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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.)	
)	Civ. No. 01-00640-RE
Plaintiffs,)	
)	FEDERAL DEFENDANT'S
v.)	SECOND QUARTERLY
)	STATUS REPORT
NATIONAL MARINE FISHERIES)	
SERVICE,)	
)	
Defendant.)	

Pursuant to this Court's Supplemental Order of July 3, 2003, the Federal Defendant hereby submits the following report on the status of the remand at the end of the second quarter.

OVERVIEW

The National Marine Fisheries Service (hereinafter "NOAA Fisheries" or "NOAA") and the Federal agencies responsible for operation of the Federal Columbia River Power System ("FCRPS")

(hereafter “the FCRPS Action Agencies”^{1/}) are making substantial progress toward completing the objectives of this remand by June 2, 2004. This report will inform the Court and the Parties of the details of this progress. In addition, this report will update the Federal agencies’ current plan for completing these remand proceedings within the one-year period established by the Court.

Generally, during the second quarter, NOAA has worked internally to identify issues, gather information and organize the production assignments necessary to prepare a revised Biological Opinion for issuance on June 2, 2004. NOAA and the FCRPS Action Agencies have also engaged their regional counterparts individually and through the Northwest Power Planning and Conservation Council (hereinafter referred to as the Northwest Power and Conservation Council or “NPCC”) and the Columbia Basin Fish and Wildlife Authority (“CBFWA”) to further the purposes of the remand. In addition to reporting on specific work products identified in the last status report, this report will identify several of the key issues relevant to this remand that NOAA is working on internally, and report on its collaboration efforts with the States, Tribes and other Federal agencies.

REMAND ACTIVITIES WORKPLAN

NOAA provided its FCRPS Workplan and Timeline as Exhibit A to the First Quarterly Status Report, which displayed NOAA’s intended activities and schedule for accomplishing the objectives of the remand. The Workplan and Timeline has been revised to reflect progress to date and the current expectations for products and timing. Further, for clarity, the document has been divided into its two component subsections – one addressing remand issues and one addressing BiOp implementation issues. These revised subsections are attached to this Second Quarterly Status Report as Exhibits A.1 and A.2 and, along with the other Exhibits hereto, will be posted on the Remand Website (<http://www.SalmonRecovery.gov/remand.shtml>). The revisions are largely descriptive refinements and adjustments to the schedule to reflect more developed assessments of the work required and the time needed for implementation. NOAA continues to work toward

^{1/} The FCRPS Action Agencies are the U.S. Army Corps of Engineers, U.S. Bureau of Reclamation and the Bonneville Power Administration (responsible for marketing hydroelectric power produced by the FCRPS).

completion of the remand activities with the issuance of a revised FCRPS Biological Opinion by June 2, 2004.

Biological Information Update

Additional NOAA work products evaluating the status of the affected Evolutionarily Significant Units (“ESUs”) have not yet been sufficiently developed and thus are not available for review at this stage of the remand. Additional data sets continue to become available to biologists studying and managing anadromous fish in the Columbia Basin, and NOAA is collecting them for incorporation into its review of the status of the affected ESUs. A central NOAA work product on ESU status will be the “Report of Updated Status of Listed ESUs of Salmon and Steelhead.” A February 2003 draft of this report was provided as Document E with the First Quarterly Status Report. NOAA anticipates that a final, updated version of this report, which includes 2001 returns, will be available at the end of March in time for the draft revised FCRPS Biological Opinion. The Interior Technical Recovery Team is currently processing 2002 data, which NOAA may also be able to incorporate into the March 24th draft. However, NOAA must first associate the new information with existing data in order to fully evaluate its importance. For example, if the new data is the number of gravel nests created by spawning salmon, known as redd counts, NOAA must, in coordination with other regional scientists, convert the number of redds to an equivalent number of fish per relevant stream reach and then determine such factors as the proportion of the spawning fish that may have been of hatchery origin.

Although some types of data for the 2003 return year likely will be used in developing the Biological Opinion, NOAA does not expect to use spawner return data for the 2003 return year in the revised opinion because it takes approximately one year to completely process such data. The data sets must be assembled and biologists must read thousands of scales from adult spawner carcasses to determine population age structure, read fish identification tags, determine the wild/hatchery ratios in the returns, and meet quality assurance/quality control standards. However, recent observations suggest that the status of many salmon populations is improving. A recent draft report by the Idaho Department of Fish and Game indicated that, in the case of wild Snake River Spring Chinook in Marsh and Bear Valley creeks in the Salmon River drainage, 2003 redd counts

were the highest on record since 1973, and the counts in Elk Creek were the second highest for the same period. Wild Summer Chinook redds in the Salmon drainage were down from 2001 and 2002, but still significantly higher than in previous years. Upper Columbia River Spring Chinook redds showed similar patterns.

The NOAA Northwest Fisheries Science Center continues to work on a number of technical papers relevant to the remand. These papers are NOAA's effort to update the science needed to assess the effects of the FCRPS on the affected salmon and steelhead ESUs. They will be instrumental in preparing the revised Biological Opinion. The topics of these papers concern, generally, mainstem flows, project fish passage, juvenile fish transportation, the effectiveness of hatchery fish when they spawn in the wild, estuary and near-shore ocean fish survival improvements, and ESU population trend and risk assessment methodology. A draft of this last paper was posted on the Remand Website on November 21st together with an announcement for a workshop held on December 5th at NOAA's Northwest Fisheries Science Center. Drafts of the other four science papers (mainstem flow and juvenile fish transportation currently are being prepared as a single paper) are also now available on the Remand Website.

NOAA's December 5th workshop for the technical paper concerning ESU population trend and risk assessment methodology included a panel of two academic scientists who prepared recommendations for NOAA in addition to summaries of the workshop presentations and discussion. The list of workshop attendees has been posted to the Remand Website, and other documents will be posted as they become available to NOAA. NOAA's revised technical paper will be available early in 2004.

Cumulative Effects and Future Federal Actions in the Environmental Baseline

NOAA Fisheries is evaluating the potential beneficial and adverse effects of Federal and non-federal projects on the environmental baseline of the Columbia Basin salmonid ESUs. For Federal actions, NOAA Fisheries is in the process of inventorying consultations listed in its Public Consultation Tracking System ("PCTS") from December 2000 through May 2004 to identify Federal projects which have completed consultation. Federal agencies have also been asked to identify projects (both beneficial and adverse) which will complete consultation by June 2004. For

completed non-federal actions, NOAA Fisheries will rely on existing project inventories such as the Pacific Coast Salmon Recovery Fund (“PCSRF”) report to Congress^{2/} and inventories completed as part of the NPCC’s Subbasin Planning process, as well as any other information provided to NOAA Fisheries.

In reviewing projects listed in these inventories, NOAA Fisheries will determine the type of project, its location, and its potential adverse or beneficial effects to listed salmon and their habitat. NOAA Fisheries will evaluate this information to determine the net overall effect on the environmental baseline. Concurrent with this process, NOAA Fisheries is soliciting from States, Tribes and planners information and advice as to projects which adhere to the “reasonably certain to occur” criteria of the regulatory “cumulative effects” definition (50 C.F.R. § 402.02). Letters setting out this process were sent to Federal agencies, States, Tribes, and State subbasin plan coordinators on November 26, 2003. (A representative letter was posted on the Remand Website.)

The September 30, 2003, FCRPS Remand Workplan and Timeline, attached to the First Quarterly Status Report, anticipated an “initial ‘what to count’ list” of future actions that are eligible for consideration in the environmental baseline and cumulative effects under the ESA consultation regulations. After further investigation and consideration of this task, NOAA determined that the majority of this initial inventory is available from NOAA’s Public Consultation Tracking System for Federal projects and from the PCSRF report that has been submitted to Congress. As discussed above, the information from these sources will be supplemented by information received from other sources including Federal agencies, the States and Tribes.

PARTICULAR ACTION UNDER CONSULTATION

As stated in our prior status report, the proposed action for the purposes of this consultation currently is the 1999 Biological Assessment ("1999 BA"), the same proposed action on which the 2000 BiOp was based. Unless the FCRPS Action Agencies notify NOAA that they believe consultation should proceed on the basis of a different action, NOAA’s task on remand will be to

^{2/} The Pacific Coastal Salmon Recovery Fund (“PCSRF”) was established by Congress in FY 2000 to provide grants to the States and Tribes to assist State, local, and Tribal salmon conservation and recovery efforts. A 2002 report to Congress is expected to be updated in 2004. A database used for that report is available to NOAA for its inventory of non-federal projects.

reconsider its original determination that the action in the 1999 BA was likely to jeopardize the continued existence of eight ESUs and, if so, develop an appropriate RPA that will satisfy the requirements of the ESA. However, NOAA recognizes that, as a consequence of the previous consultation on the 1999 BA, the FCRPS Action Agencies agreed to implement the 2000 BiOp's RPA in Records of Decision issued in 2001. Furthermore, as indicated in administrative documents and filings with this Court, NOAA intended, and the FCRPS Action Agencies understood, that the 2000 BiOp' RPA called for a flexible program which allows for the FCRPS Action Agencies to conduct salmon conservation measures more efficiently and to account for new information. This iterative process is one of the driving forces behind the preparation of annual implementation plans. Through the implementation planning process, the actions described in the 2000 RPA and the 2001 RODs are further clarified and modified to meet the original intent of the agencies in adopting the RPA and its associated implementation framework. (See generally, Chapter 9.4 of the 2000 BiOp).

Thus, while the remand consultation is currently based on the 1999 BA, NOAA expects (and the current remand schedule contemplates) that, in January, the FCRPS Action Agencies may update their proposed action and/or revise their implementation plans to address the recommendations in NOAA's 2003 Evaluation Report.^{3/} Finally, the FCRPS Action Agencies may propose, when they submit any plan revisions, that the scope of the current remand consultation be on the action adopted through the 2001 RODs (and as modified through the BiOp's adaptive management process), rather than on the action proposed in the 1999 BA. If so, then the action described in the 2001 RODs as modified, rather than the 1999 BA, will become the focus of the remand consultation.

Documents that represent modifications to the original Records of Decisions include documents such as the FCRPS Action Agencies' 1- and 5-Year Implementation Plans, including

^{3/} Concurrently, in response to the Northwest Power and Conservation Council's Mainstem Amendment, the Columbia Basin Fish and Wildlife Authority and the NPCC are leading public processes that are examining potential changes in FCRPS summer spill levels. Last August, the Federal Executives for NOAA, BPA, and the U.S. Army Corps of Engineers decided to consider alternatives to spill that could achieve the same biological objectives for salmon and steelhead at less cost. If changes in spill would reduce in-stream passage survival, means by which such reductions could be offset by other measures will be considered, thereby providing equal or better biological benefits to ESA-listed species at lower cost, as well as considering the effects on non-listed species and providing appropriate offsets for those impacts. Decisions regarding the above will be made through existing processes set forth in the 2000 BiOp.

subsidiary plans such as Water Management Plans, Capital Investment Plans, and Habitat Plans.^{4/}

APPLICATION OF ESA § 7(a)(2) JEOPARDY STANDARD

The jeopardy standard for all consultations under section 7 of the Endangered Species Act (“ESA”) is established in §7(a)(2) of the ESA, which requires that “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species” 16 U.S.C. § 1536(a)(2). Joint NOAA Fisheries/Fish and Wildlife Service (“FWS”) consultation regulations adopted in 1986 define the phrase “[j]eopardize the continued existence of” to mean “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

NOAA Fisheries has applied the jeopardy standard in its past FCRPS consultations (including the remanded 2000 consultation) using analytical tools and derivative metrics developed for each consultation based on the needs of the species, the context of the consultation and the available data at the time of the consultation. In the 2000 BiOp, NOAA used a new analytical framework, which is generally described in Chapter 1.3 of the BiOp. That framework included a species-level analysis of the listed fish in all their life stages across the full geographic range of the ESU, which was not limited to the action area for the consultation. That framework also estimated likelihoods of survival and recovery based on assumptions that some past Federal and non-federal practices would continue unchanged for up to 100 years into the future, although some of the Federal practices have not undergone consultation and some of the non-federal practices may not be reasonably certain to occur. While the use of these tools has been qualitative in nature, they have been controversial, and the subject of litigation. Accordingly, NOAA cannot continue to use the

^{4/} Also, NOAA is mindful that there was confusion among the Parties as to the actual scope of both the proposed action and the proposed RPA in the 2000 BiOp. For instance, certain Parties apparently believed that both the Basinwide Salmon Recovery Strategy and the Upper Snake Projects were part of the action or RPA under consultation, even though this was not the case. Both the FCRPS Action Agencies and NOAA are taking steps to ensure that no such confusion will be created in the new Biological Opinion.

framework from the 2000 analysis without revision.

In the current consultation NOAA Fisheries will apply the statutory and regulatory jeopardy standard in a manner that considers current risks to and needs of the species, the context of this consultation and the available data. This court's May 7, 2003 Order has suggested that some assumptions used in the 2000 consultation may no longer be appropriate.^{5/} In addition, it may not be appropriate to use certain analytical approaches in the same manner as in the past. NOAA scientists are conducting a technical review of the methods applied in the 2000 Biological Opinion and will be releasing a report with recommendations shortly.^{6/}

As with all past consultations, NOAA Fisheries will focus its analytical effort on meeting its legal duty to determine whether the proposed action or a reasonable and prudent alternative "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. Currently NOAA is identifying and evaluating all scientific information relevant to these standards, which includes the development of the six technical papers (discussed above and in the remand workplan, Exhibit A.1), for which NOAA is currently seeking review and comment, and the upcoming final report of the West Coast Salmon Biological Review Team.

STATE AND TRIBAL PARTICIPATION

NOAA has designed a process for implementing the remand, including developing the various scientific work products that will be factored into NOAA's analysis for the forthcoming Biological Opinion, to include many opportunities for interested parties, including the States and

^{5/} For example, the models NOAA Fisheries employed for the 2000 BiOp assumed that the expected FCRPS mortality rates and the current rates of mortality, from all causes, in other life stages would continue indefinitely into the future, in effect projecting harmful actions into the future that did not meet the "reasonably certain to occur" standard.

^{6/} Analytical issues being reviewed include treatment of uncertainty, recommendations for improving robustness to the choice of base years, performance of the methods in the face of correlated ocean conditions, and treatment of density dependence in estimating population growth rate at different levels of abundance (*e.g.*, current high returns).

Tribal entities, to provide input. To elaborate upon the process steps noted in the workplan, NOAA has prepared an overview of the current extensive opportunities for coordination and consideration of available information relevant to the remand and RPA implementation. This process overview is submitted herewith as Exhibit B. That document details the following existing and proposed opportunities relating to the remand:

- Establishment of Goals Representing the Characteristics of Viable Salmonid Populations: Information relating to the characteristics of viable salmonid populations, which will be important for the analysis on remand, is currently being developed through two Technical Recovery Teams (“TRTs”) formed by NOAA for the Columbia River Basin (one for the Lower Columbia and Willamette, and one for the Interior Basin). Representatives of affected State and Tribal interests are included on the TRTs along with other scientists selected for their expertise.
- Development of Current Summaries of Information on Key Scientific Questions: As described more fully in Exhibit B, a number of white papers and technical memoranda regarding key scientific issues are currently under development by NOAA, with various opportunities for regional input and comment, including participation by States and Tribes. For example, NOAA is seeking State and Tribal comments on various draft technical memos (for which either complete drafts or draft tables of contents were posted on the remand web site in November, 2003). Also, for these work products, NOAA is utilizing existing fora such as CBFWA, the processes of which involve direct review and comment from State and Tribal organizations, as an additional mechanism for bringing together input and comments from interested parties.^{2/} For one of its papers (the technical memorandum on an analytical approach to estimating the population growth rate), NOAA held a workshop on December 5, 2003, at NOAA’s Northwest Fisheries Science Center, which certain State and Tribal representatives attended and in which they participated.
- Refining What to Count for Updating the Environmental Baseline and Cumulative Effects: By letter dated September 24, 2003, NOAA has sought information from, *inter alia*, States and Tribes, regarding non-federal actions that may affect salmonid habitat. NOAA has asked to receive information by January 9, 2004.
- Developing How to Count Tributary Habitat Changes in the Environmental Baseline and Cumulative Effects: In connection with its efforts to develop a method for estimating the intrinsic potential of tributary habitat (under both historical and current conditions), NOAA presented its new approach as applied to the Yakima and the Grand Ronde subbasins to a group of Northwest watershed experts on December 11, 2003. NOAA has also been coordinating informally with State and Tribal subbasin planning representatives as it developed the Yakima and Grand Ronde pilots. Discussions between NOAA and State and Tribal representatives involved in NPCC subbasin efforts will be coordinated through the NPCC’s Regional Coordinating Group. The current plan for release of the draft basinwide review is

^{2/} With regard to the technical memorandum on the feasibility of attaining survival improvements through habitat work in the estuary, the research plans that are discussed therein were first discussed in the the Science Workgroup of the Lower Columbia River Estuary Partnership (“LCREP”), which also involves State and Tribal review and comment.

late February or early March 2004.

Although NOAA continues to believe that the current work plan represents a reasonable and inclusive plan for facilitating input from interested parties, including State and Tribal entities, NOAA is open to exploring the feasibility of holding additional discussions to discuss relevant information and the application of standards before NOAA completes its drafting of a revised Biological Opinion (which is currently scheduled for distribution at the end of March). Thus, NOAA may refine the plan to add a series of facilitated discussions in the region (*e.g.*, Portland, Boise, Spokane) in February to hear the views of State and Tribal co-managers on how the information that will have been reviewed by then could be best synthesized into a Biological Opinion.

On November 5 and 20, 2003, the Attorneys' Steering Committee held telephone conference calls to discuss State and Tribal involvement in the development of NOAA work products for the remand and implementation of the existing 2000 FCRPS BiOp. Although it was clear in those discussions that certain Parties were generally dissatisfied with the degree of participation provided for in the Federal workplan, the Parties did not offer any specific proposals for particular, additional process steps.^{8/} In addition, some Parties appeared to lack a clear understanding of the various fora that already exist, their roles, and their utility for the various remand and implementation activities.

The overview provided above clarifies those issues and demonstrates the ample opportunities already contemplated for all interested parties to obtain information and provide suggestions to fully inform the Federal decision making. Obviously, with the tight time frame in which NOAA must work to produce a revised Biological Opinion, there is a limit to the staff resources available that can be devoted to such processes (recognizing that the same staff are also needed to develop and document these important decisions). Absent a better plan under the circumstances, the Federal agencies intend to stay the current reasonable course, with the possible addition of the mentioned discussions in February, if that idea proves feasible.

^{8/} Subsequently, on December 29, undersigned counsel received a letter (dated December 18) from the Washington Department of Fish and Wildlife and the Columbia River Inter-Tribal Fish Commission ("CRITFC") that sets forth their position. We are currently reviewing that letter and anticipate sending a reply prior to the Steering Committee meeting set for January 16, 2004.

REASONABLE AND PRUDENT ALTERNATIVE IMPLEMENTATION

On December 23, 2003, NOAA issued its 2003 Implementation Progress Evaluation Report (hereafter "Evaluation Report")^{2/} concerning the FCRPS Action Agencies' 2003 Progress Report. Pursuant to the Court's Supplemental Order of July 3, 2003, that document is hereby submitted to the court with this Status Report as Exhibit C.2, and is also posted on the NOAA Regional Website, <http://www.nwr.noaa.gov/1hydro/hydroweb/fedrec.htm>. (The transmittal letter from NOAA to the FCRPS Action Agencies forwarding the Evaluation Report is attached as Exhibit C.1).

This report is one of three formalized check-ins (in 2003, 2005 and 2008) called for by the 2000 FCRPS BiOp. The questions to be addressed in 2003 include, *inter alia*, 1) whether "the Action Agencies have obtained the funding and authorizations necessary for timely implementation of key actions" identified in the RPA and subsequent annual planning processes and 2) whether "the Action Agencies have adopted detailed site-specific, offsite mitigation plans to meet the offsite mitigation performance standards." BiOp, at 9-41 to 42.

Under the 2000 BiOp, there are three potential results of the 2003, 2005, and 2008 check-in evaluations. If the RPA is being implemented and, in 2005 and 2008, the status of the stocks are improving (a "green-zone" evaluation), then there is no reason to change the RPA. If the RPA is in danger of failure either because it appears that it is not going to be fully implemented or because the status of the stocks appears, in 2005 or 2008, to be worsening (a "yellow-zone" evaluation), then NOAA may suggest changes that can be made by the FCRPS Action Agencies within their authority to either improve implementation or improve survivals in order to put the RPA back on track. Finally, if there is a failure of the RPA due to implementation or biological reasons, and NOAA is unable to identify any corrective measures within the FCRPS Action Agencies' current authorities which would allow them to meet the performance standards (a "red zone" evaluation), then it is

^{2/} This document was referred to as "NOAA's Findings Letter" in the First Quarterly Status Report and its attached FCRPS Remand Workplan and Timeline. The 2000 FCRPS BiOp, however, calls this an "Evaluation Report" concerning the FCRPS Action Agencies' implementation of the RPA as of 2003 and thus, when it was issued, it was entitled NOAA's 2003 Implementation Progress Evaluation Report. See Exhibit C.2 hereto. That document should not be confused with NOAA's separate evaluations of the single year progress reports in 2001, 2002 and 2003, or with NOAA's approval of the FCRPS Action Agencies' 1- and 5-Year Implementation Plans.

likely that the agencies will have to either seek additional authority or reinitiate consultation. See BiOp, at 9-39 (flow chart).

NOAA recently concluded the 2003 evaluation called for under Chapter 9.5.2 of the 2000 BiOp and concluded that the current implementation was best characterized as being in the “yellow zone.” NOAA stated:

“The primary reason for our determination that expectations are not being met is the delay of: 1) key actions that represent preparations for implementation of additional survival improvement measures; and 2) key planning, research, and monitoring actions that are important for implementation and evaluation of progress by 2005 and 2008 (i.e., primarily Questions 2, 3, and 5). We note that the delays cannot be remedied, but that current deadlines and milestones, as noted in the Action Agencies’ Implementation Plans, represent a more realistic schedule and should be adhered to.

“[W]hile there has been a slower start than anticipated in several areas, NOAA Fisheries recognizes that there are processes currently underway to develop the delayed products and we expect their completion within 1-2 years. While not consistent with the initial schedules developed in the Biological Opinion, it is our current opinion that, on balance, this programmatic effort, in concert with the additional recommended actions listed below, is adequate for the FCRPS Action Agencies to continue to avoid jeopardizing the listed stocks or adversely modifying designated critical habitat. In spite of the delays in developing planning products and initiating some monitoring programs, implementation of offsite mitigation actions has been proceeding. The main impact of the delayed planning products is reduced certainty that the implemented actions are of the appropriate type and magnitude to meet performance standards for each ESU. However, the offsite mitigation actions implemented to date have been regionally reviewed and coordinated to take advantage of the best available information and expertise of regional managers regarding needs of listed fish within each province. The delay in implementing an action effectiveness monitoring program means that the 2005 and 2008 evaluations will be based on less quantitative information than originally expected. We expect more qualitative information to support the 2005 evaluation. These delays are generally not a result of lack of legislative authority or funding limitations. We conclude that, at this point, new authorities or a change in the fundamental direction of Biological Opinion implementation are not warranted.”

Evaluation Report (submitted herewith as Exhibit C.2) at 16.

On November 17, 2003, the FCRPS Action Agencies submitted to NOAA their 2004/2004-2008 Implementation Plan called for under Chapter 9.4 of the 2000 FCRPS Biological Opinion. NOAA is expected, by the terms of the BiOp, to determine whether it will approve this plan within 45 days. The NOAA Evaluation Report, however, contains specific recommendations intended to address concerns for the current implementation. These recommendations would be incorporated into the Implementation Plan by the FCRPS Action Agencies.

NOAA’s finding for the 2003 Check-in, together with the FCRPS Action Agencies’ 2003 Progress Report, constitute our current response to the Court’s requirement (in its Supplemental

Order of July 3, 2003), for a “comprehensive and cumulative assessment of the progress being made.” NOAA’s determination that its concerns for the RPA implementation can be corrected within the FCRPS Action Agencies’ existing authorities, by adopting its specific recommendations from the Evaluation Report, represents its assessment that “meaningful and specific progress” will have been made once its recommendations, or their equivalent, are incorporated by the action agencies into future action plans. Thus, NOAA’s review indicates that it is unnecessary at this time to identify additional ameliorative measures.

In addition, as a practical matter, while the Federal agencies are working to fully implement the existing program for the FCRPS based upon the 2000 BiOp’s RPA, consistent with the Court’s decision to leave it in place during the remand, that program and the analysis supporting it will necessarily change to address the Court’s concerns, as well as conditions that have changed since 2000. After a new Biological Opinion is issued (expected June 2004) the question of whether or not the FCRPS Action Agencies are making meaningful and significant progress implementing the 2000 RPA will lose its relevance. The reference point will then be the new Biological Opinion and the FCRPS operation it addresses.

CONCLUSION

NOAA and the FCRPS Action Agencies have organized these remand proceedings to address the matters raised in the Court's Opinion of May 7, 2003, and are making significant progress to accomplish the remand by June 2, 2004. The Biological Opinion to be produced will develop and implement responses to the Court's identification of deficiencies in the 2000 FCRPS BiOp. The Federal agencies will apply these corrections to the biological data and analysis that is current as of 2004, taking into account the current status of the species.

Respectfully submitted this 30th day of December, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Federal Defendant's Second Quarterly Status Report, with Exhibits, was served on the following on December 30, 2003, by electronic notice from the Clerk upon electronic court filing, except that counsel indicated in **bold-face font** were served by facsimile and first-class U.S. mail:

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