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American Rivers * Friends of the Earth * Idaho Rivers United * Institute for Fisheries Resources * National Wildlife Federation * Northwest Sportfishing Industry Association * NW Energy Coalition * Pacific Coast Federation of Fishermen's Associations * Save Our Wild Salmon * Sierra Club * Trout Unlimited * U.S. Public Interest Research Group

February 20, 2004

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Re: Summer Spill Analysis Comments

Dear Sirs:

We are writing on behalf of the Save Our *Wild* Salmon Coalition and the undersigned individual organizations to comment on the *Summer Spill Update and Analysis* (January 21, 2004). We appreciate this opportunity and hope that our comments provide your agency with useful guidance to ensure the recovery of salmon and steelhead in the Columbia River Basin.

With a combined membership of over six million, Save Our *Wild* Salmon (SOS) is a diverse nationwide coalition of commercial and sport fishing associations, conservation organizations, taxpayer advocates, clean energy proponents, businesses and others joined in a single unifying mission: restoring self-sustaining, harvestable populations of wild salmon to the rivers and streams of the Pacific Northwest. As such, our organizations have a keen interest in efforts to mitigate the harmful effects of the Federal Columbia River Power System (FCRPS) on both listed and non-listed salmon and steelhead populations. It is with great concern, therefore, that

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we send you our comments on the recent proposal by federal agencies to eliminate or reduce summer spill.

Stated simply, within the scope of an “aggressive non-breach” Biological Opinion (BiOp), the project-by-project spill requirements in the 2000 FCRPS BiOp are essential in order to meet minimum legal mandates. Spill in both the spring and summer is a critical element of any plan that attempts to achieve salmon recovery *without* removing the four lower Snake River dams. This is particularly apparent in the midst of ongoing litigation over the recently invalidated FCRPS BiOp: eliminating or reducing spill would be a significant step back from a BiOp already found legally insufficient.

This proposal is further evidence that there is no federal commitment to recover salmon and steelhead to self-sustaining, harvestable levels. It is evident that instead of capitalizing on recent returns (caused primarily by cyclical improvement in ocean conditions), the action agencies are using the opportunity to seek decreases in protections that are essential to long-term salmon and steelhead recovery. This concerns us deeply and reaffirms our belief, substantiated by NOAA Fisheries’ legal briefs, that the current federal plan will not, and is not intended to, result in meaningful recovery.

The balance of scientific evidence among juvenile salmon passage routes is tilted heavily in favor of spill.¹ The survival benefits of spill compared to other passage routes are irrefutable.² It appears, therefore, that the federal effort to eliminate or limit spill in the summer months is being driven solely by the desire to maximize hydroelectric generation for financial gain. The decision process to this point has been unconnected to the best available science, recovery objectives, or the needs of businesses and communities who rely on salmon for their livelihood.

The following outlines more detailed scientific, legal, and policy concerns:

I. The *Biological Impacts Analysis* is significantly flawed and underestimates the impacts of reduced spill

We echo the significant concerns raised by state, federal, and tribal salmon managers in formal comments and in recent meetings of the Implementation Team and Technical Management Team regarding the shortcomings of this analysis.³ The biological analysis of summer spill reduction alternatives is inadequate, and the information it presents appears to be significantly flawed and

¹ “Spill has the lowest rate of direct mortality ranging in general from 0-2% for spillbays with deflectors. Direct mortality from turbine passage ranges from 2.3-19%. For screen passage, direct mortality ranged from 0.4-7.6%.” Columbia River Inter-Tribal Fish Commission, *The Biological Benefits of Spill*, January 2004 (citing Whitney et al. 1997). See also Fish Passage Center Memorandum, *Summary of Documented Benefits of Spill*, December 17, 2003.

² See Ferguson, J.W. et al. 2003. *Passage of Juvenile and Adult Salmonids at Columbia and Snake River Dams: NOAA Technical Memorandum*, Preliminary Draft (December 2003). (“...regional fishery managers have long regarded spill as the safest passage route for juvenile salmonids.”).

³ See Bouwes, N. 2004. *Review of the Bonneville Power Administration’s analysis of the biological impacts of alternative summer spill operations*, Prepared for Columbia Basin Fish and Wildlife Authority, January 29, 2004; See also State, Federal and Tribal Fishery Agency Joint Technical Staff, *Joint Agencies and Tribes Comments on the BPA Summer Spill Analysis*, February 20, 2004. Incorporated by reference herein.

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unreliable. As a result, the data likely underestimates the impacts of reduced summer spill by a significant margin. We caution against using the information presented as a basis for decision-making.

The Biological Impacts Analysis relies on the SIMPAS model, a single passage model, to estimate and analyze survival rates under various spill reduction scenarios. While it may be an effective tool for summarizing data regarding passage impacts on juvenile survival, there exists a significant body of evidence advising *against* using the SIMPAS model to determine the impacts of specific hydrosystem operations on adult returns, or for its use as a basis to determine which fish passage options should be implemented in near- or long-term management plans.⁴ The following is a summary of the fundamental flaw in using SIMPAS for this type of analysis, as identified by state, federal, and tribal salmon managers:⁵

- The model does not account for potential effects of various fish passage options (such as spill) on forebay passage in terms of reducing delay, residence time, or predation;
- The SIMPAS model has limited application for realistically predicting the overall effects of an action on salmon survival;
- SIMPAS does not explicitly consider delayed hydrosystem mortality that is common to both transported and in-river migrants; and
- Passage models such as SIMPAS are far too simple to adequately capture the complexity of salmonid survival relations.

Even the 2000 FCRPS recognized limitations of the SIMPAS model and placed caveats on its results.⁶ It is somewhat ironic that this model is now being inappropriately used to weaken the very same BiOp that urged caution in interpreting its results. There is little discussion or evidence in the analysis to explain why federal agencies now see fit to ignore the weight of this evidence and base a management decision with dramatic consequences on results from the SIMPAS model.

Aside from our concerns with the reliance on SIMPAS modeling, the analysis itself fails to account for the significant variability among the assumptions within the data, such as the number of juveniles migrating, distribution, smolt-to-adult return ratio, etc. Instead, the data is inappropriately presented as absolute and is thus subject to misinterpretation. The rigid analysis also fails to account for risk to individual Evolutionarily Significant Units (ESUs) and their unique life histories and genetic characteristics. For example, the outmigration of Snake River fall chinook is small to begin with – even small numerical decreases in juvenile or adult

⁴ See Columbia Basin Fish & Wildlife Authority (CBFWA), *Letter to Frank L. Cassidy, Jr., Chair, Northwest Power Planning Council*, October 16, 2002; State, Federal and Tribal Fishery Agencies Joint Technical Staff, *Letter to Mark Walker, Director of Public Affairs, Northwest Power Planning Council*, April 20, 2001 (“The SIMPAS model was inappropriately used as an assessment tool for spill options”); Independent Scientific Advisory Board, *ISAB consultation recommendations on Council Staff’s Draft Issue Paper: “Analysis of 2001 Federal Columbia River Power System Operations on Fish Survival”*, April 19, 2001.

⁵ CBFWA, *Letter to Frank L. Cassidy, Jr., Chair, Northwest Power Planning Council*, October 16, 2002.

⁶ NMFS, *2000 FCRPS Biological Opinion, Appendix D, Sec. D.4, Caveats to SIMPAS Modeling Results* (December 21, 2000), (“The juvenile survival rates [derived from SIMPAS modeling]...cannot be used to infer the likelihood of adult returns.”)

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mortality may represent a significant barrier to recovery. The survival benefits of spill are thought to be affected by flow levels and ocean survival rates: the loss of summer spill may have more dramatic effects during low flow summers than high flow summers. These important points are simply not captured within the analysis.

As it stands, the biological effects analysis on summer spill reduction alternatives likely underestimates in a significant way the impacts of reducing spill and should not be used as a basis for decision-making. At any rate, the analysis is sufficient to show that an unacceptable number of listed and unlisted fish will be killed unnecessarily, jeopardizing the unique genetic characteristics of each individual ESU. The protection of these qualities was the foundation of the BiOp's spring and summer spill requirements and the federal government's "spread the risk" policy, which was designed to reduce, not increase, reliance on juvenile fish transportation.⁷ Any deviation therein is a significant step away from implementation of the BiOp.

II. *Revenue Impacts Analysis* improperly characterizes spill as a "cost" and fails to put financial impacts in proper perspective

A. Spill is a legal obligation, not an expense

We take exception to the characterization of revenue gained from a spill reduction as a "savings." The term "savings" implies a reduction in expense. It is inappropriate and misleading to define spill as an "expense" for BPA. The Columbia and Snake rivers do not belong to BPA or the other action agencies, nor does the water used to satisfy legally required salmon recovery operations. In truth, BPA is simply not legally entitled to any certain amount of power from the hydrosystem.⁸ Rather, its legally defined role is to market power generated by the Army Corps of Engineers at federal dams *after* project purposes have been met. Any difference between electricity that *could* have been generated without fish operations (such as spill), and what was generated *after* fish operations, is not, therefore, a cost to BPA. It is a necessary outcome of meeting the agency's legal responsibilities to mitigate for the harm to salmon populations caused by the operation of the power system.

Using BPA's logic, other non-salmon-related consumptive or in-stream uses of Columbia and Snake River water that prohibit additional electricity generation should be labeled a "cost" to the agency, since without those uses, BPA would not have to "forego" any revenue to which the agency apparently feels entitled. Included within this category are: substantial irrigation withdrawals, municipal and industrial use, and lost generation from lock openings. However, none of these water uses are labeled as "costs" by BPA, nor, to our knowledge, has BPA ever attempted to persuade irrigators, the Corps of Engineers, or barge companies to alter their practices in a manner that would allow BPA to capture non-salmon forms of "foregone" revenue.

⁷ State, Federal and Tribal Fishery Agencies Joint Technical Staff, *Letter to Doug Marker, Northwest Power Planning Council*, June 13, 2003.

⁸ See 16 U.S.C. § 825s. ("Electric power and energy generated at reservoir projects under the control of the Dept. of Army and *in the opinion of the Secretary of the Army not required in the operation of such projects* shall be delivered to the Secretary of Energy..."(emphasis added)).

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Moreover, a significant portion of BPA's "cost" associated with "foregone" revenue is actually borne by federal taxpayers, not by BPA. Since 1995, BPA has credited the portion of expenditures allocated to non-power purposes (including "foregone" revenue attributed to salmon recovery operations) at federal hydro projects towards its annual payment to the U.S. Treasury. In 2001 alone, BPA claimed a credit of \$342 million, which nearly accounted for its total payment to the Treasury that year.⁹ Nowhere is this key point made apparent in the "revenue impacts" analysis.

Setting aside BPA's false sense of entitlement to a public resource and the omission from its revenue analysis, the *Summer Spill Update and Analysis* appears to assume that the proceeds from spill reduction will be applied to rate reduction (a generous assumption considering that salmon restoration efforts are chronically under-funded – see below). Even if all the proceeds from a complete summer spill reduction were applied to a reduction in wholesale electricity rates, it would amount to roughly less than a fifty-cent savings per month on an average residential electricity bill.¹⁰ For consumers in larger metropolitan areas like Portland or Seattle, the savings would be even less. Moreover, BPA ended Fiscal Year (FY) 2003 with \$555 million in its financial reserves after cutting costs – including salmon restoration and clean energy investments – and using other financial tools to alleviate a financial crunch of its own making. Though we share regional concerns about higher-than-normal electricity rates, with this in perspective, it is difficult to justify the economic necessity of eliminating or reducing summer spill.

There is simply no overriding financial reason to eliminate or curtail summer spill, and the weight of the uncertainty will fall on the fish and the fisheries that have already been severely and unfairly restricted. Most of the savings of this proposal will go to reduce electrical rates while fishery measures required to meet restoration goals continue to go un-funded and unmet (see below).

B. Increasing BPA revenues by further cutting salmon protections is disconcerting considering implementation and funding failures of the 2000 BiOp

Finally, we are perplexed by BPA's drive for revenue "savings" resulting from repealed salmon restoration requirements when BiOp funding and implementation are already inadequate. In its *2003 Implementation Progress Evaluation Report*, NOAA Fisheries determined that BiOp "expectations are not being met..." citing, among other concerns, that "funding limitations have clearly affected the scope and rate of the Action Agencies' implementation of the [BiOp]. At least two of the major [BiOp] funding mechanisms have faced limitations on programs, such as the...Northwest Power and Conservation Council's Fish and Wildlife Program" funded exclusively by BPA.¹¹ According to a recent evaluation of BPA's actual fish and wildlife

⁹ "BPA's Treasury Payment and 4(H)10(c) Credits," Bonneville Power Administration (October 3, 2001).

¹⁰ Assumes that additional revenue from a spill elimination or reduction is applied to about 9000aMWs of BPA load, and average residential load of 1000 kWhrs per month.

¹¹ National Marine Fisheries Service, *Transmittal of NOAA Fisheries' 2003 Implementation Progress Evaluation Report*, December 23, 2003. p. 6.

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expenditures by the Columbia Basin Fish and Wildlife Authority (CBFWA), it appears that the agency significantly overestimated its actual financial contribution to BiOp implementation by roughly \$228 million from FY 2002 to FY 2003.¹² If anything, BPA should be boosting its commitment to salmon recovery, not profiting from further cutbacks.

III. Proposed offsets patently fail to mitigate for a reduction in summer spill

As noted, our organizations believe that within the context of a so-called “aggressive non-breach” BiOp, spring and summer spill is a critical element of meeting legal responsibilities. Short of the partial removal of the lower Snake River dams, there is little to no scientifically supported opportunity to offset a reduction in summer spill. Nevertheless, federal agencies have attempted to identify alternative mitigation actions in the hopes that those actions could compensate for the biological harm caused by a summer spill reduction. In short, apart from the apparent scarcity of information on how biological benefits of various options were derived, the identified offsets fall woefully short of meeting their objective. In light of what is at stake, any proposed offsets to actions that would result in negative impacts to fish populations should carry a higher burden of proof.

We question how, three years into the implementation of the FCRPS BiOp, federal agencies would suddenly find alternative actions with sufficient biological advantage to replace a critical mitigation tool. If the action agencies or NOAA Fisheries have confidence in any of the so-called “offsets,” these actions should be studied further for incorporation into BiOp implementation *on top of*, not as a replacement for, summer spill. This is particularly true given NOAA Fisheries’ recent finding that BiOp implementation is not meeting ESA recovery standards.

Any proposed changes or offsets to BiOp actions should *improve* net fish survival and fisheries contributions. The offsets should benefit the same fish (at the same life stage) that are impacted by the loss of protection, not other fish in other areas. Any proposals to reduce protections should have the burden of proof to show that survival is improved to a greater extent by the offsetting actions. Similarly, the certainty of the overall BiOp implementation and success should not be reduced. The process to meet this burden of proof should begin with meaningful collaborative analysis, using the expertise of state, federal and tribal fishery managers. Similar collaboration is being crafted in the context of the BiOp remand and it should apply here as well. Such collaboration should analyze the impacts and the offsets in terms of average impact, effects of environmental variability, probability of post-hoc evaluation actually determining whether the anticipated effects occurred, and the effect on overall uncertainty of the BiOp effectiveness. The agencies should also have these studies peer reviewed by a credible, independent scientific panel, such as the Independent Scientific Advisory Board (ISAB), prior to taking any action that diminishes proven fish protection measures. The proposed “offsets” fall short of meeting those objectives.

¹² Columbia Basin Fish and Wildlife Authority, *Letter to BPA, U.S. Army Corps of Engineers, U.S. Bureau of Reclamation*, February 3, 2004. (“...BPA has significantly overestimated its actual financial contribution to the Action Agencies’ efforts towards habitat restoration and offsite actions.... We believe this analysis reveals a lack of urgency in addressing the offsite mitigation required to meet the intent of the 2000 NOAA Biological Opinion...”)

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The following is a short description of our concerns with the more prominent offset options:

- **Pile Dike Removal:** As the analysis recognizes, this action would not provide a quantifiable biological benefit.¹³
- **Hanford Reach Rearing Protection:** This action is already being negotiated as part of the Hanford Reach Fall Chinook Protection Program. Flow fluctuation limits in the Hanford Reach, while important for the health and survival of Hanford Reach fall chinook, provide little- to- no biological benefit for Snake River populations, or ESUs that enter the Columbia River downstream of the confluence with the Snake River. In addition, stranding mortality occurs at the fry stage, while impacts due to spill reductions will be on larger downstream migrants.
- **Avian Predation Research:** Avian predation research is already underway and required under the existing BiOp. Even so, the agencies have stated that “[n]o direct benefit to the 2004 migration would be achievable...” and, “[t]he future benefits for summer migrants...cannot be estimated...” if the monetary commitment to increased avian predation research were increased.¹⁴
- **Habitat Improvements:** No quantifiable benefits to salmon are identified. Similarly, no specifics are provided on how, where, when, or what specific habitat actions are or would be contemplated. This is similar to the deficiency that led the U.S. District Court to rule in NWF v. NMFS that reliance on such ill-defined measures was “arbitrary and capricious.”¹⁵
- **Northern Pikeminnow Management Increase:** This appears to be the option that has garnered the most confidence amongst federal agencies. Pikeminnow management is already contemplated and carried forth under the 2000 BiOp. The analysis asserts that increasing the exploitation rate of northern pikeminnow by roughly 1-2% in the first year could result in an increase of 500-8000 adults.¹⁶ The analysis contains no explanation of how that estimation was derived. Without more detail, it is impossible to ascertain the credibility of that assertion. Nevertheless, as we have noted, if biological benefits can be achieved by increasing the commitment to pikeminnow management, it should be investigated further and implemented *in addition to*, not as a replacement for, existing mitigation efforts to meet legal requirements.
- **Commercial Harvest Reduction:** This option frankly adds insult to injury. Strict restrictions on commercial fishing are already underway and have been for some time due to the depressed status of Columbia and Snake River stocks. Further reducing salmon returns

¹³ “Offset Team,” *Alternative Mitigation Actions to Offset Survival Impacts of Reduced Summer Spill Operations*, January 2004. (“[A] quantitative benefit...cannot be readily derived”).

¹⁴ *Id.*

¹⁵ National Wildlife Federation v. National Marine Fisheries Service, 254 F. Supp 2d 1196 (D. Or. 2003).

¹⁶ BPA, NOAA Fisheries, Corps of Engineers, *Summer Spill Update and Analysis*, January 21, 2004. (Errata, identified in Implementation Team Meeting, February 5, 2004.)

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by limiting or eliminating summer spill, and then placing the burden of offsetting the damage squarely on the backs of commercial fishing families and businesses that have already suffered drastically from poor salmon returns would be an unwise and unfair policy.

The impacts of further harvest reductions on Columbia and Snake River stocks would not be limited to Pacific Northwest fleets. Columbia and Snake River management issues affect salmon harvests from Northern California to Alaska and British Columbia. For example, the Alaska Trollers Association estimates that forcing Alaska fisherman to bear this burden could all but eliminate their chinook fishery.¹⁷ According to the Alaska Department of Fish and Game, additional harvest restrictions to compensate for spill reduction could also violate the Pacific Salmon Treaty, an international agreement affecting salmon stocks harvested in the Pacific Northwest, Canada, and Alaska.¹⁸ We suggest that NOAA Fisheries and the action agencies consider the international and coast-wide implications, in addition to the economic harm to the Pacific Northwest's salmon dependent businesses and communities, before pursuing this action further.

Moreover, additional harvest reductions do not provide biological benefit to juvenile outmigrants and therefore would not directly substitute for the biological benefit of spill.

IV. Other policy and scientific concerns with summer spill curtailment

A. Reducing summer spill increases reliance on truck and barges

Eliminating or reducing summer spill would increase the federal government's reliance on juvenile transportation via trucks and barges as opposed to in-river migration. Studies have consistently exposed juvenile transportation as a failed and costly experiment. Most recently, a BPA-funded study found that in-river migrants survive at nearly twice the rate of transported fish.¹⁹ A recent NOAA Fisheries draft white paper released in conjunction with the BiOp re-write also identified significant concerns with transportation.²⁰

Recognizing its limitations and drawbacks, the Northwest Power and Conservation Council (Council) recently affirmed that juvenile fish transportation is a *transitional strategy*, to be continued while seeking to improve in-river conditions.²¹ As we noted above, NOAA Fisheries

¹⁷ Alaska Trollers Association, *Letter from Dale Kelley, Executive Director, to President George W. Bush*, December 13, 2003. Incorporate by reference herein.

¹⁸ Alaska Department of Fish and Game, *Letter from Kevin Duffy, Commissioner, to Bob Lohn, Regional Administrator, NOAA Fisheries*, December 12, 2003. Incorporated by reference herein.

¹⁹ Fish Passage Center and the Comparative Survival Study Oversight Committee, *Comparative Survival Study (CSS) of PIT Tagged Spring/Summer Chinook, 2002 Annual Report*, November 26, 2003 (BPA Contract #8712702).

²⁰ William, J.G. et al. 2003. *Effects of the Federal Columbia River Power System on Salmon Populations*, NOAA Fisheries Technical Memorandum, Preliminary Draft, December 2003. ("...averaged over years and throughout migration seasons, survival for transported fish from below Bonneville Dam as a juvenile to return as an adult has averaged less than two-thirds that of the non-transported fish that arrived below Bonneville Dam.")

²¹ Northwest Power and Conservation Council, *2003 Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program*, August 2003. p.18.

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has adopted, but not fully implemented, a “spread the risk” policy that seeks to divide the migration between in-river passage and transportation (depending on river conditions) until more beneficial in-river migration conditions can be achieved.

Currently, the Snake River is operated to maximize transportation during the summer months. Eliminating summer spill on the lower Columbia River eliminates incentives to achieve in-river improvements, and thus subjects Snake River fall chinook to a virtual eternity on barges and trucks. Federal agencies must recognize that salmon recovery actions do not occur in isolation. Altering one management tool inevitably will affect other actions.²²

B. The debate over summer spill further exposes BPA’s “inherent conflict” between fish and power responsibilities

In recent testimony to the Senate Committee on Indian Affairs, a representative of the U.S. General Accounting Office (GAO) stated that:

“Bonneville’s two roles, as supplier of economical and reliable power and as protector of fish and wildlife, inherently conflict. ...[D]emands on Bonneville to supply greater amounts of power put pressure on fish and wildlife, through more intensive use of generating facilities at the expense of spilling water, and reduced revenues available for funding fish and wildlife programs....Given Bonneville’s dual role, conflicts are inevitable and will likely become more intense if growing power demands bump up against increased efforts to mitigate damage to fish and wildlife.”²³

The current debate over summer spill is, in our opinion, a symptom of a much larger problem identified by GAO. We believe that before any further consideration of a summer spill reduction, the region should contemplate and implement ways to relieve BPA of its “inherent conflict.” This can be accomplished, for example, by shifting its authority over fish and wildlife funding and management decisions (though not its responsibility to fund recovery efforts) and to an independent third party. As noted, future conflicts are inevitable and will likely be more intense. It is imperative that this issue be addressed.

C. Reducing or eliminating summer spill threatens the substantial nationwide investment in salmon recovery.

²² To further illustrate, in addition to affecting the “spread the risk” policy, a decision to eliminate summer spill at Ice Harbor Dam would necessitate a new analysis regarding the supposed financial benefit of investing \$45 million in a removable spillway weir (RSW) at this project. We question the value of these devices even under the existing spill regime because they have not been proven to increase fish survival, are extremely expensive and appear to more about increasing BPA revenue than protecting fish. However, the latter “benefit” may not accrue if no spill is occurring during summer months when electricity rates tend to be higher.

²³ U.S. General Accounting Office, *Bonneville Power Administration: Obligations to Fish and Wildlife in the Pacific Northwest*, Statement of Jim Wells, Director, Natural Resources and Environment Team, June 4, 2003 (GAO-03-844T).

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Federal taxpayers and Northwest ratepayers have invested over \$3 billion in salmon recovery efforts to date, without yet achieving self-sustaining, harvestable wild salmon populations. Eliminating or reducing summer spill could squander this investment.²⁴ Salmon are not just a resource for the Pacific Northwest, but a *national* treasure. The Pacific Northwest is currently the sole beneficiary of the low-cost electricity generated from federal dams on the Columbia and Snake rivers. As such, the Northwest has an obligation to do its part to mitigate for the harmful effects of the dams' operation, or risk heightening the growing national spotlight on whether BPA and northwest utilities are the appropriate stewards and beneficiaries of the power system.

D. The overall impact of the 2001 spill elimination appears significant based on available data.

During the height of the 2001 energy “crisis,” BPA’s unilaterally imposed “hydro emergency” resulted in the near elimination of the BiOp’s spring and summer spill requirements. Though SAR data for 2001 juvenile chinook outmigrants is not yet complete, preliminary data indicates that adult returns from the 2001 outmigration are weak.²⁵ It makes little sense to move ahead with another spill reduction or elimination while data from previous experience is still being gathered and assessed. At a minimum, the impacts of management mistakes from 2001 should be well understood before moving forward.

V. Additional legal concerns

In addition to the scientific and policy concerns raised by BPA’s summer spill reduction analysis, the issue of reducing summer spill raises several legal concerns. We are unclear whether, when, and how they would be addressed. First, NOAA Fisheries and the federal action agencies are required by section 7(a)(2) of the Endangered Species Act (ESA) to use the “best scientific and commercial data available” to ensure that agency actions are not likely to jeopardize listed species. The ESA also requires that “[federal agencies] give the ‘highest of priorities’ and ‘benefit of the doubt’ to preserving endangered species.” *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987) (citations omitted). When there is a risk that a federal action may harm an endangered species, the ESA requires agencies to err on the side of protecting the species. *See, e.g., Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). Erring on the side of protecting listed Snake River fall chinook would mean attaining flow targets and maintaining spill during the summer at Ice Harbor Dam. Erring on the side of these fish does not mean curtailing or eliminating summer spill, which would revoke the stated federal policy of improving conditions in the lower Snake River and “spreading the risk” of the juvenile migration among transported juvenile migrants and in-river migrants.

²⁴ U.S. General Accounting Office, *Columbia River Basin Salmon and Steelhead: Federal Agencies’ Recovery Responsibilities, Expenditures and Actions*, July 2002 (GAO-02-612).

²⁵ Washington Dept. of Fish & Wildlife, *Letter to National Academy of Sciences Re: Water Resources Management, Instream Flows, and Salmon Survival in the Columbia River Basin*, September 9, 2003.

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While we understand that BPA believes that the offsets it has proposed to address the harm caused by such an action would provide adequate relief, the weight of the scientific community strongly disagrees with this analysis. The burden of proof within the ESA requires BPA to prove its offsets will benefit salmon, not merely to state its beliefs or best hopes on the matter.

Moreover, as we have stated previously, the summer spill program is part of a larger recovery effort under the 2000 BiOp. NOAA's recent findings that the current program is not meeting ESA expectations throws the larger program and any further reductions in protections into serious legal question. That is, if the current plan is not meeting ESA requirements, doing less certainly cannot be the correct legal response. Again the burden of proof within the ESA requires more from the agency than it has currently provided.

In addition, as detailed in the amended 60-day notice letter of intent to sue for violations of the Endangered Species Act that was signed by several of the undersigned organizations and delivered on February 13, 2004 (hereby incorporated by reference), federal agencies may not take action that could harm a listed species until they have completed the ESA section 7(a)(2) consultation process and have received a valid biological opinion.²⁶ Because the action agencies are currently operating the FCRPS without a valid biological opinion, they are in violation of the procedural consultation requirements of the ESA. Under these circumstances, the ESA requires that the action agencies operate the FCRPS in a manner that avoids harm to listed species pending compliance with the procedural requirements of section 7(a)(2). See Pacific Coast Fed'n of Fishermen's Assoc., et al. v. BOR, 138 F. Supp.2d 1228 (N.D. Cal. 2001) (requiring that BOR suspend water deliveries in the Klamath Basin, unless flows were fully adequate for fish, pending completion of biological opinion); Greenpeace v. National Marine Fisheries Service, 80 F. Supp.2d 1137 (W.D. Wash. 2000) (enjoining implementation of fishing management plans in specific areas pending completion of a biological opinion). While no valid biological opinion is currently govern the operation of the FCRPS, the fact that the court left the 2000 BiOp's RPA in place during the current remand period means that the RPA is still relevant as a benchmark for determining the action agencies' compliance with the ESA's requirement that the agencies avoid harming the species during the remand period. Altering the spill regime called for by the RPA would be further evidence that the NOAA Fisheries and the action agencies are operating the FCRPS in violation of section 7(a)(2). We urge the agency to fully consider its ESA section 7 obligations as it moves forward to produce a proposal on summer spill reduction.

Furthermore, as we expressed last year in our comments on the Northwest Power and Conservation Council's "Mainstem Amendments," which it has since adopted, the Northwest Power Act requires the Council to base its Fish and Wildlife Program on the "best available scientific knowledge," as set forth in section 4(h)(6)(B) of the Act. Further, the Ninth Circuit holds that "the fish and wildlife provisions of the [NPPA] and their legislative history require that a *high degree of deference be given to fishery managers' ... recommendations for program measures.*" NRIC v. Northwest Power Planning Council, 35 F.3d 1371, 1388-89 (9th Cir. 1994). Emphasis added. As noted in Section I of these comments, state, tribal, and federal co-managers have raised significant concerns about eliminating or curtailing summer spill in response to the current proposal before the federal executives, as well as before the adoption of the Mainstem

²⁶ Letter from Todd True, Attorney for NWF, et al. to Gale Norton, Secretary, Dept. of Interior, *Re: Amended Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act* (Feb 13, 2004).

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Amendments. Adoption by the federal executives of any of the options detailed in the *Summer Spill Update and Analysis*, would further highlight the fact that the Council's Mainstem Amendments fail to provide the proper level of deference to the fishery co-managers.

Finally, the agencies responsible for operating the FCRPS have long been subject to a commitment to protect non-ESA listed stocks along with federal protected salmon and steelhead populations. The Power Council's first Fish and Wildlife Program in 1982 – nearly a decade before the first ESA listings -- recognized the need to “develop a plan for spills which will achieve a level of smolt survival comparable to or better than that achievable by the best available bypass and screening systems” at several mainstem dams. This was an initial attempt to meet a legal mandate under the Northwest Power Act (section 4(h)(11)) that requires federal agencies to “protect, mitigate, and enhance” fish and wildlife affected by FCRPS operations in a manner that provides equitable treatment. We encourage the federal executives to maintain their legal obligation to non-listed fish and the long standing commitment to spill as a method of protecting existing healthy stocks and preventing economically, culturally, and ecologically costly future salmon listings.

VI. Conclusion

In conclusion, within the scope of an “aggressive non-breach” BiOp, the project-by-project spill requirements in the 2000 FCRPS BiOp are essential in order to meet minimum legal mandates. Absent the partial removal of the four lower Snake River dams, spill in both the spring and summer is critical for salmon survival and indispensable for long-term recovery prospects. As we have noted, the *Summer Spill Update and Analysis* has significant scientific, policy, and legal faults. In and of itself, the analysis is not a sound basis for decision-making. More broadly reducing or eliminating summer spill would be an abrogation of federal salmon recovery responsibilities under federal law and national treaty. We urge you to continue implementing summer spill as called for in the BiOp, or otherwise, begin necessary planning and preparation for the removal of the lower Snake River dams.

Sincerely,

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Northwest Regional Director
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Gene Karpinski
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Rob Masonis
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Attachment A

Kathleen Casey
Acting Regional Field Director
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Bill Sedivy
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Erich Pica
Director, Economics Campaign
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Jeff Curtis
Western Conservation Director
Trout Unlimited

Sara Patton
Director
NW Energy Coalition

Cc:

Governor Ted Kulongoski, State of Oregon
Governor Dirk Kempthorne, State of Idaho
Governor Gary Locke, State of Washington
Governor Judy Martz, State of Montana
Greg Delwiche, Vice President of Power Generation Supply, Bonneville Power Administration
Witt Anderson, Chief, Fish Management Office, U.S. Army Corps of Engineers, Northwestern Division
John Palensky, Implementation Team Coordinator, FCRPS Branch, NOAA Fisheries
J. William McDonald, Regional Director, U.S. Bureau of Reclamation, Pacific Northwest Region
James L. Connaughton, Chairman, Council on Environmental Quality
Northwest Power and Conservation Council
Northwest Congressional Delegation