B. The Corps Cannot Rely on Section 7 Consultation to Meet Its Statutory Requirements under NEPA to Determine the Significance of the Project's Impacts on Listed Species.

The Corps must complete a comprehensive NEPA analysis on the significance of the impacts to Endangered Species Act-listed species in addition to completing ESA Section 7 consultation, because these two legally-required procedures serve different functions. One crucial factor when determining whether an action requires an environmental impact statement is whether "the action may adversely affect [a listed] species or its [critical] habitat."[65] Unlike the "no jeopardy" standard applied in Section 7 consultation under the ESA, significance for NEPA purposes need not necessarily indicate that the action is "likely to jeopardize the continued existence of any endangered species or threatened species…"[66] Rather, a lower threshold exists for the impacts of an agency action on a species to be considered "significant" under NEPA than for that same action to cause jeopardy under the ESA. Thus, a federal agency's legal obligations under NEPA and ESA are entirely separate, and compliance with ESA Section 7's prohibition against jeopardizing a species' continued existence,[67] does not simultaneously satisfy NEPA's requirements to analyze significant impacts short of the threat of extinction.

Courts have repeatedly upheld the need for agencies to engage in separate NEPA analyses and Section 7 consultations for species, noting the difference in standards for a finding of significant impacts under NEPA and a finding of jeopardy under the ESA.[68]

Moreover, because NEPA analyses are subject to public comment and biological opinions are not, if an agency fails to conduct an adequate NEPA analysis of the significance of

[64] The reasons and issues listed above are not exhaustive, throughout these comments we raise numerous other issues, risks, and inadequacies that trigger and should be addressed in an EIS.

[65] 40 C.F.R. § 1508.27(b)(9).

[66] 16 U.S.C. § 1536(a)(2).

[67] 16 U.S.C. § 1536(a)(2)

[68] *See Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1275–76 (10th Cir. 2004) (recognizing Service conclusion that action not likely to cause jeopardy does not necessarily mean impacts are insignificant); *Makua v. Rumsfeld*, 163 F. Supp. 2d 1202, 1218 (D. Haw. 2001) ("A [Finding of No Significant Impact under NEPA] . . . must be based on a review of the potential for significant impact, including impact short of extinction. Clearly, there can be a significant impact on a species even if its existence is not jeopardized."); *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d 1274, 1302 (E.D. Cal. 2000) (requiring [Environmental Impact Statement] under NEPA even though mitigation plan satisfied ESA); *Portland Audubon Society v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992) (rejecting agency's request for the court to "accept that its consultation with [the Service under ESA] constitutes a substitute for compliance with NEPA."); *Forest Service Employees for Envtl. Ethics v. U.S. Forest Service*, 726 F. Supp. 2d 1195, 1213 (D. Mont. 2010) ("Plaintiff correctly observes that [*Envtl. Prot. Info. Ctr. v. U.S. Forest Service*, 451 F. 3d 1005 (9th Cir. 2006)] does not allow an action agency to completely ignore an issue in its NEPA documents so long as the matter is discussed in adequate detail in a biological opinion….").