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**DEPARTMENT OF JUSTICE**
TRIAL DIVISION

January 23, 2004

**VIA FACSIMILE AND REGULAR MAIL**

Fred R. Disheroon
U.S. Department of Justice
Environment & Natural Resources Div.
Ben Franklin Station
PO Box 7397
Washington, DC 20044-7397

Re: *National Wildlife Federation et al. v. National Marine Fisheries Service*
United States District Court Case No. CV01-00640-KI

Dear Fred:

At last Friday's steering committee meeting, the court requested that the federal government discuss with co-managers how best to provide a collaborative scientific process as part of the pending remand. During the conversation following the steering committee meeting, it was agreed that the co-managers should prepare a letter suggesting a process for collaboration. Accordingly, we submit this proposal jointly, on behalf of the Nez Perce Tribe, the Confederated Tribes and Bands of the Yakama Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Washington Department of Fish and Wildlife, and the States of Idaho and Oregon.

The co-managers propose that collaboration should occur in three stages: (1) scoping; (2) co-manager review of data and work in specified, prioritized areas; and (3) workshops to discuss questions, concerns and suggestions arising from that review. We offer below a brief description of each step, as well as a projected timeline.

At the "scoping" stage, we propose a meeting among federal and co-manager scientists, at which the federal scientists will provide a detailed description of the purpose and status of each scientific project in the remand work plan.[1] The description should include an explanation

[1] As you note in your email of January 21, 2004, Brian Brown (NOAA's Assistant Regional Administrator for the Hydropower Division) set forth a thumbnail sketch of the science projects in the remand work plan during our conversation following the steering committee meeting last week. While Mr. Brown's description was helpful, for several reasons—including time constraints and the acknowledged absence of appropriate personnel on behalf of all participants—that conversation was no substitute for a true "scoping" session.

of who is leading the work on the given project and who else has been or will be involved. At the conclusion of the "scoping" stage, the co-managers will synthesize and collectively identify projects for collaboration.

The second stage would consist of information sharing and review. Federal scientists would share their data and analysis for each of the projects identified for collaboration by the co-managers. The shared information should include all available data (including any documentation that would facilitate interpretation of that data)—regardless of whether the federal scientists intend to rely on it—as well as documents reflecting internal discussions of methodology and analytic tools. While draft conclusions should be included, the background information is the key to facilitating a true collaborative process. The co-managers' scientists will then review the shared information.

The third and final step of the process—the actual collaboration—is for the federal and co-manager scientists on each of the identified projects to meet and discuss questions and concerns. This last stage should be interactive and independently facilitated. We suggest that NOAA-Fisheries assess the availability of Donna Silverberg Consulting—a firm with which NOAA has other pending contracts—to perform those services. To ensure a candid discussion of the science, the participants must commit—and the co-managers do hereby commit—to a "good-faith" umbrella over these meetings. Consistent with this commitment of good faith, the participants must agree that the contents of the discussions among the collaborating scientists shall not be used by or against any party in this litigation. Of course, that is not to say that any participant waives the ability to use any specific scientific or technical information, or to raise the substance of any issue, by participating in this collaboration.

With regard to timing, we will make ourselves available at your earliest convenience for the scoping meeting under the first stage of our proposed process. Within ten days of that meeting, we will identify the scientific projects for collaboration. We project that it will then take the federal scientists approximately two weeks to forward the pertinent information. Workshops would then occur on a schedule to be agreed upon by the participants. We anticipate that the entire process, if initiated promptly, could occur concurrently with other remand processes during the next three to four months, requiring no more than a 60-day extension of the current remand schedule.

We do anticipate that this collaboration will necessitate postponement of certain events scheduled on the December 24, 2003 working draft of the "FCRPS Remand Activities," submitted with the Second Quarterly Status Report. Specifically, as we indicated last Friday, we believe that it is particularly important to have co-manager collaboration on the draft "white papers." That collaboration will necessitate a slight modification of NOAA's proposed February 1, 2004 comment deadline. NOAA's deadline should follow—not precede—collaboration on the science underlying those papers.

This joint letter describes a proposed process for collaboration, consistent with our previous requests. Putting aside our concerns as co-managers that collaboration could and should have been preferred at the outset, we believe it is important to make the most of the

opportunity that remains, and we have structured this collaboration proposal to complement existing processes and hope that this plan will be acceptable to NOAA-Fisheries. Please feel free to call or write if you have questions.

Sincerely,

David E. Leith
Assistant Attorney General
Special Litigation Unit

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