

DWIGHT C. HOLTON  
Interim 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

IGNACIA S. MORENO  
Assistant Attorney General  
SETH M. BARSKY, Assistant Section Chief  
COBY HOWELL, Trial Attorney  
BRIDGET McNEIL, Trial Attorney  
MICHAEL R. EITEL, Trial Attorney  
Wildlife & Marine Resources Section  
CYNTHIA J. MORRIS, Trial Attorney  
Environmental Defense 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) 727-1023  
(503) 727-1117 (fx)

*Attorneys for Defendants*

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

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NATIONAL WILDLIFE FEDERATION, *et al.*

Civil No. 01-CV-640-RE

Plaintiffs,

v.

NATIONAL MARINE FISHERIES

SERVICE, *et al.*,

Defendants.

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**NOTICE OF  
COMPLETION  
OF REMAND**

## **I. COMPLETION OF THE LIMITED, VOLUNTARY REMAND**

By letter dated February 10, 2010, the Court advised the parties that it believed the Adaptive Management Implementation Plan (“AMIP”) is a “positive development.” See Docket No. 1749 at 1. The Court further stated that Federal Defendants “must formally incorporate the AMIP into a final agency decision before [the Court could] consider it in evaluating” the 2008 Federal Columbia River Power System biological opinion (“2008 BiOp”). Id. The Court concluded it had discretion to allow Federal Defendants to conduct a limited voluntary remand to do so. Id. The Court highlighted the benefits of this approach as the most practical and efficient way to incorporate the AMIP, as it did not require the agencies to “reopen the entire decision-making process,” “start over from scratch,” develop a new jeopardy framework, or “[jeopardize] the progress made through the regional collaborative process.” Id. at 1-2. The Court stated that it would not “dictate the scope or substance” of the remand, but that the remand must include new and pertinent scientific information relating to the proposed action, such as recent climate change data, and adequately address whether that data requires additional analysis or mitigation to avoid jeopardy. Id. at 2. The Court’s proposed order allowed Federal Defendants three months to accomplish the limited voluntary remand. See Docket No. 1749-1. Federal Defendants accepted the Court’s proposed order, which the Court entered on February 19, 2010. See Docket No. 1750.

As detailed below, NOAA used the 90 day timeframe of the limited voluntary remand to identify, gather, and evaluate recent studies, and to seek input from the parties regarding new pertinent scientific information. It also sought peer review of the new science, reviewed and evaluated the responses from that peer review and the science to determine what additional steps were required, worked with the Action Agencies to evaluate this information and appropriate additional steps, and on May 20, 2010, issued the 2010 Supplemental Biological Opinion for the

FCRPS.

In addition to review by the NOAA Fisheries Service Northwest Regional Office and its Northwest Fisheries Science Center, NOAA evaluated three external sources of information during the remand. On March 12, 2010, NOAA provided to all parties and the Independent Science Advisory Board (“ISAB”) a 40-page list of references it was considering during the remand and solicited their views on the significance of those references to the remand process and any additional information concerning the effects of operation of the FCRPS, as described in the 2008 BiOp and the AMIP, on salmonids and other protected species. See Fed. Defs.’ Exhibit 1. The focus of this request was on new information that was not considered in the BiOp, that is relevant to the BiOp or AMIP, and that can be shown to be reliable, such as through peer review. NOAA received responses from the NWF plaintiffs, the state of Oregon, the Nez Perce Tribe, the Colville Tribe, the Columbia-Snake Rivers Irrigators Association and the ISAB.<sup>1/</sup>

In addition to the information received from the parties and ISAB, NOAA sent the March 12, 2010, solicitation letter to the group of independent expert scientists who were invited to participate in the July 2009 workshop convened by the Obama Administration to assist its review of the 2008 BiOp . As requested of the parties and ISAB, NOAA asked these scientists their views on the significance of the 40-page list of references to the remand process and for any additional information concerning the effects of operation of the FCRPS. On March 30, 2010, NOAA further asked these scientists to provide their individual views on two points: (1) whether any of the known information should cause NOAA to consider whether the 2008 BiOp no longer reflects the best science or commercial data available, and (2) whether criticisms of the AMIP in two documents – a February 2010 Review of the AMIP by the Western Division of

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<sup>1/</sup> In addition, NOAA received and considered comments from the Cowlitz Tribe, which is not a party to the litigation.

the American Fisheries Society (AFS) and the 2010 Open Letter to Dr. Lubchenco from Don Chapman and Jim Martin – reflect the best available scientific and commercial data. NOAA received the individual views on these two points from three of these scientists.

Finally, NOAA evaluated information received from a third source of information, the Action Agencies themselves, who provided information for NOAA to consider supplementary to their earlier Biological Assessments for the FCRPS. While the agencies constantly worked with NOAA during the remand, major sources of additional information include the 2008 Annual Progress report, the 2010-2013 Draft Implementation Plan, and information on how climate change interacts with water temperature and habitat actions as well as information on the Columbia Basin Fish Accords..

On May 3, 2010, the Action Agencies formally requested reinitiation of consultation under the Endangered Species Act (“ESA”), explaining their understanding that the reinitiated consultation differs from an initial consultation because it relies, in part, on the information developed for the prior biological opinion, together with any information since the prior consultation and its purpose is to reconsider and update or supplement that biological opinion. See Fed. Defs.’ Exhibit 2. The Action Agencies clarified that the reinitiated consultation would include all new relevant information in compliance with ESA Section 7(a)(2), including additional information from the Action Agencies, but that a new Biological Assessment would not be required. Id. at 1-2. The Action Agencies requested confirmation of their understanding of the reinitiation process and inquired as to the scale and the timeframe for the reinitiated consultation. Id. at 2. On May 4, 2010, NOAA responded affirmatively, explaining that consultation would be scaled to the analytical needs of the factual situation, in accordance with NOAA’s interpretation of its own reinitiation regulation, 50 C.F.R. § 402.16, and past practice in reinitiated consultations. See Fed. Defs.’ Exhibit 3. NOAA further confirmed that it was

reconsidering all of its ESA determinations concerning the effects of FCRPS, as operated pursuant to the 2008 BiOp's RPA and the AMIP, and that the reinitiation process would build on the substantial record developed through years of consultation and the collaborative efforts with the region's states and tribes. Id. at 2.

For the duration of the remand, NOAA staff, with input from its Northwest Fisheries Science Center, worked with the Action Agencies to evaluate all of this information and develop appropriate additional analysis and actions, resulting in the 2010 Supplemental Biological Opinion. See Fed. Defs.' Exhibit 4. In the 2010 Supplemental BiOp, NOAA first discusses the significance of the new science and how it relates to the 2008 BiOp's analysis and conclusions. Following that review, NOAA (with the agreement of the Action Agencies) amended the AMIP in order to assure maximum responsiveness to the new science by adding the following further actions: (i) studies of thermal refugia, (ii) enhancement of adult fish population monitoring, (iii) water temperature monitoring, and (iv) a study of the density-dependent impact of hatchery fish on listed salmonids. NOAA then integrated the amended AMIP into the 2008 BiOp and its RPA as new RPA Action 1A. The 2010 Supplemental Biological Opinion documents NOAA's review of the entire RPA, including new Action 1A. NOAA's review determined whether the RPA, as amended, avoids jeopardizing the listed salmon and steelhead species and avoids destroying or modifying designated critical habitat, and concluded that the RPA is not likely to jeopardize the continued existence of species listed as endangered or threatened (i.e., when its effects are combined with the effects of the environmental baseline and cumulative effects the species can be expected to survive with an adequate potential for recovery), nor result in the destruction or adverse modification of their designated critical habitat. Lastly, NOAA reconsidered the appropriateness of the Incidental Take Statement in light of the supplemented actions, updating incidental take allowed to be consistent with the entire RPA.

## **II. COMPLETION OF AMENDMENT OF AGENCY ACTION AND COMPILATION OF THE ADMINISTRATIVE RECORDS**

After issuance of the 2008 BiOp, the Action Agencies each issued a Record of Decision (“ROD”), detailing how implementation of the 2008 BiOp’s Reasonable and Prudent Alternative (“RPA”) satisfied their substantive obligations under Section 7 of the Endangered Species Act (“ESA”). See Corps 00026 (Corps ROD); Corps 00013 (BPA ROD); BOR 00005 (BOR ROD). In light of the 2010 Supplemental BiOp, the Action Agencies will revisit these RODs and will issue amended RODs by June 11, 2010.<sup>2</sup> The Federal Defendants will then undertake compilation of the supplemental administrative records, as directed by the Court. See Docket No. 1750 at 3 (the agencies are directed to provide the Court and the parties with a supplemental administrative record as soon as practicable.) The supplemental administrative records will include all non-privileged material from the Administration’s review and development of the AMIP. In addition, the supplemental administrative records will contain all non-privileged materials related to the voluntary limited remand, concluding on May 20, 2010, for NOAA, with the issuance of the supplemental biological opinion, and June 11, 2010, for the Action Agencies, with the issuance of amended RODs. Each agency requires approximately 90 days to assemble, organize, and index the relevant documents as well as review them for applicable privileges. Accordingly, the supplemental administrative records will be filed on August 27, 2010.

## **III. FURTHER JUDICIAL PROCEEDINGS**

The Court recognized that the result of integrating the AMIP into the 2008 BiOp would be that the Court could “then review the merits of a single, comprehensive final agency action.” Docket No. 1749 at 2. Federal Defendants agree. Issuance of the 2010 Supplemental BiOp does

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<sup>2</sup> BPA will be providing notice of its amended ROD and supplemental administrative record to the Ninth Circuit as well in American Rivers v. Bonneville Power Administration, 9th Cir. No. 08-74597.

not affect the relevance of the prior proceedings concerning the 2008 BiOp, including the summary judgment briefing and argument, as well as additional briefing and argument on the merits of the AMIP.

The Court stated that the limited voluntary remand ordered in February 2010 was without regard to the validity of the 2008 BiOp and that the legal adequacy of the agency actions, including the underlying 2008 BiOp, would be reviewed upon completion of the limited remand. Docket No. 1750 at 2. The hundreds of pages of briefing concerning the merits of the 2008 BiOp, and the extensive oral argument received in March 2009, remain just as relevant to this Court's evaluation as they did before the limited remand. Like the merits of the 2008 BiOp, many aspects of the AMIP have been already briefed to this Court, culminating in oral argument in November 2009. Additionally, several Plaintiffs took the opportunity to provide additional critiques of the AMIP during the parties' supplemental briefing on the issues surrounding the procedural Administrative Procedure Act issues.

Because the 2010 Supplemental BiOp explicitly and completely integrates the 2008 BiOp, the situation before the Court is distinguishable from the line of cases which instruct that issuance of an entirely new biological opinion moots a challenge to the preceding biological opinion. See, e.g., Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1124 (9th Cir.1997) (the issuance of a superseding BiOp moots a challenge to the prior BiOp); Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv., 56 F.3d 1071, 1075 (9th Cir.1995) (same). In these cases, as well as Columbia Snake River Irrigators Ass'n v. Gutierrez, 154 Fed.Appx. 661 (9th Cir. 2005), the agency issued a "replacement document" which superseded the prior biological opinion. That is not the situation here.

Instead, as explained above, the AMIP has been modified to include additional beneficial actions and studies, which the parties have not briefed. Furthermore, the 2010 Supplemental

BiOp has new determinations regarding the implementation of the amended RPA on the listed species and designated critical habitat, as well as the sufficiency of the ITS. Finally, Federal Defendants will be filing the supplemental administrative records for the proceedings leading to issuance of the the 2010 Supplemental BiOp (including the materials related to the development of the AMIP). Accordingly, it is only fair that parties wishing to provide supplemental briefing on these new matters be afforded a reasonable chance to do so. However, since the matter has been pending for some time, the supplemental briefing process should be designed to minimize the delay in the final resolution of this case.

Accordingly, the Federal Defendants propose the following schedule:<sup>3/</sup>

Supplemental briefs filed by Plaintiffs and other similarly situated parties	30 days after filing of supplemental administrative record
Supplemental briefs filed by Federal Defendants and similarly situated parties	30 days after service of Plaintiffs' briefs

The briefs on both sides should be limited to the administrative records and governed by Local Civil Rule 7-2(b), which limits memoranda to 35 pages or less . After receiving and evaluating any supplemental briefs, in addition to the previously-filed briefs in this case, the Court should proceed to issue an opinion on the pending cross-motions for summary judgment.

#### **IV. CONCLUSION**

The Court's order of limited voluntary remand provided the Federal Defendants with the opportunity to integrate the AMIP and its administrative record into the 2008 BiOp as well as to address any new pertinent scientific information.

As detailed above, much work was undertaken over the course of the last three months

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<sup>3/</sup> The Federal Defendants' proposed schedule provides ample time to the Plaintiffs as they already possess a good deal of the material that will be included in the supplemental administrative record. They obtained much of this material through a Freedom of Information Act ("FOIA") request, and indeed, previously filed some of that material with the Court.

leading to issuance of the 2010 Supplemental BiOp. The Federal Defendants will continue their work on the ground, including with the sovereign parties in the Regional Implementation Oversight Group (“RIOG”) and various technical groups to effectively implement the 2010 Supplemental BiOp, taking into account the perspectives of the sovereign parties. The RIOG affords the opportunity for the Federal Defendants and the other regional sovereigns, including Oregon and the Nez Perce Tribe, to engage in seeking common ground to protect these species using the best available science. The Federal Defendants are committed to this successful outgrowth of the court-ordered remand Policy Work Group

At the same time, through the remand process, the Federal Defendants have undertaken substantial work to meet the Court's direction, and now seek an expeditious resolution of this case. Federal Defendants are confident that the 2010 Supplemental BiOp provides the Court with a strong basis for ruling in our favor and letting Federal Defendants and their partners fully focus for the next eight years on implementation for the benefit of the fish.

Respectfully submitted: May 20, 2010.

IGNACIA S. MORENO  
Assistant Attorney General  
United States Department of Justice  
Environment and Natural Resources Division

SETH M. BARSKY, Assistant Section Chief  
COBY HOWELL, Trial Attorney

/s/ Bridget Kennedy McNeil  
BRIDGET KENNEDY McNEIL, Trial Attorney  
MICHAEL R. EITEL, Trial Attorney  
Wildlife & Marine Resources Section  
CYNTHIA J. MORRIS, Trial Attorney  
Environmental Defense Section  
c/o U.S. Attorney's Office  
1000 SW Third Avenue

Portland, OR 97204-2902  
(503) 727-1023  
(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 May 20, 2010, 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:

Dr. Howard F. Horton, Ph.D.  
U.S. Court Technical Advisor  
Professor Emeritus of Fisheries  
Department of Fisheries and Wildlife  
104 Nash Hall  
Corvallis, Oregon, 97331-3803  
FAX: (541)-737-3590  
(hortonho@onid.orst.edu)

Walter H. Evans, III  
Schwabe Williamson Wyatt, P.C.  
1211 S.W. Fifth Ave  
1600-1800 Pacwest Center  
Portland, OR 97204  
([wevans@schwabe.com](mailto:wevans@schwabe.com))

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

/s/ Bridget Kennedy McNeil