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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*

Defendants.

Civil No. 01-640-RE

2008 REPLY
DECLARATION
ROCK PETERS

I, Rock Peters hereby state and declare as follows:

1. I have previously filed a declaration in support of the Federal government's cross motion for summary judgment and opposition to plaintiff's motion for summary judgment regarding the 2008 FCRPS Biological Opinion. In my first declaration, I described my qualifications and identified the documents I reviewed that were submitted by plaintiffs NWF et al., Oregon, and amicus Nez Perce Tribe. I also described the assertions made by NWF and Oregon, and the declarations of Edward Bowles and Frederick E. Olney, and provided relevant and factual information concerning these assertions. In particular, my declaration addressed technical errors, omissions, relevant information and data that was not presented in plaintiffs documents: (1) the implications of the September 2008 Independent Scientific Advisory Board (ISAB) report on some aspects of the spill and transport operations contained in the Reasonable and Prudent Alternative (RPA) of the NOAA Fisheries Federal Columbia River Power System (FCRPS) Biological Opinion (2008 FCRPS BiOp); (2) applicability of assumptions about spill volumes in any year; and, (3) the certainty of project modifications to provide safer passage via surface by-pass and other improvements to benefit listed fish.
2. I have reviewed the materials in the NWF and Oregon reply briefs and the declarations submitted by Bowles and Olney, and respond by providing factual information concerning: (1) the Corps' planned operation for 2009 operations addressing the ISAB report; (2) respond to NWF's mischaracterizations about implementation of modifications at dam for improved fish survival; and, (3) provide

accurate information about 2008 BiOp spill volumes.

Planned 2009 Operations

3. In my previous declaration I indicated that the Regional Implementation Oversight Group (RIOG) was meeting on October 29, 2008 to discuss the ISAB report (2008-5)(Peters Dec. ¶17), and in particular, the recommendations concerning spring spill and mid-May transport operations. As noted in my first declaration, employing the adaptive management provisions of the 2008 FCRPS BiOp, the Federal Action Agencies and NMFS recommended utilizing the RIOG as the appropriate forum to discuss the ISAB report and consider proposals for the 2009 spring transport and spill operations (¶¶ 8-18).
4. At the October 29 meeting, the RIOG requested the Action Agencies and NMFS to develop an issue paper outlining the spring spill and transport options discussed at the meeting, and provide COMPASS modeling runs for these options.
5. On December 4, 2008, the Federal agencies distributed the requested issue paper to the RIOG in preparation for the discussion of this matter at the December 12, 2008 RIOG meeting. (Attachment 1). The issue paper presented 3 options considering the best available information, including the ISAB report, as follows: Option 1 - implement operations identified in the 2008 FCRPS BiOp; Option 2 - modify spill operations at the Snake River collector projects in 2009 during the May 7 to May 2009 time frame for one year, then re-evaluate based on the additional year of adult return data; and, Option 3 - modify spill operations at the Snake River collector projects during the May 7 to May 20 time frame for two years.
6. In addition to developing the issue paper, the Action Agencies and NMFS prepared a

Federal agency recommendation for the May spill/transport operation, which was distributed to the RIOG on December 8. (Attachment 2). The recommendation was to implement Option 2.

7. The RIOG met on December 12, 2008 to discuss the spill and transport operations for mid-May. At the meeting and as requested by RIOG, an ISAB member presented information and the rationale for their recommendations. This also provided an opportunity for members to ask questions of the ISAB member in order to fully understand various aspects of the ISAB report. In accordance with the adaptive management provisions of the 2008 FCRPS BiOp, these options were discussed among the regional sovereigns and recommendations were provided. A majority of the sovereigns supported Option 2, which continues spill operations during May for the 2009 season at Snake River collector projects. (Attachment 3, draft 12/12/2008 meeting notes).
8. The Action Agencies and NMFS have decided to move forward with Option 2. The Corps will continue to spill and transport at Lower Granite, Little Goose, and Lower Monumental dams as outlined in RPA number 30 (Table 3) from May 7 through May 20, 2009 unless seasonal average flows in 2009 are less than 65 kcfs. If seasonal average flows are less than 65 kcfs, then transport will begin on April 3 and continue until the end of May consistent with the operations in the BiOp.
9. This operational change will occur in 2009. The Action Agencies and NMFS, again working with the RIOG, will reassess the juvenile survival information from 2009, and adult returns from the 2006 – 2008 outmigrations to determine future years' operations.

10. The process to arrive at this decision for spill and transport in 2009 exemplifies the effectiveness of the 2008 BiOp adaptive management provisions, and more importantly, the continued emphasis by the Action Agencies to collaborate on the best available scientific information, and solicit and consider the views of the sovereigns in the RIOG process.

NWF's Persistent Mischaracterization of Dam Configuration Implementation Actions

11. By simply referring to a table in the 2000 BiOp *RPA Action Summary*, Appendix F, NWF continues to erroneously argue that certain dam modifications have not been completed or completed late “as promised” in the 2000 BiOp. NWF omits what is said in the 2000 BiOp RPA itself (Section 9), which identifies the approach for making appropriate configuration changes at the Corps’ mainstem FCRPS dams. But more importantly, as I described in my first declaration, NWF fails to acknowledge that all 8 Corps mainstem dams will have operational surface passage systems in place for the 2009 migration seasons. In addition, as the result of these dam modifications and changes in operations, improvements in juvenile fish survival have been observed and are expected to continue. This is a primary objective of the 2008 BiOp.

12. The 2000 BiOp Section 9.6.1.4 *Juvenile Fish Passage*, notes that the BiOp measures represent the best *starting points* for planning future capital investment and that the prioritization and method of evaluation will be developed through the annual planning process. (2000 BiOp at 9-81). The process for development of the plans (Section 9.4) states that implementation of hydro actions will rely on the Regional Forum to seek agreement on the adaptive management steps necessary to avoid

jeopardy, and to be the principal decision-making forum addressing the biological opinion. (2000 BiOp at 9-25).

13. Similarly, the 2008 FCRPS BiOp carries forward this collaborative process in order to ensure actions and/or configuration changes at the dams are made in response to the best available science to achieve the desired results to benefit fish. (2008 RPA Table p. 1).
14. It is evident that NWF does not appreciate the application of adaptive management to designing features and complex modifications to dams that are responsive to research results, and actually provide desired benefits to fish. In particular, NWF does not acknowledge the value of working with the regional sovereigns to make *effective* improvements at the mainstem dams. Additionally, NWF chooses to gloss over the complexities associated with installing new fish passage structures at dams.

Regional Forum Process

15. The following discusses the extensive regional collaboration that occurs through the Regional Forum to assist in determining configuration and operational changes at the Corps' FCRPS projects to improve survival through the migration corridor. There are several teams that share technical and scientific information and provide the best available information to the Federal agencies responsible for making fish passage improvements at mainstem projects. The teams are: (1) the System Configuration Team (SCT); (2) the Fish Facility Design Review Work Group (FFDRWG); and, (3) the Studies Review Work Group (SRWG).
16. The SCT was initiated in response to the 1995 BiOp to make recommendations regarding prioritization of Corps' actions, including funding priorities and timing of

implementation of research and configuration actions. Participating members are the Action Agencies and Federal, state, and Tribal fish managers.

17. The technical aspects of BiOp measures that SCT prioritizes are developed, reviewed, and discussed by regional parties through FFDRWG and SRWG. These technical oversight groups provide detailed coordination on fish facility design development and the biological research.
18. The SCT participants establish a top to bottom list of priorities and assist in making final recommendations to the Corps once congressional appropriations are received. Lower priority actions not funded in the current year are carried forward for re-prioritization in the next fiscal year's process.

Complexities Associated with Installing Fish Passage Structures at Dams

19. NWF persists in obfuscating the actual purpose of the Configuration and Operation Plans (COPs) by asserting that NOAA improperly relies on these actions because they are nothing more than "good intentions." (NWF p. 43-44). The COPs represent commitments to follow good science; rather than a binding commitment to an untested concept that could be detrimental to fish. As I stated previously in my first declaration, the project specific COPs are planning tools used to meet dam passage performance standards by guiding identification, prioritization, and implementation of configuration and operation changes. (Peters Dec. ¶ 31)
20. The goal is to attain the 2008 BiOp performance standards, and to get there, it is imperative to use an iterative process as provided for in the COPs. This collaborative process involves significant research, testing, and evaluation, which often must be

adjusted as more data and information on the biological effectiveness of implemented structural improvements and operations are acquired.

21. An example of NWF's mischaracterization of the expectations of the 2000 BiOp is the claim that the Corps did not complete installation and testing of an RSW at John Day Dam by 2002. (NWF p. 17 fn 21).
22. Concerning this assertion, the Corps, working through the Regional Forum process during the 2000 to 2002 time frame, opted to re-prioritize John Day Dam surface flow bypass until additional information was obtained about the effectiveness of surface collection technology. The initial testing of the first RSW, which was installed and operational at Lower Granite Dam, began in 2001. At that time, surface bypass was a "promising concept" (2000 BiOp 9.6.1.4.1), and further testing was needed to verify its biological effectiveness.
23. At the recommendation of the FFDWRG, the Corps moved forward with evaluation of a 12 vs. 24-hour spill as a means of improving dam survival rather than moving forward with installation of RSWs at John Day Dam.
24. The systematic approach adopted through collaboration with regional sovereigns was used to determine whether installation of surface bypass at John Day Dam was advisable. Two TSWs were installed and operational for the 2008 migration season. (See Attachment 4, FFDRWG meeting notes representative of the decision making process.)
25. NWF also alleges that the Corps failed to investigate and install RSW's at Lower Monumental "in multiple spillway bays, as warranted." At the time this was included in the 2000 BiOp, it would have been premature to decide whether any bays, much

less multiple bays, would achieve the objectives of juvenile passage survival improvement.

26. Prior to reaching a decision to install surface collection at Lower Monumental, the region had extensive discussions about which projects were a priority and what design features would be effective at the Lower Snake projects. (See Attachment 5, examples of SCT discussions). To make a determination about an effective modification at Lower Monumental Dam, extensive physical hydraulic modeling and biological testing was conducted. This ensured that benefits to fish would be realized by installing the RSW at the appropriate spillbay and the most effective spill patterns would be used. Further, this process ensured that unintended consequences to other adult or juvenile passage routes, and other project purposes, were avoided. The 2008 biological results for the RSW at Lower Monumental Dam look very promising, due to the preparation work prior to installation.

27. A deliberate and thorough evaluation and development program for surface bypass facilities at Lower Monumental, as well as all of the other dams, has been conducted through the Regional Forum groups described above. Decisions as to the form and extent of passage improvements implemented have been made with these groups. Subsequently, post construction monitoring is conducted to verify the actual performance of the facilities and to determine if additional actions are necessary. Results over the last few years have demonstrated improved juvenile fish survival, and further increases are expected from the actions under the 2008 BiOp.

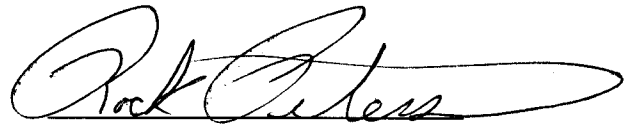
28. The 2008 BiOp provides for future modifications and operational changes to achieve the desired performance standards by incorporating adaptive management principles into project specific COPS.

Inaccuracies in Oregon's Assertions about 2008 BiOp Spill Volume Reductions

29. In my previous declaration, I noted that Mr. Bowles did not cite references for the assumed reductions in spill volumes (Peters Dec ¶19). In Mr. Bowles' second declaration, he provided several tables of information concerning spill volume reductions that were prepared by the Fish Passage Center (FPC). The Corps has reviewed Exhibit 1, Tables 5-12. Following the best available science, the 2008 BiOp recommended a reduction in spill at the Snake River collector projects and provided criteria for August spill cessation, which would reduce overall spill volumes. That being said, I believe Mr. Bowles' assertions about the magnitude of spill volume reductions is exaggerated. Based on the Corps' prior assessments of FPC methodology, faulty assumptions introduce error into the calculated estimates of spill volumes.

30. To demonstrate this point, the Corps compared the recently completed analyses prepared by the FPC and the Corps for the regional process examining current state TDG limits. In this example, the FPC estimated spill volumes are more than double those identified in the Corps' SYSTDG analysis. This is because the FPC methodology does not account for system-wide TDG production, and does not account for real-time generation capacity. (Attachment 6).

31. A more accurate representation of anticipated spill volumes requires an accounting for system-wide TDG levels and other factors affecting spill, which are accounted for in the SYSTDG analysis.
32. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 16 day of December, 2008, in Portland, Oregon.

A handwritten signature in black ink, appearing to read "Rock Peters", with a long horizontal flourish extending to the right.

Rock Peters
Senior Fisheries Biologist
Northwestern Division
U.S. Army Corps of Engineers