

## **PARTIES MULL NEW BIOPS; NOT CLEAR IF ANOTHER ROUND OF LITIGATION IN THE WORKS**

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A three-pronged federal strategy announced this week to lift beleaguered salmon and steelhead stocks onto a recovery trajectory has already begun to draw some heat.

Targeted particularly is the leg that addresses hydro system impacts on the Columbia/Snake river basin fish.

NOAA's Fisheries Service on Monday released three interwoven "biological opinions" that it says represents the most comprehensive strategy yet developed to protect listed 13 Columbia basin salmon and steelhead species that are listed under the Endangered Species Act. They are the culmination of a two-year remand/consultation process that involved federal agency collaboration with basin tribes and states.

The documents are posted at: <http://www.nwr.noaa.gov/Salmon-Hydropower/Columbia-Snake-Basin/Final-BOs.cfm>

BiOps are required under the ESA to assess whether federal "actions," such as the operation of dams, jeopardize the survival of listed fish stocks. Two of the new BiOps replace strategies declared illegal in federal court -- NOAA Fisheries' 2005 Federal Columbia River Power System BiOp for 14 Columbia/lower Snake river dams and the 2005 Upper Snake river BiOp for 12 projects in eastern Oregon and southern Idaho.

The FCRPS BiOp plots strategies for improving salmon survival through the hydro system and describes planned off-site actions, such as habitat restoration, intended to mitigate for hydro impacts. It lays out a 10-year timeline. The Upper Snake BiOp is designed to prevail for the next 30 years.

A third set of documents outlines a plan for managing salmon harvests for Indian tribes in Washington, Idaho, and Oregon, and for state-managed fisheries. It is based on a plan developed in U.S. v Oregon, a court-supervised process focused on protecting treaty fishing rights.

Each BiOp includes in its biological analysis effects on fish caused by the other two "actions."

"These biological opinions not only meet the law's requirement to protect fish, they also improve the prospects for recovery," said Bob Lohn, head of NOAA's Fisheries Service's Northwest region, based in Seattle. "In these opinions, we've taken a close look at all of the major factors --- the hydro system, habitat, hatcheries, and harvest --- and are making sure that they're all working toward healthy salmon runs."

Four treaty tribes have signed memorandums of agreement that, among other things, pledge support for the new federal salmon protection plans. Two states with a stake in fish and wildlife funding and federal power cost issues, Idaho and Montana, have signed draft agreements with federal action agencies that say they too support the new BiOps. The agreements were negotiated with the Bonneville Power Administration, which market power generated in the hydro system, and the dam operators, the U.S. Army Corps of Engineers and the Bureau of Reclamation.

The state of Oregon, a foe of the 2004 FCRPS BiOp and legal adversary of NOAA during related legal proceedings, may be lining up a new challenge. Gov. Ted Kulongoski, in an opinion piece published Tuesday in Portland's Oregonian newspaper, said the new plan "falls short of what needs to be done.

"Instead of improving river conditions for migrating fish, the plan reduces flow, which will result in slower movement through the river system, which reduces survival," the governor wrote. Likewise, he said, spill at the dams for fish passage will be ratcheted down.

"This new plan is not a credible approach to the recovery of wild salmon and steelhead," Kulongoski said.

He said that the state preferred to negotiate for improvements but "thus far, such negotiations have yielded little. If it requires another round of litigation, and that is my only option, then I will pursue that option" to gain the improvements the state desires.

Attorneys for the fishing and conservation groups that challenged the 2004 FCRPS BiOp said that the new version appears to fail both legal and scientific tests.

"This plan looks like it does even less" than the 2004 plan, Earthjustice attorney Todd True said during a press conference held following the NOAA announcement. He said Earthjustice and its clients will review the document carefully before deciding whether to again to take legal action.

The Coalition for Idaho Water announced that it was "pleased" with the final BiOp for the Upper Snake River basin irrigation projects operated by the Bureau, but wary of new legal attacks. The coalition is made up of more than 50 different organizations representing Idaho counties, cities, chambers of commerce, industrial, municipal and commercial water users, and agricultural groups.

"The new Upper Snake biological opinion continues the essential components of limiting the amount of water coming from Idaho for flow augmentation, adherence to state law, and acquisition of water only from willing sellers," according to Norm Semanko, a coalition spokesman. "The term of the opinion is through 2034 which clearly provides continued, long-term certainty for Idaho water users."

"The ball is now in the environmentalists' court. As they have in past, we fully expect them to challenge the new biological opinion, including operation of Bureau of Reclamation dams and reservoirs in Idaho, and to seek to take more water from Idaho, regardless of the impacts on our economy and way of life," Semanko said.

Lohn said it is now "up to the plaintiffs to decide if they will bring legal action," adding that he hoped they would take time to fully understand the approach and, eventually, opt to let it play out.

"The remand today is completed," Lohn said. "We're moving from planning to action."

Northwest RiverPartners says its members must be involved in the BiOp implementation process to help assure the huge planned investment is spent efficiently and toward sound scientific purposes. RiverPartners represents agricultural interests, electric utilities and large and small businesses.

"The answer to salmon recovery is not to throw more money at it, but to ensure that the dollars are well spent and deliver results," said Terry Flores, executive director of the alliance. "To accomplish that, the customers making the investment must have a place at the implementation table along with the states and tribes."

BPA CEO Steve Wright said the new FCRPS BiOp would cost an estimated \$75 million more per year to implement than the 2004 version. That has the potential to push up rates for BPA's preference wholesale power customers by 3 percent.

That rate increase jumps to 4 percent when the costs of new memorandum of agreements with four treaty tribes – the Colville, Umatilla, Warm Springs and Yakama – and states are added in. Those 10-year fish and wildlife funding agreements with the tribes include a mix of measures, targeting ESA stocks and non-listed fish and wildlife. The ESA portion is included in the \$75 million calculation.

The federal power marketing agency now has \$600 million to \$700 million in annual fish and wildlife costs for ESA and non-listed stocks, Wright said. BPA has obligations to mitigate for impacts to fish and wildlife caused by the construction and operation of the federal Columbia basin hydro system.

"Families and businesses in the Northwest are already paying 20 to 30 percent a month on their electricity bills for fish and wildlife programs," Flores said. The coalition is critical of the new harvest BiOp.

"... the direct killing or harvesting of salmon under the protection of the Endangered Species Act continues to be neglected," Flores said Monday. "The biological opinion released today on Lower Columbia commercial, sport and tribal harvest allows the continued taking of listed fish instead of conserving them.

"Our concern is that the massive investment being made by regional electricity customers will be compromised if harvest is allowed to continue at unsustainable rates," Flores said.

Lohn praised the set of agreements signed last week by the federal agencies that operate the dams and four Northwest Indian tribes, and the new relationship that the agreements represent. The tribes have often been legal and scientific antagonists.

The agreements call for \$900 million in spending over the next 10 years on tribal habitat and

hatchery projects that are aimed at improving survival of salmon, steelhead and other fish.

"This is exactly the kind of joint effort that we need to get on-the-ground projects going and long-term improvements under way," he said.

"We are doing literally thousands of habitat projects, many more than in the past," Lohn said of the combined efforts.

Lohn said that the agreements will continue the collaborative approach urged by a federal judge when he remanded the FCRPS BiOp, and later the Upper Snake BiOp, to NOAA Fisheries. The agency is charged by the ESA with protecting listed stocks.

Many of the fishing and conservation groups have long pressed for removal of four lower Snake dams as the best way to improve survivals.

"We can remove the four lower Snake dams, restore a healthy river, bring back salmon and steelhead, protect farmers, invest in clean energy, and ensure a strong economic future," said American Rivers' Michael Garrity. "Dam removal is a necessary part of an effective salmon recovery package and can be done in a way that works for local communities."

Federal documents say it is "biologically not necessary to include dam breaching" as one of the BiOp's mitigation strategies. Also, the federal agencies stress that they have no congressional authority to pursue breaching and that breaching would provide limited benefits.

"The 2008 FCRPS Biological Opinion supports a comprehensive, All-H strategy including continued fish passage improvements at the Snake River dams such as surface collection and bypass improvements, as well as offsite actions including habitat and hatchery improvements, to meet the needs for listed fish," according to a summary document. "This approach benefits not only Snake River fish, but also Upper Columbia and Mid-Columbia salmon and steelhead."

Jim Martin, a former Oregon Department of Fish and Wildlife fisheries chief, said he felt the FCRPS BiOp improperly relies on "speculative" benefits from tributary habitat actions while ignoring what is "certain" mortality in the mainstem Columbia and Snake.

Others feel the NOAA approach is sound.

"We support this BiOp" said Glenn Vanselow, executive director of the Pacific Northwest Waterways Association. "The region has focused on river operations for more than 20 years and the new BiOp and MOAs add much needed attention on habitat and hatcheries as contributors to recovery. This BiOp is a product of collaboration and we expect the region and, ultimately, the court to embrace it. It is time to end the debate and get to work on fish recovery."

The FCRPS BiOp includes mitigation proposed by the action agencies --- BPA, the Corps and the Bureau -- as well as mitigation measures NOAA Fisheries believed to be needed to avoid jeopardizing the listed species. The additional actions are called a "Reasonable and Prudent Alternative." The FCRPS RPA contains 73 detailed sets of additional mitigation actions that are required to avoid jeopardy and adverse modification of critical habitat.

NOAA says it has made a number of changes to make the hydropower BiOp more robust since its public release as a draft document last October:

-- The new document includes a strengthened climate change section, which takes climate shifts and their likely effect on salmon into consideration.

-- The new biological opinion factors in the effects of hydro operations on killer whales and green sturgeon to make sure that those important species are not adversely affected as steps are taken to protect salmon.

-- The analysis supporting these opinions was based on the best available science and validated by several independent science reviews.

Throughout this biological opinion the agency has said its approach has been to assure an extra measure of protection for salmon, especially when it comes to anticipating future conditions.

For the first time the FCRPS BiOp has aimed planned hydro system improvements at achieving specific performance standards – 96 percent per dam passage survival for spring juveniles and 93 percent per dam passage survival for summer juvenile migrants averaged across the Columbia or Snake river dams by the end of the ten-year period.

Habitat component of the RPA represents an expanded program to protect and improve tributary and estuary environments and reduce limiting factors, based on the biological needs of listed fish, according to the BiOp's executive summary.

"These habitat actions are targeted to the populations and limiting factors where there is the greatest need, based on biological analysis," the summary says. Analysis was tailored to assess the needs of each individual "population" within each of the 13 listed stocks.

The analysis describes "what this specific stock needs to recover," Lohn said. "All told this adds up to success."

The RPA includes tributary habitat actions to protect and improve mainstem and side-channel habitat for fish migration, spawning and rearing, and to restore floodplain function. Progress towards improving conditions will be assessed with methods developed during the remand collaboration.

The RPA proposes new and expanded hatchery facilities for safety-net and conservation programs that promote salmon and steelhead recovery. The proposal includes actions to increase steelhead productivity and to support hatchery reforms that reduce impacts on listed fish, according to the summary.

"While there are no quantified survival benefits in the analysis resulting from hatchery actions, important qualitative improvements are anticipated. Performance standards in this area will track progress of competing hatchery projects," the summary says.

The RPA proposes to expand efforts to reduce juvenile and adult losses from predation by birds, other fish, and marine mammals. Survival improvements anticipated for predation activities are

1.7 percent for fall chinook salmon; 3.1 percent for other chinook species and 4.4 percent for steelhead. Additional improvements are also expected from future actions to reduce avian and marine mammal predation.

The BiOp also outlines a comprehensive research, monitoring, and evaluation program to gauge the effectiveness of the actions and to try clear areas of scientific and biological uncertainty. It will also guide adaptive management.

The action agencies plan to make annual progress reports and to adapt efforts based on new information and the results of monitoring and evaluation. The federal agencies say those efforts will be coordinated with states and tribes the ongoing collaboration.

Comprehensive evaluations of progress will be produced in 2013 and 2016.

The MOAs are expected to "augment and advance the FCRPS RPA and its implementation. These actions inform and buttress the conclusions NOAA reaches for the FCRPS Biological Opinion," the summary says.