HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILD FISH CONSERVANCY, *et al.*, Plaintiffs, v. NATIONAL PARK SERVICE, *et al.*, Defendants,	No. 3:12-CV-05109-BHS PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS' MOTION FOR PARTIAL DISMISSAL

Plaintiffs Wild Fish Conservancy, Wild Steelhead Coalition, Federation of Flyfishers Steelhead Committee, and Wild Salmon Rivers d/b/a Conservation Angler (collectively, "WFC") hereby respond to Federal Defendants' Motion for Partial Dismissal of Plaintiffs' Complaint, Dkt.25 (April 12, 2012), and respectfully request the Court deny the motion.

I. INTRODUCTION.

The removal of two dams on the Elwha River will be the largest dam removal project in United States history, opening up over seventy miles of river habitat to salmonids. These efforts have been mandated by an act of Congress directing the full restoration of the Elwha River ecosystem and native anadromous fisheries, and are expected to cost taxpayers approximately

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$324.7 million. This project, as envisioned by Congress, affords a unique opportunity for wild salmonids to quickly re-colonize large expanses of pristine habitat.

The Federal Defendants, however, have approved and are implementing the Elwha River Fish Restoration Plan ("Fish Restoration Plan") that ignores best available sciences regarding fisheries management. Aspects of the plan have therefore been sharply criticized by numerous leading experts, including federal, state, and independent scientists. The large-scale hatchery programs are intended to facilitate expedited commercial harvests, but will hinder, and may even prevent, the full recovery of wild native Elwha River salmonids.

Contrary to Federal Defendants' unsupported assertions, the Fish Restoration Plan was developed without regard to any of the public processes and environmental reviews mandated by law. Federal Defendants' inflammatory characterization of WFC as "lying in the weeds" is simply not supported by the facts. As the Federal Defendants recognize, only once did they allow for any public input on these significant issues of national importance—in 1996. Federal Defendants at that time described a variety of fish restoration alternatives and represented that they intend to continue investigating all options. WFC submitted public comments at that time despite the fact that only a vague intent to study alternatives was announced. Federal Defendants issued the final Fish Restoration Plan in 2008 without any further opportunity for public input.

Federal Defendants were required to comply with federal environmental laws in determining to implement their plan to restore fisheries in the Elwha River at the cost of millions of taxpayers' dollars. Federal Defendants cannot immunize their decision from judicial review by describing the decision in a document labeled a "technical memorandum" instead of a record of decision. Agencies cannot evade the Court's jurisdiction through such illusory distinctions.

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WFC's jurisdictional allegations must be construed liberally at this stage in the litigation and its uncontroverted factual allegations considered to be true. Federal Defendants have not presented any affidavits or other evidence contradicting the allegations that they have, *in fact*, decided to authorize, fund, and implement the Fish Restoration Plan. The Court should therefore reject Federal Defendants' factually unsupported argument that the Fish Restoration Plan does not describe the agencies' final decision regarding their efforts to restore Elwha River salmonids.

The Fish Restoration Plan was prepared pursuant to the Elwha River Ecosystem and Fisheries Restoration Act ("Elwha Act"), wherein Congress directed the preparation of a specific plan for the full restoration of Elwha River anadromous fisheries. The Elwha Act requires the plan be implemented and authorizes appropriations therefor. The plan details the manner in which Federal Defendants have decided to restore fisheries. The plan thus has all the defining traits of a final agency action subject to review under the Administrative Procedure Act ("APA").

Federal Defendants' arguments regarding the Endangered Species Act ("ESA") misconstrue well-established law and WFC's claims. The APA does not apply to WFC's claims asserted under the ESA citizen suit. Further, WFC does not allege these citizen suit claims against any Federal Defendants in their capacity as administrators of the ESA, but rather as regulated parties violating the substantive mandates of the ESA.

II. LEGAL FRAMEWORK.

A. The Endangered Species Act.

Passage of the ESA "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The purpose of the statute is to conserve threatened and endangered species and protect

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the ecosystems upon which they depend. 16. U.S.C. § 1531(b). "Conserve" is defined to mean the use of all methods and procedures necessary to bring the species to a point where the protections afforded by the statute are no longer necessary. 16 U.S.C. § 1532(3).

The ESA contains a variety of protections intended to save species from extinction. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 690 (1995). The statute assigns certain implementation responsibilities to the Secretaries for the Departments of the Interior and Commerce, who have delegated responsibilities to the Fish and Wildlife Service ("FWS") and NOAA Fisheries Service ("NMFS")[1], respectively. *See* 50 C.F.R. § 402.01.

Section 4 of the ESA prescribes mechanisms by which these agencies list species as threatened or endangered. 16 U.S.C. § 1533(a). Section 9 of the ESA makes it unlawful to "take" threatened or endangered species. 16 U.S.C. § 1538(a)(1)(B).[2] "Take" is defined broadly to include kill, harass, and harm protected species. 16 U.S.C. § 1532 (19). "Harm" includes habitat modification that kills or injures fish by impairing behavioral patterns, including breeding, migrating, feeding, or sheltering. 50 C.F.R. § 222.102; *Sweet Home*, 515 U.S. at 691.

Section 7 of the ESA requires federal agencies "insure 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." 16 U.S.C. § 1536(a)(2). In carrying out this mandate, federal agencies planning an action ("action agency") that may affect an ESA-listed species are required to consult with FWS and/or NMFS ("consulting agency"). 50 C.F.R. § 402.14(a); *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). Such consultation concludes

[1] WFC refers to NOAA Fisheries Service herein as NMFS to be consistent with Federal Defendants' Motion.
[2] While section 9 only references "endangered" species, FWS and NMFS have generally applied the take prohibition to "threatened" species through protective regulations promulgated under section 4(d) of the ESA. *See* 16 U.S.C. § 1533(d); 50 C.F.R. §§ 17.31(a); 50 C.F.R. § 223.203(a). Section 9 of the ESA makes it unlawful to violate any such regulation. 16 U.S.C. § 1538(a)(1)(G).

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with the issuance of a biological opinion by the consulting agency. *See* 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(h)(3). Section 7 of the ESA also imposes a substantive duty on federal agencies to insure that their actions will not jeopardize threatened and endangered species. *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994).

B. The National Environmental Policy Act.

The National Environmental Policy Act ("NEPA") declares a broad national commitment to protecting and promoting environmental quality, and seeks to ensure that this commitment is infused into the ongoing programs and actions of the federal government. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). NEPA directs all federal agencies to "include in every recommendation or report on…major Federal actions significantly affecting the quality of the human environment, a detailed statement…on the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C)(i).

Preparation of this environmental impact statement ("EIS") serves two important purposes: 1) it ensures the agency will have and consider detailed information regarding environmental impacts when reaching its decision, and 2) it guarantees that information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision. *Robertson*, 490 U.S. at 349. "NEPA procedures must insure that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken" because they are "intended to

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help public officials make decisions that are based on understanding of environmental consequences…" 40 C.F.R. §§ 1500.1(b) and (c) (emphasis added).[3]

NEPA imposes an additional requirement that agencies "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988).

"Actions" subject to NEPA requirements "include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a). Such actions generally include:

> (2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.
>
> (3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.
>
> (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

40 C.F.R. § 1508.18(b). Agency decisions may occur at multiple levels—including a programmatic level where the agency develops alternative management scenarios and adopts a plan to guide future decisions, and at the implementation level where individual site specific projects are assessed. *Calif. Wilderness Soc'y v. U. S. Dep't of Energy*, 631 F.3d 1072, 1099 n.26 (9th Cir. 2011). An EIS must be prepared at each level. *Id.*

[3] The Council on Environmental Quality's regulations interpreting NEPA are entitled to substantial deference. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1135-36 (9th Cir. 2010).

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An EIS is required where substantial questions are raised as to whether the action *may* have a significant effect on the environment. *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). This is a low standard. *Id.* An important factor is whether the action *may* adversely affect ESA-listed species. *See* 40 C.F.R. § 1508.27(b)(9).

After an agency completes an EIS, it is to issue a "record of decision" stating what the decision was and identifying alternatives considered and factors balanced. 40 C.F.R. § 1505.2. The agency may not take any action that would have an adverse environmental impact or limit the choice of alternatives until the record of decision is issued. 40 C.F.R. 1506.1(a).

C. The Elwha Act.

The Elwha Act, Pub. L. 102-495, 106 Stat. 3173 (Oct. 24, 1992), mandates the full restoration of the Elwha River ecosystem and native anadromous fisheries. The Act authorized the Secretary of the Interior to acquire and remove the Elwha River dams upon a finding that removal is necessary to achieve this objective. Pub. L. 102-495, § 3(a), 106 Stat. 3173, 3174.

Section 3(c) of the Elwha Act directed the Secretary of the Interior to submit a report to Congress detailing plans for "the full restoration of the Elwha River ecosystem and the native anadromous fisheries." Pub. L. 102-495, § 3(c), 106 Stat. 3173, 3174-75. The report was to include a definite plan for dam removal. Pub. L. 102-495, § 3(c)(2), 106 Stat. 3173, 3174-75 (1992). The Elwha Act directs the Secretary of the Interior to implement the definite plan for dam removal and full restoration of the Elwha River ecosystem and native anadromous fisheries. Pub. L. 102-495, § 4(1), 106 Stat. 3173, 3176. The Act authorizes the appropriation of funds to the Secretaries of Interior and Commerce for expenditure through the Assistant Secretary for Fish, Wildlife, and Parks, and NMFS. Pub. L. 102-495, § 9, 106 Stat. 3173, 3178-79.

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D. The Wilderness Act.

The Wilderness Act seeks "to assure that an increasing population…does not occupy and modify all areas within the United States…, leaving no lands designated for preservation and protection in their natural condition." 16 U.S.C. §§ 1131(a). The statute provides procedures for designating "wilderness areas" and requires such areas be administered so as to "leave them unimpaired for future use and enjoyment as wilderness." 16 U.S.C. §§ 1131(a) and 1132.

The Wilderness Act defines a wilderness as "untrammeled by man…, an area…retaining its primeval character and influence…, [and] which is protected and managed so as to preserve its natural conditions..." 16 U.S.C. § 1131(c). Agencies administering wilderness areas are responsible for preserving the wilderness character. 16 U.S.C. § 1133(b). The Wilderness Act prohibits commercial enterprises within wilderness areas, subject to limited exceptions. 16 U.S.C. § 1133(c). The statute prohibits the use of motor vehicles, motorized equipment, and the landing of aircraft except as necessary to meet the minimum requirements for the administration of the area for the purposes of the Wilderness Act. 16 U.S.C. § 1133(c).

E. The Administrative Procedure Act.

The APA provides for judicial review of agency action "for which there is no other adequate remedy" except when "statutes preclude review" or the "agency action is committed to agency discretion by law." 5 U.S.C. §§ 701(a) and 704. Actions are committed to agency discretion only in the rare instances where the statute is drawn in such broad terms that there is no law to apply. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). The APA thus "creates a strong presumption of reviewability that can be rebutted only by a clear showing that judicial review would be inappropriate." *Tran Qui Than v. Regan*, 658 F.2d 1296,

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1301 (9th Cir. 1981). The APA directs courts to compel agency action unlawfully withheld and set aside agency action found to be arbitrary or not in accordance with law. 5 U.S.C. § 706.

III. STATEMENT OF FACTS.[4]

A. The Elwha River Ecosystem.

The Elwha River is approximately forty-five miles in length, flowing north on the Olympic Peninsula in Washington State into the Strait of Juan de Fuca near Port Angeles. Dkt. 1, ¶ 76. The river's watershed encompasses approximately 321 square miles, of which approximately 267 square miles are within the boundaries of the Olympic National Park. *Id.* at ¶ 77. Nearly all of the Olympic National Park is designated a wilderness under the Wilderness Act, known as the Olympic Wilderness. *Id.* at ¶ 75. The Elwha River remains in uniquely pristine condition, largely due to the protections afforded these federal public lands. *Id.* at ¶ 82.

The Elwha and Glines Canyon Dams were constructed on the Elwha River without fish passage structures, and have blocked upstream anadromous fish passage to more than 70 miles of mainstem and tributary habitat since 1911. *Id.* at ¶¶ 78-79.

The Elwha River supported several species of anadromous fish before the dams were constructed. *Id.* at ¶ 80. These fish migrate from freshwater to saltwater and then return to their natal freshwater to spawn. The Elwha River was one of the most productive salmon streams in the Pacific Northwest. *Id.* Anadromous fish returning to spawn in the Elwha River and its tributaries have been confined to the lower 4.9 miles of the river below the Elwha Dam since 1911, and have therefore not had access to the vast majority of the river's spawning habitat. *Id.* at ¶ 81. The numbers of Elwha River native anadromous fish have declined drastically as a

[4] Federal Defendants' Motion does not contest any factual allegations in the Complaint, but instead relies on such allegations and certain publicly available documents. *See* Dkt. 25, 18:25-26. Accordingly, WFC relies on these same undisputed allegations herein.

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result. *Id.* Despite the critically small population sizes, several species of salmonids remain in the Elwha River. These include three species that are listed as threatened under the ESA—Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout. *See id.* at ¶¶ 106, 107, 109, 116.

B. Elwha River Restoration Efforts.

The Department of the Interior submitted the Elwha Report to Congress in June of 1994 under the Elwha Act determining that the removal of the Elwha and Glines Canyon Dams was feasible and necessary under the Elwha Act to achieve full restoration of the Elwha River ecosystem and native anadromous fisheries. *Id.* ¶ at 83.

An EIS was prepared in 1995 that evaluated alternatives to dam removal. *Id.* at ¶ 84. The preferred alternative in the EIS was complete removal of both dams. *Id.* A second EIS was prepared in 1996 that evaluated alternatives for safe dam removal. *Id.* at ¶ 86. The National Park Service was the lead agency for both NEPA processes, and FWS was a cooperating agency. *Id.* at ¶¶ 84, 86. Neither EIS evaluated alternatives for salmonid recovery. *Id.* at ¶¶ 85, 87. Dam removal began in late 2011. *Id.* at ¶ 91.

C. The Fish Restoration Plan.

Early drafts of the Fish Restoration Plan appeared as part of the Elwha Report in 1994 and as an appendix to the 1996 EIS. *Id.* at ¶ 92. These early versions identified various alternatives for restoring fish to the Elwha River, including natural recolonization for several species. *Id.* As Federal Defendants admit, the Fish Restoration Plan attached to the 1996 EIS did not select alternatives to be implemented, but instead stated that all options would continue to be investigated. Dkt. 25, 20:9-12; *and see* Dkt. 25-3, p. 2; *and see* Dkt. 1, ¶ 92.

No further drafts were released to the public until the final Fish Restoration Plan was issued by NMFS in 2008. The document indicates that it was developed pursuant to the Elwha

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Act, and that its authors include representatives of NMFS, FWS, National Park Service, the Lower Elwha Klallam Tribe ("Tribe"), and the Washington Department of Fish and Wildlife. *First Decl. of Brian A. Knutsen* ("Knutsen Decl."), p. 6.

The Fish Restoration Plan describes the strategies to restore anadromous fish populations in the Elwha River that the Federal Defendants have decided to authorize, implement and fund:

> Since 1995 the [Department of Interior] has worked to identify the most appropriate strategies for fisheries restoration in the Elwha River. After more than a decade of refinement, these restoration strategies include selection of stocks, methods for preserving populations during dam removal, methods for reintroducing populations into the watershed following dam removal, and alternative actions if preferred strategies fail.

Id. at p. 15. In discussing the development of the hatchery programs and rejection of natural recovery alternatives, the Fish Restoration Plan notes that the Department of Interior, the Tribe, and other (unidentified) interested parties want to ensure rapid recovery. *Id.* at p. 35. The plan describes the decision-making process as follows:

> Identifying and developing the preferred role of hatcheries in the recovery process occurred following extensive consultation with a wide range of scientists and political leadings in the region.

Id. The Fish Restoration Plan describes the selected fish restoration strategies in detail, including the stocks that will be used, where fish will be raised, where fish will be released, the ages at which fish will be released, the numbers of fish that will be released, where and how returning fish will be collected for broodstock, and the number of broodstock fish that will be collected. *Id.* at pp. 56-99. The Fish Restoration Plan includes monitoring and adaptive management provisions intended to provide information necessary to reevaluate the restoration effort and make adjustments to the plan as appropriate. *Id.* at pp. 120-40.

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IV. STANDARD OF REVIEW.

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may be either a facial or factual attack. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack "asserts that the allegations in the complaint are insufficient on their face to invoke federal jurisdiction." *Id.* The court reviewing such a challenge considers the plaintiff's allegations true and draws all reasonable inferences in the plaintiff's favor. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

With a factual attack, the movant presents affidavits or other evidence that refutes the jurisdictional allegations. *See Safe Air*, 373 F.3d at 1039. The plaintiff must then respond with evidence establishing jurisdiction. *Id.* The Court may then weigh the evidence and resolve factual disputes. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). The Court may hold an evidentiary hearing, in which case it need not presume the truthfulness of plaintiff's allegations. *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987); *Safe Air*, 373 F.3d at 1039. If the Court does not hold an evidentiary hearing, it must presume plaintiff's allegations to be true. *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007); *see also McLachlan v. Bell*, 261 F.3d 908, 909 (9th Cir. 2001). The Court should allow discovery before ruling on the motion where pertinent facts "are controverted or a more satisfactory showing of the facts is necessary." *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003).

If the disputed jurisdictional issue is intertwined with factual issues going to the merits, the Court should defer a determination of the relevant facts on a motion going to the merits or at trial. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). Jurisdiction and merits issues are intertwined where a statute provides the basis for both the Court's jurisdiction and the plaintiff's substantive claim for relief. *Id.*; *Safe Air*, 373 F.3d at 1039-40.

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V. ARGUMENT.

A. The Court has Jurisdiction Over WFC's APA Claims.

Federal Defendants move to dismiss four of WFC's claims asserted under the APA—claims 1, 3, 10 and 11. Dkt. 25, 25:3-31:7. These claims allege that Federal Defendants violated NEPA, the Elwha Act, and the Wilderness Act in "preparing, authorizing, funding and/or implementing the Fish Restoration Plan and the activities described therein." *Compl.*, ¶¶ 140, 151, 187,192. Federal Defendants' decision to approve, fund, and implement the activities described in this plan was a "final agency action," and the Court therefore has jurisdiction. Alternatively, the Fish Restoration Plan itself is a final agency action.[5]

1. The APA requirement for final agency action.

The APA provides for judicial review of a "final agency action." 5 U.S.C. § 704. As a general matter, this requires the satisfaction of two conditions:

> First, the action must mark the "consummation" of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal citations omitted).

"[T]he finality element must be interpreted in a pragmatic and flexible manner." *Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1503 (9th Cir.1995) (internal quotation omitted). The label an agency gives to an action and whether the agency followed conventional procedures

[5] Federal Defendants argue that claim 10 regarding the Elwha Act is non-justiciable to the extent it alleges a failure to fully restore the Elwha River. Dkt. 25, 31:12-26. These arguments are inapplicable because WFC is not seeking to compel action under 5 U.S.C. § 706(1), but rather is seeking to set aside action taken in violation of the Elwha Act under 5 U.S.C. § 706(2). There is a strong presumption that such claims are reviewable. *See Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1118-19 (9th Cir. 2010) (distinguishing between "failure to act" claims and challenges to agency action); *and Regan*, 658 F.2d at 1301.

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are irrelevant to the finality analysis. *Abramowitz v. U. S. Envtl. Prot. Agency*, 832 F.2d 1071, 1075 (9th Cir. 1987); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478 (2001).

When assessing the second element, courts look to "whether the action amounts to a definitive statement of the agency's position or has a direct and immediate effect on the day-to-day operations of the subject party, or if immediate compliance [with the terms] is expected." *Or. Natural Desert Ass'n v. U. S. Forest Serv.*, 465 F. 3d 977, 982 (9th Cir. 2006) (internal quotations omitted, alteration in the original). Overall, "[t]he core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

2. WFC's undisputed allegations establish jurisdiction.

Federal Defendants do not dispute that they have authorized, and are implementing and funding, the activities described in the Fish Restoration Plan. Federal Defendants instead argue only that the physical document describing these activities is not, in and of itself, a final agency action. *E.g.*, Dkt. 25, 30:16-18 ("…the plan itself does not authorize these programs or mandate their implementation."). It is immaterial whether this document itself is a final agency action. *See Her Majesty the Queen v. U.S. Envtl. Prot. Agency*, 912 F.2d 1525, 1531 (D.C. Cir. 1990) ("the absence of a formal statement of the agency's position…is not dispositive"). Federal Defendants' *decision* to authorize, fund and implement the activities described in the Fish Restoration Plan—constituting the largest salmon recovery project in the United States—is a final agency action subject to APA review. Federal Defendants' failure to memorialize their decision in a record of decision as required by NEPA does not deprive the Court of jurisdiction.

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It is unclear whether Federal Defendants intended to challenge the Court's jurisdiction facially or factually.[6] Regardless of their intent, "only the factual allegations that are contested by defendants and supported by contrary evidence are placed at issue and uncontroverted factual allegations in the complaint are to be accepted as true." *Pennenvironment v. RRI Energy N.E. Mgmt. Co.*, No. 07-475, 2010 U.S. Dist. LEXIS 102220, at *8 (W.D. Penn. Sept. 28, 2010).[7]

The Complaint alleges that Federal Defendants have authorized, and are implementing and funding, the activities described in the Fish Restoration Plan. Dkt. 1, ¶¶ 102-03.[8] Federal Defendants have not presented any evidence—affidavit or otherwise—to refute these allegations. Federal Defendants could have come forward with affidavits or other evidence to show that they have not, *in fact*, decided to approve, fund and implement the Fish Restoration Plan if this is the case. Having failed to do so, WFC's allegations on this issue must be accepted as true.

These allegations satisfy the APA's "final agency action" requirement. WFC alleges that Federal Defendants *have authorized* the activities described in the Fish Restoration Plan. *See* Dkt. 1, ¶¶ 102-03. This allegation reflects that Federal Defendants have consummated their decision-making process and determined their course of action, thereby establishing rights and obligations. These uncontroverted allegations satisfy the "final agency action" standard.

[6] Federal Defendants argue that the allegations are not presumed, implying a factual attack, but rely only on the Complaint and public documents and assert that WFC has failed to articulate in the Complaint why the Fish Restoration Plan is a final agency action, implying a facial attack. Dkt. 25, 18:24-26, 23:10-14, 31:3-5.

[7] *See also McGraw v. United States*, No. 00-35514, 2002 U.S. App. LEXIS 15774, at *6 (9th Cir. 2002) ("all uncontroverted factual assertions regarding jurisdiction" are accepted as true"); *Gibbs v. Buck*, 307 U.S. 66, 73 (1939); *Cedars-Sinai Medical Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993); *Blue Lake Rancheria v. Morgenstern*, No. 2:11-CV-01124 JAM-JFM, 2011 U.S. Dist. LEXIS 140062, at *10 (E.D. Cal. Dec. 6, 2011) (submitting evidence not relevant to jurisdictional challenge does not convert motion into a factual challenge).

[8] *And see* Dkt. 1, ¶¶ 5, 105, 140, 146, 151, 187, 192.

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3. The Fish Restoration Plan itself is a final agency action.

Further, the Fish Restoration Plan itself is a final agency action subject to review under the APA. Federal Defendants' issuance of this plan marked the consummation of their decision making process and constituted a definitive statement of their position.

a. The decision making process is consummated.

Issuance of the Fish Restoration Plan was the consummation of the Federal Defendants' decision making process for fisheries restoration. The plan details the various alternatives considered, criteria applied in the decision making process, and the ultimate decisions made that "will be implemented." *See, e.g. Knutsen Decl.*, pp. 15, 26, 35, 43, 46-48, 52.

Federal Defendants admit the actions in the plan are occurring. Dkt. 25, 11:15-18. Where agencies are in fact carrying out a plan through actions that are themselves indisputably final agency actions, such as funding the Tribe's hatchery, no further decision making can be expected. *See Rattlesnake Coal. v. U.S. Envtl. Prot. Agency*, 509 F.3d 1095, 1103-04 (9th Cir. 2007) (decision to disperse appropriated funds is a final agency action).

Federal Defendants hold out the Fish Restoration Plan as their "Complete Restoration Plan." *Knutsen Decl.*, pp. 200-18 (agency websites). This indicates its finality. *See Nat'l Ass'n of Home Builders v. Norton*, 298 F. Supp. 2d 68, 77 (D.C. Cir. 2003). The plan is not tentative or interlocutory; rather, it constitutes a finite and certain plan that is to be implemented. *See Cent. Delta Water Agency v. U. S. Fish & Wildlife Serv*, 653 F.Supp. 2d 1066, 1092 (E.D. Cal. 2009) ("finite and certain [plan] that is intended to be implemented" is final agency action); *and see Natural Res. Def. Council, Inc. v. Thomas*, 845 F.2d 1088, 1094 (D.C. Cir.1988).

Contrary to Federal Defendants' arguments, the adaptive management component of the Fish Restoration Plan does not preclude judicial review. Adaptive management strategies are

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permissible where they undergo NEPA analysis—they do not allow an evasion of NEPA obligations. *See Or. Natural Desert Ass'n v. U.S. Bureau of Land Mgmt*, No. 08-CV-1271-KI, 2011 U.S. Dist. LEXIS 131784, at *53-56 (D. Or. Nov. 15, 2011); *and* 43 C.F.R. § 46.145.[9] Federal Defendants' unsupported assertions that they intend to undertake various administrative procedures are similarly unimportant. *See* Dkt. 25, 27:25-26, 37:22-24. Judicial review of agency actions "must not be frustrated by *blind* acceptance of an agency's claim that a decision is still under study." *Abramowitz*, 832 F.2d at 1075 (internal quotations omitted).

b. The Fish Restoration Plan has legally cognizable consequences.

To satisfy the second prong, an agency action may "either determine rights or obligations' or occasion 'legal consequences.'" *Alaska Dep't of Envtl. Conservation v. U.S. Envtl. Prot. Agency*, 540 U.S. 461, 483 (2004) (quoting *Bennett*, 520 U.S. at 178). "Courts have consistently interpreted *Bennett* to provide several avenues for meeting the second finality requirement." *Or. Natural Desert*, 465 F.3d at 986. Accordingly, a management plan that "commands or restricts conduct" is subject to APA review, as is a challenge alleging "site-specific injury causally related to a defect in the plan." *Stout v. U.S. Forest Serv.*, Civ. No. 09-152-HA, 2011 U.S. Dist. LEXIS 24570, at *17 (D. Or. March 10, 2011) (citing *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) and *Wilderness Soc'y. v. Thomas*, 188 F.3d 1130, 1133-34 (9th Cir. 1999)).

The Fish Restoration Plan has legal consequences. This plan, as its full title indicates, was prepared under the Elwha Act. *Knutsen Decl.*, pp. 4, 6. The Elwha Act directed the Secretary of the Interior to submit a report to Congress that included a definite plan for "the full

[9] *See also Gen. Elec. Co. v. U.S. Envtl. Prot. Agency*, 290 F. 3d 377, 380 (D.C. Cir. 2002) (that agency action may be altered in the future has nothing to do with whether it is subject to judicial review at the moment).

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restoration of the Elwha River ecosystem and the native anadromous fisheries." Pub. L. 102-495, § 3(c), 106 Stat. 3173, 3174-75. The Elwha Act directs the Secretary of the Interior to implement the "definite plan," and provides appropriations therefor. Pub. L. 102-495, §§ 4(1) and 9, 106 Stat. 3173, 3176, 1378-79. The first version of the Fish Restoration Plan was part of the report submitted to Congress. *Knutsen Decl.*, p. 26. The final 2008 Fish Restoration Plan supplanted any earlier versions of the plan, and is now part of the "definite plan" the Secretary of the Interior is required by law to implement. *See id.* at p. 14; *and see Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1110 (D. Ariz. 2009) (plan that supersedes previous final agency action can be nothing less than its predecessor). The plan therefore has legal consequences.

Contrary to Federal Defendants' arguments, the fact that the Fish Restoration Plan was prepared by an interagency group of experts does not affect its status as a final agency action. *See, e.g., Tuggle*, 607 F. Supp. 2d at 1114 (representatives of multiple federal and state agencies, counties, and tribes rendered final agency action). The Elwha Act directs the Secretary of the Interior to "consult with appropriate State and local officials [and] affected Indian tribes" in developing the restoration plan. Pub. L. 102-495, §3(d), 106 Stat. 3173, 3175. Compliance with this statutory mandate does not negate the plan's status as an agency action.

Decisions that have physical impacts on the environment are final agency actions. *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir.2008); *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 16 (D.C. Cir. 2005). The Fish Restoration Plan includes many "specific activities with a direct impact" on the environment, and is therefore a final agency action. *See Northcoast Envtl. Law Ctr. v. Glickman*, 136 F.3d 660, 670 (9th Cir. 1998). These activities include large-scale releases of hatchery fish into the environment,

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trapping of fish returning to the Elwha River, and the landing of helicopters in the Olympic Wilderness. *Knutsen Decl.*, pp. 50-51, 53-85.[10]

Two recent cases have held that species management plans similar to the Fish Restoration Plan are final agency actions subject to review under the APA. In *Tuggle*, the court held that a memorandum of understanding and a standard operating procedure for wolf control established by an interagency adaptive management group were final agency actions. 607 F. Supp. 2d at 1113-14. The court found it significant that these documents established specific control measure protocols and specified when and why those measures could be used. *Id.* The court in *Stout* held that a wild horse management plan is "a final agency action because it sets specific management protocols for wild horses, and describes when, why, and in what order of priority any excess horses shall be removed from the territory." 2011 U.S. Dist. LEXIS 24570, at *20. Similar to the management plans at issue in *Tuggle* and *Stout*, the Fish Restoration Plan establishes specific protocols and priorities (*e.g.*, adaptive management responses to recovery thresholds), it sets boundaries on discretion (*e.g.*, reduce Chamber Creek steelhead production to 20,000-40,000 fish per year), and it anticipates implementation of these limits.

Federal Defendants misconstrue several opinions in arguing that their Fish Restoration Plan is not subject to review. For example, Federal Defendants assert that the Court in *Northcoast* held that an inter-agency plan developed by a group of experts was not a final agency action. Dkt. 25:24-26:2. To the contrary, the Ninth Circuit implicitly held that the management plan at issue *was* a final agency action under the APA, but that NEPA was not required because there was not a major effect on environment. *Cal. Wilderness Coal. v. U. S. Dep't of Energy*,

[10] Indeed, if not for the interim stipulated order entered by the Court, thousands of non-native Chambers Creek hatchery steelhead would have been released into the newly opened Elwha River this Spring. *See* Dkt. 19.

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631 F.3d 1072, 1100 (9th Cir. 2011) (explaining *Northcoast*). That plan held to be a final agency action was far less determinant than the Fish Restoration Plan—it consisted of guidelines and goals only and did not propose any site-specific activities. *Northcoast*, 130 F.3d at 670.

The court in *Lowry v. Barnhart*, 329 F.3d 1019 (9th Cir. 2003), did not, as Federal Defendants suggest, address a scientific framework for which agency actions were to be carried out.[11] *See* Dkt. 24, 28:5-9. Federal Defendants' reliance on *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 92 F. Supp 2d 1072 (D. Or. 2000) is similarly misplaced. There, the court held that a consulting agency's predictions and recommendations were not a final agency action, but that the acting agency's decision related to such recommendations was. *Id.* at 1078, 1083. Here, WFC challenges the Federal Defendants' plan for implementation, not the recommendations of others that Federal Defendants purportedly sought input from.

Federal Defendants mischaracterize the decision in *Salmon Spawning & Recovery Alliance v. Lohn*, No. C06-1462-RSL, 2008 U.S. Dist. LEXIS 30809 (W.D. Wash. Mar. 20, 2008), by suggesting that the court held that a Science Center Technical Memorandum does "rise to the level of a final agency action." Dkt. 25, 29:7-12. The court in *Lohn* found that an agency decision was not arbitrary under the APA merely because it considered, but did not follow, a technical guidance document of general applicability. 2008 U.S. Dist. LEXIS 30809, at *30-33. The court did not address whether the guidance document itself was a final agency action under the APA. Moreover, WFC is not challenging a general guidance document, but rather an approved plan that is being implemented. Federal Defendants' labeling the plan a "Technical

[11] The Court in *Lowry* held that the Social Security Administration's interim bias complaint procedures were not enforceable in a mandamus action. 329 F.3d at 1022. The question of "final agency action" under the APA is not dependant on judicial enforceability, as even agency pronouncements that merely serve an "advisory function" and that entities are "technically free to disregard" can be subject to the APA review. *Bennett*, 520 U.S. at 169-70.

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Memorandum" does not affect the nature of their action. *Abramowitz*, 832 F.2d at 1075; *and see Appalachian Power Co. v. U.S. Envtl. Prot. Agency*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

That the Fish Restoration Plan was not signed by agency heads is also not dispositive; what is relevant is whether the document meets the usual finality criteria. *See Thomas*, 845 F.2d at 1094. An agency need not "dress[] its decision with the conventional procedural accoutrements of finality" where its behavior indicates the action is final. *Whitman*, 531 U.S. at 478. The National Park Service is holding the plan out as its completed plan for fish restoration efforts. *See Knutsen Decl.*, pp. 200-18. Federal Defendants' illusory labeling of the "plan" as a "technical memorandum" does not affect the Court's jurisdiction because the final agency action criteria are to be applied in a "flexible" and "pragmatic" way. *See Harrell*, 52 F.3d at 1504.

4. The Court should compel agency action unlawfully withheld.

WFC alternatively requests the Court compel agency action unlawfully withheld under 5 U.S.C. § 706(1).[12] It is well-established that an EIS or the record of decision issued thereon constitutes a final agency action. *Or. Natural Desert Ass'n v. Bureau of Land Mgmt*, 531 F.3d 1114, 1139-40 (9th Cir. 2008). This applies to a programmatic or project-level EIS. *See, e.g., Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1354-55 (9th Cir. 1994). Federal Defendants were required to issue an EIS and record of decision for their decision to implement and fund the Fish Restoration Plan. *See* 40 C.F.R § 1508(a)-(b) (adoption of plan or program is subject to NEPA requirements). Federal Defendants have therefore unlawfully withheld agency action by failing to issue an EIS and record of decision.

[12] WFC believes that its pleadings are sufficient to include claims under 5 U.S.C. § 706(1). *See* Dkt. 1, ¶¶ 8, 141, 152, 188, 193. However, to the extent the Court finds that WFC's pleadings do not encompass such a claim, WFC requests leave to amend its Complaint to include claims under this provision.

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B. The Court has Jurisdiction Over WFC's ESA Claims.

Federal Defendants move to dismiss two ESA claims in their entirety—claims 4 and 7—and four ESA claims as against the Departments of Interior and Commerce—claims 4, 5, 7, and 8. This request should be denied. Contrary to Federal Defendants' arguments, claims 4 and 7 are not subject to the APA's "final agency action" requirement. Further, claims 4, 5, 7 and 8 are alleged against all Federal Defendants in their role as action agencies, not as consulting agencies, and the Court therefore has jurisdiction of these claims under the ESA citizen suit provision.

1. APA standards do not apply to claims 4 and 7.

Claims alleged against federal agencies for violating the substantive mandates of the ESA are brought under the ESA citizen suit provision. The Court should therefore reject Federal Defendants' argument that claims 4 and 7 require a showing of a "final agency action."

The ESA authorizes citizen suit enforcement against "any person, including the United States and any other governmental…agency..., who is alleged to be in violation of any provision of [the ESA]." 16 U.S.C. § 1540(g)(1)(A). The Supreme Court has interpreted this provision:

> The Government contends that the Secretary[] [of Interior's] conduct in implementing or enforcing the ESA is not a "violation" of the ESA within the meaning of this provision. In its view, § 1540(g)(1)(A) is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties—both private entities and Government agencies—but it is not an alternative avenue for judicial review of the Secretary's implementation of the statute. We agree.

Bennett, 520 U.S. at 173. The Court held that the Department of Interior's actions in implementing the ESA are not subject to the ESA citizen suit provision, but the agency's biological opinions are "final agency actions" reviewable under the APA. *Id.* at 177-78. Thus, claims against "*regulated parties*," including "action agencies," for violating the mandates of the statute are brought under the ESA citizen suit provision, while claims against FWS and NMFS

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for inadequacies in their implementation of the ESA, such as preparation of biological opinions, must satisfy the requirements of the APA. *See Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 518-19 (9th Cir. 2010) (describing action agencies and consulting agencies).

The APA only applies where "there is no other adequate remedy." 5 U.S.C. § 704. The Ninth Circuit has therefore rejected the argument that the APA applies to ESA citizen suits:

> The APA provides judicial review for "final agency action for which there is no other adequate remedy in a court." The district court correctly held, however, that the ESA citizen suit provision creates an express, adequate remedy… Because this substantive statute independently authorizes a private right of action, the APA does not govern the plaintiffs' claims. Plaintiffs' suits to compel agencies to comply with the substantive provisions of the ESA arise under the ESA citizen suit provision, and not the APA.

Wash. Toxics Coalition v. Envtl. Prot. Agency, 413 F.3d 1024, 1034 (9th Cir. 2005).

Federal Defendants ask the Court to disregard this controlling precedent because, as they contend, it "has been called into question" by the decision in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). Dkt. 25, 32:2-4. At issue in *Home Builders* was the Environmental Protection Agency's transfer of Clean Water Act ("CWA") permitting authority to the State of Arizona. 551 U.S. at 61-62. The Supreme Court held that the mandatory language of section 402(b) of the CWA prescribing such transfers of authority precluded evaluation of the transfer under section 7(a)(2) of the ESA. *See id.* at 673. The Court did not address whether the APA standards apply to ESA citizen suit claims. *See id.* at 673.

More importantly, the Ninth Circuit has reaffirmed its decision in *Wash. Toxics Coalition* since the *Home Builders* decision. In *W. Watersheds Project v. Kraayenbrink*, the court stated, "[a]s we explained in *Washington Toxics Coalition*, the APA applies only where there is 'no other adequate remedy in a court,' 5 U.S.C. § 704, and—because the ESA provides a citizen suit remedy—the APA does not apply in such actions." 632 F.3d 472, 497 (9th Cir. 2011). The

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Ninth Circuit further noted recently that "the standard for 'agency action' under the ESA…is distinct from the standard under the APA…" *Karuk Tribe of Calif. v. U.S. Forest Serv.*, 640 F.3d 979, 988 n.9 (9th Cir. 2011). The Court should reject Federal Defendants' request to disregard this controlling case law. The APA does not apply to ESA citizen suits.

Claims 4 and 7 allege that Federal Defendants are in violation of section 7(a)(2) of the ESA for authorizing, funding, and implementing the activities described in the Fish Restoration Plan without consulting under section 7(a)(2) and without ensuring that such actions will not jeopardize protected species. Dkt. 1, ¶¶ 156, 174. These claims allege violations of the ESA against regulated action agencies, and are therefore not subject to the APA. *See id.*, ¶¶ 157, 175; *see Wash. Toxics Coal.*, 413 F.3d at 1034 (failure to consult is a citizen suit claim);[13] *see Wild Fish Conservancy*, 628 F.3d at 532 (failure to ensure no jeopardy is a substantive violation).

2. Claims 4 and 7 allege actions subject to section 7(a)(2) of the ESA.

The Court should reject Federal Defendants' argument that they are not required to comply with section 7(a)(2) of the ESA in authorizing, implementing and funding the Fish Restoration Plan. Such agency actions are squarely within those subject to this statutory provision. Federal Defendants' motion to dismiss claims 4 and 7 should be denied.

Section 7(a)(2) of the ESA requires that federal agencies, in consultation with FWS and NMFS, "insure 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." 16 U.S.C. § 1536(a)(2). This provision imposes two requirements on action agencies: they must (1) consult with FWS and NMFS regarding the effects of their actions; and (2) insure that the action will not jeopardize protected species. *See Wild Fish Conservancy*, 628 F.3d at 518, 532.

[13] *See also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1106 n.3 (10th Cir. 2010).

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"Agency action" for purposes of section 7 of the ESA is interpreted very broadly. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994). ESA regulations provide:

> Action means **all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies**… Examples include, but are not limited to: (a) **actions intended to conserve listed species or their habitat**…; or (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02 (emphasis added). Consultation is required for any action that *may* affect protected species. 50 C.F.R. § 402.14(a); *and Thomas*, 30 F.3d at 1054 n.8. This duty applies to ongoing and future agency actions. *Wild Fish Conservancy*, 628 F.3d at 518. Consultation is required where an agency authorizes actions that may affect ESA listed species. *See Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 976 (9th Cir. 2003).

Claims 4 and 7 allege that Federal Defendants have failed in comply with section 7(a)(2) of the ESA in authorizing, funding, and implementing the activities described in the Fish Restoration Plan. Dkt. 1, ¶¶ 156, 174. These activities include large scale hatchery programs that harm protected species. *See id.* at ¶¶ 100, 102, 103, 110-16. Federal Defendants are required to comply with section 7(a)(2) of the ESA for such activities. *See* 50 C.F.R. § 402.02.

Federal Defendants argue that the Fish Restoration Plan does not itself authorize, fund, or carry out activities. Dkt. 25, 32:8-33:2. This is irrelevant. Federal Defendants have not presented any evidence to refute the allegations that they are, *in fact*, authorizing, funding, and implementing hatchery operations that harm ESA-protected species. These allegations are therefore presumed true. *Pennenvironment*, 2010 U.S. Dist. LEXIS 102220, at *6-10.

Federal Defendants incorrectly argue that, while they may be required to consult under the ESA on discrete components of the Fish Restoration Plan, they are not required to consult on the entire plan. Dkt. 25, 34-35:5. Courts have repeatedly rejected this argument. Agencies are

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required to consult on the effects of the *entire* agency action, which is interpreted broadly. *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988). "Effects of the action" include direct and indirect effects of the action, together with the effects of other activities that are interrelated or interdependent with that action. 50 C.F.R § 402.02.[14] Agencies cannot conduct a series of independent ESA consultations for related actions—such an approach might result in the piecemeal chipping away of important habitat without ever evaluating the effects of the entire project. *Connor*, 848 F.2d at 1452-54; *and Wild Fish Conservancy*, 628 F.3d at 521-22.

The activities described in the Fish Restoration Plan, and Federal Defendants' authorization, funding, and implementation of such activities, are interrelated activities that are part of a single "plan." Federal Defendants are required to consult on the effects of the entire plan, and WFC can seek compliance with this requirement.[15] *See Pac. Rivers Council*, 30 F.3d at 1053-56 (agency failed to consult on a comprehensive plan governing a multitude of projects).[16]

3. <u>WFC's ESA citizen suit claims are alleged against the Departments of Interior and Commerce as regulated parties</u>.

Federal Defendants misconstrue WFC's claims in arguing that claims 4, 5, 7 and 8 should be dismissed against the Departments of Interior and Commerce. WFC asserts these claims

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[14] "Indirect effects" are those that are caused by the proposed action and are later in time, but still reasonably certain to occur. 50 C.F.R. § 402.2. Interrelated actions are those that are part of a larger action and depend and depend on the larger action for their justification. *Id.*

[15] Federal Defendants mischaracterize several opinions in arguing that they cannot be compelled to consult on the effects of the entire plan as required by the ESA. *See* Dkt. 25, 33:3-34:2. The *Bennett* decision merely found that claims against the consulting agencies for their maladministration of the ESA must satisfy the APA requirements. 520 U.S. at 174. The *Lujan v. Defenders of Wildlife* decision found that plaintiffs failed to establish Article III Constitutional standing for their challenge to a regulation of general applicability, and faulted plaintiffs for not "attacking the separate decisions to fund particular projects." 504 U.S. 555, 568 (1992). The court in *W. Watersheds Project v. Matejko* held that an agency's *failure* to take regulatory action, as opposed to an *affirmative* action, did not trigger the consultation requirements. 468 F.3d 1099 (9th Cir. 2006). The opinion in *Hells Canyon Preservation Council v. Wilderness Soc'y* did not even mention the ESA. 593 F.3d 923 (9th Cir. 2010).

[16] *See also Pac. Rivers Counsel v. U.S. Forest Serv.*, 668 F.3d 609, 620 (9th Cir. 2012) (Plaintiffs may challenge a plan when their grievance is with the entire plan, and do not have to wait for site-specific projects).

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against these agencies in their capacity as regulated action agencies violating the substantive mandates of the ESA, and not in their capacity in administering the statute.

As discussed above, the ESA citizen suit provision provides for claims against regulated agencies for violating the substantive requirements of the statute, but not claims against FWS and NMFS for errors in their administration of ESA. *See Bennett*, 520 U.S. at 173. However, the agencies charged with administering the ESA are still subject to the statute's substantive requirements, and can therefore be both the regulated action agency and the consulting agency. *See Turtle Island*, 340 F.3d at 974 (NMFS was required to consult with itself); *and Wild Fish Conservancy*, 628 F.3d at 519 (FWS was required to consult with itself).

Claims 4, 5, 7 and 8 all allege that Federal Defendants, including NMFS and FWS, have violated the substantive requirements of the ESA in approving, funding, and implementing the activities described in the Fish Restoration Plan. Dkt. 1, ¶¶ 156, 164, 174, 178, 180. These are ESA citizen suit claims alleged against Federal Defendants in their capacity as "action agencies." The only claim WFC has alleged against Federal Defendants for their maladministration of the ESA is claim 6, challenging NMFS' biological opinion under the APA. *Id.* at ¶ 171.

C. WFC's Wilderness Act Claim is Ripe for Review.

Federal Defendants argue that the Wilderness Act claim is not ripe because they have yet to authorize helicopter flights and commercial planting of fish within the Olympic Wilderness. Dkt. 25, 36:10. As with their other arguments, Federal Defendants request the Court make factual findings rejecting WFC's allegations based solely upon unsupported statements by counsel. The Court should deny Federal Defendants' request to dismiss this claim.

WFC has alleged that Federal Defendants have authorized the activities described in the Fish Restoration Plan, and that these authorized activities include helicopter flights and

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commercial planting of fish within the Olympic Wilderness. Dkt. 1, ¶¶ 100-03, 190-91.[17] Claim 11 alleges that Federal Defendants have thereby violated the Wilderness Act.

Federal Defendants argue, with no factual support whatsoever, that these claims are not ripe because Federal Defendants have yet to authorize these activities and will conduct further review required by law before doing so. Dkt. 25; 37:1-38:18. However, the Court must accept WFC's contrary and uncontroverted allegations as true in ruling on Federal Defendants' motion to dismiss. *See Pennenvironment*, 2010 U.S. Dist. LEXIS 102220, at *6-10. These allegations include the fact that Federal Defendants have authorized the challenged conduct, and there is therefore no basis to dismiss this claim as not ripe for judicial review.

D. The Court Should Defer Ruling on Jurisdictional Facts Until the Merits or Allow Discovery and Hold an Evidentiary Hearing to Resolve Disputes.

To the extent the Court finds that the Federal Defendants have presented evidence refuting jurisdiction, the Court should defer ruling on these issues until a motion on the merits or trial. If the Court is inclined to determine jurisdictional facts, it should allow discovery (and order production of an administrative record) and hold an evidentiary hearing.

Courts cannot resolve disputed jurisdictional facts that are intertwined with the merits in ruling on a motion to dismiss; such issues must be decided on a motion going to the merits or at trial. *Augustine*, 704 F.2d at 1077-79. Issues are so intertwined where a statute provides the basis for both jurisdiction and the substantive claim for relief. *Safe Air*, 373 F.3d at 1039-40.

Jurisdictional and substantive issues are intertwined here. The APA provides for both the waiver of sovereign immunity and basis for relief for the APA claims. Factual issues related to whether there has been a "final agency action" are therefore intertwined. The ESA citizen suit

[17] Contrary to Federal Defendants' mischaracterization, WFC did not allege only that the Fish Restoration Plan itself authorizes these activities.

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provides the basis for jurisdiction and relief for claims filed thereunder. The issue of whether Federal Defendants have taken actions that may affect threatened species is therefore also intertwined. Resolution of these issues is therefore not appropriate at this stage in the litigation.

To the extent the Court finds it appropriate to rule on factual jurisdictional issues before proceeding to the merits, the Court should first allow discovery and then hold an evidentiary hearing. *See Laub*, 342 F.3d at 1093 (discovery should be allowed where pertinent facts are controverted or a more satisfactory showing of facts is necessary); *and see Rhoades*, 504 F.3d at 1156 (evidentiary hearing must be held where plaintiffs' allegations and not presumed true).

VI. CONCLUSION.

For the foregoing reasons, WFC respectfully requests the Court deny Federal Defendants' Motion to Dismiss.

RESPECTFULLY SUBMITTED this 30th day of April, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the attorneys of record.

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