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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST ENVIRONMENTAL
ADVOCATES,

Plaintiff,

v.

NATIONAL MARINE FISHERIES
SERVICE and UNITED STATES ARMY
CORPS OF ENGINEERS,

Defendants

and

THE PORTS OF VANCOUVER,
WOODLAND, KALAMA, LONGVIEW,
PORTLAND, AND St. HELENS,

Intervenor – Defendants.

CASE NO. C04-0666RSM

MEMORANDUM ORDER
DENYING PLAINTIFF’S MOTION
FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANTS’
AND INTERVENORS’ CROSS-
MOTIONS FOR SUMMARY
JUDGMENT

I. INTRODUCTION

This matter comes before the Court on Plaintiff’s Motion for Summary Judgment (Dkt. #48), Defendants’ Cross-Motion for Summary Judgment (Dkt. #54), and Intervenor-Defendants’ Cross-Motion for Summary Judgment (Dkt. #55). The parties essentially ask this Court to determine two issues: (1) whether defendants’ channel deepening Final Supplemental

1 Integrated Feasibility Report and Environmental Impact Statement (“FSEIS”) fails to comply
2 with the National Environmental Policy Act (“NEPA”) because it does not consider all of the
3 significant direct and indirect impacts of the projects, connected actions and cumulative effects,
4 and because it does not present a complete picture of the projects’ economic consequences; and
5 (2) whether defendants’ biological opinions fail to comply with the Endangered Species Act
6 (“ESA”) because they substitute a qualitative, relative judgment for the analysis of the salmon’s
7 present status and the environmental baseline that are necessary to assess jeopardy.

8 Having reviewed the parties’ briefing on these issues, and having considered the oral
9 arguments presented to this Court on May 26, 2005, the Court hereby finds that defendants’
10 decisions were not arbitrary and capricious, and therefore, the Court DENIES plaintiff’s motion
11 for summary judgment, and GRANTS defendants’ and intervenor-defendants’ cross-motion for
12 summary judgment.

13 II. DISCUSSION.

14 **A. Background**

15 This case involves a challenge to the Columbia River Channel Improvement Project
16 planned for the Columbia River system and estuary. The estuary comprises the area where the
17 Columbia River system meets the Pacific Ocean. It acts as a nursery for young salmon migrating
18 from as far away as Idaho, and provides safe feeding grounds while the salmon make the
19 transition from fresh to salt water. Originally consisting of multiple channels, wetlands and
20 backwaters, the river now largely consists of a single main channel, and its depth is constantly
21 maintained at 40 feet deep through dredging and pile dike fields. The projects maintaining the
22 channel are largely conducted by defendant Army Corps of Engineers (the “Corps”).

23 In 1989, at the request of the intervenor Ports and affected local and state governments,
24 the United States Congress directed the Corps to examine the feasibility of improving the 40-
25 foot navigation channel to a maximum of 43-feet, in order to reduce shipping delays and allow
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1 larger vessels to load more fully. The Corps subsequently released an FEIS in August of 1999,
2 concluding that a 43-foot channel would provide maximum net economic benefits and create
3 transportation cost savings, without causing significantly different environmental impacts from a
4 “no-action” alternative. During the same time, the National Marine Fisheries Service (“NMFS”)
5 and the United States Fish and Wildlife Service (“FWS”) conducted separate studies pursuant to
6 section 7 of the ESA, concluding the same. In December of 1999, NMFS issued its Biological
7 Opinion regarding the proposed project, and concluding that the project was not likely to
8 destroy or adversely modify any designated critical habitat for certain salmon species.

9 As a result, Congress authorized the Corps to deepen the existing channel and to
10 conduct ecosystem restoration projects in the Columbia River and the estuary. This project
11 consists of a series of navigation improvement and ecological measures designed to enhance the
12 region’s waterborne transportation and commercial infrastructure as well as to restore the
13 habitat necessary for survival and recovery of a number of salmonids listed under the ESA. The
14 project is supported by the Corps, along with the intervenor Ports of the lower Columbia River,
15 and by the states of Washington and Oregon. To date, Congress has authorized \$19 million for
16 the project, and Washington and Oregon have appropriated a total of \$55.4 million for project
17 construction.

18 In August of 2000, NMFS withdrew its initial biological opinion and reinitiated
19 consultation with the Corps, in order to evaluate new information regarding bathymetry and
20 flow on estuarine and disposal activities. FWS also reinitiated its consultation as a result of the
21 new listings of several additional salmon species. The Corps also began preparing a
22 supplemental EIS (“SEIS”) to address concerns raised by Washington and Oregon regarding
23 sediment transport and coastal erosion, changes to the project’s restoration measures, the use of
24 additional upland disposal sites, and updated economic information. The Corps issued that SEIS
25 in 2003.

1 In the meantime, the Corps, NMFS and FWS jointly engaged a Sustainable Ecosystems
2 Institute (“SEI”), consisting of an independent panel of seven scientific experts, to review and
3 evaluate their scientific analyses. The SEI assisted the Corps in drafting a new Biological
4 Assessment to respond to NMFS and FWS concerns. Ultimately, the SEI concluded that the
5 information considered by the agencies was the “best available science commercially available.”

6 In the 2002 Biological Opinion resulting from this reinitiation process, NMFS
7 determined that the deepening project would not likely jeopardize any listed salmon species. On
8 July 9, 2002, the Corps solicited comments on its draft FSEIS, including the NMFS Biological
9 Opinion. After considering and responding to the public comments, the Corps issued its FSEIS
10 in January of 2003, in part concluding that the benefits of the project would outweigh its costs.

11 In January of 2004, the Corps issued its Record of Decision (“ROD”). The alternatives
12 selected by the Corps include: (1) deepening the existing 40-foot deep channel and three existing
13 turn basins on the Columbia River to a depth of 43-feet; (2) implementation of six ecosystem
14 restoration features; (3) disposal of dredged material at numerous sites; (4) monitoring,
15 ecosystem evaluations, and adaptive management; and (5) mitigation measures.

16 The Oregon Department of Environmental Quality (“DEQ”) and the Washington
17 Department of Ecology (“WDE”) dropped their previous objections regarding sand erosion and
18 accretion, and certified the project.

19 On February 17, 2005, defendants filed a Notice of Issuance of a New Biological
20 Opinion, along with a new Biological Opinion and Supplemental Administrative Record, that
21 supercedes the May 20, 2002 Channel Deepening Biological Opinion. As a result, plaintiff
22 dropped one of its claims from its initial Complaint.

23 On March 11, 2005, NMFS issued a new O&M Biological Opinion to replace the 1999
24 Biological Opinion. The parties agreed that plaintiff’s challenge to the 1999 Biological Opinion
25 became moot as a result, and plaintiff voluntarily dismissed its claims based on that opinion.
26

1 Plaintiff now seeks review of the Corps' EISs for violations of NEPA, and of the
2 biological opinions for each action for violations of the ESA.

3 **B. Summary Judgment Standard**

4 Summary judgment is proper where "the pleadings, depositions, answers to
5 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
6 genuine issue as to any material fact and that the moving party is entitled to judgment as a
7 matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247
8 (1986). The Court must draw all reasonable inferences in favor of the non-moving party. *See*
9 *F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*,
10 512 U.S. 79 (1994). The moving party has the burden of demonstrating the absence of a
11 genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or
12 the bald assertion that a genuine issue of material fact exists, no longer precludes the use of
13 summary judgment. *See California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics,*
14 *Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

15 Genuine factual issues are those for which the evidence is such that "a reasonable jury
16 could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. Material facts are
17 those which might affect the outcome of the suit under governing law. *See id.* In ruling on
18 summary judgment, a court does not weigh evidence to determine the truth of the matter, but
19 "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d
20 547, 549 (9th Cir. 1994) (citing *O'Melveny & Meyers*, 969 F.2d at 747).

21 **C. Standard of Review**

22 Agency compliance with NEPA and ESA is reviewed pursuant to the Administrative
23 Procedure Act ("APA"), 5 U.S.C. § 706. Specifically, this Court applies an "arbitrary and
24 capricious" standard of review, which allows the Court to set aside an agency action only if it is
25 "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."
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1 5 U.S.C. § 706(2)(A); *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 376 (1989);
2 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Selkirk Conservation*
3 *Alliance v. Forsgren*, 336 F.3d 955, 953 (9th Cir. 2003).

4 Under this standard, this Court reviews an agency's decision to determine whether they
5 are "based on a consideration of relevant factors," "whether there has been a clear error of
6 judgment," and to ensure that the agency has taken a "hard look" at the environmental
7 consequences of its proposed action. *Overton Park*, 401 U.S. at 416; *Klamath-Siskiyou*
8 *Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 992 (9th Cir. 2004); *Blue*
9 *Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998). The Court
10 also reviews the biological opinions to determine whether the agency "considered the relevant
11 factors and articulated a rational connection between the facts found and the choice made."
12 *Pacific Coast Fed'n of Fisherman Ass'ns v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001)
13 (citation omitted). Ultimately, "the standard of review is a narrow one. The court is not
14 empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416;
15 *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir.
16 2001).

17 It is well-settled that an agency's decision is entitled to a deferential standard of review.
18 *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council*, 435 U.S. 519
19 (1978). However, "[w]hile courts must defer to an agency's reasonable interpretation of
20 equivocal scientific evidence, such deference is not unlimited. The presumption of agency
21 expertise may be rebutted if its decisions, even though based on scientific expertise, are not
22 reasoned." *Greenpeace v. NMFS*, 80 F. Supp.2d 1137, 1147 (W.D. Wash. 2000).

23 Finally, the Court is generally restricted to review of the administration record as it
24 existed at the time of the agency's decision. However, a court may properly consider extra-
25 record materials "to determine what matters the agency should have considered but did not,"
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1 *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980), and to help explain, complex,
2 technical matters, *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 n. 22 (9th Cir.
3 1992). See *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1477 (W.D. Wash. 1992).

4 **D. Alleged NEPA Violations**

5 The National Environmental Policy Act (“NEPA”) mandates the procedures by which
6 agencies must consider the environmental impacts of their decisions. See 42 U.S.C. § § 4321, *et*
7 *seq.* NEPA is essentially a procedural act, which seeks to ensure “a fully informed and well-
8 considered decision.” *Vermont Yankee Nuclear Power Corp. V. Natural Resources Defense*
9 *Council*, 435 U.S. 519, 558 (1978). “It is now well settled that NEPA itself does not mandate
10 particular results, but simply prescribes the necessary process.” *Robertson v. Methow Valley*
11 *Citizens Council*, 490 U.S. 332, 350 (1989). The processes established under NEPA focus the
12 attention of both the government and the public on a proposed agency action, so that the
13 environmental consequences can be studied prior to implementation of the proposed action, and
14 so potential negative impacts can be avoided. 40 C.F.R. § 1500.1(b); 40 C.F.R. § 1500.2(e);
15 *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989); see *Churchill County*
16 *v. Norton*, 276 F.3d 1060, 1072-73 (9th Cir. 2001).

17 NEPA requires a comprehensive EIS for “major federal actions significantly affecting
18 the quality of the human environment.” 42 U.S.C. § 4332(C). The Council for Environmental
19 Quality’s (“CEQ”) regulations implementing NEPA provides guidance as to the nature and
20 content of an EIS. See 40 C.F.R. Part 1502. The regulations direct agencies to “focus on
21 significant environmental issues and alternatives” in an EIS that is “concise, clear, and to the
22 point. . . .” 40 C.F.R. § 1502.1. In an EIS, agencies are also required to describe “the
23 environment of the area(s) to be affected or created by the alternatives under consideration,” and
24 to consider cumulative impacts. 40 C.F.R. § § 1502.15 and 1508.8.

25 *I. MCR Project - Connected Action v. Cumulative Impact*

1 Plaintiff argues that the Corps failed to analyze dredging of the Mouth of the Columbia
2 River project (“MCR”) within its Channel Deepening and Disposal EIS and within its Channel
3 Maintenance EIS in violation of NEPA’s requirement that connected actions be considered
4 together. NEPA requires that all of the effects of closely related and dependant projects be
5 considered together in a single EIS. 40 C.F.R. § 1508.25(a)(1). The regulations define
6 “connected actions” as those which:

- 7 (i) Automatically trigger other actions which may require environmental
8 impact statements.
9 (ii) Cannot or will not proceed unless other actions are taken previously
10 or simultaneously.
11 (iii) Are interdependent parts of a larger action and depend on the larger
12 action for their justification.

13 40 C.F.R. § 1508.25(a)(1)(i)-(iii). An EIS must cover multiple actions when “[t]he dependency
14 is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent
15 phases were not also undertaken.” *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985).
16 The Ninth Circuit uses an “independent utility” test to determine whether an agency is required
17 to consider multiple actions in a single EIS.

18 Both defendants and intervenor-defendants argue that the MCR project is not a
19 “connected action,” and it need not be addressed in the EISs because it is a continuing project
20 that has already been evaluated under NEPA standards. The Court agrees with defendants.

21 As highlighted by defendants, the MCR project and the proposed dredging action have
22 independent utility. The MCR project has been operating for more than 20 years without the
23 channel deepening project. The Corps has conducted separate NEPA analyses for the MCR
24 project during that time. Thus, the Court agrees that there is nothing further for the Corps to
25 evaluate under NEPA. Furthermore, the Court disagrees with plaintiff’s argument that 40
26 C.F.R. § 1508.18(a) somehow compels a different result because it defines “action” as “new and
continuing.” Plaintiff’s argument is flawed in that it apparently interprets the statute as “new *or*

1 continuing,” rather than “new *and* continuing,” which defendants assert is the correct reading.
2 Defendants’ argument is supported by subsection (b) of the regulation, which sets forth several
3 “actions,” each of which is prefaced with the word “adoption” or “approval.” 40 C.F.R.
4 § 1508.18(b); *see also Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1304 (9th Cir.
5 2003) (explaining that “NEPA may require a comprehensive impact statement when several
6 concurrent proposals have cumulative or synergistic impact”).

7 The Court also agrees with defendants that the two projects are separate and distinct.
8 The MCR project does not include maintenance of the existing 40-foot channel that is set to be
9 deepened to 43-feet. In addition, the maintenance of the MCR project and the Channel
10 Deepening Project are funded separately from Congress. Thus, the Court agrees that the Corps
11 properly considered the MCR project in the FSEIS only as a “cumulative impact” rather than as
12 a “connected action.”

13 2. *Channel Deepening EIS*

14 Plaintiff next argues that the Channel Deepening EIS failed to take a “hard look” at all of
15 the direct and indirect effects of the project. Specifically, plaintiff asserts that the Corps failed to
16 disclose the direct and indirect effects of permanently removing large quantities of sediment
17 from the estuary, the Corps failed to disclose the effects of toxic contaminants that will be
18 mobilized by dredging, and the Corps failed to disclose the effects of dredging on estuary
19 salinity. Plaintiff further argues that the Corps has failed to completely analyze or even
20 acknowledge the full impacts of past projects when combined with the effects of maintenance
21 and channel deepening, the Corps never analyzed the cumulative effects of past and on-going
22 flow regulation of upstream dams together with channel deepening and maintenance, and the
23 Corp failed to fully analyze the impacts of future projects. Plaintiff also alleges that the Corps
24 has presented an incomplete picture of the costs and benefits of the project. Finally, plaintiff
25 argues that the Corps has failed to supplement its NEPA analysis based on significant new
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1 information, including the loss of two of the three major container cargo shipping companies
2 that use the lower Columbia River.

3 Defendants answer that it adequately addressed all of those issues. In particular, the
4 Corps highlights the fact that it used a model that has been used consistently all across the
5 country to address the salinity issue, as well as a second model that also found changes in
6 salinity will not be significant. Defendants also note that they conducted a careful study of the
7 mechanisms used to transport sediment in the estuary, and found that there will be no change in
8 sediment movement because the channel deepening will not have a significant impact on flow.
9 In regard to the economic analysis, defendants note that they did not need to address jetty
10 erosion because that issue was never presented to the agency below, and the jetties are
11 deteriorating independently from the channel deepening project in any event. Furthermore, an
12 independent panel found that the economic analysis complies with national guidance in this case.

13 Having reviewed the briefing and the administrative record before this Court, the Court
14 agrees with defendants that they took the requisite “hard look” under NEPA. First, in 2000, the
15 States of Washington and Oregon denied certification of the project based on concerns about
16 sediment transport issues. As a result, the Corps prepared a Revised Columbia River Sediment
17 Impacts Analysis, which was included in the FSEIS as Exhibit J. The Corps concluded that
18 deepening the channel would not reduce the available sand supply, and that the expected
19 hydraulic changes would be too small to alter sand transport or erosion or accretion in the river
20 or estuary. The States of Washington and Oregon subsequently granted certification of the
21 project based on the new analysis. Thus, the Court agrees that the Corps did not fail to consider
22 the project’s effects on sediment budget.

23 Second, the Court agrees with defendants that the Corps took a “hard look” at the
24 potential for exposing toxins from sources both outside and within the channel. The record
25 shows that the Corps examined toxins from outside the channel, and found no significant levels
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1 of contamination in the areas tested.

2 Third, the Court also agrees that the Corps took a “hard look” at the effects of the
3 project on salinity in the estuary. As noted above, the Corps and NMFS applied two models,
4 the WES R-10 and OSHU/OGI’s ELCIRC, to assess the impact of channel deepening on
5 salinity. The Corps concluded that the channel deepening project will have little or no impact on
6 salinity intrusion. While plaintiff argues that these results are based on outdated, 1958
7 bathymetry information, the record actually shows that updated bathymetry information from
8 1992 was utilized. Moreover, the SEI panel confirmed that the salinity effects were well
9 understood and that no further modeling was necessary. For these reasons, the Court finds that
10 defendants took the requisite “hard look” at the salinity issues.

11 Finally, the Court turns to plaintiff’s allegations that defendants failed correctly analyze
12 the costs and benefits of the project. As a threshold matter, the Court first addresses
13 defendants’ request to strike the Niemi declaration submitted by plaintiff in support of its
14 arguments. Plaintiff has submitted a 23-page declaration by Mr. Ernest Niemi, which argues
15 that the Corps’ economic analysis is “unreasonable and indefensible.” There are numerous
16 extra-record documents attached as exhibits to that declaration. While the Court acknowledges
17 that it may properly consider extra-record materials “to determine what matters the agency
18 should have considered but did not,” *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980),
19 and to help explain, complex, technical matters, *Idaho Conservation League v. Mumma*, 956
20 F.2d 1508, 1520 n. 22 (9th Cir. 1992), the Ninth Circuit Court of Appeals has made clear that
21 consideration of extra-record evidence “to determine the correctness of wisdom of the agency’s
22 decision is not permitted.” *Asarco*, 616 F.2d at 1160. *See also Southwest Center for Biological*
23 *Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996) (explaining that post-
24 decisional information may not be advanced as a rationalization for either sustaining or attacking
25 an agency’s decision). In the instance case, Mr. Niemi states that the purpose of his declaration
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1 is to “determine whether or not the FSEIS provides a misleading description of the project’s
2 potential impacts.” The Court finds this an improper use of his declaration. Accordingly, the
3 Court STRIKES Mr. Niemi’s declaration, along with the attached exhibits, from the record, and
4 will not consider plaintiff’s arguments based on that declaration.

5 Defendants argue that their economic analysis should be upheld because the panels
6 convened by the Corps’ Independent Review Process reviewed the economic analysis and found
7 that it was both reasonably conducted and based on well-grounded factual assumptions and
8 economic principles, and the Corps closely followed applicable national guidance in performing
9 its analysis. The Court agrees.

10 The Court further agrees that the departure of two shipping companies from the Port of
11 Portland does not trigger a new SEIS under NEPA. The courts of this circuit have continuously
12 held that new information regarding traffic through, or usage of, a potentially-impacted habitat
13 does not trigger additional NEPA review where the information did not change the
14 environmental impacts of a proposed project. *See, e.g., Airport Communities Coalition v.*
15 *Graves*, 280 F. Supp.2d 1207, 1218-19 (W.D. Wash. 2003). It does not appear from the record
16 that the departure of the two shipping companies changes the project’s environmental impacts;
17 therefore, it is not new information that requires another SEIS under NEPA. Furthermore, the
18 information does not appear to be “new,” as the Corps previously considered the likelihood that
19 shipping concerns would come and go from the Port of Portland due to market changes and
20 other factors. Accordingly, the Court finds that defendants correctly analyzed the costs and
21 benefits of the project.

22 For all of the reasons set forth above, the Court rejects plaintiff’s arguments that
23 defendants’ decisions violated NEPA, or that they were “arbitrary and capricious.”
24 Accordingly, the Court denies plaintiff’s summary judgment motion on those issues, and grants
25 defendants’ cross-motions for summary judgment.
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1 **E. Alleged ESA Violations**

2 Congress enacted the Endangered Species Act (“ESA”) in an effort to conserve the
3 ecosystems upon which threatened and endangered species depend, to provide a conservation
4 program for such species, and to enforce the laws aimed at reaching those goals. *See* 16 U.S.C.
5 § 1531(b). The mandate of the ESA is “that all Federal departments and agencies shall seek to
6 conserve endangered species and threatened species and shall utilize their authorities in
7 furtherance of the purposes of this chapter.” 16 U.S.C. § 1531(c). As the U.S. Supreme Court
8 stated in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978):

9 Lest there be any ambiguity as to the meaning of this statutory directive, the
10 Act specifically defined “conserve” as meaning “to use and the use of *all*
11 *methods and procedures which are necessary to bring any endangered*
 species or threatened species to the point at which the measures provided
 pursuant to this chapter are no longer necessary.”

12 *Tennessee Valley Authority*, 437 U.S. at 180 (emphasis in original). The Court also emphasized
13 that “the legislative history undergirding § 7 reveals an explicit congressional decision to require
14 agencies to afford first priority to the declared national policy of saving endangered species.”
15 *Id.* at 185.

16 Under the ESA, federal agencies are required to formulate a biological opinion as to
17 whether a proposed action is likely to jeopardize the continued existence of a listed species, or
18 result in the destruction or adverse modification of a critical habitat. 16 U.S.C. § 1536(a)(2) and
19 (b)(3)(A); 50 C.F.R. § 402.02. If the biological opinion concludes that the action will jeopardize
20 a listed species, the opinion must include reasonable and prudent alternatives to the agency’s
21 action plans. *Id.*

22 A biological opinion “should address both the jeopardy and critical habitat prongs of
23 Section 7, by considering the current status of the species, the environmental baseline, the
24 effects of the proposed action, and the cumulative effects of the proposed action.” *Gifford*
25 *Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1063 (9th Cir. 2004) (citing
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1 50 C.F.R. § 402.14(g)(2)-(3).

2 Section 7 of the ESA sets forth the rules pertaining to an agency consultation. Under
3 section 7, every federal agency:

4 shall, in consultation with and with the assistance of the Secretary, insure that
5 any action authorized, funded, or carried out by such agency (hereinafter in
6 this section referred to as an ‘agency action’) is not likely to jeopardize the
7 continued existence of the endangered or threatened species or result in the
destruction or adverse modification of habitat of such species . . . unless such
agency has been granted an exemption for such action by the [Endangered
Species] Committee. . . .

8 16 U.S.C. § 1536(a)(2). Additionally, “[s]ection 7 and the requirements of this Part apply to all
9 actions where there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03.

10 In a section 7 consultation, the consulting agency must “[e]valuate the effects of the
11 action and cumulative effects on the listed species or habitat.” 50 C.F.R. § 402.14(g)(3). The
12 agency must then “[f]ormulate its biological opinion as to whether the action, taken together
13 with cumulative effects, is likely to jeopardize the continued existence of listed species or result
14 in the destruction or adverse modification of critical habitat.” *Id.*

15 “Cumulative effects” are “those effects of future State or private activities, not involving
16 Federal activities, that are reasonably certain to occur within the action area of the Federal
17 action subject to consultation.” 50 C.F.R. § 402.02. “Effects of the action” are “the direct and
18 indirect effects of an action on the species or critical habitat, together with the effects of other
19 activities that are interrelated or interdependent with that action, that will be added to the
20 environmental baseline.” *Id.*

21 The environmental baseline “includes all past and present impacts of all Federal, State,
22 private, and other human activities in the action area, the anticipated impacts of all proposed
23 Federal projects in the action area that have already undergone formal or early section 7
24 consultation, and the impact of State or private actions which are contemporaneous with the
25 consultation in process.” *Id.*

1 In the instant case, plaintiff asserts that the NMFS has violated the ESA in several
2 respects. First, plaintiff argues that NMFS has failed to draw a rational connection between the
3 evidence and its no-jeopardy conclusion. Specifically, plaintiff asserts that NMFS cannot
4 rationally reconcile its conclusion that the project will not cause jeopardy to existing salmon
5 species with its unequivocal finding that the estuary's degraded conditions are currently not
6 meeting the species' biological needs.

7 Second, plaintiff argues that NMFS has not adequately identified or analyzed the
8 environmental baseline. Specifically, plaintiff asserts that the NMFS failed to actually analyze,
9 with any specificity, the significance of the current environmental baseline condition for the
10 salmon species, and the NMFS failed to analyze precisely how degraded the baseline is, what
11 actions caused that degradation, what aspects of the species' needs have been impaired, and
12 whether the current degradation of the baseline leaves any room for additional adverse impacts
13 from channel deepening or O&M dredging without causing jeopardy. The Court addresses each
14 argument in turn.

15 *1. NMFS's No-Jeopardy Conclusion*

16 While plaintiff argues that NMFS cannot rationally reconcile its conclusion that the
17 project will not cause jeopardy to existing salmon species with its unequivocal finding that the
18 estuary's degraded conditions are currently not meeting the species' biological needs, the Court
19 is not persuaded. ESA § 7(a)(2) requires that:

20 Each Federal agency shall, in consultation with and with the assistance of the
21 Secretary, insure that any action authorized, funded or carried out by such
22 agency . . . is not likely to jeopardize the continued existence of any
23 endangered species or threatened species or result in the destruction or
adverse modification of habitat of such species. . . . In fulfilling the
requirements of this paragraph each agency shall use the best scientific and
commercial data available.

24 16 U.S.C. § 1536(a)(2).

25 Consequently, the statute requires NMFS to produce a biological opinion and a summary
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1 of the information on which the opinion is based, detailing how the proposed agency action will
2 affect the species or critical habitat. 16 U.S.C. § 1536(b)(3)(A). To determine whether the
3 proposed action is “likely to jeopardize the continued existence of the species,” NMFS must
4 determine whether the proposed action

5 reasonably would be expected directly or indirectly, to reduce appreciably the
6 likelihood of both the survival and recovery of a listed species in the wild by
reducing the reproduction, numbers or distribution of that species.

7 50 C.F.R. § 402.02. Additionally, when evaluating the “effects of the [proposed] action,”
8 NMFS must consider the

9 direct and indirect effects of an action on the species or critical habitat,
10 together with the effects of other activities that are interrelated or
interdependent with that action, that will be added to the environmental
11 baseline. The environmental baseline includes the past and present impacts of
all Federal, State or private actions and other human activities in the action
12 area, the anticipated impacts of all proposed Federal projects in the action
area that have already undergone . . . consultation, and the impact of State or
13 private actions which are contemporaneous with the consultation in process.
. . .

14 *Id.*

15 In the instant case, NMFS concluded that the “biological requirements of the ESA-listed
16 salmonids are currently not being met under the environmental baseline.” However, NMFS also
17 noted that part of the proposed action includes a restoration project by the Corps specifically
18 aimed at increasing the survival and recovery of those salmonids by restoring the spatial and
19 temporal diversity and connectivity of habitats available. Thus, NMFS concluded that the
20 restoration component of the project will actually improve the environmental baseline in the
21 estuary, while the channel deepening project itself will have minimal impact on the listed species.
22 Accordingly, the Court finds that defendants can rationally reconcile its no-jeopardy
23 determination, and it does not appear to be arbitrary and capricious.

24 *2. NMFS’s Baseline Analysis*

25 Likewise, the Court finds that NMFS’s baseline analysis is not arbitrary and capricious.
26

1 Plaintiff argues that NMFS has not adequately identified or analyzed the environmental baseline
2 because it does not articulate “the degree to which the estuary’s current degraded conditions,
3 when measured against the species’ status, leave any ‘room’ to accommodate additional adverse
4 impacts without causing jeopardy.” The Court finds that argument misguided because nothing
5 in the statute, regulations, or guidance requires such an express articulation.

6 The ESA requires a consulting agency to provide “a written statement setting forth the
7 Secretary’s opinion and a summary of the information on which that opinion is based, detailing
8 how the [proposed] agency action affects the species or its critical habitat.” 16 U.S.C.
9 § 1536(b)(3)(A). The Endangered Species Consultation Handbook, March 1998, explains that
10 the analysis of the environmental baseline must include only a description of the status of the
11 species within the action area and the factors affecting species environment within the action
12 area. As noted above, in the instant case, NMFS did indeed determine that the current
13 biological requirements of ESA-listed salmonids are not currently being met under the
14 environmental baseline. However, NMFS concluded that the proposed action would not
15 prevent or delay the achievement of properly functioning habitat conditions for those listed
16 species within the action area. The basis for that decision is included in the biological opinion,
17 identifying the biological requirements of the ESA-listed salmonids, providing an overview of
18 current environmental conditions in the estuary, and discussing the importance of the river and
19 estuary’s physical process and resultant habitats to those species.

20 NMFS then examined potential consequences for the species of the impact of the project
21 on the environmental baseline, including the direct effects of the channel deepening project on
22 the listed salmonids, as well as the potential indirect effects of project activity on suspended
23 sediment, bedload, turbidity, salinity, bathymetry, tidal marsh and swamp habitats, shallow water
24 flats and water column. Thus, the Court agrees that NMFS fully evaluated the environmental
25 baseline and the effects of the action when added to that baseline, and it does not appear to be
26

1 arbitrary and capricious.

2 **III. CONCLUSION**

3 Having reviewed plaintiff's motion for summary judgment (Dkt. #48), defendants' and
4 intervenor-defendants' oppositions and cross-motions for summary judgment (Dkts. #54 and
5 #55), plaintiff's reply and response to the cross-motions (Dkt. #59), defendants' and intervenor-
6 defendants' replies (Dkts. #65 and #66), the declarations in support of those briefs, the lengthy
7 administration record and supplemental administrative record, and the remainder of the record,
8 the Court hereby DENIES plaintiff's motion for summary judgment, and GRANTS defendants'
9 and intervenor-defendants' motions for summary judgment.

10 As it appears that there are no further issues for this Court to decide, this case is now
11 CLOSED.

12 The Clerk shall forward a copy of this Memorandum Order to all counsel of record.

13
14 DATED this 15 day of June, 2005.

15
16 /s/ Ricardo S. Martinez
17 RICARDO S. MARTINEZ
18 United States District Judge
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