

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Ctoc, BJR

[Signature]
FILED
LOGGED
ENTERED
RECEIVED

SEP 30 1999

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATION;
INSTITUTE FOR FISHERIES
RESOURCES; OREGON NATURAL
RESOURCES COUNCIL; UMPQUA
WATERSHEDS, INC.; COAST RANGE
ASSOCIATION; and HEADWATERS,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE,

Defendant,

and

DOUGLAS TIMBER OPERATORS, INC.
and NORTHWEST FORESTRY
ASSOCIATION,

Defendant-Intervenors.

NO. C99-67R

ORDER GRANTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT,
DENYING DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT AND
DISMISSAL AND GRANTING
CROSS-MOTIONS TO STRIKE
IN PART

THIS MATTER comes before the court on the parties' cross-
motions for summary judgment, and cross-motions to strike evidence

ORDER
Page - 1 -

110

1 filed in support of summary judgment, and defendant-intervenors'
 2 motion for summary judgment and motion to dismiss.¹ The court has
 3 considered the pleadings and documents filed in support of and in
 4 opposition to the motions and the relevant administrative record.
 5 Being fully advised, the court grants plaintiffs' motion for
 6 summary judgment, denies defendants' motions for summary judgment
 7 and to dismiss and grants the cross-motions to strike in part.
 8

9
 10 I. BACKGROUND²

11 Plaintiffs are six Oregon-based organizations representing
 12 the interests of commercial fishermen and/or environmental causes.
 13 They have sued the National Marine Fisheries Service (NMFS) under
 14 the Endangered Species Act (ESA), 16 U.S.C. § 1536. The State of
 15 Oregon, Douglas Timber Operators, Herbert Lumber and Superior
 16

17 ¹Defendant-intervenors move to dismiss on the grounds that the
 18 court lacks subject matter jurisdiction and that plaintiffs have
 19 failed to join indispensable parties. The court rejected these
 20 arguments in a previous suit between these parties, Pacific Coast
 21 Federation of Fishermen's Associations, et al. v. National Marine
 22 Fisheries Service, No. 97-775R (PCFFA I), and they are not repeated
 here. Defendant-intervenors also move to dismiss on the ground
 23 that the court lacks a complete administrative record. Defendant-
 24 intervenors, however, have submitted the documents they contend are
 25 necessary to complete the record by way of declaration.
 26

²The procedural and factual background of this controversy are
 set out in the court's March 25, 1999, order granting plaintiffs'
 motion for a preliminary injunction and in the court's May 29,
 1998, amended order granting defendants' motion for summary
 judgment in part. The court only recites here those facts
 necessary to understand its holding.

ORDER
 Page - 2 -

1 Lumber have joined the suit as defendant-intervenors.³ Plaintiffs
2 challenge four biological opinions issued by NMFS on the impacts
3 of 24 federal timber sales in the Umpqua River Basin on the Umpqua
4 cutthroat trout and the Oregon coastal coho salmon, fish species
5 that have been listed as threatened or endangered under the
6 Endangered Species Act. Plaintiffs ask the court to vacate the
7 four opinions.
8

9 In a previous suit between these parties, plaintiffs chal-
10 lenged a Programmatic Biological Opinion (BO)⁴ NMFS issued on March
11 18, 1997. In the Programmatic Biological Opinion, NMFS concluded
12 that the continued management of public land in the Umpqua River
13 Basin in Oregon under the United States Forest Service's (USFS)
14 existing Land and Resource Management Plans (LRMPs) and the Bureau
15 of Land Management's (BLM) existing Resource Management Plans
16 (RMPs) would not jeopardize the survival of the Umpqua cutthroat
17 trout. In that suit, plaintiffs contended that NMFS failed to use
18 the best available scientific information in reaching its "no
19 jeopardy" conclusion as required by the ESA, that it did not
20 consider enough evidence in reaching its "no jeopardy" conclusion,
21

22
23 ³In discussing the defendants' substantive arguments, the
24 court refers to the defendants collectively as "NMFS" unless
otherwise indicated.

25 ⁴The parties also refer to the Programmatic Biological Opinion
26 as the "Plan BO," "Northwest Forest Plan BO," or "NFP BO." For
consistency the court uses "Programmatic Biological Opinion."

ORDER

Page - 3 -

1 that the conclusion conflicted with evidence before the action
 2 agencies and that the Programmatic Biological Opinion authorized
 3 site-specific actions without adequate consultation as required by
 4 the ESA. Plaintiffs asked the court to invalidate the March 18,
 5 1997 Programmatic Biological Opinion and order the government
 6 defendants to reconsult on the continued implementation of USFS
 7 and BLM's Umpqua River Basin management plans. Plaintiffs also
 8 sought an order prohibiting USFS and BLM from "tiering to" (rely-
 9 ing on) the Programmatic Biological Opinion to authorize any site-
 10 specific projects or management actions that may affect the listed
 11 fish. A central contention in that suit was whether NMFS had
 12 ensured compliance with the Aquatic Conservation Strategy (ACS),
 13 a component of the Northwest Forest Plan. The Northwest Forest
 14 Plan adopted standards and guidelines for forest management within
 15 the range of the northern spotted owl. The ACS addresses the
 16 habitat needs of salmonids on federal lands within the range of
 17 the northern spotted owl.

18
 19 The court upheld the Programmatic Biological Opinion. And it
 20 held that USFS and BLM could properly tier to the Programmatic
 21 Biological Opinion in their respective management plans. The
 22 court found that NMFS did not act arbitrarily or capriciously in
 23 assuming that the USFS and BLM would implement the LRMPs and RMPs
 24 in a manner consistent with the ACS. The court held, however,
 25 that NMFS could not rationally reach a "no jeopardy" conclusion in
 26

ORDER
 Page - 4 -

AO 72
 (Rev 8/82)

1 reviewing the agencies' site-specific biological opinions without
 2 analyzing whether the proposed projects did, in fact, comply with
 3 the ACS. Thus, the court held that NMFS could properly assume on
 4 the programmatic level that the agencies' proposed actions would
 5 comply with the ACS, but found that it had failed to ensure or
 6 verify ACS compliance on the site-specific or project level.

7 Following the court's decision in PCFFA I, the government
 8 defendants consulted on 24 timber sales covered by the biological
 9 opinions at issue in this litigation. In November and December
 10 1998, NMFS issued four biological opinions concluding that the
 11 proposed timber sales would not jeopardize coho or cutthroat
 12 survival and recovery.⁶ AR 1 at 14, 1s-3s. In the instant suit,
 13 plaintiffs challenge NMFS's new biological opinions. They contend
 14 that the new opinions suffer from the same flaw in that they are
 15 inadequate to ensure or verify the action agencies' compliance
 16 with the ACS.

18 / / /

19 / / /

20 / / /

21 _____
 22 ⁶Twelve of the timber sales at issue in PCFFA I are at issue
 23 here because they were submitted for reconsultation following the
 24 court's order: Little River DEMO, Final Curtain, Dream Weaver,
 25 Buck Fever, Sweet Pea, Buck Creek Commercial Thin, E-mile, Red Top
 26 Salvage II, Lower Conley, Foghorn Cleghorn Commercial Thin, Sugar
 Pine Density Management and Diamond Back. The remaining timber
 sales were proposed since the court's order and have, therefore,
 not been reviewed by the court.

ORDER
Page - 5 -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

II. DISCUSSION

A. Motions to strike

Both sides have filed extra-record evidence in the form of declarations. Both sides move to strike the other sides' extra-record evidence.⁵ Specifically, plaintiffs seek to strike portions of Michael P. Tehan's declaration and all of Daniel R. Kenney's declaration because they are either not proper extra-record submissions or because they are impermissible expert opinions. Defendant seeks to strike Christopher Frissell and Mark Powell's declarations on the same basis.

Extra-record evidence is admissible to show the agency has not considered all relevant factors and to explain technical matters:

If the reviewing court finds it necessary to go outside the administrative record, it should consider evidence relative to the substantive merits of the agency action only for background information, . . . or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision . . . Consideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted, even if the court has also examined the administrative record.

ASARCO, Inc. v. United States Envtl Protection Agency, 616 F.2d 1153, 1158 (9th Cir. 1980). The court will consider the challenged

'Plaintiffs move, in the alternative, for leave to file a surreply brief on the summary judgment motions. The court finds that the summary judgment motions have been adequately briefed and the motion is denied on that basis.

ORDER
Page - 6 -

1 evidence only for background information and hereby grants the
 2 cross-motions to strike to the extent the challenged declarations
 3 contain opinion evidence or evidence pertaining to the correctness
 4 of the challenged agency action.

5 B. Summary judgment motions

6 1. Standard of review

7 Summary judgment is appropriate where there is no genuine
 8 issue of material fact and the moving party is entitled to judg-
 9 ment as a matter of law. Fed. R. Civ. P. 56. A biological opin-
 10 ion is a final agency action that may be set aside under the
 11 Administrative Procedure Act⁷ if the court finds it is "arbitrary,
 12 capricious, an abuse of discretion, or not otherwise in accordance
 13 with law." Bennett v. Spear, 520 U.S. 154, 174 (1997). A bio-
 14 logical opinion is arbitrary and capricious if the agency has
 15 "entirely failed to consider an important aspect of the problem,
 16 offered an explanation for its decision that runs counter to the
 17 evidence before the agency, or is so implausible that it could not
 18 be ascribed to a difference in view or the product of agency
 19 expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto.
 20 Ins. Co., 463 U.S. 29, 43 (1983). A biological opinion is also
 21 invalid if it does not employ the best available scientific infor-
 22 mation as required by 16 U.S.C. § 1536(a)(2). Greenpeace Action

25 _____
 26 ⁷5 U.S.C. § 706(2)(A).

ORDER
 Page - 7 -

1 v. Franklin, 14 F.3d 1324 (9th Cir. 1992).

2 2. ACS consultation procedure

3 The ACS has nine stated objectives aimed at maintaining or
4 restoring the salmonid's aquatic habitat. The objectives provide
5 a framework for managing aquatic ecosystems. The objectives
6 describe the attributes and distribution of aquatic ecosystems
7 believed necessary to provide conditions for maintaining currently
8 strong populations of fish and other aquatic and riparian depend-
9 ent organisms and to allow for recovery of currently degraded
10 ecosystems. See Reeves Decl. at 5, ¶ 9. The ACS has four
11 essential features designed to accomplish the nine objectives:
12 1) establish riparian reserves (an allocation of land associated
13 with riparian areas with special standards and guidelines that
14 restrict management activities in those areas); 2) designate key
15 watersheds (watersheds important to the at-risk fish stocks);
16 3) utilize watershed analysis procedures for evaluating biologic
17 processes in specific watersheds; and 4) provide for watershed
18 restoration. AR 21 at B-9.

19
20 As part of the Northwest Forest Plan consultation, the Pro-
21 grammatic Biological Opinion endorsed a streamlined consultation
22 process. Under the streamlined consultation process, interagency
23 teams meet to evaluate specific forest management activities.
24 When USFS or BLM proposes to take an action that may affect a
25 threatened or endangered species covered by the Programmatic
26

ORDER
Page - 8 -

1 Biological Opinion, a "Level 1" team (an interagency team that
2 includes a NMFS biologist), conducts an analysis to determine
3 whether the project is likely to adversely affect the species.
4 The Level 1 team records information regarding a specific project
5 using a "matrix of pathways and indicators" set forth in the
6 Programmatic Biological Opinion and a checklist.

7
8 If the Level 1 team cannot reach unanimous agreement on a
9 project's impacts and consistency with the ACS, the action is
10 elevated to the Level 2 team, an interagency team of scientific
11 professionals. The project can also be elevated to the Level 3
12 team to resolve differences. Once there is consensus on project
13 effects and consistency with the ACS, the project is forwarded to
14 NMFS for formal consultation if necessary. With the exception of
15 the proposed Little River DEMO sale, which was the subject of the
16 court's preliminary injunction, none of the other timber sales at
17 issue in this litigation was elevated by the Level 1 team.

18 The matrix and checklists reflect information needed to
19 implement and attain the ACS objectives. It is divided into
20 "pathways," which indicate water quality, habitat access, habitat
21 elements, flow/hydrology, channel conditions and dynamics and
22 watershed conditions. The pathways are broken down into "indica-
23 tors" addressing specific components of each habitat characteris-
24 tic. The matrix provides three possible characterizations of the
25 existing condition of each habitat indicator that correspond to
26

ORDER
Page - 9 -

1 a statement about the habitat condition: 1) poorly functioning,
 2 2) at risk or 3) not properly functioning. For each habitat
 3 indicator, the checklist provides columns corresponding to the
 4 three characterizations. It also provides columns to indicate
 5 whether the proposed action will restore, maintain, or degrade
 6 the habitat condition for each indicator.

7 3. ACS compliance

8
 9 In the earlier suit, there was evidence in the record, as
 10 evidenced by the matrixes and checklists for the proposed sales,
 11 that the proposed sales would degrade the habitat conditions at
 12 the project or site-specific level. Many of the checklists, for
 13 example, documented poorly functioning or at-risk habitat condi-
 14 tions. Following the court's decision, the action agencies re-
 15 initiated consultation for twelve of the sales at issue in PCFFA I
 16 in order to document ACS compliance and implementation and initi-
 17 ated consultation for the other sales before the court. Plain-
 18 tiffs contend that during the reconsultation process, the agencies
 19 refocused their criteria for assessing ACS compliance in a manner
 20 that gave the appearance that ACS compliance was being achieved,
 21 rather than engaging in a meaningful analysis of ACS compliance
 22 at the project scale. By refocusing their criteria, plaintiffs
 23 argue, the action agencies masked or ignored evidence that the
 24

25
 26 ¹See note 5, supra.

1 proposed timber sales would not "maintain or restore" habitat
2 conditions, as mandated by the ACS.

3 Plaintiffs advance a number of arguments: First, that NMFS
4 backed away from ensuring ACS consistency at the project level and
5 instead directed that ACS consistency and jeopardy be determined
6 at the 5th field⁹ watershed, which can span 20-200 square miles.
7 Second, that few if any timber sales will produce measurable
8 impacts on such a large scale. Third, that by determining ACS
9 consistency on a 10-20 year frame, the agencies ignored the sales'
10 near-term impacts on fish survival and recovery. Fourth, that
11 the agencies ignored conditions on non-federal lands in assessing
12 the cumulative watershed effects of additional logging. Fifth,
13 that the agencies ignored watershed analysis and riparian reserve
14 violations.¹⁰

15
16 In PCFFA I, the court held that NMFS could properly assume
17 in the Programmatic Biological Opinion that the action agencies'
18 implementation of the ten LRMPs and RMPs at issue in a manner

19
20 ⁹Aquatic ecosystems are described as fields. The size of
21 watershed determines its category. Fifth field ranges from 20-200
22 square miles and are referred to as watersheds. Sixth field ranges
from 2-50 square miles and are referred to as subwatersheds.
Reeves Decl. at 3, ¶ 5, n. 1.

23 ¹⁰Plaintiffs also make several arguments that appear to
24 overlap with issues already raised and ruled on in PCFFA I. To the
25 extent plaintiffs seek to challenge elements of the Programmatic
26 Biological Opinion that the court upheld, such as NMFS's reliance
on FEMAT's habitat-based analysis, the court will not address those
arguments.

ORDER
Page - 11 -

1 consistent with the ACS would not likely jeopardize the continued
2 existence of the Umpqua cutthroat trout. PCFEA I at 24. At issue
3 here is whether NMFS adequately evaluated the action agencies'
4 compliance with the ACS in reaching its "no jeopardy" conclusion.

5 a. Project scale degradation and short term impacts

6 1. scale of ACS measurement

7
8 It is undisputed that the proposed timber sales before the
9 court will result in some site-specific degradation: NMFS's four
10 biological opinions issued in November and December 1998 document
11 degrading effects at the subwatershed scale on sediment, flows,
12 substrate, disturbance history, pool quality, large woody debris,
13 and riparian reserves. In evaluating the actions for ACS compli-
14 ance, NMFS concluded that only actions that would adversely affect
15 the environmental baseline over an entire watershed over a long
16 period would be inconsistent with ACS objectives. AR 1s at 10-13;
17 see also AR 1 at 11-13; AR 2s at 12-16; AR 3s at 14-21. Under
18 this analysis, which looks at the long term net effect of all
19 management actions at the watershed scale, NMFS concluded that
20 although the proposed timber sales would cause degradation at the
21 site level, they were not inconsistent with the ACS because the
22 effects were short term and localized.

23
24 Plaintiffs challenge NMFS's long term/watershed scale ap-
25 proach. At the outset, they argue, NMFS's approach is entirely
26

ORDER
Page - 12 -

1 new and they suggest it was designed in response to the court's
 2 earlier summary judgment order. Substantively, they contend that
 3 focusing on so large a landscape masks each sales' impacts. They
 4 also argue that by focusing on the watershed level, NMFS has
 5 ensured that no project will ever result in a jeopardy finding
 6 because few if any projects will create sufficient degradation at
 7 the watershed level to be deemed inconsistent with the ACS. They
 8 argue that ACS consistency and implementation must be determined
 9 and measured at the site-specific or project level.

11 NMFS argues that determining ACS compliance on the watershed
 12 scale is proper. It argues that ACS compliance was never intended
 13 to be measured at the project scale. Rather, it is intended to
 14 measure cumulative degradation across the watershed. Under NMFS's
 15 approach, there would be no ACS violation until the culminated
 16 degradation caused by individual projects is measurable at the
 17 watershed level. NMFS argues that plaintiffs' project level
 18 approach wrongly equates evidence of project level degradation
 19 recorded in the matrixes and checklists with ACS noncompliance.
 20 This approach, it contends, has no support in the Northwest Forest
 21 Plan, the ACS, the Programmatic Biological Opinion, the scientific
 22 evidence or elsewhere. NMFS also challenges plaintiffs' assertion
 23 that it has employed an entirely new approach following PCEFA I.¹¹

25 ¹¹NMFS does not, however, cite to documentation in the PCEFA I
 26 record that it employed a long term/watershed approach before the

ORDER
 Page - 13 -

AO 72
 (Rev. 8/82)

1 NMFS maintains that it is clear that the watershed scale is
 2 the appropriate scale for making consistency findings. In support
 3 of this interpretation it cites to the Northwest Forest Plan which
 4 states:

5 The Aquatic Conservation Strategy was developed to re-
 6 store and maintain the ecological health of watersheds
 7 and aquatic ecosystems contained within them on public
 8 lands The approach seeks to prevent further
 degradations and restore habitat over broad landscapes
 as opposed to individual projects or small watersheds.

9 AR 16, p. B-9. NMFS argues that the focus on the "ecological
 10 health of watersheds" and prevention of further degradations "over
 11 broad landscapes" demonstrates that the proper emphasis in ACS
 12 compliance is the watershed scale. This argument is misplaced.
 13 NMFS is correct that the ACS seeks to prevent degradation at the
 14 landscape level. The section of the Northwest Forest Plan quoted
 15 above, however, merely states that it is no longer appropriate to
 16 evaluate ecosystem degradation and restoration on a project by
 17 project basis. Rather, it reflects a new approach adopted in the
 18 Northwest Forest Plan, which requires the government defendants to
 19 consider the health of aquatic habitats over entire watersheds.
 20 NMFS' reliance on this mandate, thus, begs the question of what
 21 level it is supposed to measure or verify ACS compliance to ade-
 22 quately protect the watershed.
 23

24 The FEMAT report, which the court, at least implicitly, held
 25 _____
 26 court issued that opinion.

ORDER
 Page - 14 -

1 in PCFEA I represents the best scientific information, is the
 2 scientific underpinning of the ACS. AR 15a. In its report, FEMAT
 3 stressed (and indeed this court held in its prior decision) that
 4 the ACS strategy must be implemented at all four spatial scales:
 5 regional, province (river basin), watershed, and site (or pro-
 6 ject). The Programmatic Biological Opinion, in reliance on FEMAT,
 7 also requires ACS compliance at these four spatial scales. Thus,
 8 not only must the ACS objectives be met at the watershed scale (as
 9 NMFS argues), each project must also be consistent with ACS objec-
 10 tives, i.e. it must maintain the existing condition or move it
 11 within the range of natural variability.¹²

13 Notwithstanding the fact that ACS compliance is required at
 14 all four spatial scales, NMFS is correct that the Programmatic
 15 Biological Opinion does anticipate some harmful activities under
 16 the Northwest Forest Plan. BO at 26. NMFS is also correct that
 17 evidence in the checklists and matrixes that a project will result
 18 in some degradation does not, standing alone, constitute ACS
 19 noncompliance. NMFS, however, provides no basis for its shift to
 20 a broad watershed scale of analysis and away from the multi-scale
 21 approach contained in the Programmatic Biological Opinion.

23
 24 ¹²The "range of variability" at the watershed or subwatershed
 25 scale is the distribution of conditions of smaller subwatersheds
 26 that support acceptable populations of anadromous salmonids and
 other aquatic and riparian dependent organisms. Reeves Decl. at
 8, ¶ 15.

ORDER
 Page - 15 -

AO 72
 (Rev. 8/82)

1 ii. short term effects

2 On reconsultation, the action agencies considered degradation
3 over the long term (at least a decade). See, e.g. AR 1s at 10.
4 Each biological opinion concludes that recorded degradation is
5 inconsequential across the 5th field watershed over the long term.
6 NMFS argues that a long term approach is fully consistent with the
7 Programmatic Biological Opinion and should be upheld. It also
8 argues (somewhat inconsistently) that it evaluates short term
9 effects as well and the potential for these effects to cause
10 jeopardy in the short term.
11

12 The Programmatic Biological Opinion mandates that "management
13 actions that do not maintain the existing condition or lead to
14 improved conditions in the long term would not 'meet' the intent
15 of the Aquatic Conservation Strategy and, thus, should not be
16 implemented." AR 14 at 39. The Programmatic Plan Biological
17 Opinion also recognizes that individual projects can be consistent
18 with the ACS "[n]otwithstanding the potential for minor, short
19 term adverse effects." AR 14 at 39.

20 NMFS's stated reason for choosing a ten year time frame to
21 assess ACS compliance is that ten years "is the minimum period
22 stated when recovery would be seen" AR 58 at 2; AR 59 at
23 2. The plaintiffs complain that this ten year assessment is
24 faulty because it relies too heavily on passive restoration (i.e.
25

26
ORDER
Page - 16 -

1 tree regrowth) and assumes that if more portions of the watershed
 2 cross the ten year regrowth threshold than are being cut, the
 3 logging will not have long term impacts. Plaintiffs argue that
 4 NMFS ignored short term impacts even where the watershed analysis
 5 stressed the need to avoid short term degradation. And, they
 6 argue, by looking so far ahead to determine when clearcut forests
 7 will be fully recovered, the agencies are essentially assuming
 8 away the sales' adverse hydrologic effects.

9
 10 The court agrees with plaintiffs that NMFS has failed to
 11 adequately assess the short term impacts of the timber sales and
 12 that it has failed to adequately explain its assumption that
 13 passive restoration will adequately mitigate the adverse impacts
 14 of logging. The problem with NMFS's approach, as plaintiffs point
 15 out, is that NMFS is analyzing the sales' effects based on pre-
 16 dicted conditions ten years after the sale. Because more trees
 17 are predicted to grow back over ten years than are being cut in
 18 the sale, every sale under consultation could ultimately result in
 19 a "no jeopardy" analysis. The court further finds that in order
 20 to fully ensure the action agencies' compliance with the ACS, NMFS
 21 would have to assess the conditions immediately after the sale
 22 instead of relying on tree regrowth as passive mitigation to com-
 23 pensate for the logging. The court concludes that its failure to
 24 do so was arbitrary and capricious.

25 / / /
 26

ORDER
 Page - 17 -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

b. Private land conditions

In the Roseburg BLM district, where most of the proposed sale sites are located, there is a checkerboard pattern of federal and non-federal land ownership. Plaintiffs contend NMFS ignored the conditions on non-federal lands in making its "no jeopardy" determination.

It is undisputed that conditions on non-federal lands in the range of the Umpqua cutthroat trout have contributed significantly to the degradation of the specie's habitat:

Within the range of the UR cutthroat trout (the Umpqua River Basin), approximately 47% of the land is Federally managed. The remaining 53% is made up of private, county, and State land consisting primarily of agricultural and forest land. Historically, agriculture, livestock grazing, forestry and other activities on non-Federal land in the Umpqua River Basin have contributed substantially to temperature and sediment problems in the Umpqua River Basin. Conditions on and activities within the non-Federal riparian areas along stream reaches downstream of the USFS and BLM land presently exert a greater influence on river temperatures and probably contribute more sediment to the habitat of UR cutthroat trout and other Pacific salmonids in the Umpqua River Basin than USFS and BLM land.

Programmatic Biological Opinion, AR 14 at 41. In PCFFA I, plaintiffs challenged the Programmatic Biological Opinion on the ground that it did not take into account activity on non-federal land. The court rejected this argument, finding it "clear from the record that NMFS did consider the effects of the activities on non-federal lands in reaching its "no jeopardy" conclusion." PCFFA I at 22. The court declines to address this issue further

ORDER
Page - 18 -

1 since it was resolved in the earlier litigation.

2 c. Watershed analysis violations

3 Under the Northwest Forest Plan, USFS and BLM are directed to
 4 use the results of watershed analysis to determine whether each
 5 project is consistent with the ACS objectives. The finding must
 6 include a description of the existing condition, a description of
 7 the range of natural variability of the important physical and
 8 biological components of a given watershed, and how the proposed
 9 project or management action maintains the existing condition or
 10 moves it within the range of natural variability. Plaintiffs
 11 contend that although the agencies drew some information from the
 12 watershed analysis in the site-specific consultations, they did
 13 not incorporate the watershed analysis recommendations or desired
 14 future conditions in the ACS consistency determination. NMFS
 15 contends that the site-specific biological opinions before the
 16 court adhere to the findings and recommendations in the watershed
 17 analysis relevant to the particular project.

19 As examples of the action agencies' failure to adhere to the
 20 watershed analysis, plaintiffs point to the Little River Watershed
 21 Analysis, which identifies the Upper Little River as a high prior-
 22 ity for restoration and protection. AR 17 at Recs-14, 16-17. The
 23 Little River Demo sale,¹³ they argue, collides with these recom-
 24

25 ¹³This is the sale the court preliminarily enjoined on March
 26 25, 1999.

ORDER
Page - 19 -

1 mendations by allowing logging in riparian reserves in the Willow
2 Flats area and Upper Little River drainage. They contend, and
3 NMFS does not persuasively dispute, that the biological opinion
4 does not mention the watershed analysis recommendations or provide
5 any rationale for concluding that the sale is consistent with ACS
6 objectives. NMFS argues instead that to the extent there is a
7 conflict between recommendations, the DEMO project is permissible
8 because it "clearly falls within the research exception to harvest
9 in riparian reserves because no significant risk to watershed
10 values or to ACS objectives exists."¹⁴ The court, however, re-
11 jected the argument that the sale clearly fell within the research
12 exception in ruling on plaintiffs' preliminary injunction motion.
13

14 In response to plaintiffs' criticisms of other projects'
15 failure to adhere to the relevant watershed analysis or recommen-
16 dations (e.g. the E-mile timber sale's failure to mention slope
17 stability and the Upper South Myrtle Harvest Plan's failure to
18 adhere to watershed analysis), NMFS offers the somewhat conclusory
19 (and circular) response that there is no evidence that any of the
20 projects criticized by plaintiffs will jeopardize the continued
21 existence of the listed species.

22 The court finds that in the challenged biological opinions,
23 NMFS failed to use watershed analysis to determine whether the
24

25
26 ¹⁴Defendant's memorandum in support of summary judgment at 25.

ORDER
Page - 20 -

1 watersheds at issue are within the acceptable range of vari-
 2 ability. There is no discussion of the watershed analyses' de-
 3 scriptions of desired future conditions or incorporation of the
 4 watershed analyses recommendations to attain those conditions.
 5 For these reasons, the court finds that NMFS has not fully or
 6 sufficiently incorporated watershed recommendations into its ACS
 7 analysis.

8 d. Riparian reserve violations

9 The ACS standards prohibit logging in riparian reserves with
 10 narrow exceptions for salvage logging and thinning where needed to
 11 accelerate the development of mature forests in riparian areas or
 12 to otherwise attain the ACS objectives. Plaintiffs contend that
 13 in the second round of timber sale consultations, NMFS has not
 14 insisted on strict compliance with the Northwest Forest Plan's
 15 riparian reserve standards, despite its heavy reliance on invio-
 16 late reserves to mitigate the sales' degrading effects. The
 17 Little River Demo sale, for example, would log designated riparian
 18 reserves. The applicable biological opinion, however, states that
 19 the sale falls within a research exception. The court rejected
 20 this research exception rationale when it granted plaintiffs'
 21 motion for a preliminary injunction.
 22

23 Similarly, Sugar Pine Density Management will log a 35-40
 24 foot radius around designated sugar pines in a Tier 1 Key Water-
 25 shed, and in riparian reserves. NMFS acknowledged in the biologi-
 26

ORDER
 Page - 21 -

1 cal opinion that it was unclear whether this logging would promote
2 attainment of any ACS objectives or meet an exception for timber-
3 ing in a riparian reserve. AR 3s 12. NMFS found that the Sugar
4 Pine action was justified in order to increase the survival of
5 individual sugar pines. In the Red Top Salvage II action BLM
6 proposes to salvage approximately 132 acres of blown-down timber.
7 Twenty-three of those acres are in a riparian reserve. NMFS found
8 the action justified to reduce the potential for insect infesta-
9 tion and to reduce fuel loads and the associated risk of cata-
10 strophic fire. NMFS has also approved several sales that will log
11 in riparian reserves as part of commercial thins or salvage log-
12 ging, including three sales in Key Watersheds. Plaintiffs contend
13 that many of these sales have riparian buffers as small as 20
14 feet.¹⁵

16 NMFS acknowledges that logging in riparian reserves violates
17 the ACS standards unless it will accelerate the development of
18 mature forests or otherwise attain the ACS objectives. AR 3s at
19 2. In nearly identical language for each sale in a riparian
20 reserve, the biological opinions state that the thinning will have
21 beneficial effects on the rate of tree growth and riparian reserve
22 recovery, even though there is evidence in the record to the
23

24 ¹⁶NMFS contends that plaintiffs do not offer a citation to the
25 record to support this figure. This is incorrect. In the site-
26 specific biological opinions some sales have proposed "no-cut
buffers" of as little as 20 feet. See AR 19 at 3.

ORDER

Page - 22 -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

contrary. See AR 1s at 9; AR 3s at 12-14.¹⁶

Logging in riparian reserves is prohibited for salvage sales unless "watershed analysis determines that present and future coarse woody debris needs are met and other ACS objectives are not adversely affected." Northwest Forest Plan Standard TM-1. The problem with NMFS's explanation for allowing violations of ACS riparian reserve standards is that it has no real relation to the sales' aquatic impacts. It is approving projects that serve some non-aquatic function (i.e. reduction of insect infestation) in violation of ACS riparian standards although there is nothing in the record that demonstrates that those projects have an aquatic benefit. The court finds that, at a minimum, NMFS must require some relation between the benefits used to justify projects in riparian reserves and an aquatic function. By permitting violations of ACS riparian reserve standards where there is no evidence of a rational connection between the proposed action and the attainment of ACS objectives, NMFS acted arbitrarily and capriciously.

///
///

¹⁶The Red Top II biological opinion, for example, notes that the watershed analysis found that large woody debris is not well-distributed or abundant in this area, that the subwatersheds where the logging will occur are not properly functioning for large woody debris, and that the sale violates the riparian reserve logging standard. AR 3s at 11.

ORDER
Page - 23 -

1 4. Conclusion re: ACS compliance

2 The court finds that NMFS is required by the Northwest Forest
3 Plan and the Programmatic Biological Opinion to ensure ACS compli-
4 ance at all four spatial scales. Its decision to measure ACS
5 compliance only at the watershed level and its failure to evaluate
6 ACS compliance at the project or site level, therefore, was arbi-
7 trary and capricious. The court further concludes that NMFS could
8 not rationally conclude, based on the evidence before it, that
9 evaluating only long term impacts of agency activities satisfied
10 its mandate to ensure ACS compliance. Its failure, therefore, to
11 evaluate the short term impacts, (i.e. impacts that would manifest
12 in less than a ten year period) was also arbitrary and capricious.
13 Finally, the court finds that NMFS has not fully incorporated
14 watershed recommendations into its ACS analysis. Its failure to
15 do so was arbitrary and capricious in light of the fact that the
16 watershed analysis undoubtedly represents the best available
17 scientific information available.
18

19 By employing a long term/watershed approach in making jeop-
20 ardy determinations, NMFS has virtually guaranteed that no timber
21 sale will ever be found to jeopardize the continued existence of
22 the Oregon coastal coho or Umpqua River cutthroat trout. By
23 failing to require the action agencies to rely on and adequately
24 incorporate watershed analysis into their biological opinions,
25 NMFS has allowed the agencies to ignore the best scientific infor-
26

ORDER

Page - 24 -

1 mation available. In light of the overwhelming evidence of the
 2 ongoing degradation to the habitat of the endangered aquatic
 3 species in the Umqua River Basin, the court finds that NMFS's
 4 approach is not rationally calculated to achieve the goals of the
 5 ACS. The court, therefore, finds that NMFS acted arbitrarily and
 6 capriciously in approving biological opinions that run counter to
 7 the evidence before it¹⁷ and that fail to employ the best available
 8 scientific information as required by 16 U.S.C. § 1536(a)(2).¹⁸
 9

10
 11 III. CONCLUSION

12 The court GRANTS plaintiffs' motion for summary judgment
 13 [docket 60-1]; DENIES defendants' motions for summary judgment and
 14 dismissal [docket 77-1, 81-1]; GRANTS the parties' cross-motions
 15 to strike [docket 88-1, 97-1]; and DISMISSES this action.

16 DATED at Seattle, Washington this 29th day of September, 1999.

17
 18 
 19 BARBARA JACOBS ROTHSTEIN
 20 UNITED STATES DISTRICT JUDGE

21
 22
 23
 24
 25 ¹⁷See Bennett v. Spear, 520 U.S. 154.

26 ¹⁸See Greenpeace Action v. Franklin, 14 F.3d 1324.

ORDER
 Page - 25 -