

BY FAX AND U.S. MAIL

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Re: Scoping Comments on Aquatic Conservation Strategy EIS

Dear Ms. Casey:

Pacific Rivers Council, Pacific Federation of Fishermen's Associations, Institute for Fisheries Resources and Oregon Natural Resources Council submit the following comments describing viable alternatives that must be considered in a supplemental environmental impact statement on weakening the Aquatic Conservation Strategy ("ACS") component of the Northwest Forest Plan. These comments supplement earlier submittals.

INTRODUCTION

The Aquatic Conservation Strategy is a linchpin of the entire Northwest Forest Plan, and changes to it could easily undermine the Plan's balance between ecosystem function and extractive management. The proposed amendments have the potential to render essential parts of the strategy discretionary, hortatory guidance rather than binding standards and guidance. These changes are fundamental, not editorial and selective as the public notification indicates. The SEIS should be far more candid in describing the nature of the changes and their relationship to the Forest Ecosystem Management Assessment Team ("FEMAT") report that formed the scientific underpinning for the ACS. The SEIS should explicitly relate any proposed changes to the legal requirements applicable under the National Forest Management Act, the Endangered Species Act and other applicable federal law.

The media briefing paper released with the public notification described the reason to remove certain "language" in the ACS as follows:

This language has resulted in confusion for those reviewing our actions, for some members of the public, and in the courts. As a result of lawsuits, lost in part because of this confusing language, 24 biological opinions and more than 100 projects have been held up.

In other words, the purpose of the proposed amendments is to eliminate the basis for the judicial rulings in the Pacific Coast Federation of Fishermen's Associations v. NMFS litigation ("PCFFA litigation"). Given this stated purpose, it is imperative that the SEIS fully and fairly consider the scientific and legal basis for these rulings. The action agencies must further consider viable alternatives that comply with – rather than undermine – these rulings.

These comments touch briefly on the importance of the ACS as a fundamental building block of the Northwest Forest Plan, accurately describe the basis of the PCFFA litigation, and identify alternatives which must be fully considered in an SEIS. It is our strong belief that all stakeholders in federal land management would be best served by the Administration's investing its energy in full implementation of the Plan rather than seeking to whittle away at its protections.

THE ROLE OF THE ACS IN THE NORTHWEST FOREST PLAN

As a cornerstone of the Northwest Forest Plan, complete implementation of the ACS is necessary for the Plan to deliver on its obligation to maintain the viability of both aquatic and terrestrial species under NMFA and to avoid jeopardizing the continued existence of listed and candidate species under the ESA. The FEMAT scientists who were given the task of weighing the likely fate of fish populations under the plan were instructed to "assume that the [ACS] would be fully implemented." FSEIS at 3 & 4-192. Even with "full implementation" the estimated chance of maintaining the habitat necessary for stable, well-distributed populations of the seven targeted salmonids in the Plan area was only 80%. FSEIS at 3-4-196. Any change that reduces the habitat-related prospects for these or other species could put the plan under the legal bar required for the agencies to meet their species maintenance duties under NFMA, the ESA and other federal law.

Implementation of the ACS was intended to occur through application of information gained from watershed-level analysis that would provide the contextual basis for planning and management decisions, as well as in monitoring activities at all levels. *See e.g.* ROD at E-20. This analysis was intended to provide the information necessary to translate the overall intent of the ACS to maintain and restore disturbance patterns similar to those under which aquatic species evolved into watershed-specific ecosystem condition objectives and to design management activities consistent with these objectives. Management actions were explicitly made contingent on a determination of compatibility with the stated goals and objectives of the ACS, supported by information from watershed analysis.

In order to make the finding that a project or management action "meets" or "does not prevent attainment" of the [ACS] objectives, the analysis must include a description of the existing condition, a description of the range of natural variability of the important physical and biological components of a given watershed, and how the proposed project or management action

maintains the existing condition or moves it within the range of natural variability. Management actions that do not maintain the existing condition or lead to improved conditions in the long term would not "meet" the intent of the [ACS] and thus should not be implemented."

ROD at B-10; B-23.

Watershed analysis was intended to become the primary planning tool. It was the intent of FEMAT that the allowable impacts of land use activities would first be determined at the watershed level using ACS objectives and that activities inconsistent with meeting these objectives would never be proposed. It was also anticipated that activities would be analyzed together, such that the cumulative effects of all activities could be appropriately analyzed. Unfortunately, after a decade of implementing the Plan in the region we are aware of no watershed in which this type of planning actually has taken place as envisioned by the framers of the Plan. Rather, land managers have continued to propose individual projects without due regard to their watershed context, then attempted post-hoc rationalization of their negative environmental impacts.

Notwithstanding the political brokering over the volume of timber that could be harvested under the Plan, the Plan itself makes no representations about exactly what level of harvest would be consistent with the ACS. Advisers made their best estimates at the time about what would be required to fully implement the standards and guides over the first decade. However, there remained considerable uncertainty about the accuracy of these estimates given that the plan had yet to be implemented, the operational difficulties inherent to harvesting between large newly designated riparian reserves and the lack of significant short-term opportunities for thinning from the predominantly young stands prevalent both inside and outside reserve areas. *See e.g.* Statement by Dr. Norman K. Johnson to the U.S. House of Representatives, August 3, 1993.

Given that full implementation of the ACS as currently written is an assumption upon which the legal defensibility of the plan explicitly relies, the SEIS must explicitly describe how the proposed changes in the ACS can be reconciled with the legal requirements the Northwest Forest Plan was carefully designed to meet. We note that with respect to both aquatic and terrestrial species, judicial review of the Plan found it to be adequate but with very little margin for error. *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd*, 80 F.3d 14-1 (9th Cir. 1996) (finding that full implementation of all components of the plan is necessary for Plan to remain within legal requirements). Likewise, programmatic compliance with the Endangered Species Act has been explicitly tied to full implementation of the ACS as written in mandatory terms and conditions of incidental take authorization by the National Marine Fisheries Service. *See e.g.* NMFS Biological Opinion on NWFP at 66-67 incorporating language at ROD B-10.

THE PCFFA LITIGATION

The litigation arose because the Forest Service and Bureau of Land Management ("BLM") planned and pursued timber sales that significantly degraded aquatic habitat, in contravention of the goals and objectives of the Aquatic Conservation Strategy. Many of the

targeted sales log in pristine areas that provide high quality salmon habitat, including in key watersheds. Others perpetuate degraded conditions by clearcutting in watersheds already experiencing adverse cumulative watershed effects from past logging and roadbuilding.

In PCFFA v. NMFS (“PCFFA I”), No. C97-775R, Amended Order on Summary Judgment (W.D. Wash., May 29, 1998), the court held that the National Marine Fisheries Service (“NMFS”) had failed to ensure that the timber sales would meet the ACS objectives. Although the agencies did “recognize the need for a limit on the amount of cutting in a watershed when there has already been an excessive amount of cutting . . . [the agencies] did not add mitigation for the logging” in heavily degraded watersheds. Id. at 27-28. In the Court’s view, “NMFS could not have rationally concluded, based on the evidence of adverse effects and lack of evidence of significant mitigation before it, that the proposed actions were consistent with the ACS’s mandate that agencies maintain and restore aquatic systems within the range of the northern spotted owl.” Id. at 30.

In the next round, the federal agencies determined that “only those actions with adverse effects which are significant at the watershed scale over a long period,” *i.e.* 10-100 years, would be inconsistent with the ACS objectives. It is important to recognize that NMFS did not aggregate the impacts of all degrading activities in the watershed when it made its ACS consistency determinations. It looked at the impacts of only one or sometimes a couple timber sales in isolation (at times even when others were also undergoing consultation), and it assumed that all remaining areas of the watershed would improve over this period. By assessing the impacts of a single timber sale across an entire watershed in isolation, NMFS consistently (and not surprisingly) never found a timber sale that would visibly degrade conditions because the activities’ impacts were not detectable when measured using only watershed-level indicators. The environmental plaintiffs challenged this practice as contrary to the letter and the intent of the Plan.

In PCFFA v. NMFS, 71 F. Supp.2d 1063 (W.D. Wash. 1999) (“PCFFA II”), the court held that, “[b]y employing a long term/watershed approach in making jeopardy determinations, NMFS has virtually guaranteed that no timber sale will ever be found to jeopardize the continued existence of the Oregon coastal coho or Umpqua River cutthroat trout.” Id. at 1073. In keeping with the scientific evidence and the plan biological opinion, “not only must the ACS objectives be met at the watershed scale (as NMFS argues), each project must also be consistent with ACS objectives, *i.e.*, it must maintain the existing condition or move it within the range of natural variability.” Id. at 1069 (emphasis in original). NMFS’ “failure to evaluate ACS compliance at the project or site level, therefore, was arbitrary and capricious.” Id. at 1073. The court further explained: “The problem with NMFS’ approach, as plaintiffs point out, is that NMFS is analyzing the sales’ effects based on predicted conditions ten years after the sale. . . . [T]o fully ensure the action agencies’ compliance with the ACS, NMFS would have to assess the condition immediately after the sale. . . .” Id. at 1070. According to the Court, “NMFS could not rationally conclude, based on the evidence before it, that evaluating only long-term impacts of agency activities satisfied its mandate to ensure ACS compliance. Its failure, therefore, to evaluate the short-term impacts, (*i.e.* impacts that would manifest in less than a ten-year period) was also arbitrary and capricious.” Id. at 1073.

The Ninth Circuit affirmed, holding that NMFS is not “free to ignore site degradations because they are too small to affect the accomplishment of that [maintain and restore aquatic functions] goal at the watershed scale”:

Its disregard of projects with a relatively small area of impact but that carried a high risk of degradation when multiplied by many projects and continued over a long time period is the major flaw in NMFS study. Without aggregation, the large spatial scale appears to be calculated to ignore the effects of individual sites and projects. . . . If the effects of individual projects are diluted to insignificance and not aggregated, then Pacific Coast is correct in asserting that NMFS’s assessment of ACS consistency at the watershed level is tantamount to assuming that no project will ever lead to jeopardy of a listed species.

PCFFA v. NMFS, 265 F.3d 1028, 1035-36 (9th Cir. 2001); id. at 1036 (NMFS cannot ignore “the cumulative effects of individual projects on small tributaries within watersheds”). Accordingly, “NMFS’s assuming away site-specific degradations that could lead to a jeopardy finding contradicts the purpose of the ESA and is arbitrary. Any effect on a particularly important spawning area should show up as a degrade rating for the entire watershed.” Id. at 1037.

Nor can NMFS consider “only degradations that persist more than a decade This generous time frame ignores the life cycle and migration cycle of anadromous fish. In ten years, a badly degraded habitat will likely result in the total extinction of the subspecies that formerly returned to a particular creek for spawning.” Id. at 1037. The Ninth Circuit explains:

The NMFS predicts that more trees will grow within the watershed during the ensuing decade than are cut in the proposed project and, therefore, concludes that the “short-term” and “localized” effects of the logging will be naturally mitigated by regrowth. This optimism may be justified for the purpose of counting trees, but for the purpose of counting anadromous fish, it is wholly unrealistic.

Id.; *see also id.* at 1038 (finding no scientific evidence in the record to support NMFS’ approach or to “ensure that fish that never hatched could return to the recovered spawning habitat”). The Ninth Circuit further stated that “NMFS does not and cannot explain adequately its disregard of short-term effects. . . . Given the importance of the near-term period on listed species survival it is difficult to justify NMFS’s choice not to assess degradation over a time frame that takes into account the actual behavior of the species in danger.” Id. at 1038.

In sum, the PCFFA litigation revealed that the agencies have been producing and approving projects that have no rational basis in the watershed context that the ACS intended would guide decision-making. The Administration now seeks to evade judicial review of project-level decisions by weakening the legal handles available to the PCFFA plaintiffs. We propose that the answer is not to remove language from the Plan, but to reinvigorate the agencies with a new focus on meaningful implementation of the ACS. Under this scenario, a rational basis would be demonstrated as to why projects proposed under the Plan are compatible with the ACS, making them less likely targets for legal challenge.

**THE SEIS MUST EXPLORE ALTERNATIVES THAT FAITHFULLY COMPLY WITH
THE ACS AND THE PCFFA RULINGS**

The SEIS must explore as an alternative faithful compliance with the ACS and the court rulings in the PCFFA litigation. For example, the agencies can use watershed analysis to identify areas that can sustain no further degradation and pursue only restoration activities in those areas. Or in areas where watershed functions are compromised, the agencies could avoid pursuing logging practices, such as extensive clearcutting, that are associated with substantial degradation of aquatic habitat. But rather than pursue strategies that would clearly comply with the ACS, the agencies have thrown up their hands and claimed that the judicial rulings preclude all restoration projects or require that each and every project must meet every ACS objective by itself. Neither assertion reflects an honest reading of the court decisions. A far more thoughtful assessment of viable options is warranted.

One option that the SEIS must explore is full implementation of the ACS as laid out by Dr. Gordon Reeves, a co-leader of the Aquatic Team of the Forest Ecosystem Management Assessment Team (“FEMAT”), in a declaration that he submitted on NMFS’ behalf in PCFFA II. Dr. Reeves endorsed determining ACS compliance and jeopardy to species with reference to whether proposed logging maintains or moves conditions toward the natural range of variability at the watershed level. To conduct this analysis, watershed analysis must, in Dr. Reeves’ opinion, be used to determine the natural range of variability, which he defines as “the distribution of conditions of smaller subwatersheds that support acceptable populations of anadromous salmonids and other aquatic and riparian organisms. It may be expressed as the frequency of distribution of productive and non-productive sites and subwatersheds in a subwatershed or watershed.” Reeves Decl. ¶ 15. Not only does the watershed analysis define the natural range of variability, but it also establishes the criteria for determining consistency with the ACS at the watershed scale. Id. ¶ 16.

More specifically, both jeopardy and consistency with the Aquatic Conservation Strategy would be determined in relation to the natural range of variability:

If the current distribution of conditions was determined to be within the acceptable range of variability for the watershed or subwatershed, then presumably sites are in compliance with the ACS. If the distribution of conditions was outside the acceptable range of variability then the watershed or subwatershed is out of compliance. Management actions that would degrade a site or small subwatershed were not expected to proceed under such circumstances unless it was established that the actions would bring the system back within the acceptable level of variability in the long-term and this outweighed any short-term negative impacts. Management activities are focused on restoration in such cases.

Reeves Decl. ¶ 16.

Notably, Dr. Reeves' declaration never states that he reviewed the challenged biological opinions or NMFS' direction for conducting the consultations. His declaration does not defend the challenged biological opinions or the policy guidance underlying them. Nonetheless, Dr. Reeves has put forward the framework for a workable analysis to meet ACS objectives, thereby undercutting the agencies' current contention that compliance with the court rulings under the existing Plan language inevitably leads to a result that is contrary to the original intentions of FEMAT or the ACS.

If the land managers and NMFS were to use Dr. Reeves' approach to assessing the effects of logging and other activities, it would need to ascertain, based on watershed analysis, which drainages currently have properly or improperly functioning conditions, such as sediment and flow regimes, whether that distribution of conditions approximates the natural range of variability, and whether the current distribution of conditions was inside or outside the range of variability required to support acceptable fish populations. *See* Reeves Decl. ¶¶ 12-16. This analysis could then guide subwatershed- and site-level activities such that in non-functioning watersheds degrading activities would not proceed unless they can support a determination that the detrimental impacts of short-term degradation is outweighed by long-term restoration of the desired range of conditions. *Id.* Neither NMFS nor the Forest Service or BLM conducted any such analysis at either the watershed, subwatershed or site levels. Instead, they dismissed all degradation that could not be measured across the watershed. No determination whatsoever was made as to whether further degradation of these drainages would move the distribution of conditions in drainages throughout the watershed toward or away from the natural range of variability. Thus, no meaningful analysis of the degrading activity's impact on either watershed processes or protected species occurred. We propose that the agencies must explore options which fully implement the plan's original intent to link site and subwatershed actions with the distribution and frequency of watershed conditions at the mid-scale before it abandons this science-based approach altogether.

We note that there already has been considerable work completed as part of the Northwest Forest Plan effectiveness monitoring strategy that would support further development of the proposed approach. The Aquatic and Effectiveness Monitoring Plan (AREMP) focuses specifically on characterizing watershed status and trend at the watershed level, protocols that will assist in assessing current conditions and describing desired conditions that would meet the ACS. This kind of information will enable managers to make a credible determination as to what kinds of cumulative watershed impacts can permissibly occur in a given drainage. Proposed timber harvest, for example, would be aggregated and analyzed in a consolidated process that controls disturbance (and, therefore project level proposals) to comport with ACS objectives at multiple temporal and spatial scales. This kind of analysis is consistent with the analytical approach promoted by NMFS in its programmatic evaluation of the Plan. *See e.g.* BiOp at 48.

While it remains somewhat unclear exactly what the Administration currently is proposing, it cannot credibly propose to amend the ACS to eliminate the requirement of project-level consistency with the ACS without also conducting an honest appraisal of what it would take to fully comply with the current mandate. We propose that, as described by the federal expert opinion offered in PCFFA II, such an alternative is highly practicable and in keeping with the original intent of the Plan and FEMAT. Since neither NMFS nor the federal action agencies

have diligently tried to implement Dr. Reeves' range of variability approach, the agencies have not yet developed a consistent methodology for doing so. As part of their assessment of future options, the agencies should assess the extent to which they have in hand or can develop credible methods for adhering the approach laid out in Dr. Reeves' declaration or other ways of remaining true to the FEMAT report and the ACS.

CONCLUSION

We are extremely dismayed that this Administration may be proposing to take the heart out of the ACS's ecosystem management approach. The courts have told the agencies what types of logging and assessments fall short, but have left numerous options for fulfilling the promise of the ACS. The agencies' own expert has outlined a blueprint for ACS implementation that has yet to be tested by the agencies. Hastily weakening the ACS in an attempt to eliminate obstacles to potentially devastating logging is short-sighted, and irresponsible in light of the viable alternatives.

Respectfully submitted,

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And on behalf of

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