

STEPHEN D. MASHUDA (WSB #36968)
MATTHEW R. BACA (WSB #45676)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340 | Phone
(206) 343-1526 | Fax
smashuda@earthjustice.org
mbaca@earthjustice.org
*Attorneys for Plaintiffs Idaho Rivers United;
Washington Wildlife Federation; Pacific Coast
Federation of Fishermen's Associations; Institute
for Fisheries Resources; Sierra Club; and
Friends of the Clearwater*

DAVID J. CUMMINGS (WSB#33551)
MICHAEL A. LOPEZ (*Pro Hac Vice pending*)
Nez Perce Tribe
Office of Legal Counsel
PO Box 305
Lapwai, ID 83540
(208) 843-7355
(208) 843-7377 (fax)
mikel@nezperce.org
djc@nezperce.org
Attorneys for Plaintiff Nez Perce Tribe

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IDAHO RIVERS UNITED; WASHINGTON)	No.
WILDLIFE FEDERATION; PACIFIC COAST)	
FEDERATION OF FISHERMEN'S ASSOCIATIONS;)	COMPLAINT FOR
INSTITUTE FOR FISHERIES RESOURCES; SIERRA)	DECLARATORY AND
CLUB; FRIENDS OF THE CLEARWATER;)	INJUNCTIVE RELIEF
)	
and)	
)	
NEZ PERCE TRIBE,)	
)	
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES ARMY CORPS OF ENGINEERS,)	
)	
Defendant.)	

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

INTRODUCTORY STATEMENT

1
2 1. This is an action for declaratory and injunctive relief. Plaintiffs Idaho Rivers
3 United, Washington Wildlife Federation, Sierra Club, Pacific Coast Federation of Fishermen’s
4 Associations, Institute for Fisheries Resources, and Friends of the Clearwater (collectively “the
5 Coalition”) and the Nez Perce Tribe seek judicial review of the 2014 Final Environmental Impact
6 Statement (“FEIS”) and Records of Decision (“RODs”) released by the U.S. Army Corps of
7 Engineers (“Corps”) on November 17 and 18, 2014 for the Programmatic Sediment Management
8 Plan (“PSMP”) and “current immediate need action” to dredge the lower Snake River (“dredging
9 action”) beginning on December 15, 2014. Plaintiffs’ claims arise under and assert violations of
10 the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347; the Clean Water
11 Act (“CWA”), 33 U.S.C. §§ 1251-1387; each of these statute’s implementing regulations; and
12 the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*

13
14 2. The Corps’ dredging action authorizes the removal of nearly half a million cubic
15 yards of sediment from sensitive fish and Pacific lamprey habitat in the lower Snake River
16 starting on December 15, 2014 to manage sediment accumulation in parts of the lower Snake and
17 Clearwater River navigation channel and near Ice Harbor Dam. The PSMP is a long-term plan
18 of unspecified duration to manage the sediment that accumulates in the Corps’ Lower Snake
19 River reservoirs. The PSMP does not propose any specific action, but instead presents a list of
20 options, including dredging and disposal, reservoir operations, and construction of in-water
21 structures, that the Corps may decide to take at some point in the future to address sediment. The
22 Corps committed to complete the PSMP by 2009 in a settlement agreement with many of the
23 plaintiffs in this case. *See Ex. 2 at 6.*

1 3. After over nine years of study and delay, the Corps released the RODs to the
2 public at the latest-possible hour, just 28 days before the Corps seeks to begin dredging on
3 December 15, 2014, and then released a new version of the RODs with unspecified “corrections”
4 the following day, 27 days before the Corps seeks to begin dredging.

5 4. This challenge represents the third in a succession of lawsuits over the last decade
6 in which Coalition Plaintiffs and the Nez Perce Tribe have been forced to seek this Court’s
7 review of the Corps’ eleventh hour determination to expeditiously dredge the lower Snake and
8 Clearwater Rivers without meaningful consideration, evaluation and disclosure of alternatives to
9 dredging, or the impacts that dredging will have on culturally significant aquatic species and
10 their habitat.

11 5. This Court has rejected the Corps’ dredging-only approach on two previous
12 occasions. After the Corps proposed a nearly identical set of dredging actions for the Lower
13 Snake River in 2002, this Court enjoined the agency from dredging until the Corps and NMFS
14 complied with NEPA and the Endangered Species Act (“ESA”). *Nat’l Wildlife Fed’n v. Nat’l*
15 *Marine Fisheries Serv.*, 235 F. Supp. 2d 1143 (W.D. Wash. 2002). In 2004, this Court
16 preliminarily rejected the Corps’ attempt to comply with NEPA and again enjoined the Corps
17 from dredging the lower Snake River. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, C02-
18 2259L, Order Granting Mot. Prelim. Inj., Dkt. No. 107 (W.D. Wash. Nov. 1, 2004).¹ Based on
19 the Corps’ commitment to consider alternatives to dredging in a comprehensive Environmental
20 Impact Statement by 2009, many of the plaintiffs here agreed to a settlement allowing the Corps
21 to proceed with dredging in the winter of 2005-2006. *Nat’l Wildlife Fed’n v. Nat’l Marine*
22
23
24
25

26 ¹ Attached as Exhibit 1.

1 *Fisheries Serv.*, C02-2259L, Order re: Settlement Agreement and Mot. Dismiss, Dkt. No. 124
2 (W.D. Wash. Sept. 8, 2005).²

3 6. The FEIS and RODs purport to analyze and memorialize two proposed actions:
4 1) the Corps' "immediate need" proposed dredging action for the winter of 2014-2015; and 2)
5 the Corps' long-term plan for addressing sediment accumulation in the Snake River from
6 Lewiston, Idaho to the confluence with the Columbia River. For both actions, the Corps asserts
7 that it must maintain a navigation channel of 14 feet by 250 feet at all times for barges that
8 transport goods up and down the Snake River.

9 7. The Corps' "immediate need" dredging action involves scraping nearly a half
10 million cubic yards of sediments from the bottom of the Snake River, transporting those
11 sediments downstream, and dumping the sediment back into the Snake River in a location
12 downstream where sediment will not interfere with barge navigation. Although the Corps
13 repeatedly emphasizes that it seeks a channel depth of 14 feet, and alleges that depth is
14 statutorily required, the Corps proposes "overdepth" dredging to a depth of 16 feet to achieve
15 what it terms "advance maintenance." FEIS App'x L at L-3. Dredging would occur for
16 approximately 24 hours a day beginning on December 15, 2014 and would run through March 1,
17 2015. *Id.* at L-11.

18 8. Both the dredging and in-river dumping will mobilize sediments into the water
19 column, increase turbidity locally and downstream, harass juvenile and adult fish and Pacific
20 lamprey in and adjacent to the project area, damage or eliminate rearing habitat for Pacific
21 lamprey and threatened Snake River fall Chinook, and impact the base of the food chain on
22 which all aquatic organisms rely. The dredging and dumping activities will also likely harm,
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² Attached as Exhibit 2.

1 kill, or displace Pacific lamprey, as well as ESA-listed adult steelhead and overwintering
2 juvenile fall Chinook salmon.

3 9. In addition to the dredging action due to begin in a few weeks, the Corps has
4 proposed a PSMP containing a menu of options from which it may select at some future point to
5 manage sediment in the lower Snake River. The PSMP does not explain which of these options,
6 other than dredging, it will use or under what circumstances, nor did the Corps analyze or
7 consider any of these or other measures, or combination of measures, as alternatives to dredging
8 in 2014-2015 for its proposed dredging action.

9 10. In issuing its FEIS and RODs, the Corps has violated NEPA and the CWA by
10 failing to evaluate a reasonable range of alternatives for its actions; failing to take a hard look at
11 the impacts of its proposed dredging action on aquatic life; failing to take a hard look at the
12 impacts of climate change; failing to fully disclose and evaluate all relevant costs and benefits of
13 the Corps' proposed actions; and by failing to conduct a public interest review for its activities as
14 require by the CWA.
15

16 11. Plaintiffs seek a declaration that the Corps violated NEPA by issuing an FEIS and
17 RODs that fail to include a reasonable range of alternatives for the dredging action and the long-
18 term PSMP; fail to take a hard look at the impacts of the Corps' dredging action on Pacific
19 lamprey, salmon, and steelhead and that fail to take a hard look at the effects of climate change
20 over the period of the PSMP; and fail to provide an accurate and unbiased analysis of all of the
21 relevant costs and benefits of the dredging action, the actions proposed in the PSMP, and the
22 alternatives to those actions. Plaintiffs also seek a declaration that the Corps violated the CWA
23 by failing to conduct or consider the factors required in a public interest review for its dredging
24 action. Based on these violations of law, Plaintiffs request that this Court vacate, reverse, and
25

1 remand the RODs and FEIS, and to enjoin the Corps from proceeding with its planned 2014-
2 2015 dredging action until it complies with NEPA and the Clean Water Act.

3 PARTIES

4 12. Idaho Rivers United (“IRU”) is a non-profit corporation organized under the laws
5 of the state of Idaho with a principal place of business in Boise, Idaho. IRU and its
6 approximately 3,500 members throughout the state of Idaho are dedicated to the protection and
7 restoration of Idaho’s rivers and river resources.

8 13. Washington Wildlife Federation is a non-profit conservation organization with a
9 principle place of business in Seattle, Washington and members throughout the state of
10 Washington. Washington Wildlife Federation is dedicated to the preservation, enhancement, and
11 perpetuation of Washington’s wildlife and wildlife habitat through education and conservation.

12 14. Pacific Coast Federation of Fishermen’s Associations (“PCFFA”) is the largest
13 organization of commercial fishing families on the west coast, with member and port
14 organizations from California to Washington States, representing thousands of men and women
15 in the Pacific commercial fishing fleet. Many of PCFFA’s members are salmon fishermen
16 whose livelihoods depend upon salmon as a natural resource and who, until recent fisheries
17 closures, generated hundreds of millions of dollars in personal income within the region. PCFFA
18 has its main office in San Francisco, California, and a northwest regional office in Eugene,
19 Oregon.
20

21 15. Institute for Fisheries Resources (“IFR”) is a non-profit corporation that
22 constitutes the conservation arm of PCFFA and shares PCFFA’s offices in San Francisco,
23 California, and Eugene, Oregon.
24

25 16. Friends of the Clearwater (“FOC”) a non-profit corporation, is dedicated to the
26 protection and preservation of the native biodiversity of the Clearwater Bioregion through
27

1 grassroots public involvement, outreach, education, and when necessary, litigation. FOC
2 members include biologists, outfitters, recreationists, and researchers who observe, enjoy, and
3 appreciate the Clearwater River System, the main tributary to the Snake River.

4 17. Sierra Club, a national environmental organization founded in 1892 and devoted
5 to the study and protection of the earth's scenic and ecological resources – mountains, wetlands,
6 woodlands, wild shores and rivers, deserts, plains, and their wild flora and fauna. Sierra Club
7 has its principal place of business in San Francisco, California and has some 60 chapters in the
8 United States and Canada, including the Washington State Chapter in Seattle, Washington and
9 the Idaho State Chapter in Boise, Idaho.

10 18. The Coalition and its members use the Snake River and its tributaries in
11 Washington, Idaho, and Oregon, its wildlife, and adjacent habitat for recreational, scientific,
12 aesthetic, spiritual, cultural, and commercial purposes. Plaintiffs' members derive (or, but for
13 the degraded status of the Snake River and its wildlife and habitat, would derive) recreational,
14 scientific, aesthetic, spiritual, cultural, and commercial benefits from the Snake River, its salmon,
15 steelhead, its other wildlife, and wildlife habitat through wildlife and nature observation, study,
16 meditation, photography, recreational boating, swimming, and recreational and commercial
17 fishing within the Columbia and Snake River basins and the Pacific ocean. Plaintiffs' members
18 plan to continue their activities in the future, but their use and enjoyment of these wildlife
19 species and their habitats is harmed by the Corps' continued operation and maintenance of the
20 four Lower Snake River dams for, among other purposes, navigation; the Corps' failure to
21 consider alternative approaches to managing and maintaining these dams and reservoirs; and its
22 failure to provide full and accurate information about the effects of its actions to the public in the
23 NEPA and Clean Water Act processes. The past, present, and future enjoyment of the Snake
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1 River, and its wildlife by Plaintiffs' members has been and will continue to be harmed by the
2 Corps' failure to comply with environmental and procedural statutes designed to minimize
3 needless damage to the environment and imperiled species and which will result in further
4 degradation of river resources and native fish and wildlife species. Plaintiffs' interests fall
5 within the zone of interests protected by the statutes at issue in this complaint.

6 19. The injuries to the above-described interests of Plaintiffs and their members are
7 actual, concrete injuries that are presently suffered by Plaintiffs and are directly caused by the
8 Corps' failure to comply with the law. An order from this Court requiring the Corps to comply
9 with the substantive and procedural mandates of NEPA and the Clean Water Act would protect
10 Plaintiffs' members' interests and redress Plaintiffs' injuries. Plaintiffs have no other adequate
11 remedy at law.
12

13 20. Plaintiff Nez Perce Tribe ("Tribe") is a federally recognized Indian tribe with
14 headquarters in Lapwai on the Nez Perce Reservation in Idaho. Since time immemorial, the
15 Tribe and its members have used and enjoyed the lands and waters of the Columbia and Snake
16 River basins, including the lower Snake River and its tributaries.

17 21. In 1855, the Tribe negotiated a treaty with the United States. Treaty of June 11,
18 1855 with the Nez Perce Tribe, 12 Stat. 957 (1859) ("1855 Treaty"). In the 1855 Treaty, the
19 Tribe ceded millions of acres of land in what are today Idaho, Oregon and Washington while
20 reserving, and the United States securing, a permanent homeland for the Tribe. The 1855 Treaty
21 further reserves certain rights to the Tribe, including the "exclusive right to take fish in streams
22 running through or bordering the Reservation, and "the right to fish at all usual and accustomed
23 places in common with citizens of the Territory; and of erecting temporary buildings for curing,
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1 together with the privilege of hunting, gathering roots and berries, and pasturing their horses and
2 cattle upon open and unclaimed lands.”

3 22. The Tribe has a significant interest in the Corps’ administration and regulation of
4 the Snake River and its tributaries. These waters provide important habitat for treaty-reserved
5 aquatic species such as Pacific lamprey, salmon, and steelhead. When not prevented from doing
6 so by the dredging action and PSMP, the Tribe and its members derive subsistence, ceremonial,
7 recreational, aesthetic, scientific, commercial, cultural, and spiritual benefits from the water and
8 resources of the Snake River and its tributaries that comprises part of the Tribe’s vast aboriginal
9 territory and on which the Tribe enjoys access to, and exercise of, treaty-reserved rights.

10 23. As co-manager of its treaty-reserved resources, the Tribe is substantially involved
11 in the management, restoration, and protection of its fisheries, including Pacific lamprey,
12 salmon, steelhead and bull trout that spawn and rear in waters within and adjacent to the project
13 area. The Tribe implements millions of dollars a year in fish restoration activities, including
14 areas in and adjacent to the project area within the Clearwater and lower Snake Rivers and its
15 tributaries that benefit the fish resource for tribal and non-tribal communities alike.

17 24. The Tribe and its members intend to continue to derive subsistence, ceremonial,
18 recreational, aesthetic, scientific, commercial, cultural, and spiritual benefits from the water and
19 resources of the Snake River and its tributaries, including the project site and other affected
20 waters and lands in Snake River and Columbia River basins. The Tribe also intends to continue
21 to implement fish management, restoration, and protection activities in these rivers and
22 tributaries, including the Snake River basin. The past, present, and future enjoyment of these
23 benefits by the Tribe and its members has been, is being, and will continue to be harmed by
24

1 Defendant's violations of law, for which judicial relief is required to remedy the harm caused to
2 the Tribe.

3 25. Defendant U.S. Army Corps of Engineers ("Corps") is an agency of the United
4 States Army and the Department of the Defense that constructs and operates federal engineering
5 projects throughout the United States, primarily in rivers, coasts, and wetlands. The Corps has
6 primary management authority over the operation and maintenance of four dams on the lower
7 Snake River, operations that are at the heart of this action. The Corps is also responsible for
8 issuing permits for the discharge of dredged or fill material under Section 404 of the Clean Water
9 Act, 33 U.S.C. § 1344.

10 JURISDICTION AND VENUE

11 26. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question
12 jurisdiction), § 2201 (declaratory relief), § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706
13 (Administrative Procedure Act).

14 27. Venue is properly vested in this Court under 28 U.S.C. § 1391(e), as Defendant
15 maintains offices in this district, some of the plaintiffs reside in this district, and a substantial part
16 of the acts and omissions giving rise to this lawsuit took place in this district.

18 STATUTORY FRAMEWORK

19 28. The Administrative Procedure Act ("APA") authorizes courts reviewing agency
20 action to hold unlawful and set aside final agency action, findings, and conclusions that are
21 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5
22 U.S.C. § 706(2)(A). Environmental impact statements prepared pursuant to NEPA and
23 compliance with the substantive requirements of the CWA are reviewed under this provision of
24 the APA.
25

1 A. The National Environmental Policy Act

2 29. The National Environmental Policy Act, 42 U.S.C. § 4321-4347 is “our basic
3 national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA serves two
4 purposes: (1) “it ensures that the agency, in reaching its decision, will have available, and will
5 carefully consider, detailed information concerning significant environmental impacts,” and (2) it
6 “guarantees that the relevant information will be made available” to the public so it may play a
7 role in the decision-making process. *Robertson v. Methow Valley Citizens Council*, 490 U.S.
8 332, 349 (1989).

9 30. Under NEPA, agencies are required to prepare an environmental impact statement
10 for any major federal action significantly affecting the human environment. 42 U.S.C.
11 § 4332(C). The EIS requirement is designed to ensure that NEPA’s environmental protection
12 policies are integrated into environmental decision-making, 40 C.F.R. § 1501.1(a), and provide a
13 means by which decision-makers and the public can evaluate the environmental impacts of
14 government proposals. 40 C.F.R. § 1502.1.

15 31. The EIS must detail, among other requirements, “the environmental impact of the
16 proposed action” and “alternatives to the proposed action.” *Id.* § 4332(2)(C)(i), (iii). NEPA
17 further provides that agencies must “study, develop, and describe appropriate alternatives to
18 recommended courses of action in any proposal which involves unresolved conflicts concerning
19 alternative uses of available resources.” *Id.* § 4332(2)(E).

20 32. NEPA requires that an EIS contain a thorough discussion of the “alternatives to
21 the proposed action.” 42 U.S.C. § 4332(C)(iii), (E). NEPA’s implementing regulations provide
22 that agencies must discuss “the environmental impacts of the alternatives including the proposed
23 action, any adverse environmental effects which cannot be avoided should the proposal be
24 implemented, [and] the relationship between short-term uses of man’s environment and the
25 implemented, [and] the relationship between short-term uses of man’s environment and the
26 implemented, [and] the relationship between short-term uses of man’s environment and the

1 maintenance and enhancement of long-term productivity.” 40 C.F.R. § 1502.16. The discussion
2 of alternatives is “the heart” of the NEPA process, and is intended to provide a “clear basis for
3 choice among options by the decision-maker and the public.” 40 C.F.R. § 1502.14. NEPA’s
4 implementing regulations require the agency to “[r]igorously explore and objectively evaluate all
5 reasonable alternatives.” 40 C.F.R. § 1502.14(a). An agency’s failure to consider a reasonable
6 alternative is fatal to the sufficiency of an EIS. *Idaho Conservation League v. Mumma*, 956 F.2d
7 1508, 1519 (9th Cir. 1992). As the NEPA regulations and case law make clear, an alternative
8 need not be within an agency’s existing legal authority or a complete solution to the agency’s
9 goals to warrant consideration and analysis. 40 C.F.R. § 1502.14(c); *Natural Res. Def. Council,*
10 *Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).

11
12 33. Under NEPA, federal agencies must take a “hard look” at the environmental
13 consequences of their actions before action is taken. *Blue Mountains Biodiversity Project v.*
14 *Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998). Taking a hard look requires the agency to
15 provide “a reasonably thorough discussion of the significant aspects of the probable
16 environmental consequences.” *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). The hard
17 look doctrine bars “[g]eneral statements about ‘possible effects’ and ‘some risk’ . . . absent a
18 justification regarding why more definitive information could not be provided.” *Neighbors of*
19 *Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). This “ensures that
20 important effects will not be overlooked or underestimated only to be discovered after resources
21 have been committed or the die otherwise cast.” *Robertson*, 490 U.S. at 349.

22
23 34. To satisfy the requirement that it take a “hard look” at the environmental
24 consequences of its actions, and alternatives to those actions, an agency must engage in a
25 “reasoned evaluation of the relevant factors” to ensure that its ultimate decision is truly
26

1 informed. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992). Additionally,
2 “[a]gencies shall insure the professional integrity, including scientific integrity, of the
3 discussions and analyses in environmental impact statements.” 40 C.F.R. § 1502.24. An
4 agency’s failure to include and analyze information that is important, significant, up-to-date,
5 available, or essential renders an EIS inadequate. 40 C.F.R. § 1500.1 (“The information must be
6 of high quality.”).

7 35. These principles apply to the economic as well as environmental analyses
8 included in an EIS. While the purpose of NEPA is to evaluate the environmental consequences
9 of a proposed federal action, “[w]hen an [EIS] is prepared and economic or social and natural or
10 physical environmental effects are interrelated, then the [EIS] will discuss all of these effects on
11 the human environment.” 40 C.F.R. §§ 1508.14, 1508.8. An economic analysis or cost-benefit
12 statement that includes erroneous data, or that is otherwise misleading, violates NEPA.

13
14 B. The Clean Water Act

15 36. The goal of the Clean Water Act (“CWA”) is to “restore and maintain the
16 chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The
17 CWA sets the structure for regulating discharges of pollutants in the waters of the United States.
18 Under the CWA, it is unlawful to discharge dredged or fill material into navigable waters
19 without a permit. 33 U.S.C. § 1344.

20 37. While the Corps does not issue permits to itself, the CWA’s implementing
21 regulations require the Corps to “apply[] all applicable substantive legal requirements, including
22 public notice, opportunity for public hearing, and application of the 404(b)(1) guidelines” before
23 proceeding with maintenance dredging. 33 C.F.R. § 336.1(a). Those substantive requirements
24 include at least (1) “an evaluation of the probable impacts, including cumulative impacts, of the
25 proposed activity and its intended use on the public interest,” 33 C.F.R. § 320.4(a)(1); and (2) a

1 “public interest review” that requires “the consideration of the full public interest by balancing
2 the favorable impacts against the detrimental impacts,” 33 C.F.R. § 320.1(a). As part of the
3 public interest review, the Corps must consider “conservation, economics, aesthetics, general
4 environmental concerns, wetlands . . . fish and wildlife values . . . water quality . . .” and
5 guidelines for disposal of dredged material developed under § 404(b)(1) of the CWA. 33 C.F.R.
6 § 320.4(a)(1). The Corps must weigh “[t]he relative extent of the public and private need for the
7 proposed structure or work” and where there are conflicts about resources use, “the practicability
8 of using reasonable alternative locations and methods to accomplish the objective of the
9 proposed structure or work.” 33 C.F.R. § 320.4(a)(2)(i)-(ii).

10 C. Statutory Authorization for Snake River Projects, Navigation and Dredging

11 38. The Columbia and Snake River navigation system was authorized pursuant to the
12 Rivers and Harbors Act in 1945. *See* Pub. L. No. 79-14, 59 Stat. 10, 21 (1945) (adopting H.R.
13 Doc. No. 75-704). The four lower Snake River dams (Ice Harbor, Lower Monumental, Little
14 Goose, and Lower Granite), and McNary dam on the Columbia River, are authorized to provide
15 for slackwater navigation and irrigation, with power generation as a “secondary” purpose. *Id.*
16 The authorizing report indicates that construction of the lower Snake River dams would provide
17 a minimum navigation draft of five feet at low flows (six feet at ordinary flows), and on average
18 be navigable for ten months a year. House Doc. No. 75-704, at 9, 39.

19 39. Construction of the Ice Harbor dam was initiated in 1956; the project was
20 dedicated in 1962. Work on the last and farthest upstream of the four Snake River dams, Lower
21 Granite, began in 1965; the dam was operational by 1975, and additional power generation
22 capacity was added through 1978.

23 40. The Flood Control Act of 1962, which authorized several new projects, includes a
24 provision that reads as follows: “The depth and width of the authorized channel in the
25
26

1 Columbia-Snake River barge navigation project shall be established at fourteen feet and two
2 hundred and fifty feet, respectively, at minimum regulated flow.” Pub. L. No. 87-874, 76 Stat.
3 1173, 1193 (1962). Minimum regulated flow is not defined. The Flood Control Act does not
4 alter the component of the 1945 law that states that the navigation system will be navigable, on
5 average, ten months a year.

6 41. Although the Corps has the authority to operate the lower Snake River navigation
7 channel at a depth of fourteen feet, it is not legally obligated to do so. The Corps can exercise its
8 discretion to maintain the navigation channel at a depth of less than fourteen feet for all or part of
9 the year and has operated it at a depth of less than fourteen feet in the past.

10 II. THE STATUS OF ANADROMOUS FISH IN THE SNAKE RIVER

11 42. Steelhead and salmon are anadromous fish. They are born and rear in fresh water,
12 migrate downstream through tributaries of the Snake River, the Snake River itself, and the
13 Columbia River to the Pacific Ocean where they grow and live as adults, returning to their natal
14 streams and lakes to spawn and die. The Columbia and Snake Rivers, their tributaries, and
15 estuary historically provided habitat for Chinook, sockeye, chum, and Coho salmon, as well as
16 steelhead, as well as Pacific lamprey and sturgeon. Historical salmon and steelhead escapement
17 to the Columbia and Snake River basins were 8-16 million and 500,000- 2 million, respectively.
18

19 43. During the course of their juvenile and adult lives, the remaining populations of
20 salmon and steelhead face numerous artificial obstacles to successful migration, reproduction,
21 and rearing. Chief among these obstacles for many salmon and steelhead stocks is the series of
22 dams and their associated reservoirs, locks and other facilities, and operations on the Columbia
23 and Snake rivers that provide a navigable waterway to Lewiston, Idaho and comprise the Federal
24 Columbia River Power System (“FCRPS”). This system seriously and adversely affects ESA-
25 listed salmon and steelhead in a variety of ways, including but not limited to the following: (1)
26

1 operation of the FCRPS alters the hydrograph of the Snake and Columbia Rivers, reducing and
2 shifting river flows in ways that directly and indirectly kill and injure juvenile and adult salmon;
3 (2) juvenile salmon migrating down the Snake and Columbia Rivers are killed and injured in
4 significant numbers at the dams themselves, regardless of the route they take to pass each dam,
5 although some dam passage routes are more lethal than others; (3) even before juveniles reach
6 each dam, passage through the reservoirs created by the dams and operated for navigation takes a
7 high toll on survival through mechanisms ranging from poor water quality and high water
8 temperatures, increased risks of disease, predation, and mortality, to trapping and stranding,
9 disorientation, and stress; (4) once past the FCRPS, the toll the system imposes on juvenile
10 salmon through reduced fitness and survival is still high even in the estuary and ocean, especially
11 for juvenile fish captured and transported downstream around the FCRPS dams and reservoirs by
12 truck or barge. Returning adult salmon and steelhead also must face upstream passage through
13 the FCRPS risking injury, death, and reduced reproductive success through a variety of FCRPS-
14 imposed mechanisms ranging from delays at upstream fishway facilities, to fallback (leading to
15 repeated passage of the same dam), disorientation, trauma, disease, and significantly reduced
16 available spawning habitat.

18 44. Those salmon and steelhead species that must successfully pass the four lower
19 Snake River dams, and their associated locks and other facilities, as well as the four mainstem
20 Columbia River projects, on their way to and from the ocean are particularly hard hit by the
21 operations of this series of federal dams. These four species include Snake River spring/summer
22 Chinook, Snake River fall Chinook, Snake River sockeye, Coho, and Snake River steelhead.

24 45. As a consequence of dramatic population declines, NMFS has listed the Snake
25 River Sockeye, Snake River spring/summer Chinook, Snake River fall Chinook, and Snake

1 River steelhead as threatened or endangered and designated their migratory, spawning, and
2 rearing habitat in the basin, including the Snake and Columbia Rivers themselves, as critical
3 habitat. FEIS at 3-21.

4 46. According NMFS's latest status review of these ESA-listed Snake River stocks,
5 virtually all populations of Snake River spring/summer Chinook face high viability risks, Snake
6 River steelhead have viability risks ranging from unknown to high, Snake River Fall Chinook
7 face moderate viability risks, and Snake River Sockeye remain at a high risk of extinction.

8 NMFS, *5-Year Review: Summary & Evaluation of Snake River Sockeye, Snake River Spring-*
9 *Summer Chinook, Snake River Fall-Run Chinook, Snake River Basin Steelhead* (2011), available
10 at <http://goo.gl/qbHK2P>.

11
12 III. THE STATUS AND IMPORTANCE OF PACIFIC LAMPREY IN THE SNAKE AND
13 COLUMBIA BASINS

14 A. Life History

15 47. Pacific lamprey are anadromous and parasitic fish widely distributed along the
16 Pacific coast of North America and Asia. *See* Nez Perce Tribe's FEIS Cmts., Attach. A, U.S.
17 Fish and Wildlife Service, *Best Management Practices To Minimize Adverse Effects to Pacific*
18 *Lamprey* (2010) ("USFWS Lamprey Report"), at 3. Pacific lamprey are jawless fishes which
19 lack paired fins, vertebrae or a swim bladder and possess an elongated, cylindrical body and disc
20 mouth. *Id.*

21 48. After spending between six months to 3.5 years in the marine environment,
22 Pacific lamprey return to fresh water primarily during the spring and summer months. *Id.* at 5.
23 They often spend about one year in freshwater habitat before spawning, usually holding under
24 large substrate (e.g., large boulders, bedrock crevices) associated with low water velocities until
25 the following spring, when they move to spawning areas. *Id.* Adult lamprey spawn generally
26

1 between March and July in gravel bottom streams, usually at the upstream end of riffle habitat
2 near suitable habitat for larvae (“ammocoetes”), and die after spawning. *Id.* The incubation
3 period for larvae has been observed to be between 18-49 days after which larvae drift
4 downstream to areas of low stream velocity and burrow into sand or silt substrate. *Id.* They are
5 mostly sedentary, remaining burrowed in the stream substrate for 3 to 7 years. *Id.* Ammocoetes
6 gradually move downstream during high flow and scouring events. Following dislodgement and
7 downstream movement, the ammocoetes again burrow in silt or sand substrate. After this period,
8 larvae transform into juvenile lamprey (“macrophthalmia”), generally from July through
9 November. *Id.* Out-migration to the ocean occurring during or shortly after transformation from
10 larvae to juveniles. *Id.* Adults in saltwater feed on a variety of marine and anadromous fish, and
11 are preyed upon by sharks, sea lions, birds, and other marine mammals. *Id.*

12
13 49. In the Columbia River, returning adults enter freshwater from February to
14 September, although most migrate through the system between June and September, according to
15 adult daytime and nighttime counts at Bonneville and the Dalles dams. Adults spend a winter
16 prior to spawning sexually maturing in deep river pools with cover, such as boulders and organic
17 debris before completing their March–July spawning migrations. Adult Pacific lamprey die after
18 spawning.

19 B. Ecology

20 50. Pacific lamprey are one of the foundational species of the Columbia basin, and
21 have set the ecological stage for development of the basin’s native freshwater fish community.
22 Pacific lamprey may have served as a primary food source for aquatic, mammal, and avian
23 predators that also prey on ESA-listed salmonids and other recreational and commercially
24 important fish species. USFWS Lamprey Report at 2. The potential loss of Pacific lamprey to
25 Columbia basin biodiversity threatens the basin’s ecological framework. Pacific lamprey were a
26

1 significant contributor to the nutrient supply in nutrient-deficient streams of the basin as adults
2 die after spawning and their carcasses are a key contribution to the aquatic and terrestrial food
3 web. Juvenile lamprey are filter feeders, and as such, contribute to cleaning algae and sediment
4 from rocks in streams and riparian areas, preparing these habitats for successful production of
5 other aquatic biota.

6 C. Status

7 51. Fossil records indicate that Pacific lamprey have existed for nearly 450 million
8 years. Historic runs of Pacific lamprey in the Columbia River Basin numbered in the hundreds
9 of thousands at Bonneville Dam as recently as 1965. USFWS Report at 3. However, the
10 abundance and distribution of Pacific lamprey has significantly declined throughout its range
11 over the past three decades. *Id.* Available data suggest severely depressed lamprey runs in the
12 Columbia and Snake Rivers. The USFWS has identified Pacific Lamprey populations in the
13 Snake and Upper Columbia River regions as either presumed extirpated, possibly extirpated or
14 critically imperiled. Extremely low counts of adult Pacific lamprey counted passing Lower
15 Granite Dam indicate that lamprey have declined from more than 1,000 adults in the late 1990s
16 to just 12 in 2009. Many factors have contributed to this decline, including: impeded passage at
17 dams and diversions, altered management of water flows and dewatering of stream reaches,
18 dredging, chemical poisoning, poor ocean conditions, degraded water quality, disease, over-
19 utilization, introduction and establishment of non-native fishes, predation, and stream and
20 floodplain degradation. USFWS Report at 3. Dredging from construction, channel maintenance
21 and mining activities can impact all age classes of lamprey larvae. *Id.* at 11. Removal of
22 substrate with a backhoe or trackhoe could remove several hundred lamprey per bucket load. *Id.*
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25 52. The Pacific lamprey is included as a state-sensitive species in Oregon and
26 Washington, state-listed endangered species in Idaho, designated tribal trust species, and a

1 “species of special concern” for the U.S. Fish and Wildlife Service. *Id.* at 3. The Pacific
2 lamprey has also been designated as a Forest Service Sensitive Species in Regions 1 and 4, and is
3 classified as a Type 2 species (Rangewide/Globally imperiled) by the Bureau of Land
4 Management. *Id.*

5 D. Importance of Lamprey to the Nez Perce Tribe

6 53. Pacific lamprey have high cultural significance to the Nez Perce Tribe and other
7 Native American tribes from California to Alaska. Pacific Lamprey, or *Heesu* in the Nez Perce
8 language, are a culturally significant, treaty-reserved resource that have been integral to the
9 spiritual, physical, and economic health of the Tribe since time immemorial. Pacific Lamprey
10 figure prominently in Nez Perce oral histories, and are an important source of protein in the Nez
11 Perce traditional diet, supplementing salmon, steelhead, wild game, roots and berries. Lamprey
12 skin was also used for moccasins and the oil was a medicine for hair as well as the skin and
13 body. Tribal members are not able to harvest Pacific lamprey in the Snake Basin due to low
14 annual returns and the severely depressed status of these fish.
15

16 54. In response to the extremely depressed status and precarious future of Pacific
17 lamprey in the Snake Basin, the Nez Perce Tribe is working to protect, conserve and enhance
18 Pacific lamprey to include these fish in the Tribal diet. The Tribe initiated an adult Pacific
19 lamprey translocation effort in 2006. The translocation seeks to: maintain some level of
20 production in the Snake Basin until mainstem passage improves; thwart further local
21 extirpations; prevent loss of pheromone migration cues from larval lamprey; maintain lamprey
22 related ecosystem values to promote diversity, productivity and ecosystem health; and preserve
23 cultural values associated with Pacific lamprey.
24

25 55. The translocation initiative consists of collecting adults from lower Columbia
26 River mainstem dams for ultimate release in Snake basin streams. From 2007 through 2013, the

1 Nez Perce Tribe translocated 987 adult Pacific lamprey to 7 Snake Basin streams above Lower
2 Granite Dam; Asotin Creek, Little Canyon Creek, Orofino Creek, Lolo Creek, Newsome Creek,
3 Wallowa River and South Fork Salmon River. Clearwater River Basin tributaries received 488
4 (49%) of these outplants. Genetic parentage analyses have confirmed production from
5 translocated adults in all streams receiving translocated fish.

6 56. In addition to the Tribe's adult translocation efforts, the Tribe, in cooperation with
7 the Columbia River Intertribal Fish Commission (CRITFC), has developed and implemented a
8 Tribal Restoration Plan called the *Wy-Kan-Ush-Mi Wa-Kish-Wit* (Spirit of the Salmon) to benefit
9 anadromous and resident fish, including Pacific lamprey. This Tribal Restoration Plan provides
10 recommendations and actions to benefit lamprey, and includes information from a related plan
11 that was adopted by the tribes in 2011, which is the "*Tribal Pacific Lamprey Restoration Plan.*"
12 There are a number of key aspects that this Pacific lamprey restoration plan intends to achieve:
13 halt population declines and prevent further extirpation in tributaries; have 200,000 adult
14 lamprey at Bonneville Dam by 2020, and have those fish distributed throughout tribal ceded
15 areas; and have 1 million adult lamprey at Bonneville on annual basis by 2035, and have those
16 fish distributed throughout ceded areas and provide opportunities for tribal harvest. The
17 CRITFC *Wy-Kan-Ush-Mi Wa-Kish-Wit* also identifies actions including: improving lamprey
18 mainstem passage, survival and habitat; improving tributary passage and protect habitat; use
19 supplementation or reintroduction and translocation of adults into areas where they are severely
20 depressed or extirpated; evaluating and reducing contaminant accumulation and improve water
21 quality for lamprey; conducting research, monitoring, and evaluation of lamprey at all life
22 history stages; and including lamprey in existing Columbia Basin management and restoration
23 forums.
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1 57. The Tribe has also been actively involved in various regional forums addressing
2 limiting factors and threats to the continued existence of Pacific lamprey, including the Lamprey
3 Technical Work Group, the U.S. Fish and Wildlife Service Lamprey Conservation Initiative, the
4 Corps/Tribal Lamprey Work Group, the Anadromous Fish Evaluation Program, the Corps Study
5 Review Work Group, the Technical Management Team, the System Configuration Team, the
6 Fish Facility Design Review Work Group, the Fish Passage Operation and Maintenance
7 Committee, the Regional Implementation Oversight Group, the Fish Passage Advisory
8 Committee and the Northwest Power and Conservation Council. Pacific lamprey issues
9 addressed in these forums focus on Federal Columbia River Power System operations and
10 configurations to improve upstream and downstream passage through the hydrosystem.
11 Regional Pacific lamprey monitoring and assessment strategies and needs are also addressed.

12 E. The Corps' Treatment of Lamprey Concerns During the NEPA Process

13 58. In the Tribe's March 26, 2013, comments on the Draft Environmental Impact
14 Statement (DEIS), the Tribe emphasized Pacific Lamprey's importance as a treaty-reserved
15 resource integral to the spiritual, physical, and economic health of the Tribe. Nez Perce Tribe
16 DEIS Cmts. at 1. The Tribe questioned the Corps' reliance on its 2011 survey results finding no
17 juvenile lamprey in the dredging action area and its related assertion that juvenile lamprey
18 presence is likely low in the lower Snake River due to a lack of suitable habitat. *Id.* at 18-19.
19 The Tribe referenced a 2012 published study finding that larvae of multiple sizes occupied a
20 broad range of areas within the Columbia River mainstem, including Bonneville pool. The study
21 further found that reservoirs on the Columbia River created by the dams, as well as some
22 reservoir tributary mouths, may be used at a disproportionately higher rate by Pacific Lamprey.
23 The Tribe explained that the Clearwater River tributaries upstream of the proposed dredging
24 action area are known producers of lamprey larvae and juveniles. *Id.* at 19. Because this
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26

1 evidence indicates the potential for relatively high lamprey larval densities in the proposed
2 dredging action areas, and because Pacific Lamprey status is so imperiled, the Tribe requested
3 that the Corps conduct, using suitable methods, additional lamprey monitoring of the project area
4 prior to, during, and after project completion consistent with U.S. Fish and Wildlife Service
5 guidelines. *Id.*

6 59. In the FEIS, the Corps acknowledged that Pacific lamprey are “a culturally
7 significant resource to local tribes.” FEIS at 3-15. The Corps further recognized that the Nez
8 Perce Tribe’s 1855 Treaty with the United States “includes the right to fish within the
9 geographical area of the potential affected environment identified in the PSMP EIS.” *Id.* at 5-8.

10 60. The Corps acknowledged that Pacific lamprey are present in the Lower Snake
11 River Project (“LSRP”). FEIS at 3-4; *see also id.* at 3-15. (“Pacific lamprey pass upstream
12 through the LSRP as adults when returning to spawn in tributaries and downstream as juveniles
13 when migrating to the ocean.”). The Corps concluded, however, that “it is unlikely juvenile
14 lamprey are present in moderate or high numbers within the reservoirs of the lower Snake River
15 due to a paucity of available rearing habitat.” FEIS at 3-16. The FEIS further concluded that
16 “there is no evidence that Pacific lamprey have used or currently use the mainstem Snake River
17 for spawning or rearing.” *Id.* The Corps again based these conclusions on juvenile lamprey
18 surveys conducted in July and September, 2011. *Id.* These surveys used an experimental
19 electroshocking sled with an optical camera at 24 sample sites within the LSRP to determine the
20 presence of juvenile lamprey, including some locations where the Corps may dredge or dump
21 dredged material. *Id.* While the Corps noted that no lamprey were observed at any of the 24
22 sample sites during the two sample periods, it qualified those findings by noting that “[i]t is
23 plausible that juvenile lamprey were present but not observed with this electroshocking sled as it
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1 was recently developed for this specific objective and had a limited testing period prior to
2 deployment.” *Id.*

3 61. Elsewhere in the FEIS, the Corps also acknowledged that “[t]he placement of
4 dredged material could have a negative effect on Pacific lamprey ammocetes by burying them if
5 they are present.” FEIS at 4-11. Without any further explanation or analysis of these recognized
6 negative effects from the disposal of dredge spoils on lamprey, the Corps concludes that, “[i]n
7 the long term, habitat conditions in the area could be improved for lamprey.” *Id.*

8 62. In its response to the Tribe’s comments on the DEIS, the Corps more candidly
9 recognized that “juvenile lamprey may be present at an individual location (e.g., the Snake River
10 and Clearwater confluence) seasonally and/or at least during sporadic periods such as after high
11 flow events,” and acknowledged that “juvenile lamprey may be impacted during the proposed
12 near-term action.” *See* FEIS App’x G at G-140 (Response to Comment 8589). Contrary to its
13 statements in the FEIS, FEIS at 3-16, the Corps acknowledged that because the confluence of the
14 Snake and Clearwater Rivers provide “suitable rearing habitat ... for ammocetes, it is possible
15 they may be present and could be impacted by the proposed actions.” *Id.* The Corps attempted
16 to minimize these impacts, however, by speculating, without any reference to scientific support
17 or other information, that “juveniles may have the opportunity to be flushed or swim from the
18 barge if captured during dredging activities.” *Id.* It also contended, again without any scientific
19 support, that “[b]y placing dredged materials in shallow water, any juvenile lamprey that remain
20 in the materials may have the opportunity to escape and/or continue to utilize the area.” *Id.*

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23 63. In its September 29, 2014 comments responding to the FEIS, the Tribe reiterated
24 that Pacific lamprey emanating from the Clearwater River system associated with the Tribe’s
25 adult translocation initiative, and the alluvial deposition in the area, suggest usage and
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1 importance of the general Clearwater-Snake River confluence area for larval rearing. Nez Perce
2 Tribe FEIS Cmts. at 4. The Tribe again highlighted the 2012 study of similar habitat in the
3 Columbia River showing that conditions like those in the Snake-Clearwater confluence area are
4 now likely to support higher relative abundance of lamprey. As a result, the Tribe explained,
5 there is no effective “work window” applicable to rearing larval lamprey that can be present in
6 suitable habitat at any time. Potential impacts from disturbance from dredge activities in this
7 area include direct injury (including mortality) and increased susceptibility to predation.

8 64. Although the Corps declined to perform any other surveys or other monitoring for
9 lamprey in the three subsequent years leading up to the RODs, at either the dredging or disposal
10 sites, more recent USGS unpublished juvenile lamprey survey data funded by the Bonneville
11 Power Administration also suggests a high likelihood of moderate to high localized juvenile
12 lamprey relative abundance densities in the Lower Snake River Project area. The U.S.
13 Geological Survey had incidentally collected juvenile Pacific lamprey at multiple locations in
14 Lower Granite and Little Goose Reservoirs while sampling for other species in 2009, 2012, and
15 2013 at 19 separate sample sites (9 Lower Granite pool and 10 Little Goose pool) from River
16 Mile 76.0 to River Mile 134.3. Sample data did not differentiate ammocoete (larvae) and
17 macrophthalmia (transformed) lamprey. Even with non-target directed sampling for lamprey
18 juveniles, these data suggest a broad distribution of lamprey within Lower Granite and Little
19 Goose reservoirs. Collection sites included locations approaching the proposed dredging and
20 disposal footprint: Lower Granite RM 134.3, 132.0, 129.7 and 128.6, 119.0, and 112.5. This
21 data on juvenile lamprey in Lower Granite and Little Goose Reservoirs indicate a high likelihood
22 for moderate to high localized densities of lamprey. Notably, these collections document
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1 juvenile lamprey within the lower Snake River corridor and during the designated in-water work
2 window. These data were not included in the FEIS or RODs.

3 65. Finally, the U.S. Fish and Wildlife Service (“Service”), November 13, 2014
4 Biological Opinion for the Lower Snake River Channel Maintenance Project – Idaho and
5 Washington, recommends monitoring, as well as recovery measures, for juvenile Pacific
6 lamprey.³ More specifically, Conservation Recommendations provided as part of that Biological
7 Opinion included implementing monitoring and recovery measures for juvenile Pacific lamprey
8 similar to those defined under the Terms and Conditions for bull trout.

9 66. Despite the Corps’ general acknowledgement of potential impacts to lamprey, the
10 U.S. Fish and Wildlife Service recommendations, and Pacific lamprey’s imperiled status in the
11 Snake and Columbia Rivers, the Corps did not perform any detailed or meaningful evaluation of
12 the severity or extent of the impacts of its actions at an individual or population level. The Corps
13 ignored relevant information on the presence and relative abundance of Pacific lamprey in Lower
14 Granite and Little Goose reservoirs, the presence of suitable lamprey habitat within the dredge
15 and disposal sites, and refused to perform any additional survey or monitoring of lamprey before
16 beginning its 2014-2015 dredging action. The Corps’ conclusion that “the proposed actions
17 [dredging action and the PSMP] would have no long-term, adverse impacts on important treaty
18 resources,” FEIS at 5-8, 5-9, is not based on the “hard look” at the impacts of its actions on
19 Pacific lamprey as required by NEPA.
20

21 III. DREDGING AND NAVIGATION IN THE LOWER SNAKE AND COLUMBIA
22 RIVERS

23 67. On two occasions, this Court has preliminarily enjoined the Corps’ dredging plans
24 in response to challenges by conservation plaintiffs and the Nez Perce Tribe. The PSMP is a

25 ³ A copy of that Biological Opinion is available at [http://www.nww.usace.army.mil/Portals](http://www.nww.usace.army.mil/Portals/28/docs/programsandprojects/psmp/PSMP_RODs_Package_Corrected4.pdf)
26 [/28/docs/programsandprojects/psmp/PSMP_RODs_Package_Corrected4.pdf](http://www.nww.usace.army.mil/Portals/28/docs/programsandprojects/psmp/PSMP_RODs_Package_Corrected4.pdf).

1 result of those earlier lawsuits and resulting settlement agreement between the Corps and
2 conservation plaintiffs.

3 68. Construction and operation of the Corps' four dams on the lower Snake River has
4 substantially interfered with the natural movement of sediments through the Snake River system.
5 As sediment-rich waters enter the Lower Granite pool, they slow down so that suspended
6 sediments settle on the bottom rather than being carried further downstream or out to the ocean,
7 as would be the case in the absence of the reservoirs or with different reservoir operations. This
8 results in the buildup of sediments over time, particularly in the Lower Granite pool. In response
9 to this sediment buildup, the Corps has periodically dredged the navigation channel and various
10 port facilities on an as-needed basis since construction of the projects. The Corps released a
11 Final EIS for a 20-year Dredged Material management plan ("DMMP") in July 2002. That EIS
12 either declined to mention, or refused to evaluate, several alternatives for managing sediment and
13 providing for navigation that would have reduced or eliminated the need to dredge. The Corps
14 signed a Record of Decision formally adopting its preferred alternative on September 27, 2002.

16 69. On November 4, 2002, a group of conservation plaintiffs, including many in this
17 case, filed their first complaint challenging the Corps' 20-year Dredged Material Management
18 Plan ("DMMP") and EIS for the lower Snake River. *Nat'l Wildlife Fed'n, et. al. v. Nat'l Marine*
19 *Fisheries Serv., et al.*, C02-2259 (W.D. Wash. 2002). A few days later, the plaintiffs moved this
20 Court for a preliminary injunction to enjoin dredging planned for the Snake River during the
21 winter of 2002-03. The Tribe, joining as amicus, supported the injunction request. After a
22 hearing, this Court on December 12, 2002, granted plaintiffs' preliminary injunction motion,
23 concluding that plaintiffs were likely to prevail on the merits (or raised serious questions about
24 the merits) of their legal claims under NEPA and the ESA, and that the balance of harms and the
25

1 public interest favored issuance of an injunction. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries*
2 *Serv.*, 235 F. Supp. 2d 1143 (W.D. Wash. 2002). No dredging occurred during the winter of
3 2002-03.

4 70. On June 5, 2003, the Corps invited public comment on a proposal to prepare a
5 draft supplemental EIS that would address the flaws in the 20-year DMMP/EIS identified by
6 plaintiffs and this Court. 68 Fed. Reg. 33,684. At roughly the same time, the Corps released a
7 “Supplemental Environmental Analysis for Purposes of 2003-04 Dredging” (“2003 SEA”). The
8 purpose of the 2003 SEA was to identify and justify near-term dredging actions in the Snake
9 River to maintain the navigation channel during the winter of 2003-04 while the supplemental
10 NEPA process for the 20-year DMMP/EIS was underway. The proposal outlined in the 2003
11 SEA was virtually identical to the first year of dredging proposed for implementation in the 2002
12 DMMP/EIS and ROD the Court had previously enjoined.

14 71. On September 24, 2003, the Corps announced that it was postponing its decision
15 to proceed with dredging during the winter of 2003-04. On December 17, 2003, the Corps
16 announced an intent to implement maintenance dredging in the Snake River, as described in the
17 2003 SEA, starting in December 2004.

18 72. Conservation plaintiffs filed a second amended complaint, adding claims against
19 the 2003 SEA and the Corps’ 2004 decision adopting the SEA. The conservation plaintiffs,
20 again with full support of amicus Nez Perce Tribe, moved for a preliminary injunction against
21 implementation of the dredging proposal during the winter of 2004-05. On November 1, 2004,
22 this Court granted the motion finding that plaintiffs were likely to prevail on the merits of several
23 of their claims and enjoining the Corps from proceeding with dredging in the winter of 2004-
24

1 2005. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, C02-2259L, Order Granting Mot.
2 Prelim. Inj., Dkt. No. 107 (W.D. Wash. Nov. 1, 2004).

3 73. In March 2005, the Corps released a draft EIS for a plan that was in virtually
4 every respect identical to the ones previously rejected by the Court, identifying as a preferred
5 alternative the same dredging plan that had been enjoined on two occasions. The Corps issued a
6 final EIS, and a record of decision adopting the dredging proposal outlined in the final EIS
7 followed.

8 74. On September 28, 2005, the parties reached a settlement agreement that would
9 allow the Corps to dredge once during the winter of 2005-2006, but that required the Corps to
10 develop a long-term plan for sediment maintenance in the lower Snake navigation system and to
11 analyze that plan in an EIS. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, C02-2259L,
12 Settlement Agreement and Mot. Dismiss, Dkt. No. 123 ¶¶ 2-3 (W.D. Wash. Sept. 8, 2005). The
13 parties agreed upon a schedule for completion of this Programmatic Sediment Management Plan
14 (“PSMP”) that would culminate in the issuance of a Final EIS and Record of Decision by
15 December 1, 2009. *Id.* App’x. ¶¶ 1-5.

17 75. The Corps carried out the planned dredging in the winter of 2005-2006, and there
18 has been no significant dredging since that time.⁴

19 IV. THE PROGRAMATIC SEDIMENT MANAGEMENT PLAN, ENVIRONMENTAL
20 IMPACT STATEMENT, AND RODS

21 76. In December 2012, the Corps issued the PSMP and a draft EIS. After seven years
22 of study, the Corps’ PSMP and draft environmental impact statement yet again identified
23 dredging as its preferred immediate and likely long-term solution, based largely on its failure to
24 fully evaluate a reasonable range of possible alternatives.

25 _____
26 ⁴ The Corps notes in its FEIS that it performed dredging in the lock approach at Ice Harbor Dam
in fall of 2012, but provides no additional detail. FEIS at 4-72.

1 77. The Corps’ PSMP and DEIS consisted of two actions. First, although the Corps
2 had previously committed that the EIS would not “result in any immediate sediment
3 management actions” and that any actions would be “tiered off of the EIS with site-specific
4 environmental review,”⁵ the Corps’ DEIS included an action to dredge beginning December 15,
5 2013 to address what the Corps termed an “immediate need” to restore the 14-foot channel depth
6 in some areas of the channel. Second, for the long-term, the Corps outlined a non-binding list of
7 possible options for managing sediment, including dredging, navigation objective reservoir
8 operation, sediment flushing through reservoir drawdown, construction of in-water weirs and
9 dikes to channel river flow, reconfiguration or relocation of facilities, raising levees, dikes and
10 dike fields, agitation to re-suspend sediment, and trapping sediment upstream. While the Corps
11 proposed to implement dredging to address what it characterized as its “immediate need,” it did
12 not propose to adopt any specific measure or combination of measures to manage sediment in the
13 future, asserting instead that would address any such measures in future site-specific NEPA
14 analyses that would “tier off” the PSMP EIS.

16 78. The Coalition, along with many other conservation groups, concerned citizens,
17 the Nez Perce Tribe, and the Environmental Protection Agency (“EPA”) submitted extensive
18 comments documenting these and other flaws in the DEIS on March 26, 2013.

19 79. The Corps initially indicated an intention to finalize the EIS and carry out
20 “immediate need” dredging the winter of 2013-2014, but subsequently withdrew that proposal,
21 purportedly because of “remaining complex EIS technical and environmental review
22 requirements, plus associated contract planning efforts.” Press Release, U.S. Army Corps of
23 Engineers, Proposed lower Snake River dredging also delayed, Release No. 13-057 (Aug. 16,
24

25
26 ⁵ Exhibit 3 (Letter from Commander, Walla Walla District to Todd True (Feb. 23, 2012)) at 1.

1 2013), *available at* <http://goo.gl/cXL1J2>. The Corps also noted that the EIS must be finalized
2 “before a solicitation for a contract can be issued for proposed dredging.” *Id.*

3 80. In August 2014, the Corps issued a final EIS, changing essentially nothing in the
4 substantive analysis from its draft. The Coalition, the Nez Perce Tribe, and others – including
5 EPA – highlighted the shortcomings in the FEIS through another round of detailed comments,
6 submitted September 22, 2014 and September 29, 2014.

7 81. Like the draft EIS, the Corps’ FEIS included the site-specific “immediate need”
8 dredging proposal in the programmatic EIS without an adequate, independent consideration of
9 alternatives to dredging in 2014-2015. The Corps’ entire discussion of alternatives for its alleged
10 “immediate need” to reestablish the navigation channel to 14 feet consists of only two pages of
11 text and presents only two alternatives: (1) dredging or (2) continuing the status quo and not
12 dredging. *See* FEIS at 2-41 to 2-44. Although the FEIS elsewhere notes that several measures,
13 including sediment agitation, reservoir drawdown, or construction of bendway weirs, would
14 effectively address accumulated sediment, FEIS at 2-18 to 2-20, the Corps refused to consider
15 any non-dredging actions, or combination of actions, that might provide for continued navigation
16 and/or achieve the Corps’ stated goal over a different period of time. The Corps similarly
17 refused to consider any measures, such as light loading barges, that could effectively provide for
18 navigation in the meantime. FEIS App’x G at G-85 (Response to Comment 8691)
19 (characterizing this measure as third party reaction to a shallow channel). Rather, based at least
20 in part on its continued misinterpretation of the Flood Control Act of 1962, the Corps arbitrarily
21 dismissed any measures other than dredging with the conclusory assertion that “[o]ther structural
22 and management measures ... would not effectively address sediment that has accumulated in
23 the navigation channel.” FEIS at 2-41; *see id.* at 2-42.
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1 82. Rather than complete the PSMP and then evaluate the dredging proposal in a
2 subsequent, tiered-off environmental document, the Corps, for “efficiency,” has chosen to
3 include both the 2014-2015 proposed dredging action and the long-term PSMP, each of which
4 has a different temporal and geographic scope and purpose, in a single FEIS. In the ROD, the
5 Corps points to a draft Council on Environmental Quality guidance document noting that
6 agencies may choose to include an analysis of a site-specific action in a programmatic EIS.
7 Dredging ROD at 2, n.2. While this draft guidance document may allow the Corps to combine
8 its paperwork for two separate actions, it does not excuse the Corps from complying with its duty
9 to rigorously and independently consider a range of alternatives for each of its actions.

10 83. While the Corps’ preferred alternative (Alternative 7) lists several other measures
11 and actions (including more dredging) that the Corps may take to manage future sediment
12 accumulation, the FEIS contains no analysis or determination of which of these would be
13 implemented or when. Instead, the Corps proposes to evaluate the impacts and cost-
14 effectiveness of these potential measures in separate NEPA analyses that would “tier off” the
15 PSMP EIS in the future when the Corps reaches one of several “triggers” for additional analysis,
16 each of which is set at a level that ignores currently available information and/or is too late to
17 avert anything other than an “immediate need” (likely dredging) action in response. *See* FEIS
18 App’x A at A-21 to A-28 (describing “immediate” and “forecast” triggers for navigation and
19 other purposes and listing potential actions in response). There is no indication or analysis in the
20 FEIS as to why or when any alternatives, other than dredging, which the Corps evidently
21 believes are ineffective and too costly now, would ever be considered cost-effective or otherwise
22 more effective than the Corps’ years-long preference for dredging. The Corps is not currently
23 undertaking any such long-term analysis or planning for the implementation of non-dredging
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1 measures, despite already being “aware of areas of reoccurring sediment problems.” PSMP
2 ROD at 6; FEIS at 1-12 to 1-13 (table 1-3).

3 84. The FEIS fails to take a hard look at the effects of proposed dredging actions on
4 Pacific lamprey. The Corps acknowledges that lamprey may be “impacted” as a result of
5 dredging, but aside from this cursory statement, the agency includes no meaningful or detailed
6 analysis disclosing what the severity or extent of impacts will be to lamprey, especially given
7 their imperiled status in the Columbia and Snake Rivers. The Corps also acknowledges that
8 lamprey larva may be smothered by the deposition of dredge spoils resulting from the project,
9 but the agency fails to elaborate on or examine any meaningful way how many lamprey may be
10 killed or harmed and what the impact that mortality will have on the already imperiled status of
11 lamprey in the Snake River. The Corps also did not consider more recent data collected by
12 USGS, suggesting a high likelihood for moderate to high densities of juvenile lamprey within the
13 dredge project area. This recent data contravenes the Corps’ conclusion that juvenile lamprey
14 are unlikely to be present in the project area and calls into serious question the accuracy and
15 reliability of the Corps’ own 2011 lamprey survey data for which the Corps itself recognizes
16 potential methodological limitations. The Corps further ignored or failed to consider that the
17 higher production of Pacific lamprey emanating from the Clearwater River system resulting from
18 the Nez Perce Tribe’s adult translocation initiative, and the alluvial deposition in the area,
19 suggest usage and importance of habitat in the general Snake-Clearwater confluence area –
20 including the proposed dredging footprint – for lamprey larval rearing. Despite this evidence,
21 and the species’ imperiled status in the Snake and Columbia Rivers, the Corps did not take a hard
22 look at the full impacts of its dredging action on Pacific lamprey, and did not include any
23 measures to survey or monitor for lamprey presence before, during, or after its 2014-2015
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1 dredging action. The Corps similarly discounted impacts to water quality and habitat that would
2 impact ESA-listed fall Chinook salmon and steelhead present in the reservoirs during its
3 dredging action. The Corps' cursory examination of these impacts violates NEPA.

4 85. The FEIS fails to take a hard look at the effects of climate change, which will
5 result in increases in sediment delivery and which will continue to adversely impact water
6 quality, Pacific lamprey, salmon, steelhead, and other fish and wildlife in the Snake River over
7 time. In its consideration of the future effects of climate change on its proposed actions, the
8 Corps arbitrarily dismissed predictions of large sediment increases due to increased forest fires
9 and changes in precipitation associated with climate change. *See, e.g.*, FEIS App'x D at D-10
10 (2012 study predicting that increased forest fires associated with climate change could produce a
11 10-fold increase in sediment yields), *but see* FEIS at 4-96 (dismissing consideration of any
12 increase based on mistaken belief that current conditions may represent peak sediment delivery).
13 These increases will require more aggressive and more frequent channel maintenance and will
14 increase both the environmental and economic impacts.
15

16 86. Similarly, the FEIS fails to disclose or adequately consider the number and
17 magnitude of adverse effects that climate change will have on nearly every element necessary to
18 support healthy fish and wildlife populations through the life of the plan. *Compare* FEIS at 4-98
19 (noting only that climate change may affect timing of river flows) *with* NMFS Biological
20 Opinion for the PSMP at 31-32 (summarizing studies regarding changes in water temperatures,
21 stream flows, precipitation, ocean conditions, and freshwater fish habitat and concluding that
22 each will negatively impact salmon populations).
23

24 87. The FEIS presents an inadequate and misleading analysis of the costs and benefits
25 of the Corps' proposed actions and alternatives to those actions. The primary assumption
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1 underlying the Corps' decisions to proceed with either the "immediate need" dredging action or
2 the long-term PSMP is that the navigation channel is worth maintaining. *See* FEIS at 3-55. The
3 Corps' FEIS presents only an oversimplified calculation, based on outdated information, that
4 excludes relevant costs and overstates economic benefits to reach that conclusion. FEIS at 3-55.
5 That calculation was based on outdated and unreliable data and methodology from 2002. The
6 Corps did not correct or perform the updated studies or analysis necessary to continue its reliance
7 on that data and failed to consider more recent available information demonstrating navigation
8 volumes (and any transportation costs saving associated with them) continue a decade-long
9 dramatic decline. Moreover, the Corps' calculation also failed to disclose the relevant costs
10 associated with continued sediment management – such as the costs associated with its proposals
11 for maintaining flow conveyance through Lower Granite reservoir through dredging or levee
12 reconstruction – over the life of the PSMP. The Corps' belated discussion of the economic
13 impacts of the PSMP and dredging action, falls far short of what NEPA and the agency's own
14 regulations require – a robust, honest discussion of whether the benefits of this major federal
15 action justifies its many economic and environmental costs. Consideration of all of these factors
16 would likely undermine and reverse the Corps' unsupported assumption that the benefits of
17 channel maintenance exceed the costs.
18

19 88. In short, rather than provide a full analysis of all the alternatives and effects of
20 sediment management, the Corps' FEIS for the PSMP proposed to indefinitely continue the
21 Corps' preferred past practice of dredging-as-usual, starting with its "immediate need" dredging
22 action proposed for this year.
23

24 89. At the eleventh hour – nearly five years later than promised in the 2005
25 settlement, and only 28 days before it seeks to begin dredging once again – the Corps issued a
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1 ROD for the PSMP and a separate ROD for the “immediate need” dredging action on November
2 17, 2014. The next day, the Corps released revised RODs with unspecified “corrections.” The
3 Corps purportedly signed the RODs on November 14, 2014 but did not release them to the public
4 at that time.

5 90. The RODs rely on and adopt the FEIS for both the 2014-2105 dredging action and
6 the long-term PSMP. The RODs do not correct the substantial flaws in the EIS but rather
7 authorize the Corps to proceed immediately with both actions.

8 91. The Corps issued a Public Notice announcing its proposal to dredge in 2013-2014
9 on March 11, 2013 and seeking Clean Water Act § 404 authorization. Corps Public Notice,
10 CENWW-PM-PD-EC 13-01. On November 19, 2013, the Corps issued a Public Notice
11 announcing applications for § 404 permits to dredge in the Ports of Lewiston and Clarkston.
12 Corps Joint Public Notices, NWS-2013-916 (Clarkston), NWW-2013-519 (Lewiston).
13 Conservation groups, the Nez Perce Tribe, and others, filed comments on both Public Notices on
14 April 30, 2013 and December 18, 2013.⁶

15 92. The Corps has not complied with its obligations under the Clean Water Act.
16 Neither the Public Notice, nor the EIS contain a public interest review as required by 33 C.F.R.
17 § 320.1(a). In its response to comments on the DEIS, the Corps argued that it need not undertake
18 that important analysis because it believes that continued Congressional appropriations can stand
19 in for the public interest review. *See* FEIS App’x G at G-173 (Response to Comment 9319).
20 The Corps cites no authority for this extraordinary claim.
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25 ⁶ To the best of Plaintiffs’ knowledge, the Corps either has not issued, or has not made available
26 to the public, any permits or related analysis for the dredging activities proposed at the Ports of
Clarkston and Lewiston in this Public Notice.

FIRST CLAIM FOR RELIEF

VIOLATION OF NEPA 42 U.S.C. § 4332 AND APA: FAILURE TO CONSIDER REASONABLE RANGE OF ALTERNATIVES FOR ITS 2014-2015 DREDGING ACTION

93. Plaintiffs incorporate by reference all preceding paragraphs.

94. The discussion of alternatives to the proposed action is “the heart” of the NEPA process and is intended to provide a “clear basis for choice among options by the decision-maker and the public.” 40 C.F.R. § 1502.14. *See also* 42 U.S.C. § 4332(C)(iii), (E). NEPA and its implementing regulations require an agency to “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a) (emphasis added).

95. For the reasons described above, the Corps has violated NEPA, and the FEIS is invalid because it fails to rigorously explore and evaluate all reasonable alternatives. Several alternatives to the Corps’ dredging action in 2014-2015 are available and were proposed for consideration, but the Corps failed to evaluate any of them.

96. The APA authorizes reviewing courts to set aside federal agency action that is arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. §§ 701-706.

97. By issuing an EIS that fails to meet the standards laid out in NEPA, its implementing regulations, and governing case law, the Corps has acted in a manner that is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of NEPA and the APA. 5 U.S.C. §§ 701-706.

SECOND CLAIM FOR RELIEF

VIOLATION OF NEPA 42 U.S.C. § 4332 AND APA: FAILURE TO TAKE A HARD LOOK AT THE EFFECTS OF THE DREDGING ACTION ON PACIFIC LAMPREY

98. Plaintiffs incorporate by reference all preceding paragraphs.

1 99. NEPA requires the Corps to fully disclose all of the potential adverse
2 environmental impacts of its dredging action and PSMP before deciding to proceed. 42 U.S.C. §
3 4332(C).

4 100. NEPA's implementing regulations require the Corps to assess the environmental
5 impacts of the proposed action, including direct effects and indirect effects, which are reasonably
6 foreseeable but removed in time or space. 40 C.F.R. §§ 1502, 1508.7.

7 101. NEPA also requires the Corps to use high quality, accurate scientific information
8 and to ensure the scientific integrity of the analysis in an EIS. 40 C.F.R. §§ 1500.1(b), 1502.24.

9 102. Under NEPA, federal agencies must take a "hard look" at the environmental
10 consequences of their actions before action is taken. *Blue Mountains Biodiversity Project v.*
11 *Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

12 103. The available information, including that provided by the Nez Perce Tribe in its
13 comments on the EIS, suggests a high likelihood that lamprey are found in higher relative
14 densities within the areas where the Corps proposes to dredge and dispose of material. The
15 Corps also declined to commit to perform survey or monitoring for lamprey before, during, or
16 after its dredging action, as requested by the Tribe and consistent with the USFWS' conservation
17 recommendations described in the BiOp. This requested survey and monitoring is particularly
18 important given the need to understand and avoid harming lamprey resulting from potential
19 future Corps sediment management actions. The EIS fails to take a hard look or to adequately
20 consider or disclose the impacts of the 2014-2015 dredging action on Pacific lamprey and their
21 habitat. These impacts include, but are not limited to, mortality and harm to individual lamprey
22 present in dredge or disposal areas, and modification of habitat likely used by lamprey.
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1 104. By issuing an EIS that fails to meet the standards laid out in NEPA, its
2 implementing regulations, and governing case law, the Corps has acted in a manner that is
3 arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of
4 NEPA and the APA. 5 U.S.C. §§ 701-706.

5 THIRD CLAIM FOR RELIEF

6 VIOLATION OF NEPA 42 U.S.C. § 4332 AND APA: THE EIS FAILS TAKE A HARD
7 LOOK AT THE IMPACTS OF CLIMATE CHANGE

8 105. Plaintiffs incorporate by reference all preceding paragraphs.

9 106. NEPA requires the Corps to fully disclose all of the potential adverse
10 environmental impacts of its dredging action and PSMP before deciding to proceed. 42 U.S.C. §
11 4332(C).

12 107. NEPA's implementing regulations require the Corps to assess the environmental
13 impacts of the proposed action, including direct effects and indirect effects, which are reasonably
14 foreseeable but removed in time or space. 40 C.F.R. §§ 1502, 1508.7.

15 108. NEPA also requires the Corps to use high quality, accurate scientific information
16 and to ensure the scientific integrity of the analysis in an EIS. 40 C.F.R. §§ 1500.1(b), 1502.24.

17 109. Under NEPA, federal agencies must take a "hard look" at the environmental
18 consequences of their actions before action is taken. *Blue Mountains Biodiversity Project v.*
19 *Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

20 110. The EIS fails to take a hard look or to adequately consider or disclose the impacts
21 at the reasonably foreseeable future conditions created by climate change. Although the Corps
22 includes a short section in its FEIS on climate change, it did not take a hard look at the impacts
23 of climate change on its preferred alternative, nor its preferred alternative's impacts on resources
24 in the Snake River watershed that are affected by climate change.
25

1 111. By issuing an EIS that fails to meet the standards laid out in NEPA, its
2 implementing regulations, and governing case law, the Corps has acted in a manner that is
3 arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of
4 NEPA and the APA. 5 U.S.C. §§ 701-706.

5 FOURTH CLAIM FOR RELIEF

6 VIOLATION OF NEPA 42 U.S.C. § 4332 AND APA: MISLEADING AND INACCURATE
7 ECONOMIC ANALYSIS

8 112. Plaintiffs incorporate by reference all preceding paragraphs.

9 113. NEPA and its implementing regulations require the Corps to produce an
10 Environmental Impact Statement that is factually accurate, well supported, and that fully
11 discloses the impacts of an action to the public. 40 C.F.R. § 1502. This includes an agency's
12 treatment of economic data. 40 C.F.R. §§ 1502.23 (cost benefit analysis), 1508.8 (EIS must
13 evaluate economic effects). An agency's failure to include and analyze information that is
14 important, significant, or essential renders an EIS inadequate. 40 C.F.R. § 1500.1. These
15 fundamental NEPA principles apply to both economic and environmental analyses in an EIS.
16 *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996); 40 C.F.R.
17 §§ 1502.24, 1508.8 ("effects" an EIS must evaluate include economic impacts.).

18 114. As described above, the Corps' assumption that maintaining the navigation
19 channel in both the short and long-term is based on incomplete, inaccurate, and misleading
20 calculation that relies on outdated and inaccurate assumptions about the benefits of navigation
21 and fails to include all of the costs associated with maintaining a navigation channel over the life
22 of the PSMP.

23 115. For the reasons described above, the Corps has violated NEPA, and the EIS is
24 invalid because it contains essentially no economic analysis. The minimal economic analysis it
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1 contains is fundamentally misleading, incomplete, and inaccurate. A complete and transparent
2 analysis would likely reveal that the economic benefits of the navigation system and PSMP are
3 outweighed by the economic and environmental costs that they impose.

4 116. The APA authorizes reviewing courts to set aside federal agency action that is
5 arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. §§ 701-
6 706.

7 117. By issuing an EIS that fails to meet the standards laid out in NEPA, its
8 implementing regulations, and governing case law, the Corps has acted in a manner that is
9 arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of
10 NEPA and the APA. 5 U.S.C. §§ 701-706.

11 FIFTH CLAIM FOR RELIEF

12 VIOLATION OF THE CLEAN WATER ACT, 33 U.S.C. § 1344: FAILURE TO CONDUCT A 13 PUBLIC INTEREST REVIEW

14 118. Plaintiffs incorporate by reference all preceding paragraphs.

15 119. The Corps must comply with the requirements of the Clean Water Act before
16 discharging dredged or fill material into waters of the United States. 33 U.S.C. § 1344.

17 120. The Clean Water Act's implementing regulations require the Corps to "apply[] all
18 applicable substantive legal requirements, including public notice, opportunity for public
19 hearing, and application of the 404(b)(1) guidelines" before proceeding with maintenance
20 dredging. 33 C.F.R. § 336.1(a). Those substantive requirements include at least (1) "an
21 evaluation of the probable impacts, including cumulative impacts, of the proposed activity and
22 its intended use on the public interest," 33 C.F.R. 320.4(a), 33 U.S.C. § 1344(a); (2) a "public
23 interest review" that requires "the consideration of the full public interest by balancing the
24 favorable impacts against the detrimental impacts," 33 C.F.R. § 320.1(a). Those factors include
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1 “conservation, economics, aesthetics, general environmental concerns, wetlands . . . fish and
2 wildlife values . . . water quality” and the guidelines issued by EPA under 33 U.S.C.

3 § 1344(b)(1). *Id.*

4 121. The Corps did not complete a separate public interest review for either its
5 dredging action or the PSMP, despite its earlier stated intentions that it would do so. The Corps
6 may not rely on its EIS to supply that compliance because as discussed above, the EIS does not
7 consider multiple factors relevant to the public interest review, including a reasonable range of
8 alternatives, and the economic effects and the costs and benefits of its proposals. 33 C.F.R.
9 § 320.4(a)(1).

10 122. By failing to undertake a separate and adequate public interest review of its
11 proposed actions, the Corps has acted in a manner that is arbitrary, capricious, an abuse of
12 discretion, and not in accordance with law, in violation of the Clean Water Act, 33 U.S.C.
13 § 1344, its implementing regulations, and the APA. 5 U.S.C. §§ 701-706.

14
15 PRAYER FOR RELIEF

16 WHEREFORE, Plaintiffs respectfully request that the Court:

17 123. Declare, adjudge, and order that the EIS and accompanying RODs issued by the
18 Corps are arbitrary, capricious, and not in accordance with law, and that the Corps is in violation
19 of NEPA, the CWA, and the APA;

20 124. Vacate, set aside, and remand the EIS and accompanying RODs;

21 125. Enjoin the Corps to withdraw the EIS and accompanying RODs;

22 126. Enjoin the Corps from commencing dredging activities in the lower Snake River
23 pending completion of a valid EIS and ROD;
24

1 127. Enjoin the Corps from taking action that is harmful to fish in order to
2 accommodate uninterrupted navigation pending completion of a valid EIS and ROD;

3 128. Award Plaintiffs their reasonable fees, costs, expenses, and disbursements,
4 including attorneys' fees, associated with this litigation; and

5 129. Grant Plaintiffs such further and additional relief as the Court may deem just and
6 proper.

1 Respectfully submitted this 24th day of November, 2014.
2

3 *s/ Stephen D. Mashuda*
4

5 _____
6 STEPHEN D. MASHUDA (WSB #36968)

7 *s/ Matthew R. Baca*
8

9 _____
10 MATTHEW R. BACA (WSB #45676)

11 Earthjustice

12 705 Second Avenue, Suite 203

13 Seattle, WA 98104-1711

14 (206) 343-7340 | Phone

15 (206) 343-1526 | Fax

16 smashuda@earthjustice.org

17 mbaca@earthjustice.org

18 *Attorneys for Plaintiffs Idaho Rivers United;*
19 *Washington Wildlife Federation; Pacific Coast*
20 *Federation of Fishermen's Associations; Institute*
21 *for Fisheries Resources; Sierra Club; and*
22 *Friends of the Clearwater*

23 *s/ David J. Cummings*
24

25 _____
26 DAVID J. CUMMINGS (WSB#33551)

27 (*Signature with permission via e-mail)

28 Nez Perce Tribe

Office of Legal Counsel

PO Box 305

Lapwai, ID 83540-0305

(208) 843-7355 | Phone

(208) 843-7377 | Fax

mikel@nezperce.org

djc@nezperce.org

Attorneys for Plaintiff Nez Perce Tribe