THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SALMON SPAWNING & RECOVERY ALLIANCE, WILD FISH CONSERVANCY, NATIVE FISH SOCIETY, and CLARK-SKAMANIA FLYFISHERS,

Plaintiffs,

v.

D. ROBERT LOHN, in his official capacity, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION'S NATIONAL MARINE FISHERIES SERVICE, CARLOS M. GUTIERREZ, in his official capacity, UNITED STATES DEPARTMENT OF COMMERCE, REN R. LOHOEFENER, in his official capacity, UNITED STATES FISH & WILDLIFE SERVICE, DIRK KEMPTHORNE, in his official capacity, UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 06-01462 RSL

MEMORANDUM OF *AMICUS CURIAE* INDIAN TRIBES AND WASHINGTON DEPARTMENT OF FISH AND WILDLIFE IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

TABLE OF CONTENTS

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

TABLE OF AUTHORITIES

Cases

Statutes

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

Regulations

Miscellaneous

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

LIST OF ACRONYMS

AR Administrative Record

BO Biological Opinion

DFW Washington State Department of Fish and Wildlife

ERD Evaluation and Recommended Determination

ESA Endangered Species Act

ESU Evolutionary Significant Unit

MSY Maximum Sustainable Yield

NMFS National Marine Fisheries Service

RAP Risk Assessment Procedure

RER Recovery or Rebuilding Exploitation Rate

RMP Resource Management Plan

SUS Southern United States

TRT Puget Sound Technical Recovery Team

VSP Viable Salmonid Population

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

I. INTRODUCTION.

The Jamestown S'Klallam Tribe, Lower Elwha Klallam Tribe, Lummi Nation, Makah Tribe, Muckleshoot Tribe, Nisqually Tribe, Nooksack Indian Tribe, Port Gamble S'Klallam Tribe, Puyallup Tribe of Indians, Sauk-Suiattle Indian Tribe, Skokomish Tribe, Squaxin Island Tribe, Swinomish Indian Tribal Community, Tulalip Tribes and Washington State Department of Fish and Wildlife (DFW) submit this amicus brief in response to plaintiffs' summary judgment motion. Plaintiffs challenge the National Marine Fisheries Service's (NMFS') approval of a Resource Management Plan (RMP) developed by the Tribes and DFW (the Co-Managers) to manage Puget Sound chinook salmon harvests from May 1, 2004, to April 30, 2010. The Tribes and DFW are intimately familiar with the RMP and NMFS' approval of it.

In 1999 NMFS listed the Puget Sound Chinook Salmon Evolutionary Significant Unit (ESU), as a threatened species under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544. To assist in the ESU's recovery, the Co-Managers severely reduced harvest impacts on natural chinook populations. By eliminating almost all fisheries directed at natural chinook, and severely restricting other fisheries with incidental impacts on chinook populations, the Co-Managers enabled additional chinook to escape to their spawning grounds. In approving the RMP, NMFS found these harvest restraints had contributed to stable or increasing escapements for each of the 22 individual chinook populations comprising the ESU.

Under current harvest management, the fundamental and overriding impediment to recovery of the ESU arises from severely degraded habitat conditions throughout Puget Sound, which limit the productive capacity of chinook populations. Until these conditions improve, the abundance, productivity, spatial structure and diversity necessary for recovery cannot be achieved – even with *no* harvest.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

The central issue in this case is whether *any* harvest can be permitted pending the habitat improvements necessary for recovery. In its extensive evaluation of the RMP, NMFS found that the plan would allow sufficient escapements to achieve maximum sustainable yield of key populations under present conditions, and enable *increased* escapements and production should habitat conditions improve. Accordingly, NMFS concluded that the RMP would *not* appreciably reduce the likelihood of survival *or* recovery of the ESU. NMFS did not depart from the requirements of its own regulations or the ESA in reaching this conclusion.

II. NMFS COMPLIED WITH THE 4(d) RULE IN APPROVING THE RMP.

Section 9(a) of the ESA, 16 U.S.C. § 1538(a), generally prohibits "taking" endangered species. Pursuant to § 4(d), 16 U.S.C. § 1533(d), NMFS extended that prohibition to threatened salmonid ESUs subject to certain "limits". *See* 65 Fed. Reg. 42,422 (July 10, 2000).

NMFS approved the RMP under Limit 6 (*see* AR 3 at 1-2), which provides that the "take" prohibitions "do not apply to actions undertaken in compliance with a resource management plan developed jointly by the State[] . . . and the Tribes" if certain conditions are satisfied. 50 C.F.R. § 223.203(b)(6). The primary condition is that NMFS determine that "the joint tribal/state plan will not appreciably reduce the likelihood of survival and recovery of affected threatened ESUs." *Id.* § 223.203(b)(6)(i). In making that determination, NMFS must "*take[] comment* on how any fishery management plan addresses the criteria in [Limit 4]." *Id.* § 223.203(b)(6)(iii) (emphasis added). Limit 4, in turn, contains criteria that a Fishery Management and Evaluation Plan must address adequately to be approved under that Limit. *Id.* § 223.203(b)(4).

Plaintiffs claim NMFS' approval of the RMP was inconsistent with three of nine Limit 4 criteria and failed to consider one aspect of the RMP. The ultimate question under Limit 6 is whether the RMP would "appreciably reduce the likelihood of survival and recovery" of the ESU,

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

not whether it would satisfy individual Limit 4 criteria. Nevertheless, as we show below, NMFS properly considered and analyzed each of those criteria. *See generally* AR 3 at 2-3 & Table 1.[1] NMFS' interpretation and application of its own regulation is entitled to considerable deference and should be upheld in this case.[2]

A. NMFS Properly Considered the RMP's Use of "Viable" Population Thresholds.

1. The Purpose of "Viable" and "Critical" Thresholds in Fishery Management Plans Is to Insure that Harvest Does Not Appreciably Reduce the Likelihood of Recovery.

Plaintiffs first argue that NMFS' approval of the RMP was inconsistent with a Limit 4 criterion pertaining to the use of "viable" population thresholds. *See* Pl. Mem. at 6-9, 21-26. The relevant criterion provides in part that a fishery management plan must:

> Utilize the concepts of "viable" and "critical" salmonid population thresholds, consistent with the concepts contained in the technical document entitled "Viable Salmonid Populations (NMFS, 2000b)." The VSP paper provides a framework for identifying the biological requirements of listed salmonids, assessing the effects of management and conservation actions, and ensuring that such actions provide for the survival and recovery of listed species. Proposed management actions must recognize the *significant differences in risk* associated with viable and critical population threshold states and respond accordingly to *minimize the long-term risks to population persistence*.

---

[1] NMFS completed a proposed analysis of the RMP in April 2004 and solicited public comment on it, including its analysis of each of the Limit 4 criteria. *See* AR 1; AR 4 at 2; AR 6. Thus, NMFS complied with its obligation under Limit 6 to "take[] comment on how any fishery management plan addresses the criteria in [Limit 4]." 50 C.F.R. § 223.203(b)(6)(iii).

[2] *See, e.g., Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512 (1994) (Court "must give substantial deference to an agency's interpretation of its own regulations"). The Court's task "is not to decide which among several competing interpretations best serves the regulatory purpose." *Id.* "Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.,* quoting *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965). "[B]road deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Id.,* quoting *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 697 (1991); *see also Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 150-51 (1991) ("[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers").

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

Id., § 223.203(b)(4)(i)(B) (emphasis added).

As the emphasized language indicates, this provision was not intended to prohibit harvest of populations that are below the "viable" threshold, but to insure that management minimizes long-term risks to such populations. The provision goes on to state explicitly that harvest actions can be permitted as long as they are designed: (1) to maintain populations that are functioning at or above the "viable" threshold at or above that level; (2) to not "appreciably slow" achievement of "viable" function of populations above "critical" levels but not yet at "viable" levels; and (3) to not "appreciably increase" genetic and demographic risks facing populations below "critical" levels and to permit such populations to achieve "viable" function. *Id.*

2. The VSP Paper's Definition of a Viable Population Does Not Specify What Harvest Rates Are Needed to Avoid an Appreciable Reduction in the Likelihood of Recovery. Instead, NMFS Developed a Risk Assessment Procedure to Determine Benchmark Harvest Rates.

The Viable Salmonid Populations (VSP) paper, which is referenced in the Limit 4 criterion quoted above, defines a "viable" population as "an independent population of any Pacific salmonid . . . that has a negligible risk of extinction due to threats from demographic variation (random or directional), local environmental variation, and genetic diversity changes (random or directional) over a 100-year time frame." AR 241 at 2. The VSP paper acknowledges it is not possible "to predict with great precision a population's status that far into the future," but asserts it is possible to "describe those population attributes necessary for a species' long-term persistence." *Id.* at 3. The paper identifies four such attributes – abundance, productivity, spatial structure, and diversity – and provides guidelines for each of these attributes in a "viable" population. *Id.* at 11-23. It is important to note that, according to the VSP paper, these attributes are "concerned with extinction risks, *not with setting harvest levels*." *Id.* at 37 (emphasis added).

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

In May 2000, contemporaneously with its promulgation of the 4(d) rule, NMFS prepared a paper entitled "A Risk Assessment Procedure for Evaluating Harvest Mortality on Pacific Salmonids." AR 58. The paper provided a management tool that linked "available biological data about the listed species with quantified standards of acceptable risk to survival *and recovery*." *Id.* at 2 (emphasis added). NMFS explained that while the VSP paper identified attributes of "viable" populations, it did "not provide quantified risk standards, or a framework for assessing risk." *Id.* In developing the Risk Assessment Procedure (RAP), NMFS "sought to use an approach that was consistent with the concepts developed" in the VSP paper. *Id.* at 4.

NMFS designed the RAP to assess harvest management actions that may be considered under various sections of the ESA, including 4(d) rules, "utilizing the concepts of the VSP [paper]." *Id.* at 2.[3] The RAP "defines maximum exploitation rates (Recovery Exploitation Rates, or RERs) for individual populations which are projected to result in a low risk to survival *and a moderately high to high probability of recovery of the population in the long term*." *Id.* (emphasis added). As NMFS explained, "[r]isk is measured in terms of the frequency that escapements are above or below previously defined benchmark thresholds of abundance." *Id.*

In prior biological opinions NMFS used two methods to establish population thresholds. *Id.* at 6-7. For purposes of "viable" thresholds, the first method used guideline ranges in the VSP paper for abundance levels that presented a low risk of extinction due to genetic or environmental factors. *Id.* However, when population-specific information was available, NMFS used a second method, which was based on the level of escapement required to achieve the maximum sustainable yield (MSY) under *current* habitat conditions. *Id.* According to NMFS, "[a]s applied

[3] This contemporaneous construction of the 4(d) Rule by the agency charged with administering it is entitled to particular deference, *Udall v. Tallman,* 380 U.S. at 16, especially since, as discussed below, NMFS had held consistently to it. *See Thomas Jefferson,* 512 U.S. at 515.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

in RAP to date, the MSY level represents a maximum sustainable level *given current productivity and capacity restraints on the population, and is not intended to represent a potential recovery level for the population.*" *Id.* (emphasis added).

This approach allowed NMFS to evaluate the effects of proposed fisheries on population recovery. By comparing the effects of a harvest management plan against a no-fishing scenario, NMFS could determine whether the plan would reduce the likelihood of recovery given current habitat conditions. Considering both its past decisions and accepted scientific standards, NMFS concluded that, to avoid jeopardy under the ESA: (1) the percentage of escapements below the *critical* threshold must differ no more than 5% from that under no-fishing conditions over a 25-year period; and (2) either the *viable* threshold must be met 80% of the time or the percentage of escapements less than the *viable* threshold must differ no more than 10% from that under no-fishing conditions at the end of the 25-year period. *Id.* at 9-10. "Said another way, these criteria seek to identify an exploitation rate that will not appreciably increase the number of times a population will fall below the critical threshold *and also not appreciably reduce the prospects of achieving recovery.*" *Id.* at 10 (emphasis added).[4]

3. NMFS Evaluated the RMP Using Both the VSP Paper's Concept of "Viable" Populations and NMFS' Risk Assessment Procedure.

a. Population Thresholds and Exploitation Rate Limits in the RMP.

NMFS set forth its analysis of the Tribal-State RMP in its Evaluation and Recommended Determination (ERD). AR 3. NMFS began by explaining that the RMP imposes restrictions on directed and incidental harvests of each chinook population within the Puget Sound ESU. *Id.* at 7.

[4] Note that "the RER analysis is made with respect to populations, while jeopardy determinations must be made with respect to the anticipated impacts to the ESU. That is, the failure to meet the RER standards for one population in an ESU with multiple populations does not necessarily indicate jeopardy to the ESU as a whole." *Id.* at 11-12.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

These restrictions are a function of the RMP's rebuilding exploitation rates, upper management thresholds, low abundance thresholds and critical exploitation rate ceilings. *Id.*

As used in the RMP, rebuilding exploitation rates are limits on the proportion of each population that may be harvested. *Id.* Except as noted below, these rates constrain *all* harvests under the RMP, including harvests of populations that are *above* their upper management thresholds. AR 15 at 33. Upper management thresholds are escapement levels associated with optimum productivity (*i.e.,* maximum sustainable harvest) under current habitat conditions. AR 3 at 11. The RMP prohibits all directed harvests on populations below those thresholds. *Id.*

The RMP's low abundance thresholds are spawning escapement levels set above the point of biological instability. *Id.* at 12. When a population is projected to be below its low abundance threshold, the RMP provides for "extraordinary fishery conservation measures to minimize fishery related impacts and increase spawning escapement." *Id.* The RMP's critical exploitation rate ceilings place an *upper* limit on exploitation rates when a population's spawning escapement is projected to fall below its low abundance threshold, or if Canadian exploitation rates make it difficult or impossible to achieve the RMP's rebuilding exploitation rate. *Id.*

b. NMFS' Analysis of the RMP's Population Thresholds and Exploitation Rates.

The ERD extensively analyzes the RMP's use of "viable" and "critical" population thresholds under the Limit 4 criterion quoted above. *Id.* at 24-47. NMFS understood this criterion to require the use of such concepts so that management actions: "(1) recognize significant differences in risk associated with viable and critical population threshold states; and (2) respond accordingly to minimize *long-term* risks to population persistence." *Id.* at 24 (emphasis added). NMFS found, consistent with this criterion, that the RMP "takes into account

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

the different risks facing a population depending on the status of the population," *i.e.*, whether the population is above or below its upper management and low abundance thresholds. *Id.*

Consistent with the approach NMFS took in its May 2000 Risk Assessment Procedure, the ERD states that "viable and critical thresholds in the context of this evaluation are a level of spawning escapement associated with rebuilding to recovery, *consistent with current environmental conditions*." *Id.* at 25 (emphasis added). NMFS explained:

> For most populations, these thresholds are well below the escapement levels associated with recovery, but achieving these goals under current conditions is a necessary step to eventual recovery *when habitat and other conditions are more favorable*. Survival and recovery of the Puget Sound Chinook Salmon ESU will depend, over the long term, on necessary actions in other sectors, *especially habitat actions*, and not on harvest actions alone.

Id. (emphasis added).

Based on the RAP, NMFS "completed a comprehensive analysis to derive viable and critical thresholds for a subset of Puget Sound chinook salmon populations under current habitat and environmental conditions." AR 3 at 25; *see also id.* at 7; AR 4-02 at 9.[5] NMFS then used these thresholds to develop rebuilding exploitation rates, utilizing the criteria from the RAP, which would not appreciably increase the number of years in which escapements were below "critical" levels and would not appreciably reduce the likelihood that escapements would be below "viable" levels at the end of a 25-year period. AR 3 at 25. According to NMFS, these criteria addressed "*both* survival *and* recovery." *Id.* (emphasis added). In particular, NMFS found that, for individual populations, "exploitation rates at or below NMFS-derived rebuilding rates will not appreciably reduce the likelihood of rebuilding that population, assuming current environmental conditions based on specific risk criteria." *Id.* at 7; *see also id.* at 48.

[5] For populations for which NMFS was not able to derive its own "viable" and "critical" levels, NMFS used either guideline levels in the VSP paper or analyses of habitat conditions. *Id.* at 26.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

To determine how the RMP would affect population levels, NMFS first analyzed escapement trends since the ESU was listed in 1999. *Id.* at 26-27. It found that for nine populations currently above their "viable" level, two had stable and seven had increasing escapement trends; accordingly, harvest management actions appeared "to be maintaining these populations above the viable threshold." *Id.* at 27. For 12 populations above "critical" but below "viable," NMFS found four had stable and eight had increasing escapement trends; here, harvest management actions appeared "to have not appreciably slowed achievement to viable function for these populations." *Id.* Finally, for one population currently below "critical," NMFS found it had an increasing escapement trend and that there were "no significant differences" between this population and associated hatchery production; accordingly, it concluded "that the RMP does not appreciably increase genetic and demographic risks facing this population." *Id.* at 27-30.

In addition to examining current escapement trends, NMFS undertook a risk analysis for each population under the RMP. In conducting this analysis, NMFS separately considered each of the four attributes of a viable population identified in the VSP paper – population size (abundance), growth rate (productivity), spatial structure and diversity. *Id.* at 30-47. In its discussion of population size, NMFS compared the RMP's upper management thresholds to the NMFS-derived "viable" thresholds, and found that the RMP's thresholds were "the same, *or more commonly greater,* than the NMFS-derived viable thresholds." *Id.* at 34 (emphasis added). NMFS also analyzed the RMP's upper management thresholds for populations for which NMFS had not derived a "viable" threshold, and in each case found they were consistent with NMFS' standards. *Id.* at 34-35; *see also* note 5 above.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

NMFS also evaluated the anticipated exploitation rates and escapements under the RMP. *Id.* at 47-66.[6] For populations for which NMFS had derived its own rebuilding exploitation rates, it compared those rates to the anticipated rates under the RMP to determine whether the RMP would "appreciably reduce the likelihood of rebuilding that population." *Id.* at 48-58. It separately analyzed the risk to each population for which it had not yet developed its own rebuilding exploitation rate. *Id.* at 58-66.

4. Plaintiffs' Challenge to NMFS' "Viable" Thresholds Lacks Merit.

a. NMFS Was Not Required to Use TRT Planning Ranges for Equilibrium Spawner Abundance in Evaluating the RMP.

Plaintiffs argue that, under the 4(d) Rule, the RMP was required to use population ranges developed by the Puget Sound Technical Recovery Team for recovered populations as "viable" population thresholds in analyzing the RMP. Pl. Mem. at 7. They claim NMFS' "viable thresholds were developed without reference to the TRT's work," and are less than the TRT ranges by "an order of magnitude or more." *Id.* at 8. Accordingly, they assert NMFS' "viable" population thresholds "have no connection to the VSP Paper's concept of a population large enough to have a negligible risk of extinction." *Id.* There are four problems with this argument.

First, the TRT document on which plaintiffs rely presents "draft targets for recovery" for Puget Sound chinook populations. AR 70-01 at 1. Nowhere does the TRT suggest these targets, which are premised on vast habitat improvements, should be used to establish "viability" thresholds in current harvest plans. *Id.*[7] Accordingly, it was NMFS' Risk Assessment Procedure,

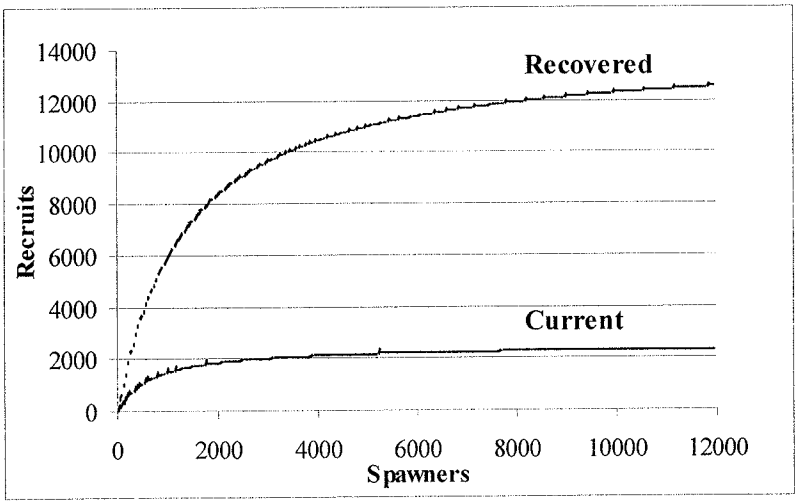
[6] The Co-Managers, in cooperation with NFMS, modeled the anticipated impacts of implementing the RMP. *Id.* at 13. The model generated anticipated ranges of exploitation rates and escapements for all chinook populations within the ESU. *Id.* at 13-14 & Table 3.

[7] The particular planning ranges cited by plaintiffs are for "equilibrium spawner abundance," *id.* at 8 (Table 1), a level at which spawners only replace themselves and which does not allow for any fishing. *See id.* at 6-8. As

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

not the TRT paper, which provided the basis for evaluating harvest levels under the RMP to determine whether those levels would appreciably reduce the likelihood of survival or recovery.

Second, contrary to plaintiffs' claim, NMFS explicitly considered the TRT's work. NMFS noted that the TRT had "derived preliminary recovery goals for most populations" and that those goals "can provide a useful contrast between current productivity and the level of potential productivity associated with recovery." AR 3 at 37. As NMFS explained, in order to achieve the TRT's recovery goals, "an increase in productivity (recruitment)" is necessary. *Id.* And, while "[p]ast harvest constraints have contributed to stable or increasing trends in escapements," the available evidence from several systems "suggests that *marine, freshwater, and estuary habitat quality and quantity is the primary constraint on productivity.*" *Id.* (emphasis added). NMFS illustrated this point with the following figure, which shows productivity of North Fork Stillaguamish summer chinook under current and recovered habitat conditions:



illustrated in the Shared Strategy Plan, recovery planning targets for populations that produce harvestable surpluses – which all parties hope to achieve – are much lower. *See* AR 269 at 137 (Fig. 4.1); *see also* AR 15 at 47-48.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

Id. at 38 (Fig. 3). Because "[f]urther harvest constraint will not, by itself, effect an increase above the asymptote associated with current productivity, until habitat conditions improve," such constraints could not be expected to assist in recovery. *Id.*

Third, the "viability" thresholds utilized by NMFS were closely tied to the VSP paper's concept of a population large enough to have a negligible risk of extinction. For some populations NMFS relied on guidance from the VSP paper itself in setting "viable" population thresholds of 1,250 spawners per year. *See* AR 3 at 26; AR 7 at C-7; AR 58 at 6-7. For other populations (*e.g.,* Skagit) NMFS derived "viable" thresholds based on current habitat conditions. *Id.* The evidence in the record indicates that these thresholds satisfy the VSP standard of a negligible risk of extinction over 100 years.

The VSP paper suggests that a range of 250 to 2,500 spawners per year represents "a low risk of extinction, i.e., a viable threshold." AR 58 at 6 (emphasis in original). All of the "viable" thresholds calculated by NMFS were within or above that range (and the RMP's upper management thresholds were even higher). AR 3 at 28 (Table 8).

Moreover, in the RMP, the Co-Managers calculated a "rebuilding escapement threshold" for the Skagit summer/fall management unit "for which there is a *99 percent* probability that the run will persist," that is, "if current exploitation rates and freshwater and marine survival conditions were maintained, the probability that the run would go extinct (i.e., fall below 100) at the end of 100 years would fall below one percent." AR 15 at 109 (emphasis added). The "rebuilding escapement threshold" calculated by the Co-Managers was 4,700 fish. *Id.* In contrast, the NMFS-derived MSY-escapement levels for the three populations comprising the same management unit totaled 10,317 fish. AR 3 at 28 (Table 8). The fact that NMFS' MSY-escapement level was more than *twice as large* as the escapement level needed to assure a *99*

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

percent probability of persistence over 100 years strongly suggests that NMFS' MSY-escapement levels meet the VSP criteria. *See also* AR 241 at 37 (VSP paper's statement that "wild population harvested at MSY is, by definition, sustainable (VSP)").

Finally, plaintiffs' argument does not come to grips with NMFS' analysis. To determine whether the RMP satisfied the Limit 4 criterion requiring the use of "viable" and "critical" thresholds, NMFS first analyzed escapement trends for populations currently above "viable," between "viable" and "critical," and below "critical" thresholds. AR 3 at 26-30. While plaintiffs' argument that NMFS should have used higher "viable" thresholds might move the current status of some populations from above-viable to between-viable-and-critical, it would not alter the results of NMFS' analysis. Of the nine populations NMFS found to be above-viable, two had stable and seven had increasing escapement trends since listing. *Id.* at 27. NMFS found harvest management of populations with similar trends had "not appreciably slowed achievement to viable function" and thus satisfied this Limit 4 criterion. *Id.* at 27.

NMFS also analyzed the effects of the RMP compared to a no-fishing scenario on *each* of the four attributes of a "viable" population identified in the VSP paper, thus explicitly utilizing the VSP paper's concept of a "viable" population. Again, plaintiffs do not show how the use of higher "viability" thresholds would have affected NMFS' analysis. Plaintiffs do not address NMFS' analysis of productivity, spatial structure or diversity at all. And, they fail to show that NMFS' analysis of the RMP's effect on abundance compared to a no-fishing scenario would change if NMFS had used higher "viability" thresholds. As the North Fork Stillaguamish figure illustrates, it is not possible under current habitat conditions to achieve the TRT's target equilibrium spawner abundance range even with *no* fishing. Accordingly, NMFS' conclusion that, compared to a no-fishing scenario, the RMP would not appreciably reduce the likelihood of

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

achieving "viable" abundance levels would not have changed even if NMFS had used higher "viability" targets in its analysis. Simply put, it is habitat, not the RMP, which is preventing achievement of those levels.

b. The RMP Does Not Constrain Future Population Levels to Levels That Can Be Achieved Under Current Conditions.

Plaintiffs claim the exploitation rates developed by NFMS "allowed harvest to be managed to produce the long term result of a population no larger than could be achieved today, under current conditions." Pl. Mem. at 9; *see also id.* at 24 (claiming exploitation rates approved by NMFS will slow recovery of populations below NMFS' viability threshold and prevent growth in populations above that threshold). According to plaintiffs, "NMFS did not attempt to determine whether a lower harvest rate is needed to avoid slowing progress toward the TRT-identified viable population ranges." *Id.* at 9.

It should first be noted that NMFS was analyzing a short-term harvest plan, which will only be in effect until April 30, 2010. *See, e.g.,* AR 3 at 2. NMFS specifically found it is unlikely that habitat conditions would change during the remaining period of the plan to an extent that higher productivity could be expected – regardless of further harvest constraints. *E.g.* AR 58 at 10; AR 7 at 3-24 n.2, 3-45 ("[w]ith the [RMP] only covering the next five fishing seasons, it is likely that abundance and survival conditions will be similar to those in recent years").

However, plaintiffs' argument rests on a more fundamental misunderstanding of the RMP and NMFS' analysis. By setting limits on exploitation *rates*, the RMP was designed to take advantage of improvements in habitat conditions that would support *larger* populations than can be supported today. As the Co-Managers explained, under the RMP MSY-escapement levels are not goals, but levels "that [are] expected to be exceeded most of the time." AR 15 at 141.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

Moreover, "when productivity conditions for [a] population improve due to recovery actions," these MSY-escapement levels will usually increase as well, as will the probability of exceeding them under the plan. *Id.* Thus, the MSY-escapement levels "serve as a proxy for the true goal of the plan," which is to achieve population levels which take advantage of improvements in productivity over time. *Id.*

NMFS likewise explained that its calculation of rebuilding exploitation rates was conservative and supported *recovery* of the ESU. AR 4-02 at 10-11. First, NMFS' rebuilding exploitation rates "were set so that escapement would meet or exceed the viable threshold at least 80% of the time at the end of 25 years." *Id.* at 11. "By using at least 80 percent, one would on average, obtain an escapement level *greater* than MSY." *Id.* (emphasis added). Second, "NMFS assumed low marine survival rates for salmon populations, which is conservative and risk averse." *Id.* If marine, freshwater or estuary survival rates were to increase, the RMP's use of exploitation rates as its primary management tool would mean that escapements would also increase. *See, e.g.,* AR 7 at 3-19. NMFS explained that a major objective of the RMP

> is to pass 'additional' spawners to the spawning grounds in high-abundance years – something that would not occur under fixed-escapement goal management . . . . These additional spawners can take advantage of newly-restored and expanded habitat provided through recovery actions in the other "H" sectors and favorable environmental conditions. Because the [RMP] provides for additional spawners, over the long term, the managers' Rebuilding Exploitation Rate ceilings provide *a natural rebuilding potential as habitat conditions and capacity improve . ..*

Id. at 3-23-24 (emphasis added).

Third, the RMP's rebuilding exploitation rates may be modified in response to more current information about the productivity and status of populations, or in response to better information about management error and, in any event, are only set for the duration of the plan. AR 4-02 at 11. Because "[t]he NMFS-derived rebuilding exploitation rates are based on

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

simulations over a more conservative 25-year period, whereas the RMP's duration is for a much shorter duration . . . , NMFS' approach in evaluating the RMP is conservative and considers the uncertainty of the data and simulation outcomes." *Id.; see also id.* at 12; AR 7 at 3-24 n.2.

Under these circumstances, plaintiffs' claim that NMFS' rebuilding exploitation rates allowed harvest to be managed to prevent growth is simply incorrect. In fact, the RMP provides "a natural rebuilding potential as habitat conditions and capacity improve." AR 7 at 3-24.

c. Plaintiffs Provide No Support for the Claim that NMFS Failed to Consider Populations Producing More Salmon than NMFS Suggested Was Possible.

Finally, plaintiffs assert that NMFS failed to consider the significance of several populations producing more salmon than NMFS' analysis suggested was sustainable under current conditions. Pl. Mem. at 9. However, plaintiffs do not identify these populations, provide no information regarding their current productivity, do not specify what aspect of NMFS' analysis they are referring to, and provide no record citations to support this claim. *Id.* NMFS estimated current productivity "as accurately and conservatively as possible given the best available information," AR 7 at 3-24; *see also* AR 4-02 at 10 ("NMFS used the best estimate of the level of escapement that produces maximum sustainable yield (MSY) of the system"), and responded in detail to specific comments about productivity in the administrative process. *E.g.,* AR 7 at 3-25-26. Plaintiffs' unsupported observation provides no basis for questioning NMFS' highly technical, scientific judgment regarding MSY levels under current habitat conditions.

B. NMFS' Evaluation of the RMP's Exploitation Rates Was Consistent with the 4(d) Rule.

Plaintiffs argue NMFS' evaluation of the RMP ran afoul of another Limit 4 criterion, namely, that "[m]aximum exploitation rates not appreciably reduce the likelihood of survival and

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

recovery of the ESU." 50 C.F.R. § 223.203(b)(4)(i)(C); *see* Pl. Mem. at 25. Plaintiffs rely on two of the TRT's five preliminary recommendations for de-listing the ESU in making this argument. *Id.* First, the TRT recommended that "[a]n ESU-wide recovery scenario should include at least 2-4 viable chinook salmon populations in each of 5 geographic regions within Puget Sound, depending on the historical biological characteristics and acceptable risk levels for populations within each region." AR 70-01 at 12. Second, it recommended that "[p]opulations that do not meet the viability criteria for all VSP parameters (i.e., abundance, productivity, spatial structure and diversity) should be sustained to provide ecological services and preserve options for ESU recovery." *Id.* at 15.

Relying on these *recommendations*, plaintiffs argue the expected exploitation rates under the RMP are inconsistent with achieving of two-to-four viable populations in two regions and with sustaining five other populations. *Id.* at 10-12, 25-26. However, plaintiffs' discussion of these regions and populations fails to present all of the information on which NMFS relied in its analysis. Because, as we show below, NMFS "considered the relevant factors and articulated a rational connection between the facts found and the choices made," there is no basis on which to set aside its decision. *See Midwater Trawlers Cooperative v. Department of Commerce,* 393 F.3d 994, 1002-03 (9th Cir. 2004).

At the outset, we note, as do plaintiffs (*see* Pl. Mem. at 10), that the requirement in the 4(d) Rule that a harvest plan "not appreciably reduce the likelihood of survival and recovery" of a threatened species parallels the requirement imposed on federal agencies under the ESA.[8] In the federal agency context, causation is a key element of a jeopardy finding. "[A]n agency only

[8] *See* 16 U.S.C. § 1536(a)(2) (requiring federal agencies to insure that their actions do not "jeopardize the continued existence of" a threatened or endangered species); 50 C.F.R. § 402.02 (defining "jeopardize the continued existence of" to mean "reduce appreciably the likelihood of both the survival and recovery of a listed species").

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

'jeopardize[s]' a species if it *causes* some new jeopardy," *i.e.,* if it "*causes* some deterioration in the species' pre-action condition." *National Wildlife Federation v. National Marine Fisheries Service,* 2007 WL 1040032 at *8 (9th Cir. Apr. 9, 2007) (emphasis added). Moreover, while the regulatory definition of jeopardy requires consideration of the effects of an action on both the species' survival and its recovery, "'except in exceptional circumstances, injury to recovery alone would not warrant [a jeopardy finding].'" *Id.* at *9, quoting 51 Fed. Reg. 19,934 (June 3, 1986) (emphasis omitted). The types of exceptional circumstances where recovery impacts might result in jeopardy involve "'significant impairment of recovery efforts . . . which rise to the level of 'jeopardizing' the 'continued existence' of a listed species.'" *Id.*, quoting 51 Fed. Reg. at 19,934.

As discussed below, NMFS' analysis of the RMP's effects on individual regions and populations, as well as its analysis of the RMP's effects on recovery of the ESU as a whole, correctly adhered to these principles. Because the record showed the RMP would *not* significantly impair recovery efforts, NMFS correctly concluded that it would not appreciably reduce the likelihood of survival and recovery of the ESU.

1. NMFS' Analysis of Individual Regions and Populations Was Consistent with the 4(d) Rule.

a. Georgia Strait Region.

Plaintiffs claim the Georgia Strait Region does not have "at least two populations headed for viability." *Id.* at 25. However, NMFS found that the two populations in the region, the North and South Fork Nooksack River populations, had *increasing* escapement trends since listing. AR 3 at 29 (Table 9), 50, 68. Although the recent average escapement of 180 North Fork natural-origin chinook was below the NMFS-derived critical threshold of 200 fish, there was a significant contribution of hatchery-origin fish to the natural spawning areas. *Id.* at 30, 50, 68-70. Including

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

these hatchery-origin fish, an average aggregate escapement of *3,438* natural spawners had been observed in the North Fork since listing. *Id.* at 30, 50, 69. These hatchery fish "retain the genetic characteristics of the wild population . . . [and] are expected to buffer harvest-induced genetic and demographic risks to the natural-origin . . . population." *Id.* at 69*; see also id.* at 27-30.

Contrary to plaintiffs' assertions, NMFS' scientists did not believe the RMP would "slow recovery" of the Nooksack populations, for several reasons. First, given their increasing escapement trends, "the results of harvest actions since . . . listing . . . appear[] to have not appreciably slowed achievement to viable function for these populations." *Id.* at 27 (discussing South Fork Nooksack River and other populations). Second, NMFS found, on the basis of empirical evidence, that habitat was constraining recovery of the Nooksack River populations. *Id.* at 37-38, 69. Third, on the North Fork, hatchery-origin spawners would augment natural origin spawners, test the natural production potential of the system at higher escapement levels, and possibly benefit natural-origin production by capitalizing on favorable survival conditions in some years. *Id.* at 69.[9]

NMFS explicitly considered the fact that the anticipated total exploitation rate in all Alaskan, Canadian and Southern United States ("SUS") fisheries (20 to 26%) exceeded the NMFS-derived rebuilding exploitation rate of 12%, and that the NMFS' rate would be exceeded even with *no* fishing under the RMP. *Id.* at 51, 69. It also considered the results of modeling which indicated that, "[u]sing the exploitation rate in Canadian and Alaskan fisheries as a

[9] Because NMFS found it likely that most RMP harvest impacts on the Nooksack River populations would occur in treaty Indian fisheries, NMFS was committed to considering the Tribes' expertise regarding the conservation of these stocks. *Id.* at 69-70. As discussed in the RMP, the Tribes believed these stocks were protected by a series of management measures, including substantial reduction in exploitation rates from past levels, exploitation rate ceilings designed to achieve stable abundance under current habitat conditions (without impeding recovery to higher abundance as habitat conditions improve), and weak stock management procedures. *See, e.g.,* AR 15 at 53-54.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

baseline," the maximum exploitation rate under the RMP represented a 14 percentage point increase in the likelihood that the populations would fall below their critical thresholds (but only "a 2 percentage point decrease in the probability of rebuilt populations in 25 years"). *Id.* at 52.[10]

Considering *all* of these factors, NMFS concluded that "the implementation of the RMP from May 1, 2005 through April 30, 2010, will adequately protect chinook salmon populations in the Georgia [Strait] Region," *id.* at 70, 78, and "would not appreciably reduce the likelihood of survival and recovery of the Puget Sound Chinook Salmon ESU in the wild." *Id.* at 79. Because NMFS considered all relevant factors, and articulated a rational connection between the facts found the choice made, its decision should be upheld. While plaintiffs may disagree with NMFS' conclusion, NMFS was entitled to rely on the considered judgment of its own experts.[11]

b. Hood Canal Region.

Plaintiffs also claim the Hood Canal Region does not have "two populations headed for viability." Pl. Mem. at 25. The two populations in the region, Skokomish River and Mid-Hood Canal rivers, inhabit watersheds where indigenous chinook populations no longer exist. AR 3 at 74.; *see also* AR 255 at 54. Although the TRT identified these populations, it noted that important components of the historical diversity may have been lost (in part due to the use of transplanted Green River origin fish for hatchery production), and that it was not possible to differentiate them on the basis of life history information. AR 3 at 41.

---

[10] Actual SUS exploitation rates have been *far less* than anticipated. *Cf.* AR 3 at 52 (anticipating 7% exploitation rate) *with* AR 271 at 76 (reporting actual 2002 and 2003 exploitation rates of 1% and 3%, respectively).

[11] *See, e.g., Greenpeace Action v. Franklin,* 14 F.3d 1324, 1332 (9th Cir. 1992) (agency "'must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive,'" quoting *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 378 (1989)); *see also Davis v. U.S. E.P.A.,* 348 F.3d 772, 781 (9th Cir. 2003) (judicial deference "'is particularly great where [agency] decision is based on complex scientific or technical analysis,'" quoting *Nat'l Petrochemical & Refiners Ass'n v. EPA,* 287 F.3d 1130, 1135 (D.C. Cir. 2002) (per curiam)).

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

Plaintiffs focus on the Mid-Hood Canal rivers population, which comprises spawning aggregations in the Hamma Hamma, Duckabush and Dosewallips Rivers. Pl. Mem. at 11; AR 3 at 75. NMFS found this population had exhibited an increasing escapement trend since listing, with the Hamma Hamma River component generally comprising the majority of the population. *Id.* at 41, 74. Although the escapement trend in the Dosewallips River component had declined, and spawning levels below 40 fish had been observed in the Duckabush and Dosewallips Rivers, "exchange among the three spawning aggregations within the Mid-Hood Canal Management Unit, and with other Hood Canal natural and hatchery populations is probable." *Id.* at 41-42. NMFS believed the "demographic risks" to the population "may be buffered by this straying at all abundance levels." *Id.* at 42. In addition, "production from the Hamma Hamma Fall Chinook Restoration Program, a hatchery-based supplementation program, has contributed substantially to the Mid-Hood Canal rivers population." *Id.* The program may "buffer demographic risks to the . . . population in the short term, particularly to the natural-origin spawning aggregate returning to the Hamma Hamma River." *Id.*

NMFS' analysis indicated that, while the RMP was expected to result in a 13 percent SUS exploitation rate, *id.* at 75, it would have very little effect on overall escapement, and virtually no effect on escapement to the Duckabush and Dosewallips spawning aggregations. *Id.* at 42-43 (on average, *no* Puget Sound fishing would increase overall escapement by only *23* fish (from 504 to 527), and by only *3* and *2* fish in the Duckabush and Dosewallips, respectively); *see also id.* at 75.

Specifically acknowledging the TRT's recommendation that an ESU-wide recovery scenario include at least two to four viable chinook salmon populations in each region, NMFS concluded the RMP was "adequately protective of the geographic, life history and diversity of the populations within the Hood Canal Region." *Id.* at 76. NMFS' conclusion took into

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

consideration that hatchery production may buffer demographic risks, and that Skokomish River and South Puget Sound populations could serve as reserves. *Id.* However, the "primary reasons" for its conclusion were "the total abundance status of the population, the increasing escapement trend observed for the population, the annual monitoring and evaluation actions outlined in the RMP . . . , and *the likelihood that further decrease in the SUS fisheries-related impacts would have limited beneficial effects*." *Id.* (emphasis added). Again, plaintiffs may disagree, but NMFS was entitled to rely on the considered judgment of its own experts.

c. Lower Sauk, Lower Skagit, Skykomish, Cedar and Sammamish River Populations.

Plaintiffs claim NMFS "concluded that several important populations in both the North and South Sound regions will not improve and will remain at risk under the [RMP]." Pl. Mem. at 12; *see id.* at 25-26. However, nothing in NMFS' analysis suggests any of these populations will not be "sustained" under the RMP and, therefore, nothing in NMFS' analysis is inconsistent with the TRT recommendation on which the plaintiffs rely. *See* AR 70-01 at 15.

North Puget Sound Region Populations. The lower Skagit, lower Sauk and Skykomish River populations are three of ten populations in the North Puget Sound Region. AR 3 at 70. NMFS concluded that the RMP would "contribute to the rebuilding" of the other seven populations within this region, but identified "a potential elevated level of risk under the RMP" for these three populations. *Id.*

The lower Skagit River population had shown an increasing escapement trend since listing. *Id.* The anticipated escapement under implementation of the RMP was 1,182 fish, which is "well above the NMFS-derived critical threshold of 251 fish." *Id.* NMFS' modeling indicated that the *combined* effects of Canadian fisheries under the Pacific Salmon Treaty and SUS

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

fisheries under the RMP would reduce the probability of a rebuilt population in 25 years by 26 percentage points under current conditions, but that "there is no change in the probability that the population will fall below the critical level during that same 25-year period." *Id.* at 71.

The lower Sauk River population had also exhibited an increasing escapement trend since listing. *Id.* The most likely escapement under implementation of the RMP was 588 fish, which "is above the NMFS-derived critical threshold of 200 fish." *Id.* Although *total* exploitation rates under implementation of the RMP were expected to be slightly above the NFMS-derived rebuilding exploitation rate (55% vs. 51%), a lack of information prevented NMFS from modeling the increased risk to this population. *Id.* NMFS assumed that the effects on this population would "be similar to those identified for the lower Skagit River population." *Id.*[12]

The Skykomish River population had likewise exhibited an increasing escapement trend since listing. *Id.* The *total* exploitation rate that is most likely to result from implementation of the RMP would exceed the NMFS-derived rebuilding exploitation rate for this population by 5 percentage points, *id.*, resulting in "a 14 percentage point decrease in the probability of a rebuilt population in 25 years under current conditions," but only "a 3 percentage point increase in the probability that the population will fall below the critical level during that same 25-year period." *Id.* at 72.

NMFS noted that the "life history and run timing characteristics of the three populations identified as having an elevated level of risk *for rebuilding* . . . are similar to the seven other populations in the region." *Id.* (emphasis added). Moreover, two of these populations were above their "viable" thresholds and all three had an increasing escapement trend. *Id.* Accordingly,

[12] NMFS acknowledged that its anticipated total exploitation rate of 55% on Skagit River populations (including lower Skagit and lower Sauk) was "likely an overestimate." *See* AR 3 at 16, 18 n.2, 93-99. The predicted total fishing exploitation rate of 38% on Skagit summer/fall chinook in 2004 confirms this. *See* AR 165-01 at 1.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

NMFS concluded "the RMP's management objectives are adequately protective of the geographic distribution, life history characteristics, and diversity of populations within the North Puget Sound Region of the ESU." *Id.* NMFS made no suggestion that any these populations will not be "sustained" under the RMP.

South Puget Sound Region Populations. The Cedar and Sammamish River populations comprise the Lake Washington Management Unit in the South Puget Sound Region. *E.g.* AR 3 at 72. The TRT delineated six populations in this region. *Id.* However, it found that, both in terms of genetics and life history traits, most chinook salmon in the region are similar. *Id.*

Contrary to plaintiffs' claim, NMFS "found that the proposed RMP is anticipated to contribute to the *stabilization or rebuilding* of all populations within this region." *Id.* (emphasis added). NMFS did identify a concern for the Cedar and Sammamish River populations, "primarily due to anticipated low abundance under the implementation of the RMP." *Id.*

Since listing, the average escapement for the Cedar River population (385 fish) was considered stable, while that for the Sammamish River population (373 fish) was increasing; each exceeded the VSP guidance for a critical threshold of 200 fish but remained below the VSP guidance for a viable threshold. *Id.* at 60, 72-73. However, the escapement estimates for these populations were considered conservative estimates, "as the total escapements for these two systems are likely greater than those depicted" in NMFS' data. *Id.* at 61, 73.

NMFS' modeling indicated "the co-managers will continue to meet or exceed the critical threshold of 200 natural spawners for both populations." *Id.* NMFS was concerned that the populations "could experience very low abundance in the next several years, below the critical thresholds," but found that "a substantial contribution of stray hatchery-origin fish to the natural escapement in the Sammamish River tributaries . . . may lessen demographic concerns that may

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

arise regarding low escapement for that population." *Id.* NMFS also found that protective measures in the RMP, "imposed to safeguard the Cedar River population . . . will also incidentally benefit the Sammamish River population." *Id.; see also id.* at 60-61.

NMFS stated that "[i]dentifying these two populations as a concern is considered a precautionary approach, as information suggests that the escapements estimated for these systems are likely conservative." *Id.* at 74. NMFS did not suggest that implementation of the RMP would mean that either of these populations would not be "sustained." To the contrary, it found that implementation of the RMP "will not preclude management options for recovery of the Lake Washington chinook populations." AR 7 at 3-29. Considering the region as a whole, NMFS concluded that "the RMP's management objectives are adequately protective of the geographic distribution, life history characteristics, and genetic diversity of the populations within the South Puget Sound Region of the ESU." AR 3 at 74.

2. NMFS' Analysis of the ESU as a Whole Was Consistent with the 4(d) Rule.

In summarizing its conclusion that the RMP would not appreciably reduce the likelihood of survival or recovery of the ESU, NMFS first explained that the ESU, not the 22 component populations, was the primary focus of its analysis. AR 3 at 77. It then reiterated the TRT's preliminary recommendation "that any ESU-wide recovery scenario should include at least two to four viable chinook salmon populations in each of five geographic regions within Puget Sound, depending on the historical life history and biological characteristics of populations in each region." *Id.* at 78. NMFS also took into consideration biological criteria in the 4(d) rule, its other mandates under the ESA, and its trust responsibility to treaty Indian tribes. *Id.*

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

As discussed above, the ERD analyzed each of the 22 populations comprising the ESU to determine whether anticipated exploitation rates and escapements under the RMP would appreciably reduce the likelihood of recovery of that population and provided a region-by-region summary of its conclusions. *See* AR 3 at 66-79. "Based on the stable or increasing trends in escapement; the apparent positive response to significant decreases in exploitation rates for most populations; the distribution and life history representation of chinook populations throughout the ESU relative to their status and the TRT guidance; the low level of exploitation in southern U.S. fisheries for those populations at low abundance; taking into account its Tribal trust responsibility; and the buffer against genetic and demographic risks provided by some associated hatchery programs, NMFS' evaluation of the [RMP] concluded it would not appreciably reduce the likelihood of survival and recovery of the . . . ESU." AR 7 at 3-76-77.

NMFS carefully followed the dictates of the 4(d) Rule by analyzing whether the RMP would *cause* any deterioration in the species' prospects for survival *or* recovery, and, as to the latter, found no evidence of a "significant impairment of recovery efforts." *National Wildlife Federation, supra,* at *9. NMFS explicitly considered the TRT's preliminary recommendations, and carefully analyzed the anticipated impacts from implementing the RMP on the ESU as a whole as well as on the individual regions and populations comprising the ESU. Plaintiffs identify no factors NMFS was required but failed to consider. Because NMFS considered the relevant factors and articulated a rationale connection between the facts found and the choices made, its decision should be upheld.

C. NMFS' Evaluation of the RMP's Critical Exploitation Rate Ceilings and Its Provisions to Minimize Take of Listed Species Was Consistent with the 4(d) Rule.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

Plaintiffs assert NMFS failed to evaluate whether allowing harvests under the RMP's critical exploitation rate ceilings would comply with the requirements of the 4(d) Rule. Pl. Mem. at 26. However, NMFS' analysis of the RMP explicitly took into account the plan's critical exploitation rate ceilings. *See* AR 3 at 12-13, 17-18 (Table 5). As NMFS stated, it "compared the proposed RMP's mortality limits, *regardless of their basis,* to the NMF-derived standards." AR 4-02 at 8 (emphasis added); *see also id.* at 4, 5-6 (modeling addressed all mortality limits in RMP, including critical rate ceilings), 7 (column added to ERD Table 5 to show management units in which critical rate ceiling "was implemented during modeling"). Since NMFS' analysis was based on the RMP as a whole, including its critical rate ceilings, it is simply incorrect to state that NMFS failed to evaluate those ceilings.

Plaintiffs also claim NMFS failed to evaluate "whether widespread use of mark-selective fishing – at a minimum in Puget Sound's recreational fisheries – would further minimize the take of threatened Chinook, as required by the 4(d) Rule." Pl. Mem. at 26-27. Plaintiffs assert this was required by one of the Limit 4 criteria, which states that a fishery management plan must "[i]nclude restrictions on resident and anadromous species fisheries that minimize any take of listed species, including time, size, gear, and area restrictions." *Id.* at 27; 50 C.F.R. § 223.203(b)(4)(i)(H).

In the ERD, NMFS stated that, while the RMP's rebuilding exploitation rates, upper management thresholds, low abundance thresholds, and critical exploitation rate ceilings are the primary elements of the plan, "[t]ime, size, gear and area and retention restrictions are all among the actions taken to ensure that salmon fishing-related mortality is consistent with these management objectives." AR 3 at 84-85. These actions have included closure of salmon directed fisheries in terminal areas; restrictions on or delays of fisheries to protect naturally spawning

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

chinook; closures and size limits to protect spring chinook in recreational fisheries; closed spawning grounds; required non-retention of chinook; and closures around river mouths. *Id.* at 85; *see also* AR 7 at 3-64-65 (discussing use of selective fishing gear). In addition, the Co-Managers are testing mark-selective fishing in some fisheries and, "[d]epending on the success of these fisheries, they might be expanded in the future." AR 7 at 3-65.

Having concluded that the RMP *did* include time, size, gear, area and retention restrictions to minimize take of listed species, and that the Co-Managers *were* examining mark-selective fisheries in particular, there was nothing in the 4(d) Rule that required NMFS to evaluate a further expansion of such fisheries. There are infinite combinations of restrictions that might be applied to achieve the RMP's objectives. NMFS was required to evaluate the harvest management plan provided to it by the Co-Managers; if the plan met "the criteria of Limit 6 of the 4(d) Rule and will not appreciably reduce the likelihood of survival and recovery of the affected ESU, then [NMFS] must issue that finding." AR 7 at 3-62.

There is no merit to plaintiffs' assertion (Pl. Mem. at 27) that management measures that fulfill one criterion under Limit 4 criteria cannot be relied upon to fulfill another criterion. NMFS' approach did not "effectively excise[]" (*id.*) any of the criteria; it independently analyzed each to insure that it was adequately addressed by the RMP. No more was required.

III. NMFS' BIOLOGICAL OPINION COMPLIED WITH THE ESA.

Plaintiffs argue NMFS' Biological Opinion (BO) violated the ESA because it allegedly failed to consider the effect of NMFS' action (approval of the RMP) on recovery of the ESU and failed to utilize the best scientific data. Pl. Mem. at 27-31. As to the first claim, plaintiffs are correct that NMFS was required to evaluate the effect of its action on both the survival and the recovery of the ESU. Pl. Mem. at 27-28; *National Wildlife Federation, supra,* at *8-10.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

However, contrary to plaintiffs' claim, NMFS did evaluate the effect of its action on recovery and reasonably concluded that approval of the RMP would *not* appreciably reduce the likelihood of recovery.

The BO specifically notes that the Puget Sound TRT "has prepared a draft document that includes general guidelines for assessing recovery efforts across individual populations within Puget Sound and determining whether they are sufficient for delisting and recovery of the listed ESU." AR 2 at 24. NMFS stated that it used the TRT's preliminary delisting and recovery criteria "to assist in the evaluation of the harvest management strategy of the RMP." *Id.* More specifically, NMFS stated that, "[w]hile changes in harvest alone cannot recover the . . . ESU, NMFS can use the preliminary TRT guidance in evaluating whether the proposed RMP would impede recovery and survival of the ESU." *Id.* at 25.

As noted, the TRT recommended that an ESU-wide recovery scenario should include at least two to four viable chinook salmon populations in each region, and recommended that an ESU-wide recovery scenario include within each region one or more viable populations from each major genetic and life history group historically present within that geographic region. *Id.* Consistent with the TRT's guidance to assess ESU-wide effects, NMFS evaluated "the estimated impacts on the ESU, by region, from the fisheries proposed by the RMP." *Id.; see also id.* at 25-38. In following the TRT's guidance, NMFS explicitly considered the effects of its action on the recovery of the ESU.

Plaintiffs assert that NMFS failed to consider the effects of its action on recovery because it did not set "viable" population thresholds based on the TRT's abundance estimates for recovered populations. Pl. Mem. at 28-29. However, as discussed above, for those populations for which sufficient data was available, NMFS set "viable" population thresholds at a level that

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

would produce maximum sustained yield under current conditions, conditions NMFS expected to persist for duration of the RMP. For other populations, NMFS relied on other information regarding current productivity or the generic guidance in the VSP paper. The use of these "viability" thresholds does not mean that NMFS failed to consider the effects of approving the RMP on the recovery of the ESU. To the contrary, NMFS reasonably concluded that, if fisheries were being managed to meet the RAP criteria under current conditions (including achievement of maximum sustained yield levels more than 80% of the time at the end of a 25-year simulation), those fisheries were not causing an appreciable reduction in the likelihood of recovery. Further, as NMFS explained, because the RMP uses exploitation rates as its primary management tool, if productivity did increase while the RMP was in effect, the exploitation rate limits in the plan would result in higher escapements, which would assist in rebuilding the populations.

Nor is there merit to plaintiffs' claim that NMFS failed to use the best available scientific information because it did not set "viable" population thresholds based upon the VSP paper's concept of a "viable" salmonid population or TRT's planning ranges for recovered populations. As discussed above, NMFS did apply the VSP paper's concept of "viable" salmonid populations, evaluating the effect of the RMP on population abundance, productivity, spatial structure and diversity, and it expressly considered the TRT's abundance estimates for recovered populations. However, the TRT estimates were not helpful in determining whether *the RMP* would appreciably reduce the likelihood of recovery because, as NMFS found, the primary restraint on recovery to TRT levels came from productivity and capacity limitations resulting from current habitat conditions, not fisheries.

It is not true, as plaintiffs assert, that NMFS' "[i]gnor[ed] available expert scientific analysis" or "disregard[ed] specific quantitative goals like those developed by the TRT in favor of

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

mere assertions that an action will avoid jeopardy." *See* Pl. Mem. at 30-31. To the contrary, as discussed above, NMFS developed specific quantitative criteria through its Risk Assessment Procedure to evaluate the effects of the RMP. Those criteria were based on the concepts in the VSP paper and were developed for the specific purpose of evaluating the harvest management plan to insure that it was not appreciably reducing the likelihood of survival *or* recovery. *See, e.g.,* AR 58 at 10 (NMFS' "criteria seek to identify an exploitation rate that will not appreciably increase the number of times a population will fall below the critical threshold and *also not appreciably reduce the prospects of achieving recovery*") (emphasis added). NMFS use of these quantitative criteria fully satisfied the ESA's requirement that it use the "best scientific . . . data available." 16 U.S.C. § 1536(a)(2).

IV. NMFS WAS NOT REQUIRED TO REINITIATE CONSULTATION.

Plaintiffs assert NMFS was required to reinitiate consultation on its decision to approve the RMP under 50 C.F.R. § 402.16(b). That regulation requires re-initiation "where discretionary Federal involvement or control over the action has been retained or is authorized by law" and "new information reveals effects of the action that may affect listed species . . . in a manner or to an extent not previously considered." Because NMFS drafted this regulation and is the agency primarily responsible for protecting the species, its determination not to reinitiate consultation is entitled to deference. *See Sierra Club v. Marsh,* 816 F.2d 1376, 1388 (9th Cir. 1987).

A. Canadian Harvests.

Plaintiffs assert there has been an increase in the harvest of chinook salmon in Canadian fisheries and a shift in the timing of those fisheries, which has resulted in an increase in the harvest of Puget Sound chinook. Pl. Mem. at 15-16. Plaintiffs acknowledge "[i]t is difficult to evaluate the impact of Canada's timing shift on specific populations," but then assert that "the

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

available data does show that Canada's harvest rates on Puget Sound populations are higher than previously expected, in some cases dramatically so." *Id.* at 16.

The effects of actions that are neither part of nor dependent on a federal action do not trigger a duty to reinitiate consultation under § 402.16(b). *See Sierra Club v. Marsh,* 816 F.2d at 1387. The Canadian fisheries are neither part of nor dependent on NFMS' approval of the RMP; they are the actions of a separate sovereign over which NMFS and the Co-Managers have no control. *See, e.g.,* AR 3 at 15. Accordingly, the Canadian fisheries "cannot trigger reinitiation, whatever [their] effects." *Sierra Club v. Marsh,* 816 F.2d at 1387.

B. Puget Sound Chinook Recovery Plan.

Plaintiffs argue that the "formal adoption of population recovery objectives [in a Puget Sound Chinook Recovery Plan] at or near the levels endorsed by the TRT in 2002, the endorsement of the 'negligible risk' version of viable population targets, and the setting of 2015 to put populations on the path to recovery are all 'new information' within the meaning of 50 C.F.R. § 402.16(b) that should have caused NMFS to revisit its analysis and reinitiate consultation on the Harvest Plan." Pl. Mem. at 33.

As discussed above, NMFS explicitly considered the TRT's planning ranges for recovered chinook populations and the VSP paper's viability criteria in the ERD. The subsequent "formal adoption" of these projections and criteria thus did not present new information. Nor is the statement in the recovery plan's executive summary, that "[a] ten-year timeframe is a reasonable period of time to ask for commitments and begin to see progress and results," AR 269 at xviii, new information that calls into question NMFS' conclusion about salmonid productivity during the three remaining years of the RMP.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

Moreover, to require reinitiation of consultation under § 402.16(b), the "new information" must "reveal[] effects of the action that may affect listed species . . . in a manner or to an extent not previously considered." Plaintiffs identify nothing in the recovery plan that provides new information about the effects, or potential effects, of NMFS' approval of the RMP on Puget Sound chinook. They attempt to fill this gap by asserting – with no supporting citation – that "[f]isheries conducted under the Harvest Plan are having a greater impact than NMFS acknowledged," Pl. Mem. at 33, but nothing in the recovery plan supports this claim.

C. Exclusion of Chinook with Clipped Fins from ESA Take Prohibitions.

In June 2005 NMFS decided that ESA take prohibitions for salmon from threatened ESUs would apply only to salmon with an intact adipose fin. 70 Fed. Reg. 37,160, 37,166-67 (June 28, 2005); 50 C.F.R. § 223.203(a). Plaintiffs claim "[i]t is now possible for fishermen in Puget Sound to tell, before they have killed the Chinook they have caught, whether the fish on their hook or in their net is protected by the ESA." Pl. Mem. at 34. However, plaintiffs do not explain how this information bears upon the effects of the RMP on listed species. Plaintiffs make no claim that NMFS' decision to limit the take prohibitions to salmon with an intact adipose fin means that more or different fish will be harvested under the RMP, or that the RMP will otherwise affect listed species "in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(b). Accordingly, this information provides no basis for reinitiating consultation.[13]

D. Escapement Data.

[13] Under the ESA, NMFS' only duty was to insure that its approval of the RMP would not jeopardize the continued existence of the threatened ESU. 16 U.S.C. § 1536(a)(2). The possibility that other management measures might better protect the ESU does *not* provide a basis for overturning NMFS' decision. *See Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation,* 143 F.3d 515, 523 (9th Cir. 1998) (Secretary not required to pick the best alternative or the one that would most effectively protect the listed species; Secretary need only comply with the jeopardy standard). Thus, the possibility that other, potentially more effective measures might now be available does not require reinitiation of consultation.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

Finally, plaintiffs claim escapement data reported in a March 2006 email required NMFS to reinitiate consultation. Pl. Mem. at 34-35. The email noted that, "on a high note, half of the populations are exceeding their upper management thresholds, even with the dip in abundance in 2005, and increasing in several areas." AR 272.[14] However, the email also expressed concerns about returns to the South Fork Nooksack River and the Mid Hood Canal rivers populations (as well as the South Fork Stillaguamish River population). *See* AR 272. The author stated that the returns for these populations were lower than NMFS had anticipated and below critical levels in recent years. *Id.*; *see also* AR 272-01. Thus, while "overall the news is pretty good, . . . this *preliminary look* does highlight some areas that deserve a closer look." *Id.* (emphasis added). The author acknowledged "this is only part of the picture since the information on exploitation rates is not yet available." *Id.* However, '[g]iven the patterns seen for some of the stocks, a primary goal of the recovery plan that all populations must improve, and the importance of the SF Nooksack and MHC populations to the ESU in particular, it is important that we try and explain the causes for these patterns and, *consistent with the RMP*, to determine whether taking any additional fishery actions would make a substantive difference in them." *Id.* (emphasis added).

The March 2006 email provides no basis to reinitiate consultation. First, as the author acknowledged, it presented only a "preliminary look" at data that had not yet been verified or fully analyzed. Although "[a] preliminary summary of catch and effort is available four months

[14] In the North Puget Sound Region, the average escapement from 2000 through 2005 exceeded the critical threshold for all ten populations and exceeded the upper management threshold for eight of the ten populations. AR 272-01. In the South Sound Region, the average escapement exceeded the critical threshold for all six populations and exceeded the upper management threshold for four of the six populations. *Id.* In the Strait of Juan de Fuca region, the average escapement exceeded the critical threshold for both populations and 2004 and 2005 returns were well above those expected in the ERD. *Id.* In the Hood Canal Region, the average escapement of the Skokomish River population exceeded both the critical and upper management thresholds. *Id.* In the Georgia Strait Region, the average escapement to the North Fork Nooksack River was above the critical threshold and in 2004 and 2005 escapements exceeded those anticipated by NMFS in the ERD. *Id.*

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

after the season, . . . a final, error-checked record may require a year or more to develop." AR 15 at 55. Estimates of annual, adult equivalent exploitation rates can take up to two years to complete. *See id.* at 59. Second, as the author recognized, the RMP already includes mechanisms to review and respond to data such as that presented in the March 2006 email. *E.g., id.* at 55, 57-58, 62; *see also* AR 3 at 81-82 (summarizing RMP provisions for monitoring and adjusting management practices).

Third, the preliminary data do not indicate that the low returns to the South Fork Nooksack River or the Mid Hood Canal rivers populations were the result of the action at issue here – NMFS' approval of the RMP – as opposed to Canadian harvests or environmental or other factors beyond the control of the parties. According to the Recovery Plan, there is substantial evidence that the problems in Mid Hood Canal are the result of severely degraded habitat and Canadian harvests, not the RMP's "severely reduced fisheries." *See* AR 269 at 309-10. Also, post-season model runs for 2002 and 2003 indicated SUS exploitation rates on Nooksack River chinook were only 1% and 3%, respectively, well below the 7% exploitation rate NMFS had anticipated. *See* AR 271 at 76. As such, the preliminary data provide no new information about the "effects of the action" within the meaning of 50 C.F.R. § 402.16(b).

V. CONCLUSION.

For the foregoing reasons, the Tribes and DFW see no merit to plaintiffs' claim that NMFS' approval of the RMP was improper or that it was required to re-initiate consultation, and urge the Court to deny those claims.

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

Dated: May 29, 2007.

Respectfully submitted,

GENDLER & MANN, LLP
By: /s/ Lauren P. Rasmussen (per email authorization)
Lauren P. Rasmussen, WSBA #33256
Email: lpr@gendlermann.com
1424 4th Ave., Suite 1015
Seattle WA 98101-2217
Tel.:206-621-8868, Fax: 206-621-0512
Counsel for the Jamestown & Port Gamble S'Klallam Indian Tribes

By: /s/ Russell W. Busch (per email authorization)
Russell W. Busch, Attorney at Law
WSBA #3489
Email:russbusch@comcast.net
P.O. Box 51159
Seattle WA 98115
Telephone:206-517-5011
Attorney for the Lower Elwha Klallam Tribe

RASS JOHNSON & STUEN, P.S.
By: /s/ Daniel A. Rass (per email authorization)
Daniel A. Raas, WSBA #04970
Email: danraas@comcast.net
1503 E Street, PO Box 5746
Bellingham, WA 98227-5746
Telephone:360-647-0234, Fax: 360-733-1851
Counsel for the Lummi Nation

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
By: /s/ Marc Slonim
Marc Slonim, WSBA #11181
Email: mslonim@zcvbs.com
2101 Fourth Avenue
Seattle, WA 98121
Telephone:206-448-1230, Fax: 206-448-0962
Counsel for the Makah Tribe

MUCKLESHOOT INDIAN TRIBE
By: /s/ Alan C. Stay (per telephone authorization)
Alan C. Stay, WSBA #04569
Email: alan.stay@muckleshoot.nsn.us
39015 172nd Ave, S.E.
Auburn, WA 98092
Telephone:253-939-3311, Fax: 253-939-5311
Counsel for the Muckleshoot Tribe

NISQUALLY INDIAN TRIBE
By: /s/ Bill Tobin (per email authorization)
Bill Tobin, WSBA #04397
Email: billtobinattorney@comcast.net
PO Box 1425
Vashon, WA 98070
Telephone:206-463-1728, Fax: 206-463-1729
Counsel for the Nisqually Indian Tribe

NOOKSACK INDIAN TRIBE
By: /s/ Edward J. Wurtz (per email authorization)
Edward J. Wurtz, WSBA #24741
Email: ewurtz@nooksack-tribe.org
5048 Mount Baker Hwy.
PO Box 157
Deming, WA 98244-0157
Telephone:360-592-4158, Fax: 360-592-5721
Counsel for the Nooksack Indian Tribe

PUYALLUP TRIBE OF INDIANS
By: /s/ Samuel Stiltner (per email authorization)
Samuel Stiltner, WSBA #07765
Email: sams@puyalluptribe.com
3009 E. Portland Ave.
Tacoma, WA 98404
Telephone:253-573-7875, Fax: 253-680-5998
Counsel for the Puyallup Tribe of Indians

SAUK-SUIATTLE INDIAN TRIBE
By: /s/ Regina Hovet (per email authorization)
Regina Hovet, WSBA #33654
Email: RegelizH@aol.com
5318 Chief Brown Ln.
Darrington, WA 98241-9420
Telephone:360-436-0139, Fax: 360-436-0471
Counsel for the Sauk-Suiattle Indian Tribe

SKOKOMISH INDIAN TRIBE
By: /s/ Lori E. Niles (per telephone authorization)
Lori E. Niles, WSBA #26652
Email: Inies@skokomishlegal.net
North 80 Tribal Center Rd.
Skokomish Nation, WA 98584
Telephone:360-877-2100, Fax: 369-877-2104
Counsel for the Skokomish Indian Nation

SQUAXIN ISLAND TRIBE
By: /s/ Kevin R. Lyon (per telephone authorization)
Kevin R. Lyon, WSBA #15076
Email: klyon@sqaxin.nsn.us
SE 3711 Old Olympic Hwy
Shelton, WA 98584
Telephone:360-432-1771, Fax: 360-432-3699
Counsel for the Squaxin Island Tribe

By: /s/ Alix Foster (per email authorization)
Alix Foster, WSBA #04943
Email: afoster@swinomish.nsn.us
PO Box 817
LaConner, WA 98257
Telephone:360-466-7220, Fax: 360-466-5309
Counsel for the Swinomish Indian Tribal Community

MORISSET, SCHLOSSER, JOZWIAK & McGAW
By: /s/ Mason Morisset (per email authorization)
Mason Morisset, WSBA #00273
Email: m.morisset@msaj.com
Rob Roy Smith, WSBA #33798
Email: r.smith@msaj.com
1115 Norton Building, 801 Second Ave.
Seattle, WA 98104-1509
Telephone:206-386-5200, Fax: 206-386-7322
Counsel for the Tulalip Tribes

ROBERT M. MCKENNA
Attorney General
By: /s/ Michael S. Grossman (per telephone authorization)
Michael S. Grossmann, WSBA #15293
Senior Counsel for Washington State Department of Fish and Wildlife
By: /s/ Sheila Lynch (per telephone authorization)
Sheila Lynch, WSBA #26343
Assistant Attorney General for Washington State Department of Fish and Wildlife

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 FOURTH AVENUE, SUITE 1230
SEATTLE, WASHINGTON 98121-2331
TELEPHONE 206-448-1230

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties registered in the Court CM/ECF system.

DATED: May 29, 2007.

__/s/ Marc D. Slonim_____
Marc D. Slonim, WSBA #11181
ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM
2101 Fourth Avenue, Suite 1230
Seattle, Washington 98121