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July 6, 2004

MEMORANDUM

TO: Council Members

FROM: John Shurts
John Ogan
Doug Marker

SUBJECT: Proposal for revision to mainstem implementation forum consistent with fish and wildlife program amendments

Introduction

Through the biological opinions, the federal agencies have established an implementation forum for annual planning and in-season management of operations for fish and wildlife and for developing recommendations on funding for passage improvements. This is often known as the Regional Forum, and it includes the Technical Management Team (TMT), the System Configuration Team (SCT), the Implementation Team (IT), and a federal executives group.

The Council recommended changes to this forum in both the 2000 Fish and Wildlife Program and 2003 Mainstem Amendments. The Council's perspective was that the present forum is not sufficient to integrate fish and power considerations, to provide appropriate consideration for the needs of unlisted anadromous and resident fish, or to attract or allow for the meaningful participation of many affected entities. The Council's Program amendments recommended changes to broaden the nature of the forum, and to allow for effective participation by the relevant federal agencies, the Council, the states, the tribes and others in a highly public forum. The Council recommended that it jointly sponsor the forum with the federal agencies to achieve those objectives. The amendment provisions are attached in an Appendix.

The purpose of this memorandum is to set forth a staff proposal to implement these program provisions -- that is, to recommend revisions to the configuration, expectations, elements, and procedures of the mainstem implementation forum. The organization of this memorandum is to present the proposal first, and follow that with additional context and history that we believe helps understand why the proposal is being offered and why it is so designed.

We will discuss this proposal with the Fish and Wildlife Committee in Spokane, and use the guidance we receive from the Committee to bring back a revised proposal to the August meeting for review by the Committee and full Council. If we have a proposal acceptable to the Council at that time, the next step will be to begin discussions with the federal agencies about these proposed changes.

The Proposal -- Reconfigure the Regional Forum structure with the key modification being the establishment of a new Executive Committee co-sponsored by the Council

The staff believes that the forum should be configured to have but two levels. The highest level would be an Executive Committee comprised of regional executives, (understanding that in most cases, those executives would be represented by their very highest-level delegate) along with representation from the tribes, states and Council at the high policy level. The staff believes that representatives from significant non-governmental players, such as Idaho Power and the Mid-Cs, could also participate as part of this Committee in some capacity, most likely on an as-needed basis as the issues dictate.

As you will see below, we would cast the role of this Executive body as a standing coordinating group focused on issue identification and development and dispute avoidance -- we ***do not*** propose that this Executive group be oriented towards, or thought of as, a “collaborative decisionmaking” and/or dispute resolution group. The functions of the Executive Committee, in order of priority and emphasis, would be:

1. Hydrosystem operations/management coordination and issue spotting/issue development all aimed at the general function of dispute avoidance, with significant work in the "off-season" to smooth the way for the upcoming operations year.
2. Tasking the technical/management group below.
3. To provide a standing public forum where the federal agencies with decision-making authority can: a) receive input on pending decisions within their jurisdiction, and similarly; b) where the federal agencies with decision-making authority will report their decisions and the bases upon which they reached decisions. In the particular instance of in-season operational/management issues that come to the Executive Committee because they are not resolved in the technical/management group below, the Executive body would function less as a collaborative dispute resolution group, and more as a forum where policy-level discussion of the issue would be facilitated and exhausted, and if in the course of that dialogue an agreement among the Executive Committee representatives does not emerge, then the responsible action agency is tasked to make the final decision and report on that decision and its basis to the Executive Committee.

The decision making model for the Executive Committee would depend upon the issue being addressed. When performing functions 1 and 2 and often 3 above, NOAA and the Council would be jointly responsible for agenda development, but the group consensus on the proposed agenda would be sought. When function 3 becomes closest to the nature of dispute resolution (specific in-season issue unresolved from below), the Council would be responsible for

facilitation of the group's discussion of the matter, but it would be clearly recognized that the agency or agencies with jurisdiction for the decision would be solely responsible for making the ultimate decision.

The second level of the forum would be a combined technical/management group. Essentially, this is constituted by linking the existing TMT and IT and the SCT with the IT, and trimming out resulting redundancy. What this should yield is really a management group, which brings with it technical support or a technical advisory committee. To the extent that they do not currently exist, the states, tribes, and Council would propose a limited number of additional representatives -- non-governmental to some extent -- to this technical/management group that would advance non-listed fish and wildlife, resident fish, and power considerations.

The decision making model for the technical/management group would be to seek consensus, but this is done with a full understanding that the agencies with jurisdiction to make the decision are solely responsible for making the ultimate decision. To try to sharpen this point a bit, the staff believe that the current TMT and IT spend substantially too much time and energy striving for a decision that no representative in the group finds objectionable, apparently because a lack of consensus represents a breakdown or failure in a "collaborative decision-making" model. As explained in the Context section below, the Council staff believe that a major improvement in the operation of the forum would be to clearly and finally reject "collaborative decision-making" as the decision making model in favor of the accountability, certainty, and transparency that would be produced by clearly identifying the entity with legal responsibility for making a particular decision, and normalizing a public process within which information related to those decisions is shared and decisions made and/or reported.

Context and explanation for the proposal

The current Regional Forum was a creation in the aftermath of the *IDFG v. NMFS* litigation over the 1992 Hydro BiOp. A thread running through that litigation reflected in the Judge Marsh's Opinion that overturned that BiOp was that the agencies and tribes have significant interests and expertise on issues dealt with in the BiOp, that they were not fully consulted by NMFS on important scientific or technical matters in the development of its BiOp, and that this, at the very least, compromised, NMFS' ability to convincingly demonstrate that it had used best science. In the wake of the ruling, NMFS set up a Regional Forum, and invited states and tribes to participate. The government explained that this new Regional Forum was needed because the science and technical issues were dynamic, and coupling that with constantly changing water and fish status information it needed a place to have a "continuing hydrosystem consultation" underway.

The Regional Forum ran into trouble nearly right away because of lack of clarity about the roles of states and tribes and the decision-making rule for the forum. Many of the state and tribal parties believed that the Regional Forum would be used by the federal agencies for "collaborative decisionmaking" -- that is, the states and tribes would actually participate much like "voting parties" along with NOAA and the Action Agencies to make decisions by committee. Others, however, saw the forum's function largely as providing for a transparent

process where the federal agencies would come to receive input and advice from states and tribes before they had made any commitment to a course of action, and that while the agencies with decision making jurisdiction would always retain that authority, they would be accountable to explain those decisions based on the information shared within the Regional Forum. Finally, there was a small minority of entities that really did think that to the extent that states and tribes could be at the table in the forum it was only to make it convenient for the federal agencies to provide them notice of the decisions they had worked out somewhere else.

In more recent years, and as reflecting in the Council's program amendments, a strict adherence, or perhaps more accurately the desire of some parties for a strict adherence, to a limited subject matter within the Regional Forum has been problematic. The simple fact is that even if the Regional Forum was originally established as a process for interpreting and implementing a Biological Opinion for listed salmon, the impacts of those decisions run to unlisted and resident fish and wildlife, as well as other significant uses of the Columbia system, and several parties, including the Council, believe that it is imprudent to ignore these other matters as outside the narrow scope of the forum as originally conceived.

We believe that there are three core problems with the existing Regional Forum.

1. The insistence that this be a dispute *resolution* mechanism -- which was supposed to operate in a particular fashion that it does not (as different or broader perspectives really do not come from the players as they go up the chain). So, some of this can be improved by a clear understanding of the real nature of the decision-making (*see 2. below*), and some of it can be improved by creating a more proactive, longer and more broadly-focused, dispute avoidance/coordination executive body.
2. A persistent debate/confusion about the decision-making model for the forum. The staff believes that a proposal to reconfigure the forum needs to clearly reject the "collaborative decision-making" model (where states, tribes or others have a "vote" on a committee). Rather, while consensus is ideal, it must be made clear that those legally responsible for the decision will make the decision and be accountable for it. At the same time we must reject the notion that the forum is simply a table for federal agencies to provide "notice" and take comment on their pre-developed decisions made in other venues. As outlined above, we propose that the Regional Forum is a place where the federal agencies are clearly and clearly recognized as the final decision-makers, but they come to the table without forming commitments in advance and with the full breadth of their decision making discretion intact to receive input and requests from all other parties, and, in the end that their decisions will have to be reconciled on the information developed in the regional forum and/or announced through the forum once made.
3. The third core problem is inadequate representation for other interests impacted by hydrosystem management decisions. That is, hydrosystem operations/management has significantly impacted the interests of non-listed species, resident fish, non-listed salmon, as well as interests on the river (power, especially). This is inadequate subject matter or representation of interests problem is a product of this process being fashioned out of an ESA process focusing on listed salmon.

APPENDIX

RELEVANT PROVISIONS FROM COUNCIL'S FISH AND WILDLIFE PROGRAM

2000 Fish and Wildlife Program, Hydrosystem Strategies

- **In-season Management Coordination**

Through the biological opinions, the federal agencies have established an implementation structure for annual and in-season operations and for recommendations on funding for passage improvements. It is the Council's perspective that the part of the implementation structure that allows for technical review functions adequately, although there is a need for greater participation by affected entities. The Council recommends to the federal agencies that the Technical Management Team and the Implementation Team be jointly sponsored by the Council and the federal agencies, and allow for effective participation in these considerations by the relevant federal agencies, the Council and states, the tribes of the Columbia River Basin, and other affected entities, in a highly public forum. The Council will initiate discussions to jointly sponsor these coordination teams.

2003 Mainstem Amendments, Strategies

- **Annual and In-season Decisionmaking**

Through the biological opinions, the federal agencies have established an implementation structure for deciding on annual operation plans for fish and wildlife, in-season management of hydrosystem operations for fish and wildlife and recommendations to Congress for funding for passage improvements. At present, this decision structure is insufficient to integrate fish and power considerations in a timely, objective and effective way, and it focuses on listed fish with little consideration for unlisted anadromous and resident fish species and wildlife. The Council continues to recommend to the federal agencies that this implementation structure, which includes the Technical Management Team and the Implementation Team, be jointly sponsored by the Council and the federal agencies. The implementation structure should allow for effective participation in these considerations by the relevant federal agencies, the Council and states, the tribes of the Columbia River Basin and other affected entities in a highly public forum. Discussions to this end began in 2001, but then were overcome by events. The Council will re-initiate the discussions to jointly sponsor these coordination teams.

The Council recommends that the forum then broaden its focus to improve in-season hydrosystem operations decisionmaking, in the following ways:

- 1) Include expertise in both biological and power system issues.
- 2) Have the technical capability to analyze and present power supply forecasts, hydrosystem operational alternatives, and other power related issues. The Council should play a significant role.
- 3) Have the technical capability to analyze differing hydrosystem operation proposals relative to impacts on salmon, steelhead, sturgeon and resident fish migration, survival, spawning, and rearing, and relative to impacts on wildlife.
- 4) Regularly schedule meetings, as often as required, to deal with short-term, real-time decisions (e.g. weekly in-migration season), as well as middle and long-term issues (e.g. addressing longer term reliability issues in a way that removes risk to providing operations to meet requirements of salmon).
- 5) Operate with a defined set of decisionmaking criteria and hold participants accountable for the decisions they make, according to the established criteria.