

2.0 BACKGROUND

2.1 INTRODUCTION

2.1.1 2000 FCRPS Biological Opinion

NOAA Fisheries issued the 2000 FCRPS Biological Opinion (“2000 BiOp”) on December 21, 2000, at which time NOAA Fisheries found that the action proposed by the Action Agencies in their 1999 Biological Assessment was likely to jeopardize eight listed species of Columbia Basin salmon and steelhead and their designated critical habitats. NOAA Fisheries also recommended a reasonable and prudent alternative (RPA), pursuant to ESA § 7(b)(3)(A) and 50 CFR § 402.14(h)(3). The Action Agencies subsequently decided to implement the recommended RPA through their respective records of decision.

The RPA recommended an adaptive management framework for planning and implementing a program of operations at the FCRPS projects, non-hydro mitigation, and a program of research, monitoring, and evaluation necessary to ensure that the FCRPS continued to avoid jeopardy and adverse modification of critical habitat for ten years. The RPA proposed a suite of 199 default actions to be implemented by the Action Agencies with the understanding that alternative actions could be substituted for the default actions through the planning framework provided they were at least equally as effective as the default action they replaced. Further, the RPA recommended performance expectations and regular reporting to ensure that the ESA standards were met throughout the ten-year period.

Since implementation of the 2000 BiOp began in 2001, the Action Agencies have documented and explained a number of adjustments to initial RPA actions in their annual implementation plans and progress reports. These revisions have been evaluated by NOAA Fisheries and documented in its annual findings letters. For example, some actions have been completed, some have been modified, some have been better defined, and some have been augmented. As a result, the precise wording of the 199 RPA actions is not the most current or accurate description of hydrosystem operations or mitigation called for by NOAA Fisheries’ 2000 RPA.

2.1.2 National Wildlife Federation v. NMFS Remand Order

NOAA Fisheries’ 2000 BiOp was challenged in the case *National Wildlife Federation v. NMFS*, CR 01-640-RE (D. Oregon, filed May 5, 2001). On May 7, 2003, District Court Judge James A. Redden found the 2000 BiOp invalid, and he remanded that biological opinion to NOAA Fisheries on June 2, 2003 to consider revisions consistent with his Opinion of May 7, 2003. The Court also decided that the 2000 BiOp should remain in effect while NOAA Fisheries and the Action Agencies developed changes in response to the Court’s concerns.

“ . . . [T]he court agrees with NOAA Fisheries and the State of Oregon that remand is appropriate in order to give NOAA Fisheries the opportunity to consult with interested parties to insure that only those range-wide non-hydro

Federal mitigation actions which have undergone section 7 consultation, and range-wide non-hydro non-Federal mitigation actions that are reasonably certain to occur, are considered in the determination whether any of the 12 salmon ESUs will be jeopardized by continued FCRPS operations.” May 7, 2003, Opinion and Order, p. 25.

NOAA Fisheries developed this biological opinion with the goal of fully complying with the Court’s Opinion and Order of May 7, 2003.

2.1.3 Hatchery Listing Policy and Status Reviews

In a September 12, 2001 order in *Alsea Valley Alliance v. Evans*, Judge Michael R. Hogan of the U.S. District Court in Eugene, Oregon found NOAA Fisheries’ definition of an ESU to be a permissible interpretation of “distinct population segment” for salmon. However, the Court found that when NOAA Fisheries finds that an ESU includes both hatchery and naturally spawned fish, the agency may not permissibly list only the naturally spawned fish as threatened or endangered under the ESA. On these grounds, the Court set aside NOAA Fisheries’ 1998 ESA listing of Oregon Coast coho salmon.

In response to the *Alsea* decision, NOAA Fisheries has conducted a review to examine how the logic of the *Alsea* decision should be applied to those ESUs that include fish reared in hatcheries. This review entailed development of methods to determine which hatchery fish are part of the same ESU as naturally spawned fish and how the existence of ESU hatchery fish and their interactions with natural populations affect the prospects for survival of the entire ESU. The review was also extended to address the relationship of resident *O. mykiss* (rainbow or redband trout) to anadromous *O. mykiss* (steelhead) within the same ESU. Additionally, NOAA Fisheries’ Biological Review Team (BRT) prepared a draft report on the updated status of 26 ESA-listed ESUs and one candidate species ESU of salmon and steelhead. This draft report was circulated for technical review and comments by state, Tribal, and Federal Comanagers. The final report, dated July 2003, can be accessed at [www.nwr.NOAA Fisheries.gov/AlseaResponse/20040528/index.html](http://www.nwr.NOAA.Fisheries.gov/AlseaResponse/20040528/index.html).

NOAA Fisheries published its proposed hatchery listing policy in the *Federal Register* on June 3, 2004 (69 FR 31354) and its proposed rule to revise the listing status of 25 currently listed Pacific salmonid ESUs and to list two additional ESUs (including Oregon Coast coho) on June 14, 2004 (69 FR 33102). These proposals include listing of over 100 hatchery populations of salmon and steelhead and the listing of some resident rainbow trout. The original 90-day public comment periods on these proposals were to end on September 1, 2004 for the proposed hatchery listing policy and September 13, 2004 for the proposed listing rule. NOAA Fisheries has extended the comment periods for both proposals until October 20, 2004. Additional information, including details on public meetings, can be found at: [http://www.nwr.NOAA Fisheries.gov/AlseaResponse/20040528/ltrstkhldrs.pdf](http://www.nwr.NOAA.Fisheries.gov/AlseaResponse/20040528/ltrstkhldrs.pdf). NOAA Fisheries must make final decisions on the proposed listing rule by June 14, 2005. Promptly thereafter, notice of those decisions and rules will be sent to the *Federal Register* for publication. NOAA Fisheries expects to adopt a final hatchery listing policy several months before issuing the final listing revisions rule. NOAA Fisheries will use that final policy in making its final listing decisions.

2.1.4 Redesignation of Critical Habitat

On February 16, 2000, NOAA Fisheries designated critical habitat for 19 ESUs of salmon and steelhead in Washington, Oregon, Idaho, and Montana. Shortly thereafter, the National Association of Homebuilders chapter representing members in Washington, Idaho, and Oregon counties and the Association of California Water Agencies both filed suit challenging these designations. These lawsuits alleged, among other things, that NOAA Fisheries failed to adequately evaluate the economic impacts associated with the designation of critical habitat. While the lawsuits against NOAA Fisheries were pending, the 10th Circuit Court of Appeals held in a lawsuit against the U.S. Fish and Wildlife Service (USFWS) that the analysis of economic impacts in critical habitat designation processes must be more specific than the process used by USFWS and, by extension, the similar process in use by NOAA Fisheries. So in March 2002, NOAA Fisheries sought judicial approval of a consent decree to withdraw its critical habitat designations, undertake a new analysis, and then re-issue the designations. On April 30, 2002, the District Court for the District of Columbia vacated the initial critical habitat designations to allow NOAA Fisheries revise its analysis of economic impacts. *NOAA is in the process of completing new critical habitat designations.*

2.2 CURRENT CONSULTATION

To be added when the consultation is completed.

2.3 MEETINGS WITH TRIBAL REPRESENTATIVES

To be added when the meetings take place.

2.4 COLLABORATION WITH COMANAGERS

In January 2004, the parties to *National Wildlife Federation et al. v. National Marine Fisheries Service* agreed to embark on a collaborative process proposed by the Comanagers. The process included three stages: (1) scoping of issues; (2) Comanager review of data; and (3) workshops for discussion of questions, concerns, and suggestions arising from that review.

The professional facilitation firm, DS Consulting, was hired to plan meetings, facilitate discussions, and provide written workshop summaries.

The process began on February 12, 2004 at a joint Steering Committee meeting, where the group agreed to five specific areas for discussion: intrinsic potential of habitat; hatcheries; hydro operations and actions, including effects, the estuary, and dam passage; population trends; and the analytical framework. Between February and May of 2004, representatives from the Comanagers' agencies interacted with NOAA Fisheries representatives in more than 20 sessions, which were also attended by Action Agency representatives and plaintiff and defendant observers.