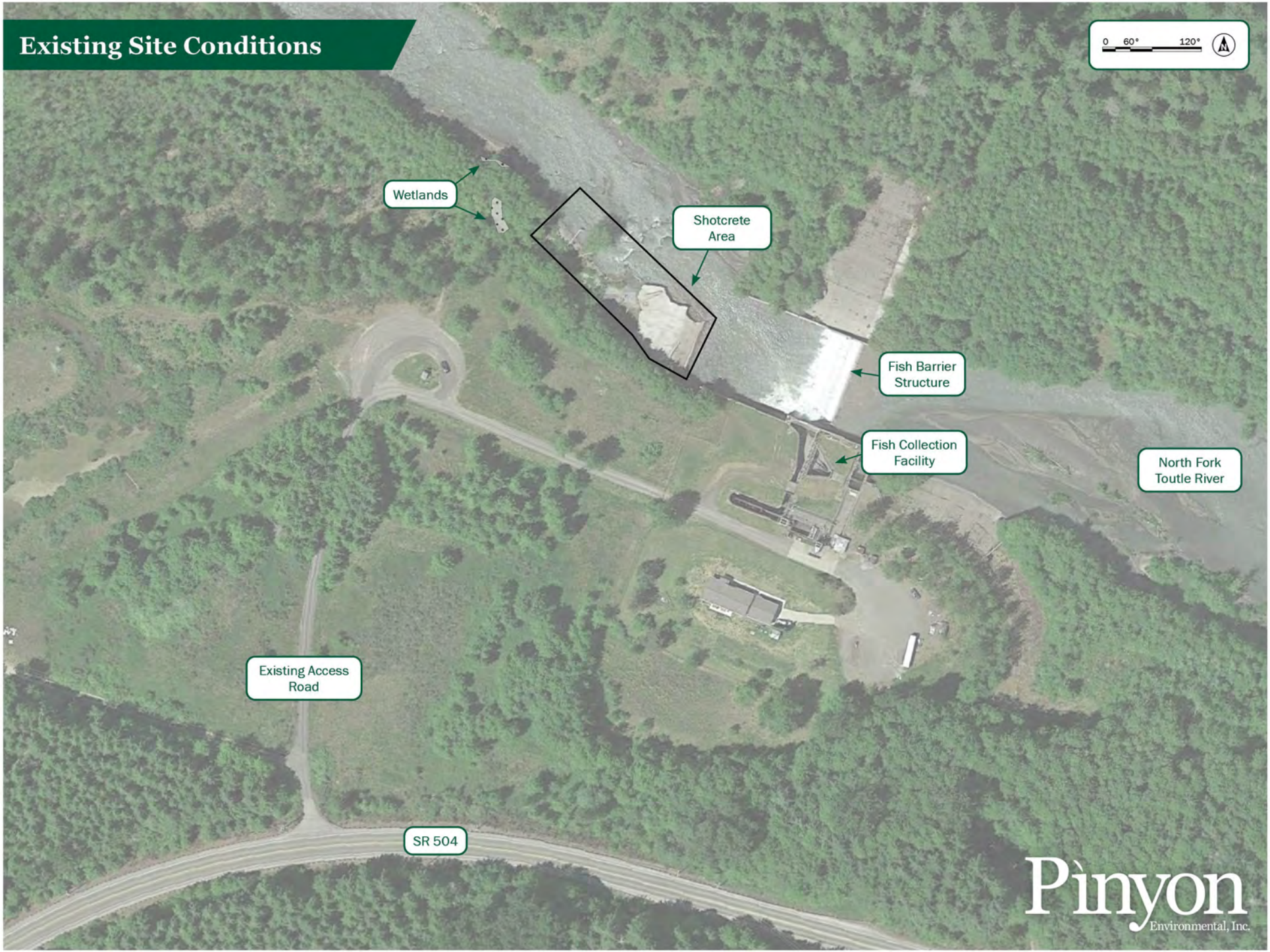
N

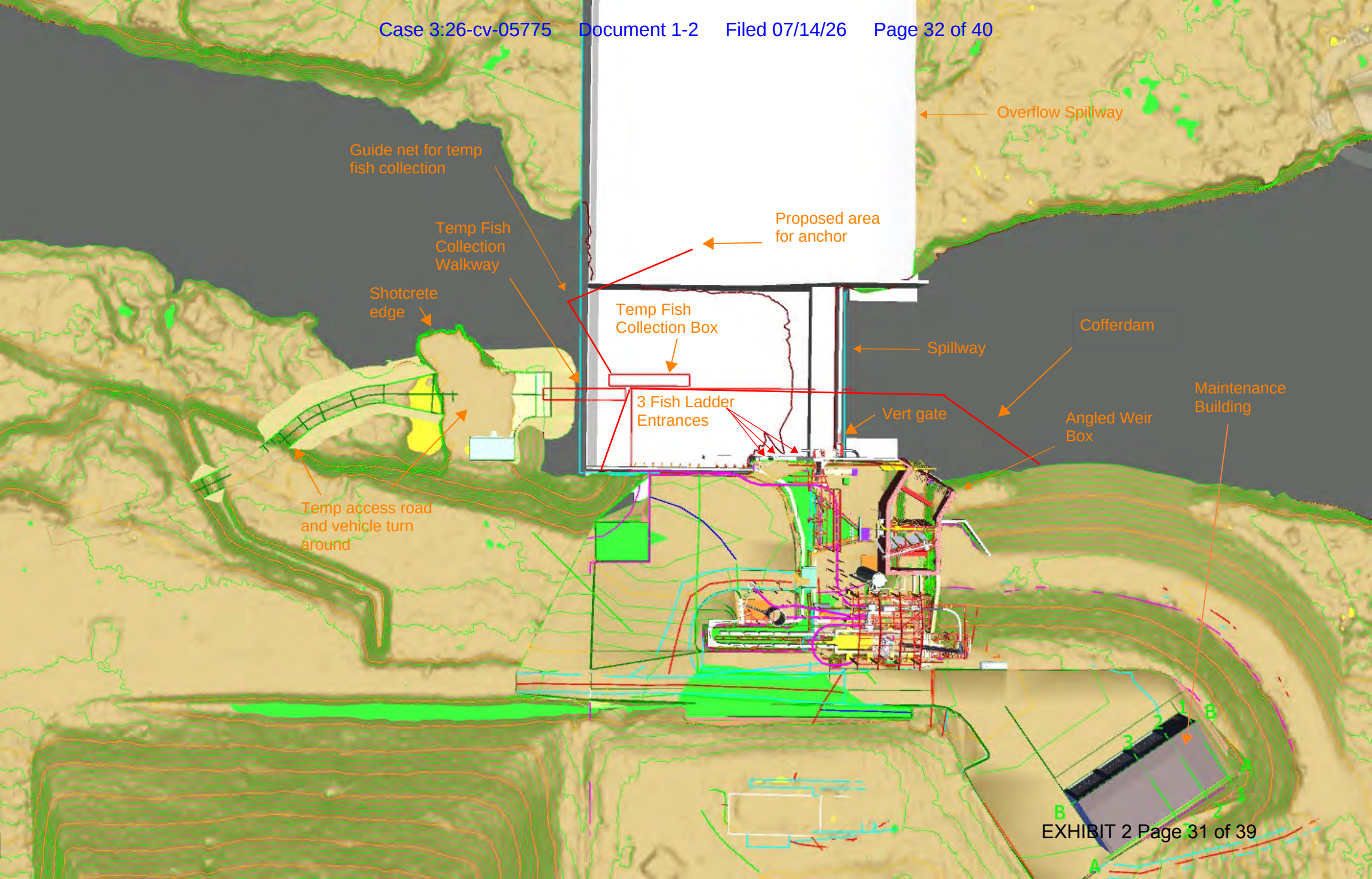
0 2 4
Miles

FIGURE 2-2. AERIAL VIEW OF FISH CAPTURE FACILITY
USACE - Portland Toutle River Fish Capture Facility Modification
Cowlitz County, Washington

0 50 100 US Feet

Pinyon


Existing Site Conditions
0 60' 120'
Wetlands
Shotcrete Area
Fish Barrier Structure
Fish Collection Facility
North Fork Toutle River
Existing Access Road
SR 504
Pinyon
Environmental, Inc.


Overflow Spillway
Guide net for temp fish collection
Proposed area for anchor
Temp Fish Collection Walkway
Shotcrete edge
Temp Fish Collection Box
Cofferdam
Spillway
3 Fish Ladder Entrances
Vert gate
Angled Weir Box
Maintenance Building
Temp access road and vehicle turn around

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, PORTLAND DISTRICT
PO BOX 2946
PORTLAND, OR 97208-2946

FEBRUARY 24, 2026

This project is part of the implementation of the U.S. Army Corps of Engineers'

_____

-

_____

-

_____

The Toutle River Fish Collection Facility is not a navigation project. There will be no adverse impact on navigation.

Temporary fish collection during construction will occur. Flow rates will be maintained at recommended levels throughout construction. USACE is consulting with National Marine Fisheries Services (NMFS) under Section 7 consultation requirements. The proposed Fish Collection Facility modifications have been specifically designed to enhance fish passage.

. The proposed project does not occur in a spawning area.

The Fish Collection Facility is a predominantly unvegetated structure and does not contain breeding areas.

No activity is scheduled to occur in areas of concentrated shellfish populations.

Material to be used for the project are limited to non-toxic materials.

The project is not located near a public water supply intake.

The proposed action includes temporary diversion of water while the coffer dam is in place. Throughout the time the coffer dam is in place, adverse effects will be minimized to the maximum extent practicable, and flows will be suitable for fish passage.

No alteration to the course, condition, capacity, or location of open waters would occur.

The proposed project will not cause negative flood-related effects.

The project elements and access road has been designed with the smallest footprint possible and would not impact wetlands.

Soil erosion and sediment control BMP's will be implemented.

Cofferdam is anticipated to remain in place for two years and will be removed as soon as practicable. Temporary fish collection facility is anticipated to remain in place for two years and will be removed as soon as practicable. Temporary access road construction is anticipated to remain in place for two years to support construction and temporary fish collection activities and will be removed as soon as practicable.

Washington Department of Fish and Wildlife will maintain the Fish Collection Facility.

The proposed project is single and complete.

officially designated by Congress as a “study river ” *The North Fork of the Toutle River is not a designated Wild and Scenic River or “study river.”*

The proposed project will not impair or modify any reserved tribal rights. USACE communicated with the Cowlitz Tribe on this project. In addition, consultation with tribes through the Section 106 consultation is complete.

USACE is completing Section 7 consultation requirements with National Marine Fisheries Services. USACE completed informal consultation with the U.S. Fish and Wildlife Service (USFWS) and a received a letter of concurrence on January 17, 2018.

The Fish Collection Facility is a predominantly unvegetated structure. Construction and noise associated with the project may result in temporary disturbance to migratory birds and waterfowl; those species are expected to temporarily disperse to avoid the active construction area. There are no known bald or golden eagle nest sites within 1500 feet of the proposed action. Therefore, USACE has determined that effects of the proposed activity are not expected to rise to the level of harm or harassment.

In 2019, USACE executed a Programmatic Agreement (PA) with the Washington Department of Archaeology and Historic Preservation (DAHP) outlining how the agency will take into consideration the effects of the undertaking on historic properties and fulfill Section 106 responsibilities. The Washington Department of Fish and Wildlife (WDFW) and Cowlitz Indian Tribe were consulting parties. This PA was amended in January 2024 to extend it an additional 5 years and include the Confederated Tribes and Bands of the Yakama Nation as an invited signatory. Per the PA, USACE , through the consultation process, will refine the Area of Potential Effect (APE), identify historic properties, assess project effects on historic properties, and, if needed, resolve adverse effects through the creation of a historic property treatment plan. Cultural resources staff will determine the need for compliance under any other laws, regulations, and Executive Orders, including, but not limited to, the Archaeological Resources Protection Act of 1979 and the Native American Graves Protection and Repatriation Act of 1990.

USACE and its contractor(s) will be informed of the procedures if an inadvertent discovery is made.

The proposed project is not in a designated critical resources water.

No wetlands will be impacted by the proposed action. No compensatory mitigation is required for the project.

The Corps will implement multiple measures to avoid, minimize, and reduce impacts to natural resources; refer to the Water Quality Monitoring Plan

Impoundment structures will comply with federal dam safety criteria

25) USACE intends to comply with water quality standards during construction of the proposed project. Refer to the Water Quality Monitoring Plan.

This project is not in the coastal zone of Washington.

See "Seattle District Regional General Conditions" section below. No additional conditions apply.

No acreage limits are specified for NWP 33. NWP A states the activity must not cause the loss of greater than one acre of waters of the United States. The project will not cause the loss of greater than one acre.

No property sale or transfer of the NWP is anticipated to occur.

USACE will prepare a memorandum to the file documenting completion of the authorized activity. Compensatory mitigation is not applicable.

This condition is not applicable because this is a civil works project to be performed by USACE and its contractors.

USACE will notify the district engineer prior to commencement of construction activities.

Corps will provide drawings.

Project will not result in a loss of waters of the US.

Project is not located in the Puget Sound

Project is not located in Commencement Bay.

No bank stabilization is included in the project.

Project does not affect crossings of the U.S.

Project will not result in stream loss.

USACE and its contractors will use boundary markers and/or construction fencing to mark construction area boundaries.

9) USACE will notify NMFS if any fish species appear to be injured or killed as a result of discharges of dredged or fill material to waters of the U.S. associated with the project.

10) . Project is not located in the Salish Sea.

11) Project will not impact forage fish spawning beaches, drift cells, or feeder bluffs.

12) No bank stabilization is included in the project

13) The project area does not include areas where Tribes have retained via treaty the right to fish.

None.

ELSKEN.JENNIFER.LYNN.1284448614

Digitally signed by ELSKEN.JENNIFER.LYNN.1284448614
Date: 2026.02.24 15:19:19 -08'00'

//for// Amy Gibbons