



U.S. Department of Justice

Environment and Natural Resources Division

CHH

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*Wildlife and Marine Resources Section
P.O. Box 7369
Ben Franklin Station
Washington, DC 20044-7369*

*Telephone (202) 305-0210
Facsimile (202) 305-0275*

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By Electronic Mail

The Honorable James A. Redden
United States District Court
District of Oregon
1000 S.W. Third Avenue
Portland, OR 97204-2908

**Re: National Wildlife Federation, et al. v. NMFS, Civ. No. 01-640 RE (D. Ore.)/
May 23, 2007 Opinion and Order.**

Dear Judge Redden:

Federal Defendants have reviewed the Court's May 23, 2007 Opinion and Order and seek to confirm their understanding of the opinion. It is Federal Defendants' understanding that the Court's Order is intended to avoid situations where the Federal Columbia River Power System ("FCRPS") is operated in such a manner where fish operations would be secondary to power marketing and production. Federal Defendants fully understand the Court's instruction in this respect and have issued directives informing all BPA and Corps staff and supervisors involved in FCRPS operations that fish operations during the 2007 migration season must and will take priority over power marketing concerns. Federal Defendants will continue to operate the FCRPS system consistent with the 2007 Agreement, and to the extent operations are not specified in the 2007 Agreement, consistent with the 2004 Biological Opinion or any other operative document necessary to implement that Biological Opinion.

The Court's Order also uses language, however, that if strictly construed may be inconsistent with the 2007 Agreement or other operative documents. For that reason, Federal Defendants seek to confirm their understanding of the Court's Order. The Order states that "BPA shall operate the FCRPS turbines within the 1% peak efficiency standard." Opinion and Order at 6. This language, read literally, suggests that BPA and the Corps must operate every turbine at 1% peak efficiency at all times. However, operating at 1% peak efficiency at all times is a standard that is operationally impossible and inconsistent with other operative documents in that those documents allow for situations where it is permissible to operate outside of 1% peak efficiency to accommodate operational constraints and short-term fluctuations in the system.^{1/} Likewise,

^{1/} For example, the 1% peak efficiency is a range for megawatts (MWs) – typically between 100-200 MWs depending on the specific turbine. When Federal Defendants initially start that turbine, it operates outside of 1% peak efficiency for a period of time (below 100 MWs) until it achieves the desired operating range. This means that each time a turbine is started, it operates

there are situations with respect to spill where there are minor variances for short periods of time due to operational constraints or structural limitations. See Federal Defendants' Second 2007 Spill Implementation Status Report, Exhibits A and B. For example, when spillway gates are adjusted there are short-term deviations from the prescribed spill quantities that could potentially be classified as a "variance." Under a strict reading of the Court's opinion, Federal Defendants would be required to report each of these "variances" to the Court "as soon as practicable." Opinion and Order at 6. In other words, these are routine occurrences and as such they are fully recognized and contemplated in the operative documents, but a strict interpretation of the Court's Order would likely result in daily status reports to the Court.

Subject to the Court's concurrence, Federal Defendants will not read the Court's opinion to require the action agencies to operate the turbines at a standard beyond that already contemplated in the operative documents. Federal Defendants will also not read the Court's opinion to require status reports for each and every variance resulting from these routine, foreseeable situations that are inherent to operating a power system like the FCRPS. Instead, Federal Defendants will continue providing the Court with their monthly status reports noting variances. Should an event occur, and we do not anticipate that it will, where a decision is made to place the needs of fish second to those of power or an emergency occurs, we will notify the Court as soon as practicable.

If the Court has any questions or concerns, we can be reached at any time.

Sincerely,
/s/
Coby Howell
(503) 727-1023

cc. Counsel of Record

outside the 1% peak efficiency range for a short period of time before it attains the 1% standard. Similarly, if there is an immediate power requirement or disturbance, the turbine, or more specifically the Automatic Generation Control ("AGC"), would compensate by operating above or below the specified range (e.g. 100-200 MWs) for a short period of time until other sources could fulfill that power requirement. These are short term power fluctuations unlike what occurred on the night of April 3, 2007, where a choice was made to operate certain turbines outside of the 1% efficiency requirement for extended periods of time.