

**FEDERAL DEFENDANTS
EXHIBIT 1**

50 C.F.R. 402.02(19) (emphasis added). Federal defendants argue that an appreciable reduction in the prospects for recovery does not offend that standard, provided prospects for survival remain intact, based on the regulation's use of the conjunctive phrase. That construction would obviate the regulation's reference to recovery. This court, like the district court, should reject that unreasonably strained interpretation.

Furthermore, the alternative, common sense interpretation of the regulation is consistent with this court's decision in *Gifford Pinchot*, which addressed the obligation to consider effects on the potential for recovery as part of the critical habitat analysis. Ultimately, impairment of the potential for recovery must be considered when evaluating jeopardy, just as impairment of the potential for recovery must be considered when evaluating degradation of critical habitat. The 2004 biological opinion improperly fails to take recovery into account.⁷

V. The biological opinion's analysis and conclusions with respect to critical habitat are flawed.

To summarize the 2004 biological opinion's critical habitat analysis:

(1) safe downstream passage through the dams is an element of critical habitat;

⁷ As the district court explained, that does not mean a jeopardy analysis must include a specific "recovery plan" under 16 U.S.C. § 1533(f). Opinion and Order, dated May 26, 2005, at 35 n. 14.