Narrative Statement of Michael S. Kelly, Fishery Biologist
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Background

In October 2001, the Southwest Region of the National Marine Fisheries Service (NOAA Fisheries) selected me to be the "technical lead" fishery biologist for anticipated Endangered Species Act (ESA) Section 7 consultations on operation of the Bureau of Reclamation's (BOR) Klamath Project.

ESA Section 7 consultations are required when a federal agency proposes an action that may affect threatened or endangered (listed) species -- in this case, the "Southern Oregon Northern California Coast" coho salmon. A formal Section 7 consultation is required if a proposed action may adversely affect a listed species. The end product of a formal consultation is a "biological opinion." The biological opinion analyzes the effects of the proposed action, determines whether the action may jeopardize the continued existence of the species, and proposes a "reasonable and prudent alternative" (RPA) if the action is found to pose jeopardy to the species.

Title 50, Part 402, Section .02 of the Code of Federal Regulations implements Section 7 of the ESA. This regulation defines reasonable and prudent alternatives as alternative actions, identified during formal consultation, that: (1) can be implemented in a manner consistent with the intended purpose of the action; (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction; (3) are economically and technologically feasible; and (4) would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.02.

The action agency -- in this case, the U.S. Department of the Interior's Bureau of Reclamation ("BOR") -- must submit a "biological assessment" that describes the proposed action and analyzes the action's anticipated effects. NOAA Fisheries then, by statute, has up to 135 days to complete its biological opinion, but can request an extension. NOAA Fisheries received a biological assessment from BOR on

February 25, 2002.

Summary of Disclosure

Political pressure appears to be the reason that the process outlined above was not implemented correctly -- both by denying NOAA Fisheries biologists the opportunity to conduct obviously necessary analyses, and by dictating how the NOAA Fisheries team should interpret information contained in a National Research Council (NRC) interim Klamath report. Consequently, the biological opinion and RPA were not developed according to the legal requirements of the ESA and its implementing regulations, and the agencies were aware that this was the case.

In addition, NOAA Fisheries did not analyze whether it would be safe to delay providing conditions that it had determined were necessary to avoid jeopardizing coho salmon. Agency guidance, *Viable Salmonid Populations* (VSP) (NOAA Technical Memorandum NMFS-NWFSC-42), details principles for recognizing risk and conducting necessary analyses using the science of conservation biology. NOAA Fisheries did not attempt to use its own guidance, or any other guidance or methods, to help recognize or analyze clear additional risk. There simply was not enough time allowed, and qualified biologists were not permitted to attempt the analysis, between receiving the proposed RPA and making the decision to accept it.

<u>These deviations, by any reasonable definition, constitute violations of law, regulation and agency rules</u>.

Finally, NOAA-NMFS and BOR managers should have been aware that this proposed RPA's level of instream flow could reasonably be expected to pose jeopardy to coho salmon. In fact, under the proposed RPA, instream flows necessary to avoid jeopardy would not be achieved until the ninth year of the ten-year plan. <u>The proposed action clearly created a risk to the species by delaying adequate conditions for up to nine years during which time it would not be known whether the species would maintain itself.</u>

<u>The extent of potential damage to the resource resulting from the agencies' actions, by any</u>

reasonable definition, constitutes gross mismanagement. Both the gross mismanagement of the species in this case, and the violation of rule or law also constitutes an abuse of authority.

Disclosure Detailed

I worked as the "technical lead" on a team that also included my supervisor (a Supervisory Fishery Management Specialist), the NOAA Fisheries Southwest Region's Assistant Regional Administrator for Protected Resources (ARA), and another NOAA Fisheries staff fishery biologist. We submitted a draft biological opinion on April 1, 2002 (See Exhibit 1). This draft biological opinion determined that the proposed action would jeopardize the ESA-listed coho salmon, and it proposed an RPA. The ARA told me that the Department of Justice reviewed the biological opinion and determined that they "could not defend" the rationale that lead either to the jeopardy conclusion or the RPA.

The team, minus the other staff biologist who left the agency in early April 2002, completed a second biological opinion and RPA on April 17, 2002 (See Exhibit 2). While I protested that the new rationale supporting the RPA were not as strong as the rationale in the April 1, 2002, draft, I was satisfied that the analysis was legitimate and that the instream flows in the RPA were still minimally adequate to avoid jeopardizing the species. I also stated that the jeopardy analysis and conclusion of the April 17 draft did not make sense biologically. See Jeopardy Analysis, below.

NOAA Fisheries presented the April 17, 2002 draft to BOR. BOR determined that the RPA was neither reasonable nor prudent. My supervisor, the ARA, and I attended a meeting on April 29 and 30, 2002, as we believed, to work with BOR to develop an RPA that was satisfactory to both parties. However, when we arrived at about mid-day on April 29, BOR representatives had nearly finished developing an RPA, which was presented on flip-chart papers on the walls of the meeting room. We spent the rest of the meeting trying to understand the BOR proposal, and trying to determine whether it was consistent with our understanding of the requirements of the ESA. By the end of the meeting, we had an understanding of how the proposed RPA would be implemented; however, we did not know how the

proposed RPA met the requirements of the ESA, and whether the proposed RPA was biologically sound (i.e., avoided jeopardy).

Within hours, the ARA received a call from someone in the Department of Commerce who stated that BOR and/or the Department of the Interior was complaining that our team was "stonewalling" the development of the RPA. On the morning of April 30, 2002, we resumed our meeting. The lead representative from BOR and the NOAA ARA left the room for perhaps an hour. When they returned, the BOR representative asked the NOAA ARA to explain the RPA to the group. The ARA described the RPA as proposed by BOR, and agreed to forward the idea for legal review.

The essential (biological) difference between our April 17 draft RPA and the proposed RPA is that the instream flows that we determined were necessary to avoid jeopardy would not be achieved until the ninth year of the ten-year plan. Clearly, an analysis of the risk to the species by delaying adequate conditions for up to nine years should have been completed to be reasonably sure that the species will maintain itself in the interim.

NOAA Fisheries biologists were denied an opportunity to examine the additional risks to the species presented by the proposed RPA. The team agreed that there were additional risks, and the final biological opinion (See Exhibit 3) points out that "57% of the RPA flows may not avoid jeopardy over the 10-year period of proposed Project operations, and therefore would not constitute a viable RPA." The final biological opinion then states that "(t)his problem was resolved when Reclamation agreed that it would use its authorities to establish a multi-agency task force/working group, comprising Federal, State, Tribal and, where possible, local agencies and interests, to develop the other 43% of the flows identified in the RPA." However, under the final RPA, 57% of the recommended flows are still not achieved until the fifth year, and flows over 57% do not have to be achieved until the ninth year. There is no analysis presented to support how 57% or less of the recommended flows for nine years avoids jeopardy, while 57% of the recommended flows for 10 years may pose jeopardy. Not only does such an analysis not appear in the biological opinion, the NOAA Fisheries team did not conduct, and were denied the opportunity to conduct, such an analysis. I explained to my supervisor that if we were ordered to accept the BOR proposal, while being denied an opportunity to analyze the additional risks and possibly give reasons to reject the

RPA, I would be unable to accept the assignment because I could not explain how or whether it avoided jeopardy. A couple of days later we received orders to develop the proposed RPA. I refused to participate, and requested that I be relieved of my role as "technical lead." The ARA granted this request and said he would take over as the technical lead.

It is clear to me that someone at a higher level had ordered us to accept the proposed RPA regardless of whether there were arguments that we could make to analyze this heretofore unanalyzed risk to the species. NOAA Fisheries issued a draft of the final biological opinion on May 16, 2002, and, after a public comment period, issued the final biological opinion on May 31, 2002.

Side by side comparison of the draft and final biological opinions

As explained above, NOAA Fisheries produced two draft biological opinions (April 1 and April 17, 2002) that were rejected by the administration and BOR, respectively, and a final biological opinion that was issued on May 31, 2002. These draft biological opinions show that the agencies had the information required to analyze the newly proposed RPA, and that there are specific logical arguments that the agencies ignored in order to produce the final biological opinion. Comparing the two draft biological opinions to the final biological opinion demonstrates that the agencies intentionally or negligently reached a result that was contrary to the law.

April 1, 2002, draft biological opinion

The April 1 draft biological opinion is important to consider because it indicates to the agencies that there are scientific principles that demonstrate risks to populations of animals when delaying provision of adequate habitat conditions. See Exhibit A, at pp. 50, 51 (outline of scientific principles). The April 1 draft demonstrates that the agencies knew about this available science, and that the team developing the biological opinion was confident enough in the validity of this science to include it in its analysis.

The preliminary draft April 1 biological opinion is important to consider because it provides an analysis of the NRC report that questions key assumptions that the administration apparently makes about the recommendations of the report. See Exhibit A, at pp. 28-33. Had this analysis been considered, NOAA Fisheries' fishery biologists would have been able to better support a biologically sound final jeopardy analysis and RPA.

April 17, 2002, draft biological opinion

The April 17 draft is important to consider because it represents the rationale ultimately used to develop the final RPA, and would have prescribed the instream flows that the final RPA delays for up to nine years. (Again, an RPA must avoid jeopardizing the species; therefore, it represents the minimal needs of the species required to avoid extinction.) While a draft biological opinion is subject to change; any changes would necessarily be based on new information or analysis. A new risk is indicated by BOR's proposed RPA; therefore, any change to the draft biological opinion must be supported by an analysis of that risk. A comparison of the April 17 draft to the final biological opinion demonstrates that acceptance of the final RPA was not accompanied by an analysis of that risk. One cannot make a logical leap from the draft to the final without an analysis of the new risk.

Jeopardy Analysis

The following italic text is excepted from the final biological opinion:

> *NRC Committee on Threatened and Endangered Fishes in the Klamath River Basin (NRC Committee) reviewed Reclamation's biological assessment and the NMFS biological opinion of 2001 regarding the effects of Klamath Project operations on coho salmon. In that review, they completed an interim assessment of the scientific information used by the agencies and other relevant scientific information, and they considered the degree to which the biological*

assessment and biological opinion were supported by that information. The Committee did not find scientific support for NMFS' proposed minimum flows as a means of enhancing the maintenance and recovery of the coho population. However, the Committee noted that progressive depletions of flows in the Klamath River main stem would at some point be detrimental to coho salmon through stranding or predation losses. Thus, incremental depletions beyond those that are reflected in the recent historical record could be accomplished only with increased risk to salmon. The proposal put forth by Reclamation in its 2001 biological assessment could lead to more extreme suppression of flows than has been seen in the past and cannot be justified either. The Committee concluded that on the whole, there is no convincing scientific justification at present for deviation from flows derived from operational practices in place between 1990 and 2000.

The administration apparently took this to mean that the NRC Committee was stating that BOR could implement the same instream flow regime that it had implemented during the previous 10 years without jeopardizing the species. The jeopardy analysis of both the April 17 and final biological opinions is largely based on this interpretation of the above information. However, the notion that incremental depletions in average flows over the past 10 years is somehow biologically relevant was disputed both verbally and in written documents provided by both fishery biologists on the original NOAA Fisheries team. The ARA told me that he was being told that some of our preliminary findings and arguments were not "consistent" with the NRC report. This was a recurring theme -- we had to be "consistent" with the NRC report. I do not know who ordered that we be consistent with their particular interpretation of the NRC report but I was left with the distinct impression that it was coming from a very high level.

As an example, early in the 2002 consultation process we developed an analysis of the NRC report, and its perceived conclusions. This analysis was included in an initial version of the April 1, 2002,

draft; however, someone decided that we should not include this analysis in the final April 1, 2002, draft biological opinion. Again, someone at a higher level had apparently ordered us to accept the perceived recommendations of the NRC report regardless of the arguments supporting alternative perspective.

In this instance, outside influence improperly dictated how the NOAA Fisheries biologists conducting an ESA consultation would interpret the NRC report in this specific way. As a result, the final jeopardy analysis contains very little that is supportable from a biological perspective.

Conclusion

The final RPA was not conceived by NOAA Fisheries, and the proposal was not presented to NOAA Fisheries biologists before the April 29, 2002, meeting with BOR. Therefore, BOR effectively handed NOAA Fisheries a new proposed action, which, as explained above, must be analyzed for possible adverse effects to the listed species.

The ESA and its implementing regulations require that NOAA Fisheries use "the best available science" to conduct its analysis. But political pressure prevented NOAA Fisheries from applying the "best available science" and from properly analyzing BOR's proposed RPA. As a consequence of this political pressure, NOAA Fisheries failed to meet its legal obligations to diligently examine the needs of coho salmon.