

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

TOM VILSACK, *et al.*,

Defendants.

Case No. 2:13-cv-01785-RFB-GWH

ORDER

I. INTRODUCTION

This case centers on a biological-control program initiated by the United States Department of Agriculture (USDA) through two of its agencies: Agricultural Research Services (ARS) and Animal and Plant Health Inspection Services (APHIS). Plaintiffs Center for Biological Diversity, Maricopa Audubon Society, and Dr. Robin Silver (the “Center”) allege that the USDA violated the Endangered Species Act (ESA) by failing to ensure that the program’s termination would not jeopardize a bird called the southwestern willow flycatcher (“flycatcher”) and by failing to take appropriate action to mitigate the adverse effects resulting from the program’s termination. The Center also alleges that the USDA and the United States Department of the Interior (USDI) violated the National Environmental Policy Act (NEPA) by failing to pursue formal consultation before terminating the program, by failing to implement mitigation measures outlined in a NEPA document after terminating the program, and by failing to supplement the USDA’s original NEPA documents.

The parties filed motions for summary judgment, ECF No. 28 and ECF No. 30. For the reasons discussed below, the Court denies the Center’s motion and grants the USDA’s motion as

1 to Claims 1, 3, 4, and 5. As to Claim 2, the Court grants the Center’s motion and denies the USDA’s
2 motion.

3
4 **II. BACKGROUND**

5 **A. Factual Background**

6 Plaintiffs contend that the Defendants violated the ESA and NEPA when, in 2010, the
7 USDA, through APHIS, terminated a certain beetle release program without taking further action.
8 See Pl.’s MSJ at viii. The facts relevant to this case occurred during three periods: (1) USDA’s
9 initial research and its 1999 program; (2) USDA’s 2005 program; and (3) USDA’s decision to
10 terminate the 2005 program in 2010. Before describing the facts pertaining to these three periods,
11 the Court provides an overview of the USDA’s processes leading to the termination of the overall
12 program in 2010.

13 **1. Overview of USDA Process Under The ESA and NEPA**

14 Under the Endangered Species Act (ESA), federal agencies are required, to: 1) “utilize
15 their authorities . . . by carrying out programs for the conservation of endangered species” in
16 consultation with the Secretary of the Interior. 16 U.S.C. § 1536(a)(1); and 2) in “consultation”
17 with the Fish and Wildlife Services (FWS), to “insure that any action authorized, funded, or carried
18 out by such agency . . . is not likely to jeopardize the continued existence of any endangered
19 species” or to “result in the destruction or adverse modification of habitat of such species” that has
20 been designated as “critical.” 16 U.S.C. § 1536(a)(2).

21 The ESA and its regulations impose certain procedural duties on various federal agencies
22 and the FWS. If an agency determines in a biological assessment (“BA”) that its action may affect
23 a listed species or critical habitat, the action agency must engage in formal consultation with the
24 FWS, unless the agency finds, and the FWS concurs, that the action is “not likely to adversely
25 affect” in any fashion the species or its critical habitat. 50 C.F.R. § 402.14(a), (b).

26 When formal consultation is required, the process culminates in preparation of a biological
27 opinion (“BiOp”) by the Service, which must be based on the “best scientific and commercial data
28 available,” 16 U.S.C. § 1536(a)(2), setting forth “how the agency action affects the species or its

1 critical habitat.” Id. § 1536(b)(3). The BiOp must address whether the action, along with
2 “cumulative effects” as defined by the Service, *see* 50 C.F.R. § 402.02, will jeopardize the species’
3 existence or adversely modify critical habitat and, if so, the Service must set forth any “reasonable
4 and prudent alternatives” that would not violate the statutory prohibitions. 16 U.S.C. §
5 1536(b)(3)(A).

6 Regarding NEPA, this act imposes only procedural requirements rather than particular
7 substantive results. Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp., 42 F.3d 517, 523 (9th Cir.
8 1994). It requires federal agencies take a “hard look” at the environmental consequences of its
9 proposed major actions. Ocean Advocates v. U.S. Army Corps of Eng’rs, 361 F.3d 1108, 1124
10 (9th Cir. 2004). NEPA also requires agencies complete an Environmental Impact Statement
11 (“EIS”) for any major federal action that may significantly affect the quality of the human
12 environment. 42 U.S.C. § 433(2)(C). However, an agency may prepare an Environmental
13 Assessment (“EA”) to determine if its proposed action might significantly affect the quality of the
14 human environment before preparing an EIS. 40 C.F.R. § 1508.9. An EIS is not required if the
15 agency issues a Finding of No Significant Impact (“FONSI”) in its EA. Dep’t of Transp. v. Public
16 Citizen, 541 U.S. 752, 752 (2004).

17 **2. Initial Research and 1999 Program**

18 In 1986, the USDA began researching biological-control methods for the saltcedar—a tree
19 nonnative to the United States that threatens the population and diversity of indigenous plants. AR
20 A6666 and A3414. Through its research, the USDA identified the *Diorhabda elongate* (the
21 “beetle”) as one such method. AR A6666. *Diorhabda elongate* is a leaf-eating beetle that acts as
22 a host-specific insect. Id. The USDA realized the beetle could be used to control the saltcedar
23 population through repeated leaf defoliation. AR A6666. Consequently, the USDA proposed to
24 introduce the beetle in the United States in an effort to encourage native plant growth and to benefit
25 other species within the ecosystem. Id. With support from multiple federal agencies, the USDA
26 scheduled the initial beetle release for June 1995. Id.

27 However, the program was delayed in March 1995 after the U.S. Fish and Wildlife Service
28 (FWS) listed the flycatcher as an endangered species and designated areas throughout the

1 southwestern United States as critical habitat. AR F988-97. The flycatcher often nests in saltcedar
2 trees because human activities and invasive plants have reduced the flycatcher's native habitat. Id.

3 Because the FWS listed the flycatcher as an endangered species and the USDA's beetle
4 program targeted a plant in which the flycatcher nests, the USDA was required to consult with the
5 FWS before releasing any beetles. Thus, the USDA drafted a biological assessment in 1997 and
6 submitted it to the FWS. AR A6666, A466, A451. The USDA also submitted a project proposal
7 to the FWS based on the draft BA. AR A1276. The project proposal included the following
8 conditions and revisions:

- 9 1. The USDA would place beetle cage sites at least 200 miles from saltcedar
10 populations that served as nesting sites for flycatchers. AR A1286, A1289.
- 11 2. The USDA would remove the Arizona and southern Nevada locations from the
12 program. AR A1275-76.
- 13 3. The USDA would review research between Phase I (release of beetles into cage
14 sites) and Phase II (general release). AR A1286. The review would determine
15 whether remedial actions would be needed before Phase II began. Id.
- 16 4. The USDA agreed to monitor the beetles in cages for one year before releasing the
17 beetles into fields. AR A186-87. The USDA would continue to monitor the beetles
18 for two to three years before the general release phase began. Id.
- 19 5. The Saltcedar Consortium¹ would review the results, progress, and effects of the
20 program and make recommendations for repression or implementation of manual
21 vegetation if needed. AR A1292-93.
- 22 6. The USDA would be the lead agency for natural revegetation, but land management
23 agencies at the release sites would retain the responsibilities for manual
24 revegetation. AR A1293-94.

25
26
27 ¹ "A Saltcedar Consortium will assist the partners in defining the roles of various cooperators in
28 this project. The consortium members include US Department of Agriculture Agricultural
Research Service Animal Plant Health Inspection Service and Forest Service. Other US
Department of Interior members including Bureau of Land Management Bureau of Reclamation
Fish and Wildlife Service National Park Service." AR A1322.

1 In December 1998, the FWS issued a Letter of Concurrence with USDA's BA, concurring
2 with USDA's finding that the proposed actions "may affect but were not likely to adversely affect
3 the flycatcher or its critical habitat." AR A1373, A6666.

4 USDA then notified the public of its draft environmental assessment (EA) as required by
5 NEPA. AR A1406-07. The draft EA discussed ARS's request for a permit for the beetle program
6 and APHIS's Finding of No Significant Impact on the flycatcher or its habitat by the program. Id.
7 After reviewing the amended EA, the FWS concurred with the FONSI in June 1999. AR A1543-
8 44. Despite concerns about the beetles' rate of travel and the ability to survive below the 37N
9 latitude, the FWS explained it concurred with the FONSI because of the conditions outlined in the
10 project proposal. Id.

11 The USDA issued a final EA and FONSI for the program in July 1999. AR A1525-54. In
12 the EA, the USDA agreed to adopt measures to mitigate the risk of beetles spreading rapidly,
13 invading nesting areas of flycatchers, and killing saltcedar trees faster than native plants could
14 regenerate. AR A1534.

15 Three months later, the Saltcedar Consortium developed a Memorandum of Understanding
16 ("MOU").² AR A1737-45. The MOU defined the roles, responsibilities, and financial resources
17 for the joint management of the program. Id. Specifically, the program participants agreed to:

- 18 1. Monitor the biology, population, natural dispersal, damage, and control of the
19 saltcedar and any non-target plant;
- 20 2. Monitor the recovery of native plants; and
- 21 3. Monitor the recovery of wildlife species during and after the program. AR A1737.

22 The MOU attached a list of the program sites and the contact agency for each site. Id. at 1738-45.
23 Land managers, in collaboration with the Saltcedar Consortium members, agreed to allow access
24 and monitoring according to the monitoring plans. Id. at 1737. They also agreed the insects and
25 monitoring equipment would not be redistributed without a USDA permit. Id.

26 _____
27 ² Representative from the FWS, U.S. Bureau of Reclamation, U.S. Bureau of Land Management,
28 Geological Survey Biological Resource Division, National Park Service, USDA, U.S. Forest
Service, Natural Resources Conservation Service, U.S. Department of Defense Corps of
Engineers, and state departments formed the Saltcedar Consortium. AR A1293-94.

1 The USDA began issuing permits for the release of beetles into secure cages in July 1999.
2 AR A1555-78. A year later, the USDA issued permits that authorized releasing the beetles from
3 field cages to open fields. AR A1702-03. The USDA then released the beetles at the permitted
4 sites. A2366-67.

5 According to monitoring reports, the beetles could not survive south of 37N latitude. AR
6 A2368, A3732-47. The FWS concurred with most of the USDA's requests for additional sites in
7 Texas, New Mexico, and elsewhere in 2003 and 2004 to determine if the beetles could survive and
8 reproduce below 37N latitude. AR A2101-02, A2179-181, A2356-57, A2359, A2363-65, A2362,
9 A2368, A2376-380.

10 **3. The 2005 Release Program**

11 In November 2003, USDA proposed a draft EA to initiate a second program to control the
12 invasive saltcedar tree. A2966-67, A2975. The draft EA asserted that flycatchers were not known
13 to nest in the proposed locations³ and that the beetles could not survive below 37N latitude. AR
14 A2975 and 2955.

15 The FWS responded to the draft EA and recommended the USDA meet with land managers
16 in each state before any beetle releases occurred to develop management plans. AR A3070. The
17 FWS suggested that the plans address any necessary control methods, funds needed for control,
18 and funding mechanisms. *Id.* The FWS also expressed concern over the risk of the beetles
19 spreading faster than hypothesized. AR A3073. It asked USDA to monitor the release sites with
20 this risk in mind and to develop a contingency plan in case the risk was realized. AR A3073.

21 In March 2004, the USDA submitted a monitoring plan in response to the FWS's request.
22 AR A3113-28. In the plan, the USDA outlined the conditions of the second release program and
23 agreed to develop and implement a restoration and mitigation plan by meeting with land managers
24 if monitoring showed the steps were warranted. AR A3114, A3120. The plan assigned data
25 management responsibilities, including post-release monitoring, to USDA personnel or local
26

27
28 ³ The proposed locations listed in the draft EA included: Colorado, North Dakota, South Dakota,
Iowa, Nebraska, Nevada, Kansas, Missouri, Montana, Idaho, Oregon, Washington, Utah, and
Wyoming. AR A2795.

1 collaborators. AR A3120.

2 In March 2005, the USDA transmitted a final BA to the FWS for the 2005 program. AR
3 A3407-97. It proposed to establish beetle release sites north of 37N latitude, an area where the
4 flycatcher was not known to nest. AR A3487, A6895, A7289. The USDA concluded the 2005
5 program was not likely to adversely affect the flycatcher or its habitat. AR A3488. In doing so, the
6 USDA relied on the assumptions found in the 2003 draft EA—namely, that the “[t]he northern
7 limit of the flycatcher’s range is about 37N latitude.” AR A3487. The USDA used the current
8 science at the time, which failed to differentiate between two beetle strains. AR A3422, A3921.
9 Namely, a strain of beetle originating from Crete, rather than Asia, were tested and revealed to be
10 more adaptable to environmental conditions below 37N latitude. AR A3422. The USDA also
11 excluded Utah from its list of proposed release sites due to an earlier event that resulted in beetle
12 release in Saint George, after a USDA employee gave a presentation on the benefits of using the
13 beetles for saltcedar control. AR A3423, AR A3922. It is disputed whether the employee provided
14 information on how to circumvent federal guidelines and encouraged the locale to distribute
15 beetles or if the employee provided standard information on federal guidelines when explaining
16 why he could not help fund or assist with obtaining the beetles. ECF No. 28 at 16; ECF No. 31 at
17 16-17.

18 In June 2005, the USDA submitted a final EA concerning general release of the beetles
19 and issued a FONSI. AR A3914-72, A3912-13. The USDA recognized the importance of the
20 saltcedar to the flycatcher but still found the proposed beetle release program would not result in
21 a significant impact. AR A3946. The USDA relied on the assumptions that the beetles could not
22 survive lower than 37N latitude and that the beetles would spread slowly. Id.

23 In July 2005, the FWS concurred with the USDA’s BA and determined that formal
24 consultation was unnecessary. AR A3994-98, A3436, A3488. The FWS based its concurrence on
25 the assumptions from the 2003 draft EA. Id.

26 The FWS clarified that the USDA would develop revegetation and mitigation plans at the
27 USDA insectary sites, but that landowners and managers were solely responsible for addressing
28 unanticipated impacts. AR A3995. The FWS also stated that it assumed the USDA’s agency,

1 APHIS, had no discretion or control over potential post-release indirect effects otherwise. Id.

2 The USDA approved the release of the beetles at selected field insectary sites in thirteen
3 states and the initial releases were made in August 2005. AR A4076, A6058. In the following
4 years, the USDA established forty-eight insectary sites. AR A5997. It considered adding Utah to
5 its 2005 program but declined after preparing a BA and consulting with the FWS. AR A5997, AR
6 A4884, AR A4992-98.

7 **4. The 2010 Decision to Terminate the Program**

8 In September 2008, the USDA learned that beetles had reached the flycatcher's critical
9 habitat. AR A5624, A5061. It was determined the beetles originated from a site in Delta, Utah
10 associated with a 1999 permit. AR A5061. Specifically, in September 2008, it was determined that
11 Utah state and local government officials had removed beetles from the Delta site and released the
12 beetles near Saint George, Utah to control saltcedar populations. AR A5627, A5061-62, A5365,
13 A5065, A9588-89, A5522-23. The beetles spread as far south as Arizona because of the releases.
14 AR A5061. The record does not indicate that any other site or any other USDA activities
15 contributed to the beetles spreading south.

16 Five months later, the USDA attended a research conference and obtained information
17 about the beetles that was not previously considered. AR A5624-28. Namely, at a 2009 research
18 conference in Reno, Nevada, scientific data indicated that a beetle had adapted and successfully
19 reproduced in areas as far south as the 32N latitude. Id. at 5628. Due to the beetles' presence in
20 flycatcher habitat and the new information obtained at the conference, the USDA requested
21 meetings and consultation with the FWS to discuss further ESA consultation. AR A5064.

22 A formal request followed three months later, in which USDA requested reinitiation of
23 consultation and assistance in preparing a revised BA. AR A5628-29. The FWS and the USDA
24 discussed the proper subject and scope of the consultation and determined that the reinitiated
25 consultation regarded the 2005 program. AR A5577-83; F693-95.

26 The USDA completed a BA proposing termination of the program. AR A5986-6121. The
27 BA outlined three paths of action that the USDA then pursued:

- 28 1. Terminating the 2005 beetle program. AR A6040. "Only monitoring of sites is

1 currently occurring.” Id.

2 2. Discontinuing the issuance of new permits for environmental release of the beetles
3 and terminated existing permits. Id.

4 3. Discouraging human-assisted movement of the beetles through an informational
5 memorandum to other federal and state agencies and departments. Id.

6 Additionally, the USDA agreed to participate in an interagency group to address the needs of the
7 flycatcher. Id.

8 While eradication efforts were addressed in the BA, the USDA ultimately stated
9 eradication was impractical due to high costs, low probability of success, and likelihood of an
10 adverse effect on other species. Id. The USDA also claimed eradication could not be undertaken
11 unilaterally. Id. The USDA concluded the above actions may affect but were not likely to adversely
12 affect the flycatcher or its critical habitat. Id.

13 The FWS concurred with the USDA’s finding of unlikelihood of an adverse effect. A6207.
14 The concurrence concluded informal consultation under Section 7 of the ESA. Id. The
15 consultation’s scope did not include any information regarding the 1999 permits. See Id.

16 **B. Procedural History**

17 The Center filed its Complaint in this action on September 30, 2013. ECF. No. 1. The
18 Complaint names five officials as defendants: USDA Secretary Tom Vilsack; APHIS
19 Administrator Gregory Parham; ARS Administrator Edward Knipling; USDI Secretary Sally
20 Jewell; and FWS Director, Dan Ashe. Id. However, the parties stipulated to the voluntary dismissal
21 of all claims against ARS Administrator Knipling and all claims against the ARS. ECF No. 13.

22 The Complaint alleges five causes of action: (1) the USDA violated Section 7(a)(2) of the
23 ESA by terminating the program without insuring the termination would not cause jeopardy to the
24 flycatcher; (2) the USDA violated Section 7(a)(1) of the ESA by failing to adopt a mitigation plan;
25 (3) the USDA and the USDI violated ESA’s formal consultation requirements; (4) the USDA
26 violated NEPA by failing to implement mitigation measures; and (5) the USDA violated NEPA
27 by failing to engage in supplemental NEPA review. ECF No. 1. The Center prayed for declaratory
28 and injunctive relief and also a requested attorney fees and costs. Id.

1 The Center moved for summary judgment on all claims in December 2014. ECF No. 28.
2 Two months later, the USDA and the USDI also moved for summary judgment. ECF No. 30. The
3 Court held oral arguments regarding the parties' motions for summary judgment on February 1,
4 2016. ECF No. 52.

5 On March 31, 2016, the Court issued a minute order, granting in part and denying in part
6 both motions for summary judgment, stating a written order would issue. ECF No. 54. This Order
7 sets forth the Court's reasoning for its ruling. In the intervening period, the Court has held hearings
8 to determine the scope of any injunctive or other relief.

9 10 **III. LEGAL STANDARD**

11 **A. Summary Judgment Under Federal Rule of Civil Procedure 56(c)**

12 The Federal Rules of Civil Procedure allow for summary judgment when the pleadings,
13 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
14 show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment
15 as a matter of law." Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A
16 material fact is one "that might affect the outcome of the suit under the governing law." Anderson
17 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (2000). In evaluating a motion for summary judgment,
18 the Court must read the evidence and draw all inferences in the light most favorable to the
19 nonmoving party. Scott v. Harris, 550 U.S. 372, 378 (2007). "A party seeking summary judgment
20 always bears the initial responsibility of informing the district court on the basis of its motion."
21 Celotex Corp., 477 U.S. at 323. If the moving party meets this initial burden, the burden shifts to
22 the nonmoving party. Id. at 330.

23 **B. Administrative Procedure Act**

24 The Administrative Procedure Act (APA) governs the Court's review of ESA and NEPA
25 claims. San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014). The
26 Court will therefore uphold an agency action unless it is "arbitrary, capricious, an abuse of
27 discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

28 Under the APA's narrow review standard, the Court must not "substitute its judgment for

1 that of the agency.” Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463
2 U.S. 29, 43 (1983). Instead, the Court must determine whether the agency “has articulated a
3 rational connection between the facts found and the conclusions made.” Pac. Coast Fed’n of
4 Fishermen’s Ass’ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1090 (9th Cir. 2005). If the
5 agency “articulated a rational connection between the facts found and the conclusions made” or
6 the “agency’s path may reasonably be discerned,” the Court will sustain the agency’s decision. Id.
7 Alternatively, the Court will overturn the agency’s action if the agency “relied on factors which
8 Congress has not intended it to consider, entirely failed to consider an important aspect of the
9 problem, offered an explanation for its decision that runs counter to the evidence before the agency,
10 or is so implausible that it could not be ascribed to a difference in view or the product of agency
11 expertise.” Motor Vehicle Mfrs. Ass’n of U.S., Inc., 463 U.S. at 43.

12 Moreover, courts give deference to an agency’s interpretation of a statute that it
13 administers. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844
14 (1984). Courts also take into account the rule of harmless error. Riverbend Farms, Inc. v. Madigan,
15 958 F.2d 1479, 1487 (9th Cir. 1992).

16 Lastly, in order to be subject to judicial review under the APA, an agency action must be
17 either reviewable by statute or considered a “final agency action for which there is no other
18 adequate remedy in a court.” 5 U.S.C. § 704.

19 20 **IV. DISCUSSION**

21 The Court first considers Claims 1 and 3, which the Center brought under Section 7(a)(2)
22 of the ESA. The Court then evaluates Claim 2, brought under Section 7(a)(1) of the ESA. Last, the
23 Court considers Claims 4 and 5, which the Center brought under NEPA and related regulations.

24 After reviewing the competing motions and the supporting exhibits, the Court concludes
25 that neither the USDA nor the USDI violated Section 7(a)(2) of the ESA. The Court also finds that
26 USDA did not violate NEPA or the related guidelines. However, the Court finds the USDA failed
27
28

1 to take affirmative action to conserve the flycatcher as required by Section 7(a)(1) of the ESA.⁴

2
3 **A. Claims 1 and 3 brought under Section 7(a)(2) of the ESA**

4 The Center alleged two claims, Claims 1 and 3, under Section 7(a)(2) of the ESA, which
5 contains a “substantive” mandate to avoid jeopardizing listed species and their habitats, and a
6 “procedural” obligation to consult meaningfully with the FWS to ensure the substantive mandate
7 is fulfilled. Sierra Club v. Marsh, 816 F.2d 1376, 1384-88 (9th Cir. 1987).

8 Under Claim 1, Plaintiff argues that the USDA failed to ensure that the flycatcher would
9 not be jeopardized when the USDA terminated the beetle program without taking any remedial
10 steps. Under Claim 3, the Center contends the USDA violated the ESA Section 7(a)(2) when it
11 reinitiated ESA consultation solely for its 2010 decision to terminate the 2005 program and
12 associated permits rather than consulting on the full scope of the programs.

13 The Court considers each in turn.

14 **1. The USDA Did Not Violate Section 7(a)(2) of the ESA by**
15 **Terminating Its Program**

16 Under Claim 1, Plaintiff alleges a substantive violation of Section 7(a)(2) and argues that
17 the USDA failed to ensure that the flycatcher would not be jeopardized when the USDA terminated
18 the beetle program without taking any remedial steps.

19 The USDA responds that the Center improperly conflated the actions of two USDA
20 agencies—APHIS and ARS. Consequently, the Center expanded the actions under review and
21 amplified the affect the program had on the flycatcher and its habitat.

22 As an initial matter, APHIS and ARS act as agencies of the USDA. 7 C.F.R. §§ 371.1,
23 500.1. The USDA created and delegated certain parts of its authority to these agencies. Id.; 7
24 C.F.R. § 7701. The delegation, however, does not divest the USDA of its powers. 7 C.F.R. § 2.12.
25 Rather, the agencies are subject to the general supervision of the USDA. 7. C.F.R. § 2.7.

26
27
28

⁴ While this Opinion references the “USDA” throughout, it should be understood that this applies to the USDA’s actions through and by its APHIS. The Court’s findings apply to that agency’s action(s).

1 Accordingly, the Court considers the actions of APHIS and ARS as actions of the USDA.

2 **a. Legal Standard**

3 Under Section 7(a)(2) of the ESA, federal agencies must ensure that any action authorized,
4 funded, or carried out by the agency is not likely to jeopardize an endangered species or its critical
5 habitat. 16 U.S.C. § 1536. An action jeopardizes an endangered species or its habitat if it
6 “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both
7 the survival and recovery of [an endangered species].” 50 C.F.R. § 402.02; see Pyramid Lake
8 Oaiute Tribe of Indians v. U.S. Dept. of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990).

9 The Supreme Court did not limit the reach of Section 7(a)(2) to federal actions relating to
10 federal projects in the planning stage. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 174 (1978).
11 Section 7(a)(2) instead reaches any federal action relating to a federal project whether the project
12 is completed or not. Id. Moreover, the implementing regulations for the ESA define “action” as
13 “all activities or programs of any kind authorized, funded, or carried out ... by Federal agencies,”
14 including the granting of permits. 50 C.F.R. § 402.02; see Nat. Res. Def. Council v. Houston, 146
15 F.3d 1118, 1125 (9th Cir. 1998). The regulation lists as examples “actions intended to conserve
16 listed species or their habitat” and “actions directly or indirectly causing modifications to the land,
17 water, or air.” 50 C.F.R. §§ 402.02(a), (d); Cottonwood Env'tl. Law Ctr. v. U.S. Forest Serv., 789
18 F.3d 1075, 1085 (9th Cir. 2015).

19 “An agency must consult under Section 7 only when it makes an ‘affirmative’ act or
20 authorization.” Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1055 (9th Cir. 1994). “Where no
21 federal authorization is required for private-party activities, an agency's informal proffer of advice
22 to the private party is not ‘agency action’ requiring consultation.” Karuk Tribe of California v.
23 U.S. Forest Serv., 681 F.3d 1006, 1021 (9th Cir. 2012) (internal citations omitted). Moreover,
24 “[t]he regulations promulgated pursuant to the ESA make it clear that the operation of a project
25 pursuant to a permit is not a federal agency action.” California Sportfishing Prot. All. v. F.E.R.C.,
26 472 F.3d 593, 598-99 (9th Cir. 2006) (internal citations omitted) (holding the granting of a license
27 is federal agency action, but the continued operation by a non-federal agency is not).

28 Additionally, Section 2(c) and Section 3(2) of the ESA direct agencies to “use ... all

1 methods and procedures which are necessary” to preserve endangered species. 16 U.S.C. §§
2 1531(c), 1532(3). A project jeopardizes the continued existence of a species when it is based on a
3 legally flawed biological opinion (BiOp). Ctr. for Biological Diversity v. U.S. Bureau of Land
4 Mgmt., 698 F.3d 1101, 1128 (9th Cir. 2012).

6 **b. Application**

7 In this matter, the Center challenges the USDA’s 2010 decision to terminate the program
8 and associated permits. ECF No. 1 at 1-2. In Claim I, the Center argues that the ESA did not ensure
9 against jeopardy as required by Section 7(a)(2) because it failed to take *additional* actions to
10 mitigate possible harm to the flycatcher after terminating the program.

11 The Center relies on Tennessee Valley Authority and Center for Biological Diversity.
12 Those cases are distinguishable. Unlike the federal agencies in Tennessee Valley Authority and
13 Center for Biological Diversity, the USDA in this case is not seeking to *continue* a project in
14 contradiction with the ESA’s purpose. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 98 S. Ct.
15 2279, 57 L. Ed. 2d 117 (1978) (prohibiting completion of dam, where operation of dam would
16 either eradicate known population of the snail darter, an endangered species, or destroy its critical
17 habitat); 698 F.3d 1101, 1119 (9th Cir. 2012); Ctr. for Biological Diversity v. U.S. Bureau of Land
18 Mgmt., 698 F.3d 1101 (9th Cir. 2012) (finding the BLM’s authorization of a pipeline was arbitrary
19 and capricious). In this case, Plaintiff does not challenge an ongoing or continuing action; the
20 USDA has already terminated the beetle-release program in order to prevent potentially
21 jeopardizing the flycatcher and its environment. Rather, Plaintiff challenges Defendants’ actions
22 as insufficient under the ESA. Therefore, Plaintiff’s reliance on these cases is unpersuasive.

23 Moreover, the facts underlying the USDA’s decision to terminate the release program
24 undermine Plaintiff’s claim. The USDA based its decision to terminate the release program on
25 newly discovered information that the beetle could survive below 37N latitude and reach flycatcher
26 habitat. By 2008, the USDA learned that the beetles had reached the flycatcher’s critical habitat.
27 AR A5624. It also learned that the beetles could survive below 37N latitude. Id. Additionally, the
28 USDA obtained previously unknown information at the research conference. Id. Based on the new

1 information, the USDA and the FWS engaged in and completed consultation under the ESA. The
2 consultation resulted in USDA's BA, which proposed to terminate the project. The FWS concurred
3 with the BA, finding the termination would not likely have an adverse effect on the flycatcher or
4 its habitat. Thus, the USDA made the same decision for itself that the court ordered the agency to
5 take in Tennessee Valley Authority: termination of a program that jeopardized listed species and
6 their habitats.

7 Additionally, unlike the federal agency in Center for Biological Diversity, the USDA acted
8 on newly discovered information to terminate its program; it did not act on an allegedly invalid
9 BiOp as a basis for continuing with a program. Ctr. for Biological Diversity v. U.S. Bureau of
10 Land Mgmt., 698 F.3d 1101, 1106 (9th Cir. 2012) (finding that "(1) the Biological Opinion's 'no
11 jeopardy' and 'no adverse modification' determinations relied on protective measures set forth in
12 a conservation plan not enforceable under the ESA; (2) the Biological Opinion did not take into
13 account the potential impacts of withdrawing 337.8 million gallons of groundwater from sixty-
14 four wells along the pipeline"). In this case, Plaintiff does not challenge the BiOp or the underlying
15 information the Defendants based their decisions on as arbitrary and capricious, but rather argues
16 that the failure to adopt further mitigating factors in addition to discontinuing the release program
17 was insufficient under the ESA. Therefore, Center for Biological Diversity is further
18 distinguishable.

19 Moreover, the beetles found in flycatcher habitat originated from the Delta, Utah site as a
20 result of state and local Utah entities' actions. AR A5627, A5061, A5365, A5065, A9588-89. The
21 USDA did not authorize the state and local actions. Id. The Administrative Record shows no
22 indication that the beetles came from any other site or as a result of federal action. Because the
23 record traces the spread of the beetles back to the Delta site and to state and local entity action, the
24 actions do not constitute federal action and thus do not fall within the purview of Section 7(a)(2).
25 See AR A5627.

26 To the extent that the Center argues the granting of the Delta permit failed to ensure against
27 jeopardy, the Court disagrees. When the USDA issued the permit to the Delta site, the USDA
28 believed the beetles would not adversely affect the flycatcher or the flycatcher's habitat. See AR

1 A5626. The USDA’s belief stemmed from exhaustive research beginning in 1986. See AR A5624-
2 25. Once the USDA learned two strains of beetle existed—one of which could survive in the
3 flycatcher’s critical habitat—the USDA followed USDA protocols and terminated the program.
4 AR A6040. Thus, the USDA acted in an effort to prevent any possible jeopardy originating from
5 sites operated by a federal agency.

6 For the reasons stated, the Court therefore GRANTS Defendants summary judgment on
7 Claim 1.

8 **2. The USDA Did Not Violate Section 7(a)(2)**

9 The Center asserts a second claim under Section 7(a)(2), which is that the USDA failed to
10 comply with the section’s procedural requirements. Specifically, Plaintiff contends the USDA
11 violated Section 7(a)(2) when it reinitiated ESA consultation solely for its 2010 decision to
12 terminate the 2005 program and associated permits, rather than consulting on the full scope of the
13 programs. ECF No. 28 at 29-30. Consequently, the Center argues, the USDA improperly avoided
14 formal consultation procedures. Id.

15 The USDA argues that the Center cannot group together all of the USDA’s agencies’
16 actions to broaden the consultation scope. ECF No. 30. It also argues that it properly limited the
17 reinitiated consultation to the 2005 program and 2010 decision because the USDA did not retain
18 any discretionary involvement or control over the 1999 permits.

19 **a. Legal Standard**

20 “Procedurally, before initiating any action in an area that contains threatened or endangered
21 species, federal agencies must consult with the FWS ... to determine the likely effects of any
22 proposed action on species and their critical habitat. The ESA and its implementing regulations
23 establish a framework for such inter-agency consultation. The agency proposing the action ... must
24 independently determine whether the action ‘may affect’ a listed species or its habitat under the
25 ESA. If the answer is yes, ‘formal consultation’ with the appropriate consulting agency is generally
26 mandatory. An action agency may bypass formal consultation if it determines, and the consulting
27 agency agrees, that the proposed action ‘is not likely to adversely affect any listed species or
28 critical habitat.’ When that occurs, ‘the consultation process is terminated, and no further action is

1 necessary.’ If, however, after this ‘informal consultation,’ the consulting agency disagrees that the
2 proposed action is not likely to have adverse effects, then formal consultation is required. In formal
3 consultation, the consulting agency must prepare a biological opinion that advises the action
4 agency as to whether the proposed action, alone or ‘taken together with cumulative effects, is likely
5 to jeopardize the continued existence of listed species or result in the destruction or adverse
6 modification of critical habitat.’” Conservation Cong. v. U.S. Forest Serv., 720 F.3d 1048, 1051
7 (9th Cir. 2013) (internal citations omitted).

8 **b. Application**

9 After reinitiating consultation, the FWS and the USDA determined the subject and scope
10 of the consultation. AR A5577-83. Based upon the discussions, the USDA completed a BA and
11 concluded that the 2005 program’s termination and permits would not likely have an adverse effect
12 on the flycatcher or its environment. AR A5986-6121, A6040. The BA included historical
13 consultation for actions beginning in 1997 through the 2005 program. See AR A5986-6121.
14 However, the BA only reviewed the USDA’s 2010 decision to terminate the 2005 program and its
15 related permits. AR A6040. The FWS concurred with the USDA’s findings, which concluded the
16 USDA’s consultation obligations under Section 7 of the ESA. AR A6207.

17 The Center argues the scope of the informal consultation should have led to formal
18 consultation and included review of all of the impacts from all of the USDA’s actions pursuant to
19 50 C.F.R § 402.16. However, 50 C.F.R § 402.16 did not require formal consultation as suggested
20 by the Center. The regulation requires formal consultation be reinitiated when new information
21 comes to light that affects the decision made in the original formal consultation. Formal
22 consultation was not pursued during the original program. Accordingly, 50 C.F.R. § 402.16 does
23 not apply and does not mandate formal consultation.

24 Rather, 50 C.F.R. § 402.12(f) governs the contents of the BA, which gives the federal
25 agency discretion in determining the document’s contents. See Conservation Cong. v. U.S. Forest
26 Serv., 720 F.3d 1048, 1056 (9th Cir. 2013) (“The contents of a biological assessment are at the
27 ‘discretion’ of the federal agency, ‘depend on the nature of the Federal action,’ and ‘may’ include
28 on-site inspections of the affected area, experts’ views, literature reviews, and analysis of alternate

1 actions, as well as ‘consideration of cumulative effects, and the results of any related studies.’ 50
2 C.F.R. § 402.12(f)’ (emphasis in the original). Here, when the BA concluded that terminating the
3 program would not likely have an adverse effect on the flycatcher and the FWS concurred, the
4 USDA’s Section 7 consultation requirements were fulfilled.

5 The Center relies on Wild Fish Conservancy v. Salazar, 628 F.3d 513 (9th Cir. 2010), to
6 argue the scope of the BA should have included all of the USDA’s actions and the resulting
7 impacts. Wild Fish Conservancy is dissimilar to the facts in this case. The court in Wild Fish
8 Conservancy held a long-term project could not be delineated into smaller projects to avoid
9 determining the cumulative effect in a BiOp. Id. at 525. Here, the USDA did not delineate its
10 project to avoid showing future impacts in a BiOp. Rather, it terminated its project to avoid any
11 future impacts. This case is therefore inapposite and does not support the Plaintiff’s position.

12 For the reasons stated, the Court therefore GRANTS Defendants summary judgment on
13 Claim 3.

14 **3. USDA Did Violate Section 7(a)(1) of the ESA.**

15 The Center brings its second claim under Section 7(a)(1) of the ESA. The Center argues
16 that the USDA violated Section 7(a)(1) by failing to adopt “any conservation program” designed
17 to conserve the flycatcher. ECF No. 28. The USDA responds that it satisfied the ESA in two ways.
18 ECF No. 30. First, it designed and adopted the beetle program, in part, to conserve habitats that
19 endangered species like the flycatcher rely upon. Id. Second, it applied a long-standing policy to
20 discontinue and terminate permits adversely effecting endangered species. Id.

21 **a. Legal Standard**

22 When enacting the ESA, Congress intended to halt and reverse the trend toward species
23 extinction at all costs. Tennessee Valley Authority, 437 U.S. at 184. Section 7(a)(1) of the ESA
24 requires federal agencies consult with the FWS and act with its assistance to carry out conservation
25 programs for endangered species. 16 U.S.C. § 1536(a)(1). “Conservation” means to use all
26 necessary methods and procedures to bring any endangered species to the point at which
27 conservation efforts are no longer necessary. 16 U.S.C. § 1532.

28 Accordingly, the ESA creates an affirmative duty: it requires federal agencies take proper

1 steps to conserve endangered species. Tennessee Valley Authority, 437 U.S. at 183. The ESA does
2 not mandate specific duties. Pyramid Lake Paiute Tribe of Indians, 898 F.2d at 1410. Moreover,
3 courts defer to an agency's determinations on how to fulfill its duties. Id. But taking insignificant
4 measures cannot satisfy the requirements under Section 7(a)(1). See id. at 1416-19.

5 6 **b. Application**

7 Because the Center challenged the 2010 decision to *terminate* the program, the Court
8 determines whether the USDA fulfilled its Section 7(a)(1) obligations by terminating the program
9 and if the USDA fulfilled its obligations *after* terminating the program. The Court finds that the
10 USDA did not fulfill its obligations under Section 7(a)(1).

11 The FWS listed the flycatcher as an endangered species in 1995. AR A6034. Accordingly,
12 the ESA requires that the USDA (and in this case the focus is on APHIS) use its authority to carry
13 out flycatcher conservation programs in consultation with assistance from the FWS. From 1999 to
14 2010, the USDA authorized the beetle release program and then operated the insectaries, hoping
15 to encourage native plant life and in turn benefit species including the flycatcher. AR A5990-92.
16 After learning the programs could adversely affect the flycatcher or its critical habitat, the USDA
17 sought consultation from FWS. AR A5064, A5628-29.

18 The USDA and the FWS agencies consulted on whether to terminate the program and its
19 related permits. AR A5986-6121. This consultation included USDA's BA, which detailed actions
20 the USDA pursued in terminating the program and resulted in a finding of an unlikelihood of
21 adverse effect on the flycatcher. Id. The FWS concurred with the finding that the termination of
22 the program may affect but was not likely to adversely affect the flycatcher or its critical habitat.
23 AR A6207.

24 The USDA first argues that its actions satisfied its obligations under Section 7(a)(1)
25 because the program served, in part, to conserve habitat that endangered species rely upon for
26 survival—including the flycatcher. ECF No. 30.

27 The USDA correctly characterizes its obligations as a general but affirmative duty to
28 conserve endangered species. ECF No. 30 at 8. It also correctly claims its decisions are entitled

1 deference. *Id.* But despite the duty’s general and deferential nature, the USDA cannot rely upon
2 its program for fulfilling Section 7(a)(1) obligations *after* terminating the program. Regardless of
3 the program’s purpose between 1999 and 2010, the flycatcher remained an endangered species
4 after USDA terminated the program. Accordingly, the USDA had a continuing obligation under
5 Section 7(a)(1) to carry out conservation measures until conservation was no longer necessary.
6 This was especially true given the beetle’s negative impact on the flycatcher’s habitat. While the
7 USDA is not explicitly obligated under Section 7(a)(1) to directly mitigate damage to the
8 flycatcher habitat arising from its beetle release program, termination of the program certainly did
9 nothing to reverse or end the damage to the flycatcher’s habitat inflicted by (and continuing to be
10 inflicted by) the beetles. As a result of the information it received about the failure of its beetle
11 release program, the USDA was clearly aware of the accelerating deterioration of the flycatcher
12 habitat and the increasing urgency of its obligation under Section 7(a)(1) to engage in conservation
13 efforts. Thus, the ESA required (and requires) that the USDA take *some* action in an effort to
14 actually conserve the flycatcher. The USDA cannot rely upon its terminated program to satisfy its
15 Section 7(a)(1) duties.

16 The USDA’s second argument also fails to demonstrate that USDA fulfilled its Section
17 7(a)(1) obligations. USDA argues it satisfied its obligations by following its long-standing policy
18 to terminate existing permits and discontinue issuing permits that were found to adversely affect
19 endangered animals. ECF No. 30 at 38-39. The USDA’s argument is unavailing. While
20 terminating the permitting program would stop the future damage that would be done to the
21 flycatcher’s habitat by the release of additional beetles, terminating the issuance of permits, as
22 noted, does nothing to satisfy the USDA’s duties under Section 7(a)(1) to take steps or establish
23 programing to *preserve* the flycatcher. In short, the USDA has not adequately demonstrated how
24 its termination policy satisfies its affirmative duty to adopt a “conservation” policy as required
25 under Section 7(a)(1). Simply referencing USDA’s own “long-standing” policy regarding
26 terminating the use of biocontrol agents is insufficient. As of the time of the submissions in this
27 case, the USDA has not identified a separate USDA conservation program(s) subsequent to the
28 termination of the beetle release program which serves to conserve the habitat of the flycatcher.

1 **i. Legal Standard**

2 Under 7 C.F.R. 372.9(f), APHIS is required to implement mitigation and other conditions
3 established in environmental documentation and committed to as part of the decision-making
4 process. 7 C.F.R. 372.9(f). Environmental statements are sufficient without requiring an agency to
5 actually mitigate adverse environmental impacts or without assurances that third parties will
6 mitigate against adverse impacts. Tyler v. Cisneros, 136 F.3d 603, 608 (9th Cir. 1998). However,
7 NEPA mandates that an agency must implement mitigation measures that the agency committed
8 to in the environmental impact statement as part of the decision for the federal action. Id.

9 **ii. Application**

10 7 C.F.R. § 372.9(f), on its face, governs APHIS' actions—not the USDA entirely. APHIS
11 made the following statements about mitigation and remedial efforts or responsibilities:

12 1. 1997 Biological Assessment and Project Proposal:

13 The proposal states that “[a]ny needed remedial actions such as manual revegetation
14 [...] will be implemented several years before the expected arrival of biocontrol agents,
15 if research and monitoring indicate a need.” AR A1286. The actions would be taken
16 before general release. AR A1286. The proposal recommends that the Saltcedar
17 Consortium be responsible for recommending repression or implementations methods.
18 Id. APHIS acted as a member of this group but made no specific commitments to carry
19 out remedial efforts. AR A1292-93. The USDA—acting through its Natural Resources
20 Conservation Service—was offered as the lead agency for natural revegetation, but the
21 proposal assigned responsibilities for manual revegetation to the land management
22 agencies at each individual site. AR A1293-94.

23 2. Final EA

24 APHIS did not commit to any specific or general actions. AR A1534.

25 3. Memorandum of Understanding

26 The memo defined the roles and responsibilities for the joint management of the beetle
27 program. AR A1737. APHIS did not commit to any remedial duties. Id.

28 4. 2003 EA and 2004 Monitoring Plan

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

APHIS agreed to meet with project cooperators and land managers to develop and implement a restoration plan for sites in the 2005 program if monitoring suggested a need. AR A3120. The plan offered generic examples as for mitigation procedures. Id. The plan also committed to immediate site visits to 2005 locations if a real or potential risk to the health of human or non-target species arose. Id. If the reduction or removal of the beetles were warranted, a plan would be developed. Id. APHIS again offered generic examples. Id.

5. 2005 Final BA and EA

APHIS and FWS clarified APHIS committed to revegetation and mitigation plans at the USDA insectary sites if found to be necessary, but landowners and managers were solely responsible for addressing unanticipated impacts at their sites. AR A3995. They emphasized APHIS had no authority or discretion of potential post-release indirect effects otherwise. Id.

APHIS agreed to participate in the interagency group to address flycatcher needs. AR A6040. However, it explicitly dismissed eradication efforts. Id. The FWS supported this decision. AR A3994-99.

In asserting its fourth claim, the Center attempts to point to all mitigation and remedial commitments made throughout the record. However, 7 C.F.R. § 372.9(f) applies only to the commitments made by APHIS specifically. APHIS made no commitments until the 2005 EA and BA. It committed to take remedial actions to the 2005 site locations, which are north of 37N latitude. This commitment does not extend to the sites below the 37N latitude—the sites which may require remedial actions. The Center has not shown APHIS failed to follow through with its commitments under the 2005 program. Accordingly, APHIS has not violated 7 C.F.R. § 372.9(f).

...
...
...

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ii. Application

The USDA completed an EA that resulted in a FONSI in July of 1999 for its initial program. AR A1525-54. The FWS concurred with this finding. AR A3422. The USDA completed a second EA resulting in a FONSI in June 2005 for the second phase of its program. AR A3914. Again, the FWS concurred. AR A3436, A3486-88.

Accordingly, the Court finds that the USDA did not violate its supplementation obligations under NEPA. There are two reasons for this ruling.

First, NEPA only requires supplementation of an EIS, not an EA. The USDA never completed an EIS. It instead completed an EA in 1999 and a second EA in 2005, both of which resulted in a FONSI; therefore, an EIS was not required. Because an EIS was not required, no supplementation was required under NEPA. 50 C.F.R. § 1502.9(c)(1)(ii).

Second, even if the USDA needed to complete an EIS, the USDA did not need to supplement its NEPA documents because there was no ongoing major federal action. Each EA resulted in a FONSI. These findings represented the USDA's determination that its proposed actions would not have a significant effect on the human environment, meaning there was no ongoing major federal action. Because there was no ongoing major federal action, even if the USDA completed an EIS, NEPA would not require the USDA to supplement its documents.

...
...
...

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V. CONCLUSION

For the reasons discussed above,

IT IS ORDERED that Plaintiffs Center for Biological Diversity, Maricopa Audubon Society, and Dr. Robin Silver’s Motion for Summary Judgment, ECF No. 28, is GRANTED IN PART AND DENIED IN PART. The Clerk of the Court is instructed to enter judgment in favor of the plaintiffs as to Claim Two.

IT IS FURTHER ORDERED that Defendants Tom Vilsack, Gregory Parham, Sally Jewell, and Dan Ashe’s Cross Motion for Summary Judgment, ECF No. 30, is GRANTED IN PART AND DENIED IN PART. The Clerk of the Court is instructed to enter judgment in favor of the defendants as to Claims One, Three, Four, and Five.

DATED: July 24, 2017.



RICHARD F. BOULWARE, II
United States District Judge