UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 12-70338

IDAHO CONSERVATION LEAGUE,
Petitioner

v.

BONNEVILLE POWER ADMINISTRATION,
Respondent

Petition for Review
Under the Northwest Power Act

OPENING BRIEF OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner Idaho Conservation League is an Idaho non-profit corporation which is recognized by the IRS as a Section 501(c)(3) public charity. It has no public shares and no corporate parent or affiliate with public shares.

DATED this 27th day of September, 2013.

Respectfully Submitted,

s/ Bryan Hurlbutt

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This Court has original jurisdiction over this Petition for Review pursuant to the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act"), 16 U.S.C. § 839f(e)(5). *See Nw. Res. Info. Ctr. v. Nat'l Marine Fisheries Serv.*, 25 F.3d 872, 874 (9th Cir. 1994) ("suits to challenge final actions of [BPA], or the implementation of such final actions, shall be filed in the Ninth Circuit"). Petitioner Idaho Conservation League ("ICL") seeks review of the decision by Respondent Bonneville Power Administration ("BPA") to adopt new "Flexible Winter Power Operations" ("FWPO") at the Albeni Falls Dam, a federal dam which regulates the water levels of Lake Pend Oreille in northern Idaho.[1] BPA's decision is in the *Final Environmental Assessment* signed on November 4, 2011. *EA* p. 9-1–9-3 (ER 107–09). ICL filed a timely Petition for Review on February 1, 2011, within 60 days of BPA's decision. *See* 16 U.S.C. § 839f(e)(5).[2]

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[1] ICL submits the attached Declaration of Susan Drumheller and Declaration of Brad Smith for the purpose of demonstrating ICL's Article III standing. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–30 (9th Cir. 1997) (holding petitioners in Northwest Power Act case were entitled to submit affidavits to this Court during briefing to establish standing). Each declaration demonstrates ICL has suffered an injury in fact which is fairly traceable to BPA's decision and which would be redressed by a favorable decision in this case.

[2] ICL's petition also named the U.S. Army Corps of Engineers ("Corps") as a respondent, since it approved the FWPO with BPA. ICL later agreed to dismiss the Corps because the Northwest Power Act does not provide this Court with original jurisdiction to review Corps action. *See* Joint Stip. of Dismissal, Dkt. # 18.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Flexible Winter Power Operations approved by BPA alter the established management of the Albeni Falls Dam, which historically maintained stable winter lake levels on Lake Pend Oreille—Idaho's largest lake, and one of the country's natural treasures. The rising and lowering of lake levels now authorized will contribute to shoreline erosion, wetland loss, property damage, and aquatic weed invasion. BPA approved this change without studying its likely adverse impacts in an Environmental Impact Statement ("EIS"), as required by the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. ("NEPA"). BPA instead relied on outdated EISs from 1983 and 1995, plus a cursory November 2011 Environmental Assessment ("EA"), to claim that the winter fluctuations would contribute only "insignificantly" to erosion and habitat loss.

I. Did BPA violate NEPA by approving the new winter operations without preparing an up-to-date EIS to evaluate adverse environmental impacts which the November 2011 EA recognize are likely?

II. Did BPA also violate NEPA by failing to evaluate a monitoring and mitigation alternative which the Corps itself determined was needed in the EA?

III. Did BPA also violate NEPA's "hard look" requirement by failing to incorporate available, up-to-date baseline information on shoreline erosion, invasive species, and wildlife in its EA?

STATEMENT OF THE CASE

This case concerns BPA's violations of NEPA in approving new winter operations at Albeni Falls Dam ("the Dam"), which will alter the status quo of the last quarter-century by now fluctuating winter lake levels at Lake Pend Oreille, thereby threatening substantial adverse impacts primarily through erosion, wetlands loss, and impacts to fish, wildlife, and water quality.

Construction of the Dam in the 1950s inundated and destroyed over 6,000 acres of ecologically-rich wetlands along the shores of Lake Pend Oreille, and along the 25-mile stretch of the Pend Oreille River which flows between the lake and the Dam. Since then, remaining fish and wildlife habitat continues to be lost or degraded by extensive shoreline erosion and the spread of invasive species attributable in significant part to the Dam's continued operations.

The Idaho Department of Fish and Game ("IDFG"), as well as property owners and conservationists, have long expressed concerns about these adverse impacts of fluctuating water levels in Lake Pend Oreille. Responding to those concerns, BPA and the Corps have operated the Dam to hold steady lake levels throughout winter since at least the mid-1980s.

Recently, however, BPA and the Corps determined to change that management regime in order to maximize winter power production at the Dam. On November 4, 2011, BPA and the Corps signed the *Albeni Falls Dam Flexible*

Winter Power Operations Final Environmental Assessment (hereinafter the "*EA*"). *See* ER 1–164 (excerpted copy of *EA)*. In the *EA*, BPA approved new winter operations to allow Lake Pend Oreille to be raised and lowered over a five-foot range three times throughout winter every year for the life of the Dam.

ICL filed a timely Petition for Review with this Court on February 1, 2012, seeking review of BPA's decision to adopt the new winter fluctuations. ICL is a conservation organization whose members use and enjoy Lake Pend Oreille, its shores and wildlife, and other areas impacted by the Dam's operations; and ICL participated in the planning process for BPA's new winter fluctuations. *See Decl. of Brad Smith*; *Decl. of Susan Drumheller*.

STATEMENT OF RELEVANT FACTS

I. LAKE PEND OREILLE

Lake Pend Oreille is Idaho's largest lake and one of the largest lakes in the western United States. *1974 EA* (ER 555). The lake covers an area of 94,600 acres in Northern Idaho and reaches depths over 1,200 feet. *1983 Albeni Falls EIS* (ER 523). Although Lake Pend Oreille is a natural lake, Albeni Falls Dam impounds and regulates the top 11.5 feet of the lake as well as approximately 25 miles of the Pend Oreille River that flows out of the lake downstream to the Dam location. *EA* (ER 12).[3] At full pool, the Dam's reservoir covers 226 miles of

[3] *See also EA*, Fig. 1-1 (ER 15) (Project Vicinity Map)

shoreline around Lake Pend Oreille and the Pend Oreille River. *1974 EA* (ER 555).

Water recreation is a major attraction for local residents and visitors to Lake Pend Oreille and the Pend Oreille River. *EA* (ER 28). Residences adjacent to the shore commonly have private docks. *Id.* And public and private marinas are located throughout the area. *Id.*

The 226-mile shoreline upstream of the Dam provides a diverse range of aquatic and upland habitat important to sustaining fish and wildlife. *See 1983 Albeni Falls EIS* (ER 520); *EA* (ER 42). Lake Pend Oreille "is the most famous fishing lake in Idaho." *1983 Albeni Falls EIS* (ER 531). The lake is a "major" kokanee salmon fishery. *1974 EA* (ER 556). The world record bull trout (14.5 kg) and world record rainbow trout (16.8 kg) were caught in Lake Pend Oreille in the 1940s. *NPPC Subbasin Summary* (ER 319).

Lake Pend Oreille is also an important waterfowl migration and wintering area. *1988 IDFG Wildlife Plan* (ER 485). The lake is a "major spring and fall stop for waterfowl migrating along the Pacific Flyway." *1995 SOR EIS* (ER 405). The wintering population of redhead ducks—which may be the largest in the United States—is 98 percent of Idaho's total and 20 percent of the Pacific Flyway population. *1988 IDFG Wildlife Plan* (ER 486); *EA* (ER 42).

The abundance of wetlands and other riparian habitat on the shoreline of Lake Pend Oreille and the Pend Oreille River are particularly important to the area's fish and wildlife. "Riparian wetland areas represent less than 0.5% of the total land surface in Idaho, yet acre for acre, they are the most important areas for fish and wildlife." *1988 IDFG Wildlife Plan* (ER 495). In 1983, approximately 8,000 acres of wetlands had been identified around Lake Pend Oreille's shoreline. *1983 Albeni Falls EIS* (ER 526).

Some of the most productive wetlands are located at deltas formed by streams and rivers where they enter Lake Pend Oreille and the Pend Oreille River. *NPPC Subbasin Summary* (ER 327). The Clark Fork River delta in particular has major significance for wildlife. *See id.* The Clark Fork River[4] has formed a large delta of braided river channels and islands where it flows into the east side of Lake Pend Oreille. *See Id.* (ER 328); *IDFG 2010 Annual Report* (ER 190) (aerial photo of the delta). Over half of lake's 8,000 acres of wetlands are located there, and the delta makes up the largest contiguous floodplain wetland complex in the Upper Pend Oreille basin. *1983 Albeni Falls EIS* (ER 526); *NPPC Subbasin Summary* (ER 327).

[4] The Clark Fork River contributes 86 percent of total inflow to Lake Pend Oreille. *1983 Albeni Falls EIS* (ER 517). It drains most of western Montana's high country, including the Bitterroot, Blackfoot, and Flathead Rivers. *See 1974 EA* (ER 551–52) (map of Lake Pend Oreille watershed).

II. IMPACTS OF ALBENI FALLS DAM

The Albeni Falls Dam is a multipurpose hydroelectric dam located on the Pend Oreille River, a tributary to the Columbia River. *EA* (ER 11). The Dam is operated as part of the Federal Columbia River Power System (FRCPS), which is a collection of federal hydroelectric dams in the Columbia River Basin jointly managed by the Corps, BPA, and the U.S. Bureau of Reclamation. *Id.* BPA is a power marketing agency of the U.S. Department of Energy that markets power from FRCPS dams, including Albeni Falls. *Id.*

Construction of the Dam began in 1951 and was completed in 1957. *EA* (ER 11). The Dam resulted in high lake levels that drowned and destroyed 6,617 acres of wetland habitat in and around Lake Pend Oreille and the Pend Oreille River. *1988 IDFG Wildlife Plan* (ER 482); *EA* (ER 144). At the Clark Fork and Pack River deltas, "vast wetland areas, consisting primarily of emergent marshes and forested swamps" were drowned by high summer lake levels, "resulting in the loss over time of in excess of 3,000 acres of wetlands and forested delta islands." *1995 SOR EIS* (ER 469).

In 1960, the U.S. Fish and Wildlife Service found that losses to wildlife were larger than expected in pre-construction estimates. *1988 IDFG Wildlife Plan* (ER 486). All big game habitat below the maximum lake level were "eliminated" due to the Dam's construction. *Id.* Anticipated new growth of vegetation along

the lake shoreline was not established, and studies indicated a 50 percent drop in duck production by 1960. *Id.*

Operation of the Dam has continued to destroy and degrade remaining wetlands, marsh, and fisheries habitats around Lake Pend Oreille and the Pend Oreille River, primarily from erosion caused by fluctuating water levels due to Dam operations. *1988 IDFG Wildlife Plan* (ER 495). As described in the FRCPS system-wide operations review EIS prepared in 1995 by BPA and the Corps:

> Wave and wind erosion have had dramatic effects, particularly in areas where shoreline vegetation has been lost. Seasonal fluctuations may be the greatest cause of erosion, resulting in sloughing of banks that become waterlogged in summer, then collapse under their own weight as the reservoir drops in elevation.

1995 SOR EIS (ER 471). Likewise, in 2001, another study found that: "Vegetation loss associated with operation of Albeni Falls Dam exposes loose alluvial soils to wave action and undercutting at high water, followed by sloughing upon annual fall drawdown. Erosion of important wildlife habitat in these locations has been significant and is ongoing." *NPPC Subbasin Summary* (ER 327).

In 1988, the Idaho Department of Fish and Game ("IDFG") estimated that 30 acres of wetlands are lost annually due to erosion caused by Dam operations, as inundation and fluctuation of lake levels causes denuded banks to be undercut and vegetation is sloughed into the lake. *1988 IDFG Wildlife Plan* (ER 489). IDFG estimated 15 acres were being lost per year in the Clark Fork River delta because

of the ongoing operations of the Dam, as well as impediment of sediment transport caused by upstream dams which reduces the opportunity for the delta to rebuild itself. *Id.* The Dam is estimated to be responsible for 70 to 80 percent of the land loss occurring at the Clark Fork River delta. *1998 Assessment of Geomorphic Processes* (ER 356). "It is possible these losses will continue for many decades, until erodible areas like the Clark Fork Delta and Priest River islands are entirely gone." *1988 IDFG Wildlife Plan* (A.R. 026148).

Wetlands and other riparian areas around Lake Pend Oreille have also faced the onslaught of invasive species facilitated, in part, by the operation of the Dam. *See EA* (ER 40–41). Recently, the aggressive invasive aquatic plant flowering rush was discovered in the Clark Fork Delta. *EA* (ER 40). Facilitated by water level fluctuations, flowering rush can densely colonize previously open riparian, wetland, and aquatic areas, thereby reducing native plants and impacting fish and wildlife. *MSU Flowering Rush* (ER 211); *EA* (ER 40, 135).

Water quality problems from nutrient pollution are also a concern in Lake Pend Oreille and the Pend Oreille River. *See EA* (ER 33–34). In the lake, excessive nearshore nutrients have resulted in nuisance algae growth around the lake's perimeter. *See EA* (ER 33). Shoreline erosion and the rewetting of shoreline caused by water level fluctuations contribute nutrients to both the lake and the river. *EA* (ER 64).

III. BPA'S PROPOSAL FOR NEW WINTER FLUCTATIONS

Winter lake levels have generally been held steady at the Dam, particularly in the last two to three decades.[5] In most recent years, the reservoir was filled to a pool elevation of 2062.5 feet during flood season in April through June. *EA* (ER 12–13). This high lake level was held throughout summer. *Id.* The reservoir was drawn down from September to mid-November. *Id.* Then, throughout winter, the reservoir was held stable (within a one-foot range) at the selected low level for that year. *Id.*

Steady winter lake levels have given Lake Pend Oreille's shoreline habitat a break during winter from the many impacts caused by water fluctuations from the Dam's operation. *See EA* (ER 107–108) (summarizing potential impacts of new winter fluctuations to include among other things, increasing shoreline erosion, increasing the spread of invasive species, dewatering habitat, and decreasing water quality); *1983 Albeni Falls EIS* (ER 506) (explaining that the lake level is lowered in fall to provide the shoreline with wind and wave protection during winter).

Now BPA and the Corps have decided to fluctuate winter lake levels on Lake Pend Oreille in order to increase power generation at Albeni Falls Dam, through the process described below.

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[5] *See EA*, Append. B, (ER 118–124) (graphs of historical winter lake levels); *1983 Albeni Falls EIS* Fig. 2 (ER 509) (graph of lake level under then-exiting operations), Fig. 6 (ER 515) (graph of lake levels under different alternatives considered)).

A. BPA's Initial Proposal

In September 2009, BPA proposed to the Corps to fluctuate the Albeni Falls reservoir during the upcoming winter to generate additional power. *Corps Press Release* (ER 286). At the time of the proposal, BPA indicated that fluctuations would be implemented as an "experiment" for one year while the State of Idaho "closely monitor[s] wildlife and bank levels throughout the operation in order to evaluate the effects." *2009 BPA Talking Points* (ER 282). As part of the proposal, BPA planned to fund additional monitoring to establish a baseline of shoreline conditions and to evaluate future impacts, including using bank pins to measure shoreline erosion rates and obtaining high resolutions maps of the shoreline using remote sensing technology called "LIDAR". *Id.* (ER 285). *See also Slideshow for 2009-2010 Winter Operations* (ER 297–99) (discussing BPA's monitoring plan).

According to BPA, the monitoring would "determine if there are any significant impacts to the fish and wildlife populations" caused by winter water level fluctuations. *2009 BPA Talking Points* (ER 284). BPA contemplated that "[a]ny findings [of the monitoring] will be an important part of the decision on whether to continue the operation in future years." *Id.* (ER 285). "Monitoring results should provide indications about the impact of the operation on fish, wildlife and habitat and will be a key consideration in any decision to continue the operation." *Id.*

B. Concerns Over the Initial Proposal

BPA's request to undertake one year of experimental winter fluctuations generated significant opposition. The Pend Oreille Basin Commission[6] expressed "serious concerns" with BPA's proposal, including erosion at deltas, the dispersal of flowering rush and other invasive aquatic plants, impacts to wintering waterfowl, and lack of mitigation. *2009 POBC Letter* (ER 279–81). The Tri-State Water Quality Council[7] warned that there was a lack of scientific analysis and disclosure of potential impacts, and explained that the 1983 Albeni Falls Dam EIS did not address the new operations. *2009 Tri-State Letter* (ER 271–72). Similar and additional concerns with the potential impacts of new winter operations were raised by many more entities.[8]

IDFG also sent a letter to BPA raising concerns about accelerated erosion of shorelines and wetlands as well as impacts to kokanee salmon, wintering

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[6] The Commission is an advisory group comprised of local community leaders and representatives from U.S. Fish and Wildlife Service and the Idaho Attorney General's office charged with studying, investigating, and controlling water quality and quantity related to Lake Pend Oreille and the Pend Oreille River. *2009 POBC Letter* (ER 279).

[7] The Council is a non-profit, collaborative of business, industry, government, tribes, and citizens working to protect and improve water quality throughout the Clark Fork-Pend Oreille watershed in Montana, Idaho, and Washington. *2009 Tri-State Letter* (ER 270).

[8] *See, e.g.*, *2009 Selkirk Alliance Letter* (A.R. 004954–55); *2009 Pend Oreille County Public Utility District Letter* (A.R. 004929); *2009 Marina Owner Letter* (A.R. 004923–25); *2009 Seattle City Light Letter* (A.R. 004862); *2009 Kalispell Tribe Letter* (A.R. 004902); *2009 Pend Oreille County Commissioners Letter* (A.R. 004722).

waterfowl, and large mouth bass. *2009 IDFG Letter* (ER 275). IDFG warned that it "cannot support the proposed operation in the absence of assurances for both monitoring and mitigation." *Id.* (ER 278). According to IDFG, it had "an agreement that BPA is willing to conduct an aerial LIDAR survey of these areas to establish a baseline data set for current conditions [and] to expand funding for the use of bank pins to measure real-time erosion rates." *Id.* (ER 275). IDFG explained that the LIDAR survey would provide a powerful tool for assessing potential losses of key habitat types in conjunction with IDFG's ongoing bank pin monitoring of erosion at sites around the reservoir, and IDFG recommended that the LIDAR surveys be collected at least once more prior to refilling the lake that spring in order to isolate the effects of winter operations from those of summer operations. *Id.* (ER 276).

IDFG sent BPA a follow-up letter on February 15, 2010, further detailing its concerns that the proposed winter operations would significantly exacerbate ongoing erosion of important habitat at Lake Pend Oreille. *2010 IDFG Letter* (ER 267). IDFG explained that it had documented "severe erosional loss of the biologically rich and unique delta habitats, as well as other shoreline and island habitats scattered along the lake and down the Pend Oreille River to the AF Dam." *Id.* (ER 268). IDFG attributed these losses to the existing modified hydrograph and warned that the proposed winter fluctuations were of significant concern

"[b]ecause there is substantial evidence to suggest that re-saturation of these eroding areas one or more additional times during winter months will exacerbate erosion rates." *Id.* IDFG also raised concerns that, because BPA's existing mitigation program addressed only construction and inundation impacts (not operational impacts), lands would be lost without mitigation since BPA would not be undertaking any new mitigation program, such as using a portion of revenues generated by the new winter fluctuations to mitigate operational impacts caused by the fluctuations. *Id.* (ER 268–69).

Notably, in early 2010, the Corps withdrew BPA's proposal "to allow more time to study the proposed operation." *Corps Letter to Seattle City Light* (ER 266). According to the Corps, it needed time to "compile background data and develop a satisfactory monitoring plan" to address the numerous concerns that had been raised with BPA's proposal. *2010 Draft Monitoring Plan* (ER 218–19).

C. The Corps Decides to Prepare the *EA*

On April 1, 2010, the Corps issued a Notice that it was preparing a draft Environmental Assessment to consider BPA's proposal for winter fluctuations. *Notice of Preparation* (ER 264–65). Once again, the Corps' announcement generated letters of concern from many entities.

Idaho Governor Butch Otter sent a letter to the Corps emphasizing the importance of Lake Pend Oreille, which supports a world-famous sport fishery

worth $17 million annually to the local economy. *2010 Gov. Otter Letter* (ER 248). The Governor warned that "[w]inter lake level management is critical to reducing erosion and habitat loss" and explained that "[l]ow-lying lands and islands around the lake provide abundant wildlife habitat, which supports economically and ecologically important wildlife and wildlife-based recreation, including hunting, trapping and viewing." *Id.* The Governor also questioned the decision to prepare an EA instead of a full EIS to consider a "change in operation [which] has the potential to have profound impacts on Idaho's valuable fish and wildlife resources." *Id.* (ER 249).

The Bonner County Soil and Water Conservation District also urged the Corps to prepare a full EIS, warning not to rush ahead without assessing the LIDAR data, and emphasizing that the "wide range of negative impacts resulting from shoreline erosion cannot be taken lightly," including the loss of property, fish populations and habitat, and shoreline vegetation and wildlife habitat as well as the increased spread of aquatic invasive species. *2010 Bonner Letter* (ER 252).

Idaho Congressman Walt Minnick also recommended that the Corps prepare an EIS given the public's many concerns, including erosion and the spread of flowering rush. *2010 Cong. Minnick Letter* (ER 215). Congressman Minnick explained that "[d]ue to the fact that winter lake levels have traditionally remained stable until spring run-off, there is little data on the impacts of this proposal." *Id.*

D. Monitoring Plan as Key Part of the *EA*

According to the Corps, the decision to develop an Environmental Assessment was made in order "to address aspects and impacts of the operation that had not previously been covered under NEPA." *2010 Draft Monitoring Plan* (ER 219). As a key component of the EA, the Corps chose to update and expand upon the monitoring program prepared by BPA in 2009 for its initial proposal in order to provide critical baseline information, as well as continued monitoring of future impacts, on ice formation, water quality, shoreline erosion, cultural resource sites, invasive aquatic plants, and docks and other infrastructure. *See id.* (ER 218–19).

The Corps asked BPA to be a "cooperating agency" for preparing the EA, requesting that BPA help prepare the final monitoring plan for shoreline erosion and structural damage, provide information on power generation impacts, and provide shoreline LIDAR survey information. *Corps Letter to BPA* (ER 262). In May 2010, BPA agreed to be a cooperating agency and to assist with the final monitoring plan. *BPA Letter to Corps* (ER 260–61). BPA planned to evaluate the results of LIDAR studies conducted by BPA in fall 2009 as well as additional LIDAR studies underway by the Corps which BPA expected to be available by summer 2010. *See May 2010 E-mail String* (ER 256); *Jun. 2010 E-mail String* (ER 253).

E. Preliminary Findings for the *EA*

On August 3, 2010, the Corps Technical Team preparing the *EA* presented its preliminary findings. *2010 Corps Presentation* (ER 230–47). The Technical Team determined that repeated drawdowns during winter fluctuations could cause shoreline erosion in the fluctuation zone, but opined that these impacts could be mitigated by reducing drawdown rates, armoring shoreline, and monitoring critical areas using the planned LIDAR shoreline maps and bank pin monitoring of erosion rates. *Id.* (ER 235). The Technical Team also found that repeated drying and wetting of the shoreline caused by winter fluctuations can release and re-suspend nutrients, which could elevate nutrient levels in Lake Pend Oreille above water quality standards. *Id.* (ER 236). The Technical Team found wildlife would be impacted by increased shoreline erosion and the continued loss of wetland and riparian habitats along the lakeshore and the Clark Fork River Delta and the Pack River Delta. *Id.* (ER 243). One component of wildlife mitigation identified by the Technical Team was to identify, delineate, and monitor existing wetland and riparian habitats and to monitor future losses. *Id.*

F. Draft Monitoring Plan for the *EA*

In September 2010, the Corps prepared the Draft Monitoring Plan, which was intended to provide "[b]aseline and regular monitoring [of] physical, chemical, and biological impacts due to winter operations" for the Environmental

Assessment. *2010 Draft Monitoring Plan* (ER 216–28). The monitoring plan was an update and expansion of the plan initially drafted by BPA when if first proposed winter fluctuations in December 2009. *Id.* (ER 219).

For shoreline erosion, the Corps would use IDFG's bank pin sites. *Id.* IDFG has been monitoring sites around Lake Pend Oreille, the Clark Fork Delta, and the Pack River Delta for several years by inserting 4-foot-long metal pins into the shoreline to track shoreline loss. *Id.* (ER 220).

The bank pin data would be used in conjunction with the LIDAR surveys to create detailed baseline maps of the entire perimeter of Lake Pend Oreille, the Clark Fork River Delta, the Pack River Delta, and the Pend Oreille River above the Dam in order to document "important wetlands, spawning grounds, erosion areas, structures or other important geographic and ecological features." *Id.* (ER 219–220). The Corps explained that aerial photography and LIDAR data were collected in the fall of 2009 and March 2010, and the Corps hoped to obtain additional LIDAR data during the upcoming winter in order to "adequately assess the impacts of a flexible drawdown." *Id.*

The monitoring plan also called for gathering water quality samples and continuing to monitor nutrient loading from the new winter fluctuations. *Id.* (ER 223). The monitoring plan would expand the Corps' existing nearshore nutrient sampling from one site to six to ten sites around Lake Pend Oreille during the

critical summer period of June through September. *Id.* The Corps would also collect sediment data to analyze potential impacts of sediments contributing to nutrient loading. *Id.*

The monitoring plan also included important baseline information gathering for flowering rush, an aggressive aquatic invasive species. *Id.* (ER 225). Under the Plan, existing flowering rush would be surveyed, mapped, and photographically documented at AFD in 2010, and mapping would continue in 2011 to depict areas of growth. *Id.*

G. BPA Opposition to Monitoring Plan and Elevation to Joint Lead Agency

On April 11, 2011, BPA notified the Corps at a meeting that it wished to withdraw the monitoring plan from the *EA*. *2011 Meeting Summary* (ER 198). However, according to the summary of the meeting, the Corps explained that the monitoring plan cannot be removed from the EA because "it is a major component of the Proposed Action," and because "it was communicated to the public that there would be a Monitoring Plan for the Proposed Action." *Id*.

On June 13, 2011, the Corps and BPA signed a Letter of Understanding, elevating BPA's status in preparing the EA to joint lead agency. *2011 Letter of Understanding* (ER 169). The letter recognized that each agency has special expertise when analyzing effects of the proposed operation, specifically identifying water quality and erosion as areas of the Corps' expertise. *Id.* (ER 170).

IV. THE NOVEMBER 2011 *EA*

A. Overview of the *EA*

On July 29, 2011, the Corps and BPA, as joint lead agencies, released a Public Notice of the Draft EA. *Public Notice of Draft EA*, (ER 165). After a public comment period, the final *EA* was issued in October 2011. *See EA* (ER 3). Under the new "Flexible Winter Power Operations" (FWPO) considered in the *EA*, BPA and the Corps would fill and draft the reservoir pool three times within a maximum 5-foot range above the minimum lake level throughout the December 15 to March 15 winter period. *EA* (ER 3).[9]

Notably, the monitoring plan is nowhere to be found in the *EA*, and the winter fluctuations would be implemented for life of the Dam, not temporarily until impacts could be better understood. *See EA* (ER 19–20). Additionally, no detailed shoreline mapping from the LIDAR surveys is presented, and only part of IDFG's bank pin monitoring studies are briefly referenced. *See EA* (ER 32).

Instead of using the up-to-date baseline information identified in the monitoring plan, the *EA* relied on a 1995 EIS prepared for its system-wide review of FCRPS operations, called the *Columbia River Power System Operation Review*

[9] BPA prepared the *EA* under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* *EA* (ER 11). The stated purpose of the *EA* is to evaluate: (1) whether the new winter operations are a "substantial change" from existing operations relevant to environmental concerns; and (2) whether there are "significant new circumstances or information" relevant to environmental concerns and bearing on existing operations. *EA* (ER 14).

Environmental Impact Statement ("*1995 SOR EIS*"). *See EA* (ER 14). As acknowledged in the *EA*, the environmental effects of winter fluctuations at Lake Pend Oreille were not addressed in the *1995 SOR EIS*. *EA* (ER 424). And even though the *1995 SOR EIS* is an "overarching programmatic analysis" of the operation of 14 federal dams and their impact on the entire Columbia River Basin with limited site-specific information for Lake Pend Oreille, BPA relied on this EIS as the governing NEPA document disclosing the environmental impacts of the Dam's existing operations. *See EA* (ER 14, 17).

The *EA* also relied on the *1983 Final Environmental Impact Statement, Operation of Albeni Falls Dam, Idaho* ("*1983 Albeni Falls EIS*"). *See EA* (ER 14). Despite the fact that this document was nearly 30 years old at the time the *EA* was released, BPA used it as the source of baseline information on wetlands, vegetation, and wildlife around Lake Pend Oreille. *EA* (ER 40) (wetland habitat and vegetation), (ER 42) (wildlife).

In the *EA*, BPA recognized that FWPO would likely have many adverse environmental impacts. The new winter fluctuations would increase shoreline erosion "primarily due to an increase in bank seepage and piping" resulting from the repeated wetting and drying of sediments caused by the fluctuations and from winter freeze-thaw effects. *EA* (ER 000040, 000064). Increased shoreline erosion would in turn contribute to nutrient water quality problems, accelerate the spread

of invasive flowering rush, and wetland loss. *EA* (ER 64) (nutrients), (ER 75) (wetlands), (ER 76) (flowering rush). Wetland loss and the spread of flowering rush would adversely impact wildlife, such as redhead duck and other significant populations of overwintering waterfowl that depend on Lake Pend Oreille's native vegetation for food. *EA* (ER 77).

However, BPA labeled all adverse impacts of FWPO as "incremental" or "additional detail" to effects disclosed in the *1995 SOR EIS*, and dismissed them as insignificant. *See*, *e.g.*, *EA* (ER 63–64) (erosion), (ER 64–65) (water quality), (ER 75–77) (vegetation and wetlands), (ER 77) (wildlife).

B. Public Comments

The Draft *EA* generated numerous comments from various entities, including the Idaho Conservation League. ICL raised concerns about the extent of erosion from the Dam's existing operations, which is inadequately addressed in the *1995 SOR EIS* and the earlier *1983 Albeni Falls EIS*. *EA* (ER 140–41). ICL explained that while the *1995 SOR EIS* clearly described the means by which lake level fluctuations can cause erosion, nowhere in either the *1995 SOR EIS* or the *EA* is there a discussion of combined impacts of the many erosion processes at work, particularly in the Clark Fork River delta. *EA* (ER 141). And ICL noted that BPA's conclusion that erosion is merely "incremental" to existing impacts is not supported by data. *Id.*

ICL also explained that the *EA* failed to consider the how sediment loading caused by the fluctuations could exacerbate nutrient water quality problems at Lake Pend Oreille. *EA* (ER 141–42). ICL commented that while the *EA* acknowledged that FWPO could increase the spread of invasive flowering rush and will contribute to erosion of important wildlife habitat, the *EA* lacked important baseline information such as more recent bird counts or any data on how operations impact Lake Pend Oreille's migrating waterfowl. *EA* (ER 142). And the EA failed to consider the significance of the spread of flowering rush; instead it assumed without explanation that the spread is inevitable, without considering potential mitigation measures. *Id.*

ICL requested that the agencies prepare an EIS in light of the lack of detailed erosion analysis. *EA* (ER 143). Finally, ICL requested that the agencies consider an alternative to the proposed action which would include monitoring and mitigation. *Id.*

IDFG raised similar concerns in its comments on the *Draft EA*, including that fish and wildlife issues did not receive sufficient assessment or were not addressed at all, and that a more thorough assessment is warranted to address these effects and consider potential mitigation. *See IDFG Comments* (ER 146). "Chief among these concerns is the potential for severe erosional loss of the biologically rich and unique delta, shoreline, and island habitats present along the lake and

down the Pend Oreille River to the AFD." *Id.* According to IDFG, "[o]ur empirical evidence indicates that the proposed operational changes will substantially magnify these operational losses that have been diminishing important wildlife habitat since the project began operations in the 1950s." *Id.*

IDFG raised concern with the "very limited analysis" in BPA's finding that increased erosion will not be significantly higher than what is described in the SOR EIS. *EA* (ER 151). "[W]e believe our empirical observations make it clear that winter erosion is substantial and significant, and that the evidence strongly points to significant exacerbation of the problem with the proposed change in operations." *EA* (ER 149) (emphasis added). IDFG also raised concerns with BPA's conclusion that wave action at full pool dwarfs other erosion processes, noting that while wave action at full pool is a major source of erosion, "we also find the erosional effects of physical draw-down and draw-up for this winter proposal were inadequately described and current data from the Department, including empirical observations using bank pins to measure erosion during the winter months, were not utilized, leading to incomplete assessment and conclusion." *EA* (ER 148). In fact, IDFG offered to provide this data and to work with BPA and the Corps to incorporate the information IDFG believed necessary to adequately assess impacts to fish and wildlife habitat. *EA* (ER 147, 149).

IDFG faulted BPA for failing to sufficiently address the likely increase in erosion in the Clark Fork River Delta caused by the exposure of exposed un-vegetated banks re-saturated from the new winter fluctuations to peaking flows from the upstream Cabinet Gorge Dam. *EA* (ER 147). And for the Pend Oreille River and Pack River deltas, IDFG commented that BPA failed to address the issue of saturating soils up to three times and then subjecting them to increased river velocities when the lake is drawn back down. *Id.* IDFG also raised concerns that the *EA* failed to even mention the Priest River Delta, which IDFG has seen to be "severely affected by winter drawdowns and increased water velocities, along with wave caused erosion during [summer]." *EA* (ER 150).

IDFG also expressed its concern that impacts of the new winter operations will be added to BPA's mitigation backlog, even though BPA has not demonstrated how it will have the capacity to address this additional mitigation burden. *EA* (ER 147). "BPA funding pursuant to the Northwest Power and Conservation Council's Fish and Wildlife Program has not been able to fully mitigate fish and wildlife impacts to date." *EA* (ER 148). "The increased losses to these habitats from the proposed changes in operations of the AFD would be in addition to impacts resulting from construction and inundation of the Albeni project, for which mitigation remains a work in progress." *EA* (ER 146).

As to over-wintering waterfowl, IDFG said that the *EA* acknowledged negative affects but did not adequately describe or discuss the context and intensity of such effects. *EA* (ER 147). And IDFG commented that BPA needed to provide a more thorough assessment of potential impacts of altered lake levels on overwintering waterfowl, including redhead and other diving ducks, to ensure the operations will not affect food availability. *EA* (152).

IDFG also warned that the EA failed to explain the connection and role of wetlands and their association with water quality, including trapping and absorbing nutrients. *EA* (ER 149).

C. Adoption of New Winter Operations

In response to the public comments, BPA again acknowledged the winter fluctuations would increase shoreline erosion, which would degrade water quality and wildlife habitat. *EA* (ER 129–131). And BPA acknowledged the Dam facilitates the spread of flowering rush, which presents a "threat" to the "ecosystem of Lake Pend Oreille," and BPA even "agree[d] that the issue warrants additional research." *EA* (ER 136–36).

Nevertheless, BPA and the Corps chose not to prepare an Environmental Impact Statement to consider these potentially significant impacts and signed the Final EA on November 4, 2011, adopting the new winter fluctuations. *EA* (EA 107–09).

SUMMARY OF THE ARGUMENT

By the time BPA signed the *EA* in November 2011, BPA's one-year, closely-monitored experiment to gauge unknown and potentially significant environmental impacts had morphed into a new winter management regime to last the life of the Dam. Instead of using the baseline information and continuing monitoring program which had been initially proposed, BPA relied on old EISs from 1983 and 1995, and a cursory analysis in its *EA*, to conclude the new winter fluctuations would have only insignificant impacts. BPA's decision violates NEPA in several respects.

First, BPA violated NEPA by failing to prepare a full Environmental Impact Statement to study the likely adverse impacts of FWPO. BPA recognized that rising and lowering winter lake levels will contribute to shoreline erosion, wetland loss, degradation of fisheries habitat, damage to property, and the invasion of aquatic weeds. Furthermore, IDFG—the one entity actively studying erosion processes and rates around Lake Pend Oreille—concluded from its ongoing erosion monitoring that the new winter fluctuations are likely to significantly exacerbate shoreline erosion.

In the *EA*, however, BPA made only speculative assertions that these environmental impacts will be insignificant, without providing any quantified or detailed information in support of its conclusions. As a result, FWPO's adverse

environmental impacts are "highly uncertain" and "highly controversial," and BPA's decision to adopt the new winter operations without preparing an EIS is arbitrary and capricious in violation of NEPA.

Second, BPA's last-minute withdrawal of the monitoring plan from the *EA* violates NEPA. When BPA first proposed new winter fluctuations, monitoring of shoreline erosion, invasive species, water quality, and other unknown impacts was a key part of the proposed action. BPA and the Corps developed an extensive monitoring plan for the *EA* to evaluate the impacts. But BPA abandoned the monitoring plan and never mentioned it in the *EA*, even in response to ICL's request that BPA consider a monitoring and mitigation alternative to the proposed action. BPA thereby violated its NEPA duty to consider reasonable alternatives in the *EA*.

Third, BPA violated NEPA's "hard look" requirement by failing to include up-to-date, comprehensive baseline information in the *EA* regarding shoreline erosion, invasive flowering rush, and wildlife. Even though BPA and the Corps identified readily-available sources of important baseline information when the new winter fluctuations were first proposed, BPA never incorporated, much less analyzed this information in the *EA*. Without this baseline information, BPA could not meaningfully evaluate potential environmental impacts and, thus, BPA failed to take a "hard look" in violation of NEPA.

ARGUMENT

I. STANDARD OF REVIEW

Action taken by BPA may be set aside under the Northwest Power Act if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 16 U.S.C. § 839f(e)(2) (imposing standards of 5 U.S.C. § 706(2)(A)). Agency action is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983).

In reviewing an agency's decision not to prepare an Environmental Impact Statement under NEPA, courts employ the APA's arbitrary and capricious standard, which requires determining whether the agency: (1) took a hard look at the environmental consequences of the action; (2) based its decision on a consideration of all relevant factors; and (3) provided a convincing statement of reasons to explain why the project's impacts are insignificant. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005). This standard applies to decisions by BPA not to prepare an EIS. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997).

II. NEPA REQUIREMENTS

Under NEPA, federal agencies must conduct a comprehensive study of alternatives and environmental impacts for every proposed major federal action. 42 U.S.C. § 4332(2)(C). NEPA's requirement that agencies consider environmental factors in their decisionmaking process serves two purposes:

> First, "it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." Second, it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."

Dep't of Transp. v. Public Citizen, 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

As the Supreme Court has emphasized, NEPA requires federal agencies to take a "hard look" at likely environmental impacts before approving an action. *See Robertson*, 490 U.S. at 349 ("NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast"); *Baltimore Gas & Elec. v. NRDC*, 462 U.S. 87, 97 (1983) (NEPA requires "that the agency take a 'hard look' at the environmental consequences before taking a major action").[10]

[10] Likewise, the Council on Environmental Quality has adopted regulations implementing NEPA, which spell out that "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." *See* 40 C.F.R. § 1500.1(b)

Taking a "hard look" under NEPA requires the agency to provide "a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). The hard look doctrine bars "[g]eneral statements about 'possible effects' and 'some risk' . . . absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

To fulfill the NEPA "hard look" requirement, agencies must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). As a preliminary step, an agency may prepare an EA to determine whether the environmental impact of a proposed action is significant enough to warrant preparing an EIS. 40 C.F.R. § 1508.9. An EA is a "concise public document" that "briefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." *Id.*

An agency must prepare an EIS when there are substantial questions about whether a project "may" significantly degrade the environment. *Native Ecosystems Council*, 428 F.3d at 1239 (emphasis in original). "[T]his is a low

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(emphasis added). The Supreme Court has held that "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

standard." *California Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011) (quoting *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006)). *See also Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) ("To trigger this requirement a plaintiff need not show that significant effects will in fact occur, raising substantial questions whether a project may have a significant effect is sufficient.") (quotation omitted) (emphasis in the original).

"An agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (quotation omitted). "The statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential environmental impacts of a project." *Id.* at 1212 (quotation omitted).

Where a federal action is ongoing, an agency has a continuing duty to comply with NEPA and must prepare a new or supplemental EIS when "the agency makes substantial changes in the proposed action that are relevant to environmental concerns" or when "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" emerge. 40 C.F.R. § 1502.9(c)(1)(ii). "[T]he decision whether to prepare

a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989). Changed action, information, or circumstances require an EIS if they "show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Id.* (quotation omitted).

III. BPA VIOLATED NEPA BY FAILING TO PREPARE AN EIS TO EVALUATE THE IMPACTS OF THE NEW FLUCTUATIONS

Instead of preparing an Environmental Impact Statement to consider the likely impacts of shifting from a regime of stable winter lake levels to now raising and lowering Lake Pend Oreille up to three times every winter, BPA relied on outdated EISs from 1983 and 1995, and on its cursory November 2011 *EA* to conclude that all adverse impacts would be insignificant. However, substantial questions remain as to whether FWPO will have a significant impact on the environment, and BPA has violated NEPA by failing to prepare an EIS.

A. BPA's Reliance on the Outdated, Programmatic *1995 SOR EIS* Is Arbitrary and Capricious

In the *EA*, BPA found that any increase in erosion and related impacts to wetlands, fish, and wildlife caused by the new winter fluctuations would be within those impacts already disclosed in the programmatic *1995 SOR EIS*. BPA's reliance on this EIS is arbitrary and capricious.

First, an agency cannot rely on outdated, or "stale", information in a NEPA document. *See Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 703–05 (9th Cir. 1993) (overturning decision where "EIS rests on stale scientific evidence"). This Court has found six- and ten-year-old fish and wildlife data, without updated habitat surveys, to be too stale. *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (six); *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085–86 (9th Cir. 2011) (ten). The 1995 SOR EIS was approximately 15 years old at the time the *EA* was released. Thus, whatever information it contains regarding shoreline erosion and related environmental impacts around Lake Pend Oreille is stale, particularly since Lake Pend Oreille's 226-mile shoreline has continued to erode away and change every year since 1995.

Second, while agencies can "tier" to prior NEPA documents, tiering to the *1995 SOR EIS* is of limited value here. "Tiering refers to the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses." 40 C.F.R. § 1508.28. "Though 'tiering' to a previous EIS is sometimes permissible, the previous document must actually discuss the impacts of the project at issue." *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of the Interior*, 588 F.3d 718, 726 (9th Cir. 2009).

This Court has held that an agency cannot cure an inadequate EA or EIS by tiering to a programmatic document which never considered the site-specific

details of the action at issue. *See*, *e.g.*, *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999) (agency could not save inadequate EIS for specific land exchange by tiering it to a programmatic document did not "account for the specific impacts of the Exchange," even though the programmatic document discussed the land exchange program and mentioned the particular exchange at issue); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 997–98 (9th Cir. 2004), (agency could not cure deficiencies in EA by tiering to documents which contained general statements about impacts on broader areas but did not reveal any "specific information" about the "incremental impact that can be expected on the . . . watershed as a result as a result of the these four successive timber sales" (emphasis in the original)).

This Court recently reaffirmed this point that tiering to a programmatic EIS does not relieve an agency of its critical duty to consider the site-specific impacts of its actions: "Our conclusion that the Breaks EIS contains sufficient analysis for informed decision-making at the programmatic level does not reduce or minimize BLM's critical duty to fully evaluate site-specific impacts" of subsequent action. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1049 (9th Cir. 2013) (internal quotation omitted).

Here, the *1995 SOR EIS* does not reveal detailed site-specific information on erosion, impacts to fish and wildlife, loss of wetlands, and degradation of water

quality at Lake Pend Oreille. Nor does it disclose the potential impacts of winter fluctuations at the lake. Rather, the SOR EIS is a programmatic EIS prepared to address the combined operation of 14 federal dams in the Columbia River Basin. The *1995 SOR EIS* never considered undertaking a single additional fluctuation at Lake Pend Oreille during any time of year—let alone three additional fluctuations every winter for the life of the Dam.[11] Instead, under all alternatives considered in the SOR EIS, only one annual fluctuation between summer high pool and winter low pool would take place at the Dam. *See 1995 SOR EIS* (ER 426–442) (explaining the alternative operations considered in the EIS).[12]

Furthermore, the *1995 SOR EIS* never disclosed complete or up-to-date information on the Dam's existing impacts to Lake Pend Oreille. As the *1995 SOR EIS* explained:

> The available studies represent somewhat dated literature, and they do not provide a complete and up to date inventory of all landslides and eroding or potentially eroding areas. The SOR is a programmatic review, however, and does not require a full, site-specific inventory and assessment of potential effects. The objective for the baseline studies relative to erosion and sedimentation was to provide a general

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[11] *See also Public Notice for the Draft EA* (ER 168) ("FWPO results in a different winter management strategy . . . compared to the SOR EIS proposed action."); *EA* (ER 97) (stating environmental effects of the new winter fluctuations at AFD were "not specifically detailed in the SOR EIS").

[12] Furthermore, the assessment of erosion impacts under different alternatives considered in the *1995 SOR EIS* only mentioned the Dam a few times, none of which contain relevant information to the new winter fluctuations. *See 1995 SOR EIS* (ER 447, 450, 457–58).

> and reasonably current overview of bedrock and surficial geologic conditions for the system.

Id. (ER 424).

The *1995 SOR EIS* did identify one study from 1983 (Gatto and Doe) which found that one location of shoreline above the Dam has experienced as much as five feet of shoreline retreat over a 12-year period. *See id.* (ER 021264). This, however, hardly provided baseline erosion conditions along the 226-mile shoreline impacted upstream of Dam, or impacted downstream reaches, and it did not disclose impacts erosion is having on Lake Pend Oreille's wetlands, fish, wildlife, and water quality.[13] Thus, ongoing shoreline erosion and related environmental impacts at Lake Pend Oreille were not disclosed in the *1995 SOR EIS*, and BPA cannot rely on this EIS does to save its inadequate November 2011 *EA*.

Finally, to the extent that the *1995 SOR EIS* does provide any useful information, it commands the opposite conclusion of that reached by BPA. The limited discussion of erosion at Lake Pend Oreille in the *1995 SOR EIS* specifically identified water level fluctuations as possibly the greatest cause of shoreline erosion:

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[13] BPA also tiered the *EA* to the *1983 Albeni Falls EIS*. That EIS is even more outdated than the 1995 SOR EIS, and disclosed minimal information on ongoing shoreline erosion. It provided a brief description of the geology and soils at Lake Pend Oreille, and noted that some stretches of Lake Pend Oreille's northern shore "are highly sensitive to shoreline erosion and landslide movement, possibly in part due to reservoir operation." *1983 Albeni Falls EIS* (ER 526).

> Approximately 6,000 acres of wetlands have been lost to erosion since the project's construction. Wave and wind erosion have had dramatic effects, particularly in areas where shoreline vegetation has been lost. Seasonal fluctuations may be the greatest cause of erosion, resulting in sloughing of banks that become waterlogged in summer, then collapse under their own weight as the reservoir drops in elevation.

1995 SOR EIS (ER 471) (emphasis added).

This is further confirmed by the two scenarios in which the *1995 SOR EIS* did consider adopting additional fluctuations at another dam. Under the SOS 9 alternative at Brownlee Reservoir on the Snake River, the EIS concluded that "an additional draft/refill cycle would cause a significant increase in the amount of shoreline exposed to wave attack" and "would cause a significant increase in shoreline erosion and mass wasting, and could nearly double the amount of erosion and mass wasting each year." *1995 SOR EIS* (ER 403, 457) (emphases added). Similarly, under the SOS 2 alternative at Brownlee Reservoir, the EIS concluded: "two small additional draft/refill cycles would occur each year with an 8-foot (2.4-m) draft/refill in July and a 22-foot (6.7-m) draft/refill in October. This could increase shoreline erosion and mass wasting significantly. The shoreline would be subjected to much more wave action and slumping." *1995 SOR EIS* (ER 449) (emphasis added).

Remarkably, even though BPA claimed that the November 2011 EA relied on the *1995 SOR EIS*, the *EA* never addressed this important information. To

summarize, the *1995 SOR EIS* is not up to date and fails to disclose site-specific information on the Dam's ongoing impacts around Lake Pend Oreille. The *1995 SOR EIS* also fails to disclose likely impacts of the Flexible Winter Power Operations, and even indicates that erosion from new fluctuations are likely to be significant. Thus, BPA cannot rely on the 1995 EIS to avoid preparing an up-to-date EIS to address its proposed action, and this Court should reverse and remand for this NEPA violation.

B. Shoreline Erosion and Related Environmental Impacts Are Highly Uncertain and Highly Controversial and Require an EIS

When deciding if substantial questions exist about whether a project may significantly affect the environment, courts turn to the NEPA regulations defining "significantly." *Native Ecosystems Council*, 428 F.3d at 1239. The NEPA regulations list ten "intensity" factors for evaluating whether a project's impacts are significant. 40 C.F.R. § 1508.27(b). The presence of any one factor may be sufficient to require an EIS. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005).

The two intensity factors most relevant here are: (1) "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial"; and (2) "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(4), (5) (emphases added). This Court has required an EIS where

environmental effects in EAs are "highly uncertain" and/or "highly controversial." *See*, *e.g.*, *Nat'l Parks & Conservation Ass'n v. Babbit*, 241 F.3d 722 (9th Cir. 2001) ("*National Parks*"), *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998) ("*Blue Mountains*").

1. FWPO's Effects Are "Highly Uncertain" Because the *EA* Lacks Quantified or Detailed Information

An agency must generally prepare an EIS where environmental effects are "highly uncertain." "Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential effects." *National Parks*, 241 F.3d at 732 (internal quotations and citations omitted). "The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action." *Id.* (quoting *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988)).

By the time the *EA* was released, BPA's initial one-year, closely-monitored experiment to evaluate numerous unknown and potentially significant environmental impacts had transformed into a new winter management regime to last the life of the Dam. BPA abandoned its initial plan to gather and evaluate baseline information that both BPA and the Corps had identified as obtainable and necessary to determine the significance of FWPO's environmental impacts. Nevertheless, BPA concluded in the *EA* that all environmental impacts would be

insignificant. The *EA*, however, is devoid of quantified or detailed information to support this conclusion, and BPA has, thus, violated NEPA.

Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998) is squarely on point. In *Blue Mountains*, the Forest Service decided to conduct salvage logging on several thousand acres of burned forest land in the aftermath of the fire without preparing an EIS. *Id.* at 1210. This Court mandated an EIS because the agency "simply fail[ed] to persuade [the Court] that no significant impacts would result" from timber salvage sales, because there was "no documentation of the estimated sediment that would result from the logging and accompanying road building or the impacts of increased sediment on fisheries habitat." *Id.* at 1213. Rather, the EA revealed only "that the expected level of increased erosion and sediment delivery will be small in comparison to that caused by the fire." *Id.* This Court explained that "[t]he proper evaluation should identify the impact of the increased sediment from the logging and roadbuildling on the fisheries habitat in light of the documented increases that already have resulted from the fire." *Id.*

Similarly here, BPA provided no documentation of estimated shoreline erosion, wetland loss, and the spread of flowering rush, as well as related impacts to fish, wildlife, and water quality. In the *EA*, BPA simply labeled all adverse environmental impacts as "incremental" or "additional detail" to the Dam's

ongoing impacts. *See EA* (ER 63–64) (erosion), (ER 64–65) (water quality), (ER 75–77) (vegetation and wetlands), (ER 77) (wildlife). Based on these vague findings, one can only guess what BPA expected the intensity of these impacts to be. As a result, FWPO's impacts are highly uncertain, and this Court must reverse and remand for this NEPA violation.

With respect to shoreline erosion, as discussed in the accompanying Declaration of Kathryn Didricksen,[14] lake level fluctuations can add to the magnitude and complexity of many reservoir erosion processes identified in the *1995 SOR EIS* and other studies in the Record. *Decl. of K. Didricksen*, ¶¶ 6–7. According to Miss Didricksen, it is difficult to evaluate FWPO's potential impacts, and hard to make sense of BPA's finding that erosion is expected to be "incremental" to ongoing summertimer erosion, because BPA has not provided any data or studies differentiating winter and summer erosion, and BPA has not identified which areas around the reservoir's 226-mile shoreline are prone to the relevant erosion processes. *Id.* at ¶ 8–10.

Finally, BPA's analysis of the infestation of flowering rush is particularly telling. BPA recognized that the Dam's operations, including FWPO, can facilitate

[14] ICL submits the accompanying Declaration of Kathryn Didricksen (a former BLM Engineering Geologist and Hyrdogeologist of 32 years) and Declaration of John Robison (MS in botany) to explain complex subject matter and determine whether BPA has considered the relevant factors and explained its decision. *See Nat'l Audubon Soc. v. U.S. Forest Serv.*, 46 F.3d 1437, 1447 (9th Cir. 1993) (extra-record declarations can be appropriate in NEPA cases for these purposes).

the spread of this aggressive invasive species around Lake Pend Oreille and downstream, and acknowledged that the "rapid colonization of flowering rush may begin to reduce the extent of native plants, which would in turn affect the local ecosystem and fish and wildlife species." *EA* (ER 40–41, 135). But instead of gathering information to evaluate potential impacts, BPA simply said that the impact the new winter operations will have on the spread of flowering rush is "uncertain." *EA* (ER 136) (emphasis added).

And for flowering rush impacts caused by the Dam's year-round operation—which has never been considered in a prior NEPA document[15]—BPA "agree[d] that the issue warrants additional research." *Id.* (emphasis added). This, however, is precisely the kind of information BPA is required to consider in an EIS. As this Court has explained, "lack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it." *National Parks*, 214 F.3d at 733.

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[15] The presence of flowering rush at Lake Pend Oreille is a new circumstance not previously considered in any NEPA document. *EA* (ER 87). In addition to considering the impacts of the new winter operations, one stated purpose of the *EA* was to consider whether there were any significant new circumstances at the Dam necessitating a supplemental EIS. *EA* (ER 14). Yet BPA arbitrarily limited its analysis of flowering rush impacts to only the incremental impacts attributable to the new winter fluctuations; BPA never considered the significance of the spread of flowering rush in relation to the Dam's year-round operation. *See EA* (ER 76–77). This oversight alone is arbitrary and capricious in violation of NEPA, because BPA "entirely failed to consider an important aspect of the problem." *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 493 (9th Cir. 2011).

2. FWPO's Effects Are "Highly Controversial" Because the Record Casts Serious Doubt on BPA's Speculative Assertions That All Impacts Are Insignificant

As explained in *National Parks*, a federal action is "controversial" and requires an EIS "when substantial questions are raised as to whether a project may cause significant degradation of some human environmental factors, or there is a substantial dispute about the size, nature, or effect of the major Federal action." *Id.* at 736 (internal quotations and citation omitted). "A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI casts serious doubt upon the reasonableness of an agency's conclusions." *Id.* NEPA then places the burden on the agency to supply a convincing reason why the evidence disputing the EA's conclusions does not create a public controversy based on potential environmental consequences. *Id.*

In *National Parks*, the Park Service prepared an EA to assess the impacts of allowing increased vessel traffic in Glacier Bay, Alaska. 214 F.3d at 725. This Court found that public comments questioning the analysis in the EA had cast substantial doubt on the Park Service's data and methodology. *Id.* at 736–37. And because the Park Service acknowledged that increased vessel traffic would have environmental impacts, but failed to "establish the intensity of the impact" in the EA, this Court held that impacts were "highly controversial" and required an EIS. *Id.* at 737. *See also Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193–94 (9th

Cir. 1988) (when affidavits and testimony of conservationists and experts are highly critical of an EA, and dispute the agency's conclusion that there would be no significant impacts, "[t]his is precisely the type of 'controversial' action for which an EIS must be prepared").

Similarly here, numerous entities—including ICL, Idaho's Governor, the Pend Oreille Basin Commission, the Tri-State Water Quality Council, U.S. Congressman Minnick, and other conservation groups, business owners, and property owners—submitted comments which cast a serious doubt on the adequacy of BPA's analysis of erosion, wetland loss, the spread of flowering rush, and related impacts to fish, wildlife, and water quality. Like in *National Parks*, BPA recognized FWPO will have definite environmental effects, but as already discussed, BPA never established the intensity of these effects and instead labeled them as merely "incremental" to existing impacts.

This Court has made it clear that an agency cannot avoid preparing an EIS by making generalized, conclusory assertions that an activity will have only an insignificant impact on the environment. *Ocean Advocates*, 402 F.3d at 864 (citing *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999)). *See also National Parks*, 241 F.3d at 735 ("The EA's speculative and conclusory statements are insufficient to demonstrate that the mitigation measures would render the environmental impact so minor as to not warrant an EIS.").

Notably, IDFG—the one agency actively monitoring erosion rates around Lake Pend Oreille—concluded from its evidence that the new winter fluctuations will likely result in a "significant exacerbation" of erosion rates. *EA* (ER 149). Yet BPA essentially disregarded this evidence.

As this Court has repeatedly ruled, a federal agency violates NEPA when it disregards the available evidence and informed comments of sister agencies in asserting that a proposed action will not have significant impacts, thereby avoiding preparation of a full EIS as required by NEPA. *See, e.g., W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011) (holding BLM violated NEPA in promulgating revised grazing regulations that weakened ecological protections, where agency scientists repeatedly warned of negative impacts to wildlife but were overridden by agency superiors). By disregarding the scientific evidence and adverse comments about the significant erosion impacts of the new winter operations, BPA has violated NEPA, requiring reversal and remand by this Court.

In summary, BPA violated NEPA by relying on the cursory and inadequate November 2011 EA to approve FWPO, without preparing a complete and up-to-date EIS as required under NEPA. The record before the Court shows that erosion and other impacts are likely to be significant, and that prior NEPA analysis has not evaluated those impacts. Accordingly, the Court should reverse and remand based on BPA's violation of NEPA.

IV. BPA ABANDONED THE MONITORING PLAN IN VIOLATION OF NEPA'S REQUIREMENT TO CONSIDER REASONABLE ALTERNATIVES

The "consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process." *Bob Marshall Alliance v.* Hodel, 852 F.2d 1223, 1228–29 (9th Cir. 1988). NEPA's goal is to ensure "that federal agencies infuse in project planning a thorough consideration of environmental values." *Conner v. Burford*, 836 F.2d 1521, 1531 (9th Cir. 1988). "The consideration of alternatives requirement furthers that goal by guaranteeing that agency decisionmakers have before them and take into proper account all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit balance." *Bob Marshall* Alliance, 852 F.2d at 1228 (internal quotation omitted).

Agencies are, thus, required to "study, develop, and describe appropriate alternatives" to the proposed course of action when preparing an EA or an EIS. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013). While the obligation to discuss alternatives is less in an EA than an EIS, an EA must still "give full and meaningful consideration to all reasonable alternatives." *Id.* "The existence of a viable but unexamined alternative renders an [EA] inadequate." *Id.* (citations omitted).

BPA violated this NEPA requirement by failing to consider a viable alternative which would adopt the new Flexible Winter Power Operations along with a monitoring plan to evaluate its environmental impacts. In its comments on the Draft *EA*, ICL asked BPA to consider an alternative with monitoring and mitigation. *EA* (ER 143). But BPA declined to include any monitoring or mitigation, and considered only two alternatives in the *EA*: (1) adopting the proposed winter fluctuations; or (2) continuing existing operations. *EA* (ER 18–20, 138–39).

A monitoring alternative was eminently viable, as the Corps and BPA had already developed an extensive monitoring plan to be part of the proposed action, as already discussed above. *See 2010 Draft Monitoring Plan* (ER 216–228). However, not only was the monitoring plan never included as part of any kind of monitoring and mitigation alternative, but the monitoring plan is never even mentioned in the *EA*, in violation of the duty to consider reasonable alternatives and a related duty to disclose the decision-making process to the public.

"NEPA's requirement that alternatives be studied, developed, and described both guides the substance of environmental decisionmaking and provides evidence that the mandated decisionmaking process has actually taken place." *Bob Marshall Alliance*, 852 F.2d at 1228. By failing to disclose the extensive monitoring plan, and failing to explain why the plan is no longer worthy of

consideration—a plan initially considered vital to understanding the significance of environmental impacts of the new operations—BPA has deprived the public and this Court of any meaningful way to evaluate BPA's decisionmaking process in violation of NEPA's basic tenets.

Accordingly, the Court again should reverse and remand based on BPA's separate violation of NEPA for failing to consider any alternative involving monitoring and/or mitigation in the *EA*.

V. BPA VIOLATED NEPA BY FAILING TO CONSIDER UP-TO-DATE BASELINE DATA ON EROSION, INVASIVE FLOWERING RUSH, AND WILDLIFE.

Finally, reversal and remand is required for a third NEPA violation: the *EA* is inadequate under NEPA's "hard look" requirement, because BPA failed to consider available and up-to-date baseline data on shoreline erosion, wildlife, and invasive species. Fundamental to NEPA's "hard look" requirement is determining the baseline conditions of the affected environment. Without determining these baseline conditions, there is no way to predict how a proposed action will impact the environment. *See Half Moon Bay Fisherman's Mark't Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). *See also N. Plains Res. Council v. Surface Transp. Board*, 668 F.3d 1067, 1083–87 (9th Cir. 2011) (holding agency violated NEPA by failing to provide baseline species data prior to issuing decision).

When the Corps withdrew BPA's initial proposal, it did so specifically to "compile background data and develop a satisfactory monitoring plan" to address the numerous concerns raised in response to BPA's original proposal. *See 2010 Draft Monitoring Plan* (ER 218–19) (emphasis added). Yet, as already discussed, the missing baseline information specifically called for in *2010 Draft Monitoring Plan* is nowhere to be found in the *EA*. Instead, BPA relied on limited and outdated information in the *1995 SOR EIS* and the *1983 Albeni Falls EIS* to fill in these gaps.

As set forth in further detail below, BPA has violated NEPA by failing to incorporate this missing baseline information in the *EA*. *See N. Plains Res. Council*, 668 F.3d at 1086–87 (agency violated NEPA by relying on stale and incomplete baseline data instead of "properly update[ing] the data with additional studies and surveys").

A. Shoreline Erosion

The monitoring plan called for using IDFG's bank pin data in conjunction with aerial photography and LIDAR surveys to create detailed baseline maps of the impacted shoreline, its ecological conditions, and estimates of erosion rates. *2010 Draft Monitoring Plan* (ER 220). However, BPA never incorporated this information in the *EA*. And as already discussed, the *1995 SOR EIS* is outdated and does not disclose site-specific erosion conditions around Lake Pend Oreille.

Therefore, without this up-to-date baseline information, BPA had no way to meaningfully consider the potential erosion-related impacts of FWPO.[16]

In response to one public comment which faulted BPA for failing to include recent LIDAR surveys, BPA simply responded, "[t]he analysis does incorporate the recent LIDAR." *EA* (ER 164). But the LIDAR information is nowhere evident in the *EA*. And from BPA's response, it is not clear what LIDAR information BPA considered, let alone what that information shows, or how it bears on BPA's decision.

Similarly, the *EA* only briefly referenced some of IDFG's bank pin erosion monitoring data. *See EA* (ER 32). IDFG commented that "current data from [IDFG], including empirical observations using bank pins to measure erosion during the winter months, were not utilized, leading to incomplete assessment and conclusions about the potential effects of this operation." *EA* (ER 147) (emphasis added). IDFG offered to provide assessment and monitoring information from a variety of shoreline locations, including substantial photographic documentation of the monitoring. *EA* (ER 148–49). IDFG explained, "[w]e believe inclusion of this important and relevant information is necessary to provide objective and adequate assessment of the proposal effects to key fish and wildlife habitats." *EA* (ER 149).

[16] *See also Decl. of Kathryn Didricksen*, ¶¶ 8–10 (explaining the difficulty of estimating potential erosion impacts of FWPO given the lack of data in the *EA*).

BPA responded to IDFG's comment by stating that it "received the referenced monitoring reports," and that the reports identified "annual shoreline erosion rates of between 0.3 and 2 feet per year which is consistent with the annual erosion rates identified in . . . the EA." *EA* (ER 155). Again, however, this data is not presented in the *EA*. And from BPA's limited response to IDFG's comments, it is unclear what monitoring reports BPA considered and what information those reports contain. Furthermore, IDFG said it had data specific to winter erosion rates, but BPA's response only mentioned annual erosion rates.

Even if BPA did consider all relevant LIDAR and IDFG monitoring data, BPA violated NEPA by failing to disclose this information to the public. "NEPA requires agencies 'to take a hard look at how the choices before them affect the environment, and then to place their data and conclusions before the public.'" *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1047 (9th Cir. 2013) (quoting *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1099 (9th Cir. 2008)). As this Court has explained:

> [A]llowing the [agency] to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which [an agency] expert derived her opinion.

Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998).

Thus, BPA violated NEPA by failing to take a hard look at up-to-date baseline erosion information and/or failing to disclose that information to the public. This Court should reverse and remand for this NEPA violation.

B. Flowering Rush

The Corps' monitoring plan also planned to survey, map, and photographically document flowering rush populations around Lake Pend Oreille and at downstream locations in 2010. *2010 Draft Monitoring Plan* (ER 225). However, the *EA* did not include any maps showing the current distribution of flowering rush, nor did it include any maps showing suitable locations where flowering rush could spread. Rather, the *EA* merely mentions that flowering rush has spread around Lake Pend Oreille and downstream of the Dam, apparently based on a phone conversation between a Corps Park Ranger and a wildlife biologist. *See EA* (ER 40–41, 114).

As discussed in the accompanying Declaration of John Robison, maps of current flowering rush populations, along with maps of the shoreline affected by the new winter fluctuations, would make it "possible to make at least a basic evaluation of the potential for flowering rush to spread around Lake Pend Oreille and to then provide a more thorough analysis of potential impacts to fish and wildlife." *Decl. of John Robison*, ¶ 13. Without this information, BPA has failed to take a "hard look" at FWPO's potential impacts with respect to flowering rush.

C. Wildlife

The *EA* found that the "primary wildlife concern is related to loss of habitat around the lake from erosion" and that habitat could also be degraded by the expansion of flowering rush. *EA* (ER 77). Similarly, a 2001 report prepared for the Northwest Power Planning Council (NPPC) identified habitat loss and invasive species competition as "[t]he two primary limiting factors for fish, wildlife, and associated habitats in the Upper Pend Oreille subbasin." *NPPC Subbasin Summary* (ER 329).

As already explained, however, BPA never considered or disclosed the baseline bank pin and LIDAR data, which could have provided up-to-date and comprehensive mapping of wetlands, riparian, and aquatic habitat, and which could have been used to identify important wildlife areas susceptible to erosion. BPA also never mapped the current location of flowering rush or areas to which it could spread. Without this information, BPA did not take a hard look at impacts to wildlife, particularly impacts to Lake Pend Oreille's major populations of overwintering waterfowl, like redhead ducks, which feed on native vegetation.

Additionally, BPA failed to incorporate up-to-date wildlife surveys in the *EA*. In its comments, ICL urged BPA to use more recent wildlife surveys. *EA* (ER 142). But instead, BPA relied on stale wildlife and wetland information found in the nearly 30-year-old *1983 Albeni Falls EIS*. *See EA* (ER 40 (wetlands), 42

(wildlife)). This Court has found six- and ten-year-old wildlife data, without updated habitat surveys, to be too stale. *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (six); *N. Plains Res. Council*, 668 F.3d at 1085–86 (9th Cir. 2011) (ten).

In summary, the November 2011 EA violates NEPA's hard look requirement in critical respects, including by failing to provide adequate baseline and current information on the resources most likely to be affected by the change in winter lake levels. The Court should therefore again reverse and remand for this NEPA violation.

CONCLUSION

For the foregoing reasons, ICL respectfully requests that this Court grant this Petition for Review, and reverse and remand the challenged November 4, 2011 EA approving the Flexible Winter Operations at Albeni Falls Dam as violating NEPA, the Northwest Power Act, and the APA.

DATED this 27th Day of September, 2013.

Respectfully Submitted,

/s Bryan Hurlbutt

Bryan Hurlbutt
Advocates for the West

Attorney for Petitioner ICL

STATEMENT OF RELATED CASES

ICL not aware of any related cases currently pending before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,001 words.

/s Bryan Hurlbutt

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Bryan Hurlbutt
Advocates for the West

Attorney for Petitioner ICL

PROOF OF SERVICE

I hereby certify that on September 27, 2013, I electronically filed the foregoing Opening Brief and the accompanying Declaration of Brad Smith, Declaration of Susan Drumheller, Declaration of Kathryn Didricksen, and Declaration of John Robison with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. On that same day, I also electronically filed Petitioner's Excerpts of Record. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s Bryan Hurlbutt

_____

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