

**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

REPLY BRIEF OF PETITIONER

Bryan Hurlbutt
(ISB # 8501)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
bhurlbutt@advocateswest.org

Attorney for Petitioner

TABLE OF CONTENTS

INTRODUCTION.....1

REPLY ARGUMENT.....4

I. NEPA APPLIES HERE.....4

A. The EA Correctly Recognized the Dam’s Operation Is an Ongoing Major Federal Action Subject to the Continuing Duty to Comply With NEPA.....5

B. Flexible Operations Are Also a Departure From the Status Quo, Triggering NEPA.....7

II. BPA MUST PREPARE AN EIS.....10

A. The 1995 SOR EIS Shows Fluctuations Will Likely Cause a Substantial Increase in Erosion.....13

B. The Rest Of The Record Confirms Impacts May Be Significant.....16

1. Impacts Are Highly Uncertain.....17

2. Impacts Are Highly Controversial.....20

III. ADDITIONAL NEPA VIOLATIONS.....22

A. BPA Failed to Consider a Monitoring Alternative.....23

B. BPA Failed to Consider Comprehensive and Up-to-Date Baseline Information.....25

1. Shoreline Erosion.....25

2. Flowering Rush.....26

3. Wildlife.....28

CONCLUSION.....29

TABLE OF AUTHORITIES

CASES

Anderson v. Evans, 314 F.3d 1006 (9th Cir. 2002).....3

Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208
(9th Cir. 1998).....11, 19

California Wilderness Coal. v. U.S. Dep’t of Energy, 631 F.3d 1072
(9th Cir. 2011).....10

Cnty. of Trinity v. Andrus, 438 F.Supp. 1368 (E.D. Cal. 1977).....8

Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005
(9th Cir. 2006)19

Idaho Sporting Cong. v. Thomas, 137 F.3d 1146 (9th Cir. 1998).....10

Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005).....28

Marsh v. Oregon Natural Res. Council, 490 U.S. 360 (1989).....5

N. Plains Res. Council v. Surface Transp. Bd., 668 F.3d 1067
(9th Cir. 2011).....28

Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722
(9th Cir. 2001).....16, 17, 20

Nat’l Wildlife Fed’n v. U.S. Army Corps of Eng’rs, 384 F3d 1163
(9th Cir. 2004).....21

Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233
(9th Cir. 2005).....10, 11

Nw. Env’tl. Defense Ctr. v. Bonneville Power Admin., 117 F.3d 1520
(9th Cir. 1997).....21

Or. Natural Desert Asss’n v. Bureau of Land Mgmt., 625 F.3d 1092
(9th Cir. 2008).....22

San Luis & Delta-Mendota Water Auth. v. Salazar,
686 F.Supp.2d 1026 (E.D. Cal. 2009).....7

Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232
(9th Cir. 1990).....7, 8

Westside Prop. Owners v. Schlesinger, 597 F.2d 1214, 1224
(9th Cir. 1979).....8

W. Watersheds Project v. Abbey, 719 F.3d 1035, 1048 (9th Cir. 2013).....22, 23

OTHER AUTHORITIES

40 C.F.R. § 1502.9(c)(1)(ii).....5, 6, 27

INTRODUCTION

Petitioner Idaho Conservation League (ICL) showed in its opening brief that Respondent Bonneville Power Administration (BPA) violated the National Environmental Policy Act (NEPA) in multiple respects when it adopted Flexible Winter Power Operations (Flexible Operations) in November 2011 for the Albeni Falls Dam (Dam), without preparing an Environmental Impact Statement (EIS) to assess and disclose adverse environmental impacts of these new winter operations.

ICL pointed to BPA's own admissions in the record that shoreline erosion caused by the Dam's operation already has significant impacts on Lake Pend Oreille's ecologically rich shoreline, and that Flexible Operations would accelerate erosion. Accelerated erosion in turn would harm fish and wildlife habitat, promote the spread of invasive species, degrade water quality, and damage lakeside properties. Individually and together, these potential impacts triggered BPA's duty to prepare a full EIS under NEPA, which BPA violated by relying instead on its cursory November 2011 Environmental Assessment (Flexible Operations EA or EA) to contend that the new fluctuations will be "incremental" and "insignificant."

BPA now argues—for the first time—that NEPA does not apply because the Dam was built in the 1950's and Flexible Operations are within the range of operations originally authorized for the Dam. This litigation-driven argument must be rejected because BPA and its sister agency that operates the Dam (the U.S.

Army Corps of Engineers (Corps)) have long acknowledged that significant changes to the Dam's operations require NEPA evaluation. Thus, they prepared the "1983 Albeni Falls EIS" and the "1995 SOR EIS", as well as the Flexible Operations EA at issue here to evaluate the Dam's operations under NEPA. BPA cannot now reverse field and claim it has no NEPA obligation at all.

Moreover, even under the *Upper Snake River* decision that BPA now relies on, NEPA applies. The decision to adopt Flexible Operations changes the future winter operating regime for the life of the Dam. It is nothing like the routine management decision made in response to one year's water supply in *Upper Snake River*. Flexible Operations, thus, alters the status quo and triggers NEPA.

Neither is BPA correct in claiming that its Flexible Operations EA reasonably concluded the new winter fluctuations would have only "insignificant" impacts. The record shows that winter fluctuations are likely to cause substantially more shoreline erosion around Lake Pend Oreille than does the current regime of steady winter lake levels. Even though the EA claimed to be based on the 1995 SOR EIS, BPA chooses to ignore the fact that the 1995 SOR EIS shows that additional fluctuations should be expected to significantly increase shoreline erosion. Likewise, BPA tries to wish away the fact—also documented in the record—that the Idaho Department of Fish and Game (IDFG) also concluded that the winter fluctuations are likely to significantly increase erosion.

Rather than confront this and other record information pointed out in ICL's opening brief, BPA relies primarily on the sheer length of the EA and the administrative record to argue that this Court must simply defer to its judgment. But as this Court explained in a whaling case, the length of an EA does not satisfy an agency's NEPA duties: "While a notable attribute of the creatures we discuss in this opinion, girth is not a measure of the analytical soundness of an environmental assessment. No matter how thorough, an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment." *Anderson v. Evans*, 314 F.3d 1006, 1023 (9th Cir. 2002).

Much like the Flexible Operations EA itself, BPA fails to show how the record supports its conclusory assertions that impacts of Flexible Operations will be "incremental" and "insignificant." For example, BPA points to erosion studies cited in the EA, which found that most erosion at the Dam takes place during summer. But BPA fails to recognize that these studies evaluated erosion under steady winter lake levels, and thus do not support BPA's assertion that winter fluctuations will not significantly increase erosion. Likewise, BPA improperly relies on an extra-record agreement it entered into with the State of Idaho after the Flexible Operations were adopted. While Idaho agreed to accept BPA funding, Idaho never changed its position that erosion impacts could be serious. These potentially significant erosion impacts thus required preparation of an EIS.

BPA also fails to provide any reasonable explanation for abandoning its prior proposal to monitor the unknown impacts of winter fluctuations for a year before making a decision on the Flexible Operations. And BPA does not justify the EA's failure to utilize up-to-date baseline information on shoreline erosion, flowering rush, and wildlife—information BPA and the Corps previously identified to be included in the EA. These defects in the Flexible Operations EA again require reversal for failing to meet NEPA's "hard look" requirements.

REPLY ARGUMENT

I. NEPA APPLIES HERE.

BPA's response brief claims that adopting Flexible Operations did not trigger NEPA, no matter how significant new impacts may be. This claim is unfounded legally and factually.

First, as BPA itself correctly recognized in the Flexible Operations EA, the agency has a continuing duty to comply with NEPA and prepare an EIS for any new significant impacts from the operation of the Albeni Falls Dam. This is because the Dam's ongoing operations have already been acknowledged to constitute a "major federal action" subject to NEPA in at least two prior EISs. Second, even under the *Upper Snake River* analysis BPA now relies on, the adoption of Flexible Operations is a long-term change to the Dam's operating regime which alters the status quo of steady winter lake levels and triggers NEPA.

A. The EA Correctly Recognized the Dam’s Operation Is An Ongoing Major Federal Action Subject To The Continuing Duty To Comply With NEPA.

Where a major federal action is ongoing, agencies have a continuing duty to comply with NEPA and must prepare a new or supplemental EIS whenever “the agency makes substantial changes in the proposed action that are relevant to environmental concerns” or “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).¹

The operation of Albeni Falls Dam is subject to this continuing duty to comply with NEPA, because the Dam’s ongoing operation has already been treated as a “major federal action” under NEPA in two EISs, as the record before the Court confirms.

First, the Corps recognized in 1983 that the Dam’s operations had “evolved over the past 30 years” so it prepared the 1983 Albeni Falls EIS “to present the environmental impacts from the continued operation of the project and the impacts from alternative modes of operation.” (ER 505–06).

¹ “[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, new information, or new 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.*

² *See also* ER 14 (“Specifically, this EA is intended to evaluate whether: (1) [Flexible Operations are] a substantial change from the proposed action evaluated

Second, BPA, the Corps, and the Bureau of Reclamation prepared the 1995 Columbia River Power System Operation Review EIS “to evaluate different management strategies for . . . 14 federal dams and reservoirs in the Columbia River Basin” including Albeni Falls Dam. (ER 13). According to the Flexible Operations EA, the 1995 SOR EIS is the “the active, governing NEPA document” for ongoing operations at Albeni Falls Dam. (ER 136).

Most recently, in issuing the Flexible Operations EA, BPA and the Corps again recognized their continuing duty to comply with NEPA in management of the Dam. The EA was expressly prepared to take a “hard look” at the “proposed action” and evaluate the “criteria for supplementing an EIS.” (ER 136–37). “The purpose of the EA is . . . to evaluate effects of the [Flexible Operations] and determine whether a supplemental or new EIS is required, or whether the SOR EIS, as confirmed through analyses in this EA is sufficient.” (ER 13–14).²

Thus, the record shows that BPA and the Corps have recognized on at least three occasions since 1983 that the Dam’s operations require NEPA compliance, including in the November 2011 EA for the Flexible Operations. BPA’s position now in litigation that it has no NEPA obligation is incorrect.

² See also ER 14 (“Specifically, this EA is intended to evaluate whether: (1) [Flexible Operations are] a substantial change from the proposed action evaluated in the SOR EIS relevant to environmental concerns; or whether, (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action of the SOR EIS or its impacts (40 C.F.R. § 1502.9(c)).”).

B. Flexible Operations Are Also A Departure From The Status Quo, Triggering NEPA.

Moreover, even under the *Upper Snake River* analysis that BPA now relies on, the Flexible Operations constitute major federal action triggering NEPA. *See BPA Resp. Br.*, pp. 25–28 (citing *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232 (9th Cir. 1990)). *Upper Snake River* involved a short-term, routine management response to one year’s water supply. Here, on the other hand, BPA has proposed a long-term change to the regime under which the Corps operates the Dam. BPA ignores these important distinctions.

BPA focuses on the fact that winter fluctuations fall within the authorized operating range of the Albeni Falls Dam. However, the Dam’s authorized range is only one of multiple factors to consider in answering the highly factual question of whether the new operations alter the status quo and trigger NEPA.

“This circuit has held that where a proposed federal action would not change the status quo, an EIS is not necessary.” *Upper Snake River*, 921 F.2d at 235. As explained by a district court discussing *Upper Snake River*, “[t]he critical inquiry is whether the [agency] causes a change to the operational status quo of an existing project.” *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F.Supp.2d 1026, 1045 (E.D. Cal. 2009). Whether further agency action constitutes major federal action “will, of necessity, depend heavily upon the unique factual circumstances of

each case.” *Westside Prop. Owners v. Schlesinger*, 597 F.2d 1214, 1224 (9th Cir. 1979).

In *Upper Snake River*, the dam releases at issue were not only authorized under the existing protocol, but they “were no more than the routine managerial actions regularly carried on from the outset without change.” 921 F.2d at 235. The Bureau of Reclamation was “doing nothing new” and was simply responding to drought conditions dictated by water supplies in a particular year. *Id.* at 235–36. Similarly, in *County of Trinity* (also cited by BPA), NEPA was not triggered because the Bureau was simply lowering a reservoir in response to a drought year. *Cnty. of Trinity v. Andrus*, 438 F.Supp. 1368, 1388–89 (E.D. Cal. 1977).

Here, by contrast, the adoption of Flexible Operations is a long-term, proactive change to the framework in which the Dam will be managed every winter for decades to come—not a short-term, routine management response to current water supplies. Under existing operations, the Corps maintains steady lake levels throughout winter. Under Flexible Operations, lake levels would be raised and lowered over a five-foot range up to three times every winter for the life of the Dam.

After adopting Flexible Operations, each specific decision by BPA and the Corps to undertake a particular winter fluctuation (in response to the water supply and other factors that winter) may arguably be a routine managerial response that

does not trigger NEPA as in *Upper Snake River*. However, the adoption of Flexible Operations at issue here is a long-term change to default winter operations which alters the status quo and thus requires NEPA evaluation.

A review of the proposal and adoption of Flexible Operations further illustrates that this was not a routine management decision. BPA first proposed Flexible Operations to be a one year, closely monitored “experiment,” and any findings of the monitoring were to “be an important part of the decision on whether to continue the operation in future years.” *2009 BPA Talking Points* (ER 285). The Corps, however, declined to implement BPA’s proposed fluctuations that year in order “to allow more time to study [BPA’s] proposed operation” in light of widespread concerns raised by numerous entities about potential impacts. *Corps Letter to Seattle City Light* (ER 266); *2010 Draft Monitoring Plan* (ER 218–19).

The Corps then decided it needed to prepare an Environmental Assessment to consider the impacts of this “potential modification to future winter operations.” *Notice of Preparation* (ER 264–65). The Corps and BPA then spent over a year and a half preparing the EA and choosing to adopt Flexible Operations to last for the life of the Dam. *EA* (ER 107–09). As the Flexible Operations EA concluded, BPA’s proposal “results in a different winter management strategy (including some differences in operating parameters for power operations)” compared to current operations. *EA* (ER 108).

While BPA acknowledges that winter lake levels have been steady for nearly twenty years, BPA suggests in its brief that winter fluctuations are a return to historic operations. *BPA Resp. Br.*, pp. 26–27. BPA is right that winter lake levels have not always been held completely constant. However, lake levels have never been repeatedly raised and lowered in one winter, let alone back to back winters. This is demonstrated by the Figures in the EA showing lake levels under Flexible Operations (ER 51, Fig. 4-1) and under historic operations (ER 120–24, Figs. B-1–B-5). In short, because the adoption of Flexible Operations changes the status quo operation of the Dam, NEPA is triggered and fully applies.

II. BPA MUST PREPARE AN EIS.

An agency must prepare an EIS when there are substantial questions about whether a project “may” significantly degrade the environment. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005) (emphasis in original). “[T]his is a low standard.” *California Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011). “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.” *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (quotation omitted) (emphasis in original).

When reviewing an agency's decision not to prepare an EIS 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*, 428 F.3d at 1239. *See also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) ("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.") (quotation omitted).

BPA violated this NEPA requirement, because the Flexible Operations EA failed to provide a reasoned basis for its conclusion that the impacts of shifting from steady winter lake levels to now fluctuating lake levels three times every winter for the life of the Dam will be insignificant.

The record discussed in ICL's opening brief—but mostly ignored by BPA—confirms this. Again, BPA and the Corps initially acknowledged that little was known about the potential impacts of Flexible Operations on Lake Pend Oreille. And as already set forth in ICL's Opening Brief (pp. 21–22), the EA admitted that Flexible Operations would cause shoreline erosion and accelerate the spread of invasive flowering rush around Lake Pend Oreille and the Pend Oreille River. The

EA also acknowledged that increased shoreline erosion and the spread of invasive weeds would in turn degrade water quality and destroy wetlands and other habitat, all of which adversely impact fish and wildlife. But the EA made no effort to quantify or assess what the scale or size of these impacts might be. Instead, the EA simply labeled all these increased adverse impacts as “incremental” or “additional detail” to previously disclosed effects and concluded all new impacts from Flexible Operations would be insignificant.

BPA’s conclusion is unsupported. As ICL’s opening brief explained, the EA claimed to be based primarily on the information and analysis found in the 1995 SOR EIS. Yet, the 1995 SOR EIS shows that additional fluctuations should be expected to substantially increase shoreline erosion. And IDFG, the one agency actively studying erosion around the Lake, concluded based on up-to-date monitoring information that Flexible Operations were likely to significantly exacerbate erosion. BPA never even addresses the information from the 1995 SOR EIS, and BPA points to nothing that refutes IDFG’s conclusion.

In its Response, BPA does little more than rely on the length of the EA and the record to ask this Court to find in its favor. However, neither the length of the EA nor the record have any bearing on whether the new winter fluctuations may have significant environmental impacts. And BPA fails to show how the lengthy record and EA support its conclusion that impacts will be insignificant.

A. The 1995 SOR EIS Shows Fluctuations Will Likely Cause a Substantial Increase in Erosion.

As explained in ICL’s Opening Brief (pp. 33–39), the 1995 SOR EIS itself was over 15 years old when BPA adopted Flexible Operations, and it included little site-specific information useful for evaluating the potential impacts of winter fluctuations. But the useful information it did include only supports the conclusion that additional fluctuations likely cause a substantial increase in shoreline erosion.

In response, BPA never addresses the specific information ICL identified in the 1995 SOR EIS that shows erosion should be expected to increase significantly. Instead, BPA tries to divert this Court’s attention to general principals of NEPA “tiering.” *BPA Resp. Br.*, pp. 31–35. Certainly, tiering to a prior EIS is a generally accepted NEPA practice, and it was appropriate for BPA to reference the 1995 SOR EIS here. But BPA cannot satisfy its NEPA duties by disregarding the information in the 1995 SOR EIS which actually undermines the EA’s cursory conclusion that Flexible Operations will have only “insignificant” impacts.

As BPA asserts in its brief, “tiering the EA to the SOR EIS incorporates all the analysis conducted in the SOR EIS and allows for a more focused analysis of the Flexible Operations proposal without repeating information and analysis documented in the previous SOR EIS.” *BPA Resp. Br.*, p. 31 (emphasis added). However, BPA’s Brief and the EA misleadingly suggest that the “information and analysis” in the 1995 SOR EIS includes much more than it actually does.

The 1995 SOR EIS was a programmatic EIS evaluating the combined operation of 14 dams. While the EIS provided some background information on historical impacts caused by the Dam, and included information on erosion processes generally applicable at all 14 dams, it provided little site-specific, up-to-date information on the impacts of the Albeni Falls Dam's ongoing operations. *See ICL Opening Br.*, pp. 35–37. The SOR EIS referred to only one study of ongoing erosion at the Dam, but that study was itself issued in 1983 and considered erosion at just one location along the 226-mile shoreline impacted upstream of the Dam. *See id.* at 37. Thus, the SOR EIS disclosed very little information needed to understand existing erosion impacts.

Therefore, it is hard to understand what is meant by BPA's conclusion in the EA that Flexible Operations would cause only "incremental" increased shoreline erosion and related impacts. How could BPA possibly know that erosion from the new winter fluctuations would be "incremental" when it barely knew before what level of erosion was occurring under existing Dam operations?

Furthermore, the information in the 1995 SOR EIS that is relevant to estimating increased shoreline erosion caused by Flexible Operations indicates that it will be much more than incremental. First, the 1995 SOR EIS does not contain any analysis or discussion of the potential impacts of undertaking a single additional fluctuation at the Albeni Falls Dam—let alone multiple fluctuations

every winter for the life of the Dam. *See ICL Opening Br.*, p. 36. However, the 1995 SOR EIS did recognize that the one annual water level fluctuation at the Dam under normal operations (filling in spring and then lowering in fall) is possibly the greatest cause of shoreline erosion. (ER 471). Second, in the two scenarios where the 1995 SOR EIS did assess the impacts of undertaking additional fluctuations at another Columbia River Basin dam, it concluded that this would cause a “significant increase” in shoreline erosion. (ER 403, 457, 449). Under one of these scenarios, the 1995 SOR EIS even explained that one additional annual fluctuation at Brownlee Reservoir “could nearly double the amount of erosion . . . each year.” (ER 457) (emphasis added). How then did BPA conclude that three additional fluctuations at the Albeni Falls Dam every year for the life of the Dam would cause only an “incremental” increase in erosion?

BPA’s reliance on the 1995 SOR EIS to avoid preparing a new and up-to-date EIS to evaluate potential impacts of Flexible Operations is thus misplaced. The 1995 SOR EIS does not provide the level of information needed to disclose and analyze the potential erosion associated with the new winter fluctuations; but its analysis does underscore that new erosion will likely be significant and directly undercuts BPA’s conclusion in the November 2011 EA that impacts would be insignificant. Because BPA never—in the EA or in its Response Brief—addresses this information, the Court should reverse and remand.

B. The Rest Of The Record Confirms Impacts May Be Significant.

Not only does the 1995 SOR EIS show that Flexible Operations is likely to cause a substantial increase in erosion, but the Idaho Department of Fish Game reached the same conclusion. IDFG is the one entity actively monitoring shoreline erosion around Lake Pend Oreille, and it concluded that “the evidence strongly points to significant exacerbation of the [erosion] problem with the proposed change in operations.” *IDFG Comments* (ER 149).

BPA’s conclusion to the contrary in the EA is unsupported and rests on speculative and generalized conclusions. And BPA still cannot point to anything in the record that provides a reasonable basis for its conclusion. Substantial questions thus exist as to whether Flexible Operations may have significant impact on the environment, and because impacts remain “highly uncertain” and/or “highly controversial,” BPA must prepare an EIS. *See ICL Opening Br.* at 39–40. *See, e.g., Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 731–32 (9th Cir. 2001) (“*National Parks*”) (EIS required where impacts on wildlife species are uncertain or controversial).³

³ ICL submitted two expert declarations with its Opening Brief. *Declaration of Kathryn Didricksen*, Dkt. 28-4; *Declaration of John Robison*, Dkt. 28-5. BPA has moved to strike these declarations. Dkt. 37-1. As ICL explained in its Opposition to the Motion to Strike, these declarations are properly before the Court under the NEPA exception to record review. Dkt. 39. The declarations help explain technical information regarding shoreline erosion and invasive flowering rush, and they identify information that BPA failed to consider.

1. Impacts Are Highly Uncertain

An agency must prepare an EIS where environmental effects are highly uncertain. “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.” *National Parks*, 241 F.3d at 732 (quotations omitted).

Again, BPA and the Corps originally recognized that little was known about the extent of potential impacts under Flexible Operations. Thus, the agencies identified important information on shoreline erosion and related impacts that they planned to obtain before deciding to proceed with Flexible Operations for the long-term. *See ICL Opening Br.*, pp. 11–19. But by time the EA was released, the agencies had inexplicably decided Flexible Operations would last the life of the Dam, and they had abandoned their plans to gather missing information. And even though the EA was devoid of quantified or detailed information on the extent of potential impacts, it conveniently asserted that all impacts would be “incremental.”

ICL’s public comments explained that “the EA lacks sufficient data and details to determine if the increased erosion will truly be ‘incremental,’ and how that erosion could impact water quality and wildlife.” *EA* (ER 141). IDFG raised similar concerns that BPA’s conclusions were speculative and unsupported by data or detailed information, including concern over the “very limited analysis” in BPA’s finding that increased erosion will be insignificant. *EA* (ER 151).

In response, BPA claims that its use of “incremental” describes “the negligible nature of these impacts based on extensive review of numerous relevant, historic and updated studies.” *BPA Resp. Br.*, p. 40. But while BPA points to studies listed in the Flexible Operations EA, neither BPA’s brief nor the EA explain how these studies provide any support for the EA’s conclusions. In fact, the only studies BPA does discuss (Parametrix (1998) and Findlay Engineering (2000)) do not support its findings. Rather, these studies further highlight the uncertainty surrounding the potential impacts of Flexible Operations.

As the EA notes: “Both [of these studies] came to the conclusion that the most significant factor influencing erosion at the delta is the duration and elevation (206.5 feet) of the lake during summer, combined with wind-generated waves and boat wakes.” *See BPA Resp. Br.*, p. 56. Based on this, BPA concludes that the new fluctuations, because they would occur during winter, cannot have a significant impact. But BPA fails to recognize that these studies evaluated erosion during steady winter lake levels. The studies say nothing about what to expect under Flexible Operations. Furthermore, these two studies evaluated erosion in only the Clark Fork River Delta. Thus, even if they do suggest something about what to expect under Flexible Operations at the Delta, they do not necessarily say anything about the rest of the 226-miles of impacted shoreline upstream of the Albeni Falls Dam, or along downstream banks of the Pend Oreille River.

BPA also relies on the *EPIC* case to justify its failure to provide any data or estimates of impacts beyond merely labeling them “incremental.” *BPA Resp. Br.*, pp. 39–40 (citing *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005 (9th Cir. 2006) (“*EPIC*”). There can be situations, like in *EPIC*, where the information in the record is sufficient to support an agency’s conclusion that impacts will be insignificant even though the agency has not provided a detailed or quantified estimate of the extent of those impacts. This, however, is not one of those situations. As already explained, the information in the record shows that Flexible Operations is likely to substantially increase erosion. BPA cannot reach the opposite conclusion by simply labeling all impacts “incremental.”

The situation here is like that in *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 2001), where this Court required an EIS because the EA’s “general statements” that a project’s sediment impacts would be “small in comparison” to other causes of sediment, without data or documentation, “simply fail[ed] to persuade [this Court] that no significant impacts would result.” Similarly here, the EA repeatedly asserts that increased erosion and related impacts of Flexible Operations will be small—“incremental”—compared to existing impacts from the Dam without providing quantified or detailed information on the extent of either existing impacts or those expected under Flexible Operations. These impacts thus remain highly uncertain and require BPA to prepare an EIS.

2. Impacts Are Highly Controversial

Impacts are highly controversial and require 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.” *National Parks*, 214 F.3d at 736 (internal quotations and citations 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.*

BPA observes that “ICL alleges that the Flexible Operations EA is highly controversial because certain public comments question Bonneville’s analysis of environmental impacts, and the analysis was based on ‘generalized, conclusory assertions.’” *BPA Resp. Br.*, pp. 40–41. These “certain public comments” include comments from ICL as well the Idaho Department of Fish and Game, Idaho’s Governor Butch Otter, U.S. Congressman Walt Minnick, the Tri-State Water Quality, the Pend Oreille Basin Commission, the Bonner County Soil and Water Conservation District, and numerous local property owners, business owners, and conservation groups. *See ICL Opening Br.*, pp. 12–14, 22–26. These comments—particularly IDFG’s comments concluding that the monitoring evidence shows shoreline erosion is likely to be significantly exacerbated under Flexible Operations—cast serious doubts on BPA’s conclusions.

In response, BPA asserts that it addressed IDFG's concerns "head-on." *BPA Resp. Br.*, p. 42. While the Flexible Operations EA does include a response to IDFG's public comments, the response relies on the same unsupported and speculative assertions found throughout the EA. *See EA* (ER 146–160). Tellingly, BPA still cannot explain how the EA addressed IDFG's key finding that Flexible Operations would significantly exacerbate shoreline erosion.

All BPA can point to is a post-decision agreement it entered into with the State of Idaho. *BPA Resp. Br.*, p. 43. Because this agreement was entered into after the adoption of Flexible Operations, the agreement is not found in the administrative record filed by BPA with the Court, and thus it could not support BPA's findings at the time of its decision. It is improper for an agency to seek to bolster a challenged decision by invoking post hoc, extra record evidence of this kind. *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004) ("A reviewing court must review the administrative record before the agency at the time the agency made its decision.").

Even considering a draft of the proposed agreement, which is in the record, the agreement does not resolve IDFG's concerns with Flexible Operations. *See 2011 Letter Agreement* (SER 268–70). BPA relies on *Northwest Environmental Defense Center v. Bonneville Power Administration*, 117 F.3d 1520, 1536 (9th Cir. 1997), where the record included a letter from the Columbia Basin Fish and

Wildlife Authority (CBFWA). In the letter, CBFWA explained that it had entered into an agreement with BPA, and that the agreement resolved CBFWA's prior concerns with an Environmental Assessment. *Id.* Here, on the other hand, Idaho has nowhere stated that this agreement would resolve its concern that Flexible Operations is likely to significantly exacerbate erosion, among other concerns. And looking at the draft proposed agreement, BPA would provide Idaho with funding to undertake some erosion monitoring and mitigation in exchange for Idaho's promise to stop raising its concerns with Flexible Operations, but the agreement does not require Idaho to use the funding to specifically address winter erosion related to the Flexible Operations. Thus, impacts remain highly controversial and require an EIS.

III. ADDITIONAL NEPA VIOLATIONS.

BPA also violated NEPA by failing to take a "hard look" in the Flexible Operations EA. 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." *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1099 (9th Cir. 2008). When considering whether an agency took a hard look, this Court's role is to "ensure that the agency has adequately considered and disclosed the environmental impacts of its actions." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1048 (9th Cir. 2013).

For the same reasons that impacts remain highly uncertain and controversial and require an EIS, BPA has also failed to take a hard look at the risks of Flexible Operations. This Court should reverse and remand for this separate NEPA violation. However this is not the only inadequacy of the Flexible Operations EA. The EA also violates two other fundamentals of the hard look requirement. The EA fails to consider a reasonable range of alternatives and fails to utilize available, comprehensive, up-to-date baseline information.

A. BPA Failed to Consider a Reasonable Monitoring Alternative.

This Court recently found that an EA violated NEPA where the agency failed to consider a reasonable range of alternatives, explaining: “The existence of a viable but unexamined alternative renders an EA inadequate.” *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1030 (9th Cir. 2013) (quotation omitted).

ICL’s Opening Brief shows that BPA failed to consider a viable alternative: an alternative including monitoring of new winter impacts. *ICL Opening Br.*, pp. 47–49. The EA considered only two alternatives: adopting the Flexible Operations; or continuing with existing operations. *EA* (ER 18–20, 138–39). In public comment, ICL and others urged BPA to consider adopting Flexible Operations along with monitoring and mitigation of new impacts, but BPA declined. *See EA* (ER 138–39).

In response, BPA notes that NEPA does not require every Environmental Assessment to include a mitigation alternative. *BPA Resp. Br.*, pp. 45–46. While correct, this does not relieve BPA of its duty under NEPA to consider viable alternatives. And here, a monitoring alternative was viable. In fact, monitoring the impacts of winter fluctuations was BPA’s original plan. Again, Flexible Operations were first proposed as a one-year closely monitored experiment, and monitoring results were to be a key factor for deciding whether to continue Flexible Operations in future years. The agencies even developed the Draft Monitoring Plan for the EA. But the monitoring was withdrawn from the EA.

BPA suggests that its decision to abandon the the Draft Monitoring Plan was reasonable because some of the monitoring was duplicative of existing monitoring obligations. *BPA Resp. Br.*, pp. 46–48. However, there is currently no monitoring of winter impacts. Thus, while it may have been reasonable for BPA to dispose of any duplicative components of the Draft Monitoring Plan, it was not reasonable to abandon monitoring designed to specifically assess impacts of Flexible Operations.

BPA also suggests that the Flexible Operations is a mitigation alternative, because it includes some constraints on fluctuations. *BPA Resp. Br.*, pp. 46–49. However, while these constraints may lessen some impacts, they are no substitute for monitoring erosion and other impacts of winter fluctuations, and no substitute for using monitoring results to decide whether to continue Flexible Operations.

BPA now seeks to avoid any monitoring focused on winter impacts. Without considering this viable monitoring alternative in the EA—which ICL, IDFG, and other requested in public comment, and which BPA and the Corps even developed—BPA has failed to consider a reasonable range of alternatives in violation of NEPA. Accordingly, the Court again should reverse and remand.

B. BPA Failed to Consider Comprehensive and Up-to-Date Baseline Data.

ICL identified specific baseline information that the Flexible Operations EA failed to consider or disclose. *See ICL Opening Br.*, pp. 50–55. In response, BPA does not contest that it failed to use this information. Instead, BPA tries to salvage the EA by listing a handful of studies referenced in the EA. This hodgepodge of studies, however, is not a suitable substitute for the missing baseline information, and this Court again should reverse and remand for these separate NEPA violations.

1. Shoreline Erosion

BPA failed to consider or disclose two key sources of baseline shoreline erosion data that were available when the EA was prepared: (1) LIDAR data for creating detailed maps of the shoreline; and (2) IDFG data bearing specifically on winter erosion under existing Dam operations. *See ICL Opening Br.*, pp. 50–52. BPA never directly addresses these specific shortcomings and instead simply lists erosion studies referenced in the EA. While these studies do provide some

information on historical and ongoing erosion caused by the Dam at a few locations, they do not provide the kind of comprehensive baseline mapping of the shoreline that the LIDAR data provides.

As IDFG explained to BPA, the LIDAR surveys, in conjunction with IDFG's ongoing monitoring of erosion sites, would provide a powerful tool for assessing potential losses of key habitat types. *2009 IDFG Letter* (ER 276). Similarly, the Corps recognized that the LIDAR surveys could be used to create detailed 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. *2010 Draft Monitoring Plan* (ER 219–220). The Corps explained that IDFG erosion monitoring data combined with the LIDAR data would enable documentation of “important wetlands, spawning grounds, erosion areas, structures or other important geographic and ecological features.” *Id.*

Yet, this information is not used in the Flexible Operations EA. BPA chose to leap blindly, which violates NEPA's hard look requirement.

2. Flowering Rush

BPA had no way to meaningfully evaluate the potential impacts of the spread of aggressive flowering rush without first mapping its current location and mapping areas to which it could potentially spread. *See ICL Opening Br.*, p. 53.

Once again, the Corps recognized the importance of this baseline information and planned to obtain it. (ER 225). But it is nowhere in the EA.

In response, BPA merely restates the EA's conclusion that "the majority of the current rush population around the lake would be unaffected by [Flexible Operations]." *BPA Resp. Br.*, p. 58. But without knowing the current extent of flowering rush, or its areas of potential growth, BPA did not have a sufficient basis for reaching that conclusion.

BPA also failed to evaluate the impacts that year-round operation of the Dam has on the spread of flowering rush. Under the continuing duty to comply with NEPA, the operation of the Dam is an ongoing major federal action, and BPA has an obligation to take a hard look at any new operations, new information, or new circumstances. See *CFR* 40 C.F.R. § 1502.9(c)(1)(ii); *supra* Part I.A. BPA admits in the EA that flowering rush is a "new circumstance" not previously considered in any NEPA documents for the Dam, because it only recently became established at Lake Pend Oreille. (ER 87). But, as ICL's Opening Brief explained, the EA arbitrarily limited its consideration of flowering rush impacts to those that may be attributable to the new winter fluctuations. See *ICL Opening Br.*, p. 43 n.15. Without considering impacts that year-round operations may have on the spread of flowering rush, BPA has failed hard look at this new circumstance in violation of NEPA. BPA is simply wrong in arguing otherwise.

3. Wildlife

This Court has found NEPA violations when agencies used six- and ten-year-old wildlife data to consider impacts to wildlife species in a NEPA document. *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 (9th Cir. 2011) (ten). In public comment, ICL urged BPA to incorporate more recent wildlife surveys. *EA* (ER 142). BPA does not contest that the Flexible Operations EA relied on wildlife and wetland surveys from the nearly 30-year old 1983 Albeni Falls EIS.

BPA tries to brush this off by simply restating the finding in the EA that the “loss of aquatic beds is not expected to occur as a result of implementing FWPO.” *BPA Resp. Br.*, p. 59. However, this finding is based on BPA’s unsupported underlying assumption that winter fluctuations have little impact on the shoreline. And aquatic beds are only one of many types of shoreline habitat that are important to wildlife populations and which can erode away and become infested with invasive species. BPA fails to address wetlands and other riparian areas. Finally, BPA says nothing about its failure to use up-to-date wildlife population surveys.

Without up-to-date wildlife surveys—and without the detailed shoreline habitat mapping from the LIDAR surveys—BPA could not make an informed decision about the potential impacts Flexible Operations would have on wildlife and wildlife habitat.

CONCLUSION

For the foregoing reasons and those set forth in its opening brief, ICL respectfully requests that this Court grant this Petition for Review, and reverse and remand the challenged November 4, 2011 EA approving Flexible Operations at Albeni Falls Dam as violating NEPA and the APA.

DATED: Dec. 27, 2013.

Respectfully Submitted,

/s Bryan Hurlbutt

Bryan Hurlbutt
Advocates for the West

Attorney for Petitioner ICL

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this Reply Brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,726 words.

/s Bryan Hurlbutt

Bryan Hurlbutt
Advocates for the West

Attorney for Petitioner ICL

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2013, I electronically filed the foregoing Reply Brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s Bryan Hurlbutt

Bryan Hurlbutt
Advocates for the West

Attorney for Petitioner ICL