

**FEDERAL DEFENDANTS  
EXHIBIT 2**

install [the dam modifications] that NOAA relies on to offset the short-term reduction in critical habitat," that "NOAA is at best 'uncertain' as to whether the short-term degradation of critical habitat will be offset by long-term habitat improvements," and that in any event NOAA "does not know '[t]he in-river survival rate necessary for recovery.'" (citations omitted)).

4. *NMFS' jeopardy analysis failed to address the effects of the action on species recovery.*

Finally, the district court properly determined that, apart from its erroneous evaluation of critical habitat, NMFS' jeopardy analysis also failed to address the impacts of the action on the likelihood of recovery of the species as the regulations require. Fed. ER 357-358. The lower court's ruling is grounded squarely in the plain language of the ESA regulations which state that an action may jeopardize a species if it appreciably reduces "the likelihood of both the survival and recovery of a listed species in the wild." 50 C.F.R. §402.02.<sup>19</sup>

As a threshold matter, the district court appropriately recognized that the regulations and Consultation Handbook require NMFS to make a determination about the impact of the action on the likelihood of a species survival *and* recovery in order to determine whether an action will cause jeopardy. Fed. ER 357-358 (citing 50 C.F.R. §402.02 and Consultation Handbook at 4-35 (ER:713 at 321)).

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<sup>19</sup> NWF also adopts plaintiff-intervenor-appellee's State of Oregon's arguments on this issue.