

KARIN J. IMMERGUT, OSB #96314
United States Attorney
STEPHEN J. ODELL, OSB #90353
Assistant United States Attorney
District of Oregon
600 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902
(503) 727-1000

RONALD G. TENPAS
Assistant Attorney General
SETH M. BARSKY, Assistant Section Chief
COBY HOWELL, Trial Attorney
BRIDGET KENNEDY McNEIL, Trial Attorney
Wildlife & Marine Resources Section
U.S. Department of Justice
Environment & Natural Resources Division
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1000
(503) 727-1117 (fx)

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*

Civil No. 01-640-RE

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*

Defendants.

**FEDERAL DEFENDANTS'
RESPONSE TO PLAINTIFFS'
REQUEST FOR A STATUS
CONFERENCE**

INTRODUCTION

Federal Defendants hereby respond to Plaintiffs' request for a status conference. In this most recent pleading, Plaintiffs contend that they require a status conference to "address the schedule for proceedings on the 2008 FCRPS BiOp . . . and such other matters as the Court or parties may wish to raise regarding proceedings on the 2008 FCRPS BiOp." Pls.' Request at 2. This request is inconsistent with the expedited briefing schedule Federal Defendants, National Wildlife Federation ("NWF"), and the State of Oregon have been discussing for the past three weeks and which has now been filed with the Court. Docket No. 1454. Admittedly, Plaintiffs raised this idea of a status conference in those discussions, albeit only after Federal Defendants agreed to a variation of Plaintiffs' proposed, compressed schedule. At that time it was, and still is, unclear to Federal Defendants why the parties would need a status conference to discuss a briefing schedule they have already agreed upon.

Plaintiffs' sole apparent motivation for this request is to encourage the Court to employ an independent science panel to review the 2008 FCRPS Biological Opinion ("BiOp"). Here again, it is unclear to Federal Defendants as to why the parties engaged in an exercise to reach an agreed upon schedule only to have Plaintiffs submit a proposal that, if granted, inevitably will delay the already compressed schedule. Besides the delay and effort of a status conference, any motion by Plaintiffs requesting the use of such a panel will likely be met with extensive briefing (similar to what occurred last time) and could derail the parties' ability to move forward with the various challenges to the 2008 BiOp in a timely manner. Moreover, the use of an independent science panel to review the merits of the 2008 BiOp would run afoul of established record review principles, but perhaps more importantly, such a proposal fails to honor the three-year,

court-ordered collaboration. This Court, with the assistance of Dr. Horton, is well equipped to review this BiOp without outside assistance, and Federal Defendants see no reason for delay.

DISCUSSION

This new 2008 FCRPS BiOp will be reviewed under the Administrative Procedure Act's ("APA") "arbitrary and capricious" standard. 5 U.S.C. § 706. Under this standard, judicial review is limited to "the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). And, in areas like this, requiring a "high level of technical expertise", courts are required to defer to an agency's determinations. *Lands Council v. McNair*, – F.3d –, No. 07-35000 *24-25 (9th Cir. July 2, 2008) (*en banc*) ("We are to be 'most deferential' when the agency is 'making predictions, within its [area of] special expertise, at the frontiers of science.") (citations omitted). Recently, the unanimous *en banc* Ninth Circuit noted that prior environmental jurisprudence had drifted away from this deferential standard of review. See *Lands Council*, at *12 ("Lands Council asks this court to act as a panel of scientists . . . But Land's Council's arguments illustrate how, in recent years, our environmental jurisprudence has, at times, shifted away from the appropriate standard of review and could be read to suggest that this court should play such a role."). Employing an independent science panel to review this BiOp would clearly run counter to the Ninth Circuit's newly-stated position.

Furthermore, the regional vetting of scientific issues involved in this consultation was a major feature of the collaborative remand process. Generally, there is no independent right to public comment for ESA Section 7 consultations. *Defenders of Wildlife v. EPA*, 127 S.Ct. 2518, 2531 n.6 (2007). However, the unique collaborative process here resulted in unprecedented

involvement by regional stakeholders and scientists who all had the opportunity to review and comment on the draft biological opinion, which resulted in a robust consideration of the issues before NMFS issued its 2008 BiOp. More importantly, the court-ordered collaboration created a scientific foundation upon which the parties could maintain constructive and productive discussions about what must be done for these fish. While the collaboration and these discussions did not produce unanimity (which is likely impossible), it did produce a consensus position that this region has not seen in many, many years. If the Court were to convene an independent science panel now, it would elevate the opinions of these particular scientists (some of which have no attachment to this region) above those that have participated in the court-ordered collaboration, intimately know these issues, and have spent the last three years investing themselves in developing an action and biological opinion that is not only good for the region, but complies with all applicable laws.

Finally, numerous and critical aspects of the 2008 FCRPS BiOp have already undergone independent scientific review. Most recently, on June 2, 2008, the Independent Scientific Advisory Board (“ISAB”) conducted a fourth review of NMFS’ COMPASS model. *See* Fed. Defs.’ Exhibit 1 (June 2, 2008 ISAB Review of COMPASS). In this review, the ISAB found that COMPASS is “a welcome addition to the analytical tools available to both scientists and managers.” *Id.* at 1. On each issue, COMPASS received high marks, so much so, this model was recently published in a peer-reviewed journal of *Hydrobiologia*. *See* Fed. Defs.’ Exhibit 2 (*Hydrobiologia* 2008). Similarly, with respect to the issue of measuring latent mortality (something the State of Oregon feels very strongly about), the ISAB reviewed the issue and while finding that latent mortality exists, it nonetheless “strongly advises against continuing to

try to measure absolute latent mortality. Latent mortality relative to a damless reference is not measurable.” Fed. Defs.’ Exhibit 3 at 1 (April 6, 2007 ISAB Review of Latent Mortality). On the issue of flow, the ISAB reviewed the Council’s Mainstem Amendments and determined that the effect would be “small” and that the “hypothesis that the effects on survival of salmonids in the lower Columbia River will be indiscernible is probably reasonable.” Fed. Defs.’ Exhibit 4 at 2-3 (November 9, 2004, ISAB Review of Mainstem Amendments). And finally, as indicated at the last status conference, Federal Defendants sought ISAB review on the issue of transport and spill as it relates to positive and negative effects on steelhead and spring chinook; more specifically, how this operation could best be balanced to provide the maximum benefit for these competing species. *See* Fed. Defs.’ Exhibit 5 (March 20, 2008 Letter to ISAB from NOAA Science Center). Federal Defendants have already sought independent science review on many of the critical scientific issues in this BiOp. There is no reason to duplicate this effort.

Throughout this process, NWF and the State of Oregon often have disagreed with the results of the collaboration and the ISAB evaluations. In contrast, the majority of the sovereigns in this region, as well as the ISAB, have reviewed many of the scientific underpinnings of this biological opinion and have found NMFS’ conclusions sound. Convening an independent science panel now will add time to an already-constricted schedule, negates three years of collaborative work, and duplicates previous scientific review. A status conference is unnecessary and the Court should deny the request. It is time to move forward with this litigation and Federal Defendants look forward to addressing the multitude of inaccuracies in NWF and State of Oregon’s complaints.

Respectfully submitted, July 25, 2008.

RONALD G. TENPAS
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

SETH M. BARSKY
Assistant Section Chief

/s/ *Bridget Kennedy McNeil*

COBY HOWELL
Trial Attorney
BRIDGET KENNEDY McNEIL
Trial Attorney
Wildlife & Marine Resources Section
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1000
(503) 727-1117 (fx)

Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c), and F.R. Civ. P. 5(d), I certify that on July 25, 2008, the foregoing will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon on all Parties enrolled to receive such notice. The following will be manually served by overnight mail:

Clarkston Golf & Country Club
Hoffman, Hart & Wagner
1000 SW Broadway
20th Floor
Portland, OR 97205

Confederated Tribes of the Colville Reservation
Office of the Reservation Attorney
P.O. Box 150
Nespelem, WA 99155

Walter H. Evans , III
Schwabe Williamson & Wyatt, PC
1600-1900 Pacwest Center
1211 SW Fifth Avenue
Portland, OR 97204

James W. Givens
1026 F Street
P.O. Box 875
Lewiston, ID 83051

/s/ Bridget Kennedy McNeil