

THE HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

SALMON SPAWNING & RECOVERY  
ALLIANCE, WASHINGTON TROUT,  
NATIVE FISH SOCIETY, and CLARK-  
SKAMANIA FLYFISHERS,

Plaintiffs,

v.

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

Defendants.

Civ. No. 06-01462 RSL

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT AND IN  
SUPPORT OF THEIR CROSS-  
MOTION FOR SUMMARY  
JUDGMENT**

[NOTED FOR CONSIDERATION ON  
July 3, 2007]

MATTHEW J. McKEOWN  
Acting Assistant Attorney General  
Environment & Natural Resources Division  
United States Department of Justice

SETH M. BARSKY  
Assistant Section Chief  
Wildlife & Marine Resources Section  
ROBERT L. GULLEY  
Senior Trial Attorney  
Wildlife & Marine Resources Section  
United States Department of Justice  
Ben Franklin Sta., P.O. Box 7369  
Washington, D.C., 20044-7369  
PHONE:(202) 305-0500  
FAX: (202) 305-0275

Attorneys for Defendants

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|------|---|
| APA  | Administrative Procedure Act  |
| ERD  | Evaluation and Recommended Determination on a Resource Management Plan Pursuant to the Salmon and Steelhead 4(d) Rule |
| ESA  | Endangered Species Act  |
| ESU  | Evolutionary Significant Unit   |
| FMEP | Fishery Management and Evaluation Plan  |
| FWS  | United States Fish and Wildlife Service   |
| MSY  | Maximum Sustainable Yield   |
| NMFS | National Marine Fisheries Service   |
| RAP  | Risk Assessment Procedure   |
| RER  | Rebuilding Exploitation Rates   |
| RMP  | Regional Management Plan  |
| SUS  | Southern United States  |
| TRT  | Puget Sound Technical Recovery Team   |
| VSP  | Viable Salmonid Population  |

1 Defendants, D. Robert Lohn, in his official capacity, National Oceanic and Atmospheric  
 2 Administration's National Marine Fisheries Service ("NMFS"), Carlos Gutierrez, in his official  
 3 capacity, United States Department of Commerce, Ren Lohofener, in his official capacity,  
 4 United States Fish and Wildlife Service ("FWS"), Dirk Kempthorne, in his official capacity, and  
 5 United States Department of Interior (collectively "Defendants") submit this memorandum in  
 6 opposition to Plaintiffs' Motion for Summary Judgment and in support of their Cross-Motion For  
 7 Summary Judgment.

## 8 INTRODUCTION

9 Salmon fishing in Puget Sound is regulated under the continuing jurisdiction of *U.S. v.*  
 10 *Washington*, Civ. No. 9213, (W.D. Wash.) by the State of Washington and the 17 Puget Sound  
 11 Tribes (the "co-managers"). Plaintiffs here challenge two decisions by the National Marine  
 12 Fisheries Service ("NMFS") under the Endangered Species Act ("ESA") regarding these  
 13 fisheries. The first is the approval of a Resource Management Plan ("RMP") prepared by the co-  
 14 managers for fisheries in the Puget Sound from May 1, 2005 through April 30, 2010. The  
 15 approval is necessary to ensure that the "take" for Puget Sound Chinook, a threatened  
 16 Evolutionary Significant Unit ("ESU") under the ESA, is protected from the prohibition against  
 17 "take" in NMFS's 4(d) Rule. The second decision is a Biological Opinion issued by NMFS  
 18 under § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) regarding the effects of its decision to  
 19 approve the RMP.

20 Although packaged in several forms, Plaintiffs' principle concerns are two. First, they  
 21 argue that NMFS was required in evaluating the RMP to use the definition of a "viable  
 22 population" from a 2000 NMFS technical memorandum, the Viable Salmonid Population Paper  
 23 ("VSP Paper"). Second, Plaintiffs argue that NMFS was required to use "planning ranges" and  
 24 other information in a draft guidance document prepared by the Puget Sound Technical  
 25 Recovery Team ("TRT") in assessing the potential for the ESU to survive and recover in its  
 26 approval of the RMP and in the Biological Opinion. Plaintiffs also advance four circumstances  
 27 that they believe constitute new information that requires NMFS to reinitiate consultation  
 28 regarding the approval of the RMP under 50 C.F.R § 402.16(b).

Judicial review of this action is governed by the Administrative Procedure Act ("APA"),  
 5 U.S.C. § 701 *et seq.* Under the APA, a reviewing court must satisfy itself that the agency

1 decision is not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
 2 law.” 5 U.S.C. § 706(2)(A). In making this determination, the court’s role is only to determine  
 3 whether “the decision was based on a consideration of the relevant factors and whether there has  
 4 been a clear error of judgment.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416  
 5 (1971). A court is not to substitute its judgment for that of the agency. *Marsh v. Oregon*  
 6 *Natural Res. Council*, 490 U.S. 360, 378 (1989); *see also Sierra Club v. Marsh*, 976 F.2d 763,  
 7 769 (1<sup>st</sup> Cir. 1992) (“This standard of review is highly deferential; the court must presume the  
 8 agency action to be valid.”). Finally, deference to a reasoned federal agency’s decision “is  
 9 especially appropriate where . . . the challenged decision implicates substantial agency  
 10 expertise.” *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993).

11 Notwithstanding Plaintiffs’ arguments, NMFS complied fully with its regulations in  
 12 deciding to approve the RMP. NMFS’s use of the concepts of “viable” and “critical” thresholds  
 13 was consistent with the concepts in the VSP Paper. Further, NMFS adequately considered the  
 14 TRT’s draft guidance in both its evaluation of the RMP and the Biological Opinion. To the  
 15 extent that it did not rely on the “planning ranges,” it fully explained its reasons for not doing so.  
 16 Finally, none of the circumstances advanced by Plaintiffs meet the regulatory requirements for  
 17 reinitiating consultation. NMFS considered all important aspects of the problem and offered an  
 18 explanation for its decision. *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1206 (9<sup>th</sup> Cir. 2004)  
 19 (citing *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43  
 20 (1983)). Accordingly, its decision to approve the RMP and its determinations in the Biological  
 21 Opinion should be upheld, and Plaintiffs’ Complaint should be dismissed in its entirety.

## 22 BACKGROUND

### 23 A. Statutory and Regulatory Framework

#### 24 1. Endangered Species Act

##### 25 a. Section 4(d)

26 The ESA creates two categories of listed species protected by the Act, endangered and  
 27 threatened species. An “endangered” species is any species “which is in danger of extinction  
 28 throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). The statutory  
 prohibition against “take” in § 9 applies only to endangered species. 16 U.S.C. § 1538(a).

A “threatened” species is one that “is likely to become an endangered species within the

foreseeable future.” 16 U.S.C. § 1532(20). Under § 4(d), NMFS must issue regulations as it  
 1 “deems necessary and advisable to provide for conservation of such species.” 16 U.S.C. §  
 2 1533(d). Such regulations, often referred to as 4(d) rules, may include any or all of the  
 3 prohibitions that apply automatically to protect endangered species under ESA § 9. *Id.*

The Puget Sound Chinook ESU is listed as “threatened.” 64 Fed. Reg. 14,308 (Mar. 24,  
 4 1999). In response to *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D.Or. 2001) appeal  
 5 dismissed, 358 F.3d 1181 (9<sup>th</sup> Cir. 2004), NMFS conducted status reviews of all listed West  
 6 Coast salmonids to ensure that any revised listings take proper account of the presence of  
 7 hatchery fish and be based on the newly available scientific data. 70 Fed. Reg. 37,160 (June 28,  
 8 2005). NMFS confirmed the threatened status of the Puget Sound Chinook ESU and included in  
 9 the listing Chinook from 26 specified hatcheries. *Id.* at 37,192, *id.* at 31,175. At the same time,  
 10 NMFS amended the existing 4(d) regulations, including the rule for Puget Sound Chinook, to  
 11 apply their protections to both natural fish and to hatchery fish that have an intact adipose fin.  
 12 *Id.* at 37,195; 50 C.F.R. § 223.203(a).

**b. 4(d) Rule For Puget Sound Chinook ESU**

On January 3, 2000, NMFS proposed a 4(d) Rule for the Puget Sound Chinook ESU. 65  
 14 Fed. Reg. 170 (Jan. 3, 2000). On July 10, 2000, NMFS issued the final 4(d) Rule for Puget  
 15 Sound Chinook. 65 Fed. Reg. 42,422 (July 10, 2000). The proposed rule concluded that the take  
 16 prohibitions applicable to endangered species are necessary and advisable for conservation of  
 17 nineteen ESUs, including the Puget Sound Chinook ESU. *Id.* at 42,423. NMFS found, however,  
 18 that it was not “necessary and advisable” to impose take prohibitions on thirteen “programs”  
 19 with adequately limited impacts on listed salmonids. *Id.* The specific conditions under which  
 20 these programs are not subject to the take prohibition are referred as “Limits”.

The limit directly at issue here is Limit 6 that covers “activities in compliance with joint  
 21 tribal/state plans developed within United States v. Washington or United States v. Oregon.” *Id.*  
 22 However, the limits for joint Tribal/State Plans (50 C.F.R. § 223.204)<sup>1</sup> and for fisheries  
 23 management activities (50 C.F.R. § 223.203(b)(4)) are also relevant. Each of these limits will be  
 24

---

<sup>1</sup> The limit for tribal resource management plans was codified at 50 C.F.R. § 223.209. 65 Fed. Reg. 42,481,  
 26 42,486 (July 10, 2000). Subsequently, NMFS moved the limit next to the 4(d) Rule in 50 C.F.R. § 223.204 to  
 27 “improv[e] the clarity of the 4(d) regulations.” 70 Fed. Reg 37,160, 37,195 (June 28, 2005).

described below along with a description of the relationships among them.

**(1) Limit 6 For Joint Tribal/State Plans**

Limit 6 covers “actions undertaken in compliance with a resource management plan developed jointly by the States of Washington, Oregon and/or Idaho and the Tribes ... within the continuing jurisdiction of *United States v. Washington* or *United States v. Oregon*.” 50 C.F.R. § 223.203 (b)(6). Limit 6 in the 4(d) Rule provides that the Rule’s “take” prohibitions “do not apply to actions undertaken in compliance with a resource management plan developed jointly by the State[] of Washington . . . and the Tribes” provided that certain conditions are satisfied. 50 C.F.R. § 223.203(b)(6). The primary condition is that NMFS has “determined pursuant to 50 C.F.R § 223.09 and the government-to-government processes therein that implementing and enforcing the joint tribal/state plan will not appreciably reduce the likelihood of survival and recovery of affected threatened ESUs.” *Id.* § 223.203(b)(6)(i)(emphasis added). However, in making that determination, NMFS must “take[] comment on how any fishery management plan addresses the criteria in [Limit 4,] § 223.203(b)(4) . . . .” *Id.* § 223.203(b)(6)(iii). In the preamble to the proposed rule, NMFS explained:

Before the take prohibitions would be determined not to apply to a joint plan, the Secretary must determine that implementation and enforcement of the plan will not appreciably reduce the likelihood of survival and recovery of the species. Before making that determination for joint fishery management ... the Secretary must solicit and consider public comment on how any fishery management plan addresses the criteria in [Limit 4].

65 Fed. Reg. at 178.

**(2) Limit For Tribal Resource Management Plans**

Limit 6 requires that the determination regarding whether an RMP will not appreciably reduce the likelihood of survival and recovery be made pursuant to 50 C.F.R. § 223.209. That regulation limits the application of the 4(d) Rule for Tribal Resource Management Plans.

Concurrent with the promulgation of the limits for the 13 programs, NMFS promulgated a limit for any actions taken in accord with any tribal resource management plan that the Secretary has determined will not appreciably reduce the likelihood of survival and recovery of a threatened ESU. 65 Fed. Reg 42, 481, 42,481 (July 10, 2000); *see also* 65 Fed. Reg at 42,424. NMFS found that this determination was the only one “necessary and advisable” for approving these plans. 65 Fed. Reg. 108, 108 (Jan. 3, 2000). NMFS explained that the purpose of the limit was to “enable the Secretary to meet the conservation needs of listed species while respecting

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tribal rights, values and needs.” 65 Fed. Reg at 42,482. In the preamble to the proposed rule,  
 1 NMFS also explained why it elected not to impose specific requirements on the tribal resource  
 2 management plans.

3 It is NMFS’ view that, given the sovereign status of the tribes it is inappropriate  
 4 to describe in this final rule the specific qualifying criteria for Tribal Plans. The  
 5 plans will be held to the same fundamental ESA standard as any other activity,  
 6 and will be evaluated consistent with principles outlined in the Secretarial Order.<sup>2</sup>  
 7 NMFS will work with the tribes to the maximum extent practicable to craft plans  
 that will meet the needs of listed species and accomplish the goals of the tribes.  
 Furthermore, NMFS recognizes, as stated in the Secretarial Order, that it has a  
 trust obligation to minimize impacts on tribes as much as possible while still  
 meeting agency responsibilities under the ESA.

8 *Id.* at 42,483.

### 9 (3) Limit 4 For Fishery Management And Evaluation Plans

10 Limit 6 requires that in approving an RMP, NMFS must take comment on how the RMP  
 11 addresses the criteria in Limit 4. NMFS created a separate, distinct Limit, Limit 4, for fishery  
 12 management “when a state develops an adequate Fishery Management and Evaluation Plan.” 65  
 13 Fed. Reg. at 175; 50 C.F.R. § 223.203(b)(4). NMFS explained that Limit 4 “provides a  
 14 mechanism whereby NMFS may limit application of take provisions to fisheries when a state  
 15 develops an adequate Fishery Management and Evaluation Plan (“FMEP”). 65 Fed. Reg. at 175.  
 16 In the preamble to the proposed rule, NMFS explained that where joint agreement between a  
 state and tribe is involved, Limit 6 applies, rather than Limit 4. *Id.* at 177.

17 The 4(d)Rule sets forth nine specific criteria that must be “adequately” addressed in a  
 18 FMEP in order to be approved by NMFS under that Limit. *Id.* § 223.203(b)(4)(i). The criterion  
 19 most at issue (Criterion B) here provides that a FMEP must:

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

24 *Id.* § 223.203(b)(4)(i)(B) (emphasis added). A “population” is a group of fish that significantly  
 25 exchange genes over a century and therefore have population dynamics independent of other

26  
 27 <sup>2</sup> The Secretaries of Commerce and the Interior issued Secretarial Order No. 3206, entitled “American Indian  
 Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,” on June 5, 1997.  
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1 populations. AR 241 at 5. An ESU usually consists of multiple populations that exchange genes  
2 over an evolutionary time scale, and, thus, form a genetic cluster distinguishable from other  
3 ESUs. *Id.* at 7-9. Criterion B of Limit 4 looks for an FMEP which analyses an ESU's  
4 constituent population structure and those populations' viability as a tool to gauge the effects of  
5 a proposed action on the survival and recovery of an entire ESU.

6 Criterion B further specifies that: (1) the FMEP must "recognize the significant  
7 differences in risk associated with viable and critical population threshold states and respond  
8 accordingly to minimize the long-term risks to population persistence;" (2) the actions impacting  
9 populations that are functioning at or above the viable threshold must be designed to maintain  
10 the population or management unit at or above that level; (3) for populations above critical levels  
11 but not at viable levels, harvest management must not appreciably slow the population's  
12 achievement of viable function; and (4) actions impacting populations at or below critical  
13 threshold must not appreciably increase genetic and demographic risks facing the population and  
14 must be designed to permit the population's achievement of viable function, unless the plan  
15 demonstrates that the likelihood of survival and recovery of the entire ESU in the wild would not  
16 be appreciably reduced by greater risks to that individual population. 50 C.F.R. §  
17 223.203(b)(4)(i)(B).

18 Plaintiffs also question whether NMFS's evaluation of the adequacy of how the RMP  
19 addresses 50 C.F. R. § 223.203(b)(4)(i)(H) ("Criterion (H)") in Limit 4. Criterion H considers  
20 the extent to which an FMEP addresses "restrictions on resident and anadromous species  
21 fisheries that minimize any take of listed species, including time, size, gear, and area  
22 restrictions." 50 C.F.R. § 223.203(b)(4)(i)(H).

23 In the preamble to the proposed rule, NMFS explained that where joint agreement  
24 between a state and tribe is involved, Limit 6 applies, rather than Limit 4. 65 Fed. Reg. at 177.

25 **c. ESA § 7(a)(2)**

26 Section 7 of the ESA requires each federal agency to ensure that any action authorized,  
27 funded, or carried out by that agency "is not likely to jeopardize the continued existence of any  
28 endangered species or threatened species or result in the destruction or adverse modification" of  
designated critical habitat. 16 U.S.C. § 1536(a)(2). To achieve this objective, the agency  
proposing the action ("the action agency") is required to consult with FWS or NMFS (the

“consulting agency”<sup>3</sup>) whenever a federal action “may affect” a threatened or endangered species. 50 C.F.R. § 402.14(a). Unless the action agency determines with the written concurrence of the consulting agency that an action is “not likely to adversely affect” the listed species or critical habitat, it must engage in “formal consultation.” 50 C.F.R. §§ 402.14(a), (b). Formal consultation typically begins with a written request by the action agency, 50 C.F.R. § 402.14(c), and concludes with the issuance of a biological opinion by the consulting agency. 50 C.F.R. § 402.14(l)(1). The biological opinion assesses the likelihood of jeopardy to the species and whether the proposed action will result in destruction or modification of critical habitat. *See* 50 C.F.R. § 402.14(g).

In preparing its biological opinion, the consulting agency must evaluate the current status of the listed species and critical habitat and the effects of the action and cumulative effects on the listed species and critical habitat in the action area. 50 C.F.R. §§ 402.14(g)(2), (3). The term “action area” means “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. The term “effects of the action” is defined to mean “the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” 50 C.F.R. § 402.02. The “environmental baseline” includes:

the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

50 C.F.R. § 402.02.

Reinitiation of formal consultation is “required” and “shall be requested” by the action agency: (a) if the amount or extent of taking specified in the incidental take statement is exceeded; (b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) if the identified action is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not considered in the biological opinion; or (d) if a new species is listed or critical habitat

<sup>3</sup> FWS and NMFS share responsibilities for administering the ESA depending on the species involved. 50 C.F.R. § 402.01(b). NMFS has responsibility for the species at issue in this case.

designated that may be affected by the identified action. 50 C.F.R. § 402.16(b).

**d. Recovery Planning**

Species are listed as threatened or endangered through the rule-making procedures mandated by 16 U.S.C. § 1533. Once a species is listed, the ESA requires NMFS to develop and implement “recovery plans” for every endangered and threatened species, unless it finds that such a plan will not promote the conservation of the species. 16 U.S.C. § 1533(f)(1). The plans incorporate, to the maximum extent practicable, “management actions” necessary for “conservation and survival of the species,” measurable criteria for attaining recovery of the species and removal from the endangered species list, and estimates of the time and cost necessary to achieve recovery of the species. *See id.* § 1533(f)(1)(B)(i)-(iii). Prior to final approval, all new or revised recovery plans are subjected to public notice and comment. *Id.* at § 1533(f)(4).

Recovery plans are broad planning documents that list the tasks that NMFS believes will lead to the recovery of a species. These tasks may involve action by NMFS, by other Federal agencies, by State, tribal, and local governments, by the private sector, or by any combination of these entities. *See, e.g.,* S. Rep. No. 100-240 (Dec. 9, 1987), *reprinted in* 1988 U.S.C.C.A.N. 2700, 2709 (recognizing that a wide range of actions could be needed to conserve diverse species). As such, a recovery plan is a guidance document, intended to be used as a basic roadmap for the recovery of a species. *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 103 (D.D.C. 1995) (stating that a recovery plan “is supposed to be a basic road map to recovery, *i.e.*, the process that stops or reverses the decline of a species and neutralizes threats to its existence”) amended on other grounds, 967 F. Supp. 6 (D.D.C. 1997).

The Secretary has broad discretion in determining how and when to implement a recovery plan: A “recovery plan is a discretionary document by which scientists determine the methods needed to promote recovery of the species . . . . It is not mandatory that the agency implement such suggestions.” *Leatherback Sea Turtle v. Nat’l Marine Fisheries Serv.*, No. 99-00152 DAE, 1999 WL 33594329, at \*12 (D. Haw. 1999); *Nat’l Wildlife Fed’n v. Nat’l Park Serv.*, 669 F. Supp. 384, 388-89 (D. Wyo. 1987) (declining to “second guess the Secretary’s motives for not following the recovery plan”); *Oregon Natural Res. Council v. Turner*, 863 F. Supp. 1277, 1284 (D. Or. 1994) (“The recovery plan presents a guideline for future goals but

does not mandate any actions, at any particular time, to obtain these goals.”).

1 In 2000, NMFS undertook development of recovery plans for the Northwest listed  
2 salmonids by grouping them into five regional “domains,” one of which is the Puget Sound  
3 domain. *See generally*

4 <http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Index.cfm>.

5 In each domain, NMFS established a “technical recovery team,” chaired by a NMFS scientist.  
6 The teams were to examine the status and population structure of the listed ESUs included in its  
7 domain and to recommend delisting criteria, which if met would indicate that an ESU could be  
8 delisted.

9 On April 30, 2002, the TRT issued preliminary delisting guidance, Puget Sound  
10 Technical Recovery Team, Planning Ranges and Preliminary Guidelines for Delisting and  
11 Recovery of the Puget Sound Chinook Salmon Evolutionary Significant Unit (AR 070-1), that  
12 established planning ranges for the Puget Sound Chinook ESU in the recovered state to help  
13 “planners evaluate the magnitude of effort that will be needed from each population to achieve  
14 recovery.” AR 70-01 at 1. On January 18, 2004, the TRT released its final draft on  
15 “Independent Populations of Chinook Salmon in Puget Sound.” AR 260-01. The co-managers  
16 used these documents in developing the RMP, and NMFS used them in its Limit 6  
17 determination.<sup>4</sup>

## 17 **B. Factual Background**

18 Salmon fishing in Puget Sound is regulated under the continuing jurisdiction of *U.S. v.*  
19 *Washington*, Civ. No. 9213, (W.D. Wash.). In 1986, the court approved the Puget Sound Salmon  
20 Management Plan as a consent decree for management of that fishery by the Northwest  
21 Washington Treaty Tribes and the State of Washington (the “co-managers”). AR 19-01. The  
22 State of Washington and the 17 Puget Sound Tribes manage salmon fisheries in Puget Sound and  
23 the Strait of Juan de Fuca. AR 196 at 1. These fisheries include recreational, commercial, and  
24 ceremonial and subsistence fisheries in marine and freshwater areas. *Id.*

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25 <sup>4</sup> After NMFS’s Limit 6 approval in 2005, NMFS adopted a Puget Sound Recovery Plan. 72 Fed. Reg. 2493  
26 (Jan. 19, 2007). The recovery plan consisted of a comprehensive plan submitted by a regional forum of interests,  
27 Shared Strategy for Puget Sound (AR 269), as supplemented by NMFS to include all of the ESA required elements  
(AR 270). The Shared Strategy plan incorporates the RMP as its salmon harvest component, stating that if there  
28 were a conflict between the plan and the RMP, the “RMP shall take precedence.” AR 269 at 420.

1 The framework for annual harvest management measures for fishing that affects Chinook  
 2 is contained in a Chinook harvest plan (the “RMP”) adopted by the co-managers, which  
 3 periodically is updated. On March 18, 2004, NMFS received the co-managers’ RMP, “Puget  
 4 Sound Comprehensive Chinook Management Plan: Harvest Management Component” (the  
 5 “RMP”). AR 16, 16-01. The RMP provides the framework for the co-managers’ regulation of  
 6 the salmon fisheries in Puget Sound and the Strait of Juan de Fuca between May 1, 2005 and  
 7 April 30, 2010. AR 003 at 2. The co-managers asked NMFS to approve the RMP as meeting  
 the terms of Limit 6 of the 4(d) Rule. AR 16-01 at 2.

8 On April 15, 2004, NMFS published a notice of availability for public review and  
 9 comment on NMFS’s evaluation of the RMP. AR 006. On January 27, 2005, NMFS staff  
 10 submitted a recommended decision. AR 003.<sup>5</sup> The ERD recommended approval of the RMP.  
 11 *Id.* at 2. It found that the RMP “would not appreciably reduce the likelihood of survival and  
 12 recovery of the Puget Sound Chinook Salmon ESU.” *Id.* The ERD then fully explained the  
 13 basis for that decision. On March 4, 2005, the NMFS Regional Administrator approved the  
 RMP under Limit 6. AR 4 at 5.

14 In recommending approval of the RMP, NMFS staff examined and set out in detail in the  
 15 ERD how the RMP addressed each of the nine criteria in Limit 4. *See* AR 003. For example,  
 16 NMFS fully set out its findings and the methodology it employed in deciding that the RMP  
 17 adequately used the “viable” and “critical” salmonid population concepts. AR 003 at 24-47.  
 18 NMFS also found that the harvest regime specified by the co-managers takes into account the  
 19 different risk facing a population depending on the status of the population as contemplated by  
 Criterion B. *Id.*

20 NMFS explained that the viable thresholds in this evaluation are a level of escapement<sup>6</sup>  
 21 associated with rebuilding to recovery, consistent with current environmental conditions. AR  
 22 003 at 25. NMFS explained that for most populations, these thresholds are well below the  
 23 escapement levels associated with recovery. *Id.* Ultimately recovery will depend on a  
 24

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25 <sup>5</sup> Evaluation and Recommended Determination on a Resource Management Plan (RMP), Pursuant to the  
 26 Salmon and Steelhead 4(d) Rule, dated January 27, 2005 (“ERD”).

27 <sup>6</sup> “Escapement” means the adult salmon that survive fisheries and natural mortality, and return to spawn. AR  
 15 at 63.

1 combination of actions across all sectors affecting salmon survival, but achieving these goals  
 2 under current conditions is an important step to eventual recovery when habitat and  
 3 environmental conditions are more favorable. *Id.* In short, NMFS found that the current RMP  
 will not appreciably reduce the likelihood of recovery.

4 NMFS derived population specific viable and critical thresholds largely guided by its  
 5 VSP paper and Risk Assessment Procedure (“RAP”).<sup>7</sup> AR 007 at C-5. The critical threshold  
 6 generally represents “a boundary below which uncertainties about population dynamics increase  
 7 and therefore extinction risk increases.” AR 007 at C-6. NMFS developed the population critical  
 8 threshold from a consideration of genetic, demographic, and spatial risk factors for each  
 9 population, as described in the VSP Paper. *Id.*; AR 241 at 18, 46, 58, 61, and 90. NMFS often  
 10 used a Ricker stock-recruit model to assess demographic risks. When insufficient data existed,  
 NMFS used general guidance provided in the VSP Paper. *Id.* at C-7; AR 241 at 57-58.

11 To set viability thresholds, NMFS used the level of escapement required to achieve  
 12 maximum sustainable yield<sup>8</sup>, the general guidance levels in the VSP Paper, or other information  
 13 related to productivity and capacity of the watershed. AR 007 at C-7; AR 003 at 25; AR 196 at  
 14 8. Where adequate data existed, NMFS always used data specific to the population under  
 15 consideration.

16 The viable and critical thresholds were then used to identify rebuilding exploitation rates  
 17 (“RER”) using the RAP. AR 003 at 7; AR 003 at 25. As set out in the RAP, the RER  
 18 represented the maximum rate of harvest under which: (1) the percentage of escapements<sup>9</sup> below  
 19 the critical threshold must differ no more than 5% from that under baseline [*i.e.*, no fishing]  
 20 conditions; and (2) either the viable threshold must be met 80% of the time or the percentage of  
 21 escapements less than the viable threshold must differ no more than 10% from that under

22 <sup>7</sup> For further discussion of the RAP, *see infra* at 15-16.

23 <sup>8</sup> The “maximum sustainable yield” represents the maximum level of escapement sustainable under “current  
 24 productivity and capacity restraints.” AR 58 at 7.

25 <sup>9</sup> NMFS and other fisheries managers use a model, the Viable Risk Assessment Procedure model (“VRAP”) to estimate future salmon populations, based on assumed initial population abundances and age structure, productivity and survival conditions and specific harvest management measures. AR 58 at 13-20 and AR 196 at 63-69. The model is run numerous times under the recent range and frequencies of conditions to obtain population abundances after 25 years. These percentages are proportion of model runs which satisfy the applicable condition. The RER is the highest exploitation rate under which both criteria are satisfied. AR 58 at 9-12.

baseline [no-fishing] conditions. *Id.* at 9-10.

1 Overall, NMFS concluded that “the levels of risk associated under the implementation of  
2 the RMP’s upper management thresholds are consistent with NMFS’s standards.” AR 4-01 at  
3 35. More specifically, NMFS found that:

- 4 • for the nine populations for which NMFS derived its own viable thresholds, the  
5 RMP’s upper management thresholds were the same, or more commonly, greater  
6 than the NMFS-derived thresholds. AR 4-01 at 33-34;
- 7 • for three populations for which NMFS has yet to derive a viable threshold, the  
8 RMP’s upper management threshold exceeds the VSP Paper’s generic guidance  
9 for a viable population of 1,250 fish. AR 4-01 at 34;
- 10 • for five populations for which NMFS has yet to derive a viable threshold, the  
11 RMP’s upper management thresholds are less than the VSP Paper’s generic  
12 guidance, but are based on habitat studies or modeling results that suggest that  
13 each threshold is consistent with the current carrying capacity and productivity of  
14 the system. AR 4-01 at 34;
- 15 • for two populations for which NMFS has yet to derive a viable threshold, the  
16 anticipated escapements over the then-remaining five-year life of the RMP are  
17 below the RMP’s upper management. Abundance, even without any fishing, is  
18 unlikely to approach the upper threshold during the life of the RMP. Therefore, it  
19 is unlikely that any elevated level of risk will result from the proposed upper  
20 management threshold. AR 4-01 at 34); and
- 21 • for one population for which NMFS has yet to derive a viable threshold, the  
22 RMP’s upper management threshold is based on escapement to an index area.  
23 AR 4-01 at 34. However, because the anticipated range of escapements for the  
24 entire population under implementation of the RMP exceeds the VSP Paper’s  
25 generic guidance of 1,250 fish, the level of risk for this population associated with  
26 the implementation of the RMP’s upper management thresholds is also consistent  
27 with NMFS’s standards.
- Recent years’ average escapement for all populations but the North Fork  
Nooksack population were above their critical escapement thresholds and the

North Fork Nooksack population's escapement was increasing. AR 4-01, Table 9.

1 Next, NMFS evaluated the anticipated levels of fishing-related mortality anticipated  
2 under the RMP. Where available, NMFS compared them with the NMFS-derived RERs to  
3 quantify possible effects on survival and recovery. NMFS concluded that five of the ten RERs  
4 derived by NMFS are expected to be met. AR 007 at 3-76. Escapements for one of the  
5 populations (Green-Duwamish) for which RERs are not expected to be met "are expected to  
6 meet or exceed the viable escapement threshold for this population across the duration of the  
7 [RMP]." AR 007 at 3-76. Some concerns remained for four individual populations in the  
8 remaining three regions. However, NMFS's "analysis indicated that conducting the [RMP]  
9 between 2005-2009 is expected to have generally little to no practical effect on the ability to  
10 achieve viability criteria in these regions." *Id.* For example, "all but two of the populations that  
11 are not expected to meet their viable thresholds under the [RMP] are also not expected to meet  
12 their viable thresholds even if Puget Sound fisheries were eliminated." *Id.*

12 NMFS also compared recent (1999 to 2002) escapements with the pre-listing (1990 to  
13 1998) average escapements to see whether escapement was increasing, decreasing, or stable. AR  
14 003 at 26-27. All of the populations have a stable to increasing trend in escapement. *Id.* at 27,  
15 29 Table 9.

16 On March, 11, 2005, NMFS announced its approval of the RMP and responded to the  
17 comments regarding how the RMP addressed the criteria. 70 Fed. Reg. 12,194 (Mar. 11, 2005)  
18 (AR 009). NMFS explained the basis on which it made this determination:

19 As required by section 223.203(b)(6) of the ESA 4(d) Rule, NMFS must  
20 determine pursuant to 50 C.F.R. 223.209 and pursuant to the government to  
21 government processes therein whether the RMP for Puget Sound chinook would  
22 appreciably reduce the likelihood of survival and recovery of the Puget Sound  
23 chinook and other affected threatened ESUs. NMFS must take comments on how  
24 the RMP addresses the criteria in section 223.203(b)(4) in making that  
25 determination.

26 70 Fed. Reg. at 12,195; *see also* AR 003 at 2.

27 On December 16, 2004, NMFS issued a biological opinion on its recommended decision  
28 to approve the RMP. AR 002 at 1. The proposed action evaluated in the Biological Opinion  
also included the funding of the Puget Sound tribe's management, enforcement, and monitoring  
projects in support of the RMP by the Bureau of Indian Affairs and FWS's authorization as party  
to the Hood Canal Salmon Management Plan that are consistent with the RMP. *Id.* The ESA

determination was then based on a consideration of the effect of the proposed fishery on the ESU as a whole. AR 196. In doing its evaluation, NMFS looked at the effects of the RMP on both survival and recovery of the ESU.

### C. Viability Criteria

#### 1. Viable Salmonid Populations Paper (“VSP Paper”)

In June 2000, NMFS issued a technical memorandum introducing the “viable salmonid population (“VSP”) concept.<sup>10</sup> AR 241. The VSP concept consists primarily of two components: 1) principles for identifying population substructure in Pacific salmonid ESUs, and 2) general principles for establishing biological guidelines to evaluate conservation status of these populations and, therefore, of the entire ESU. *Id.* at 2. The VSP Paper cautioned that although it had confidence in the conceptual framework underlying the notion of a VSP, “the approach to applying the VSP concept itself is still in the development stage and is likely to change with experience. We expect that the means of identifying population boundaries and establishing guidelines for population parameters will continue to be refined as further empirical data and modeling efforts are brought to bear on these important issues.” *Id.* at 1. NMFS further explained that:

The diversity of salmonid species and populations makes it impossible to set narrow quantitative guidelines that will fit all populations in all situations. The concepts and guidelines outlined in this document are therefore fairly general in nature. More specific guidelines can only be determined through detailed analyses of case-specific information on particular regions and particular species.

*Id.* at 2.

Against this background, the VSP Paper defines a viable population as “an independent population of any Pacific salmonid . . . that has a negligible risk of extinction due to threats from demographic variation (random or directional), local environmental variation, and genetic diversity changes (random or directional) over a 100-year time frame.” AR 241 at 2. The VSP Paper notes that, “although [its] time frame for evaluating population viability is 100 years, [it] recognize[s] and expect[s] that many management actions and their subsequent monitoring will occur over much shorter time scales.” *Id.* at 3. It also notes that, “[i]n addition to evaluating population viability over long time periods, it is often important to analyze short-term risks

<sup>10</sup> NOAA Technical Memorandum NMFS-NWFSC-42, Viable Salmonid Populations and the Recovery of Evolutionary Significant Units (“VSP Paper”), dated June 2000.

relating to population or species persistence.” *Id.* at 4. “In particular, a number of management decisions made at local, state, and federal levels are based on whether an action will have a significant effect on salmonid population viability over short time spans (e.g., 10 or fewer years).” *Id.*

## 2. Risk Assessment Procedure (“RAP”)

NMFS contemporaneously developed an approach to assess risk that it could use for the 4(d) Rule based on principles in the VSP Paper. AR 58.<sup>11</sup> The purpose of the paper was to provide a management tool that linked “available biological data about the listed species with quantified standards of acceptable risk to survival and recovery.” *Id.* at 2. The RAP extended the general concept of a viable population to apply to specific populations and to address the risks to those populations:

To address the biological requirements of salmonids, NMFS developed guidance on the characteristics of viable, i.e., recovered, salmonid populations in its [VSP Paper]. It identifies four characteristics of viable salmonid populations: population size, trends in abundance and productivity, diversity, and spatial structure. However, VSP does not provide quantified risk standards, or a framework for assessing risk.

This document describes one such framework, the Risk Assessment Procedure (RAP) used to assess harvest management actions and define population-specific harvest mortality standards.

AR 58 at 2. NMFS explained the relationship of the RAP to VSP:

Both RAP and VSP operate at the population level. However, although VSP offers general guidelines for biological characteristics of a population at increased risk or robust to risk, it is not population specific and it does not assess an action’s effects over time. Consequently, models are needed that look at population-specific population dynamics and the effects of proposed actions over time. The result is a merging of the thresholds of risk, e.g., VSP, with the effects of an action over time to assist in making management decisions, e.g., RAP.

*Id.* at 4. NMFS found that the use of the approach in the RAP was “consistent with the concepts developed” in the VSP Paper. *Id.*, AR 007 at C-5.

The RAP “defines maximum exploitation rates (Recovery Exploitation Rates, or RERs) for individual populations which are projected to result in a low risk to survival and a moderately high to high probability of recovery of the population in the long term.” AR 58 at 4; *see also* AR 007 at C-10 (explaining that the RER is the level of exploitation rate that results in “a low probability that the proposed harvest action will endanger the survival of the population, and a

<sup>11</sup> “A Risk Assessment Procedure for Evaluating Harvest Mortality on Pacific Salmonids” (“RAP”), dated May 30, 2000.

1 relatively high probability that the proposed harvest will not impede recovery” assuming current  
2 habitat conditions).

3 The RAP presented two methods to establish viable population abundance levels for  
4 Chinook salmon populations (including those in Puget Sound). AR 58 at 6-7. The first method  
5 was based on guideline ranges in the VSP Paper for abundance levels that would present a low  
6 risk of extinction due to genetic or environmental factors. *Id.* When population-specific  
7 information was available, NMFS used the preferred approach, which was based on the level of  
8 escapement required to achieve the maximum sustainable yield (“MSY”) under *current* habitat  
9 conditions. *Id.* According to NMFS, “[a]s applied in RAP to date, the MSY level represents a  
10 maximum sustainable level given current productivity and capacity restraints on the population,  
11 and is not intended to represent a potential recovery level for the population.” *Id.* Using the  
12 viable and critical thresholds, the RAP defined the RER as the level of escapement in which: (1)  
13 the percentage of escapements below the critical threshold will differ no more than 5% from that  
14 under baseline [*i.e.*, no fishing] conditions; and (2) either the viable threshold will be met 80% of  
15 the time or the percentage of escapements less than the viable threshold will differ no more than  
16 10% from that under baseline [no-fishing] conditions. AR 58 at 9-10.

17 The RERs are used in combination with other available information to assess risk to  
18 populations. However, in making a jeopardy determination, the expectation that the exploitation  
19 rate of one or more populations will exceed their RERs does not necessarily imply jeopardy to  
20 the ESU as a whole. AR 196 at 74.

### 21 STANDARD OF REVIEW

22 Defendants agree with Plaintiffs that judicial review of this action is governed by the  
23 Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* Under the APA, a reviewing  
24 court must satisfy itself that the agency decision is not “arbitrary, capricious, an abuse of  
25 discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In making this  
26 determination, the court’s role is only to determine whether “the decision was based on a  
27 consideration of the relevant factors and whether there has been a clear error of judgment.”  
28 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). A court is not to  
substitute its judgment for that of the agency. *Marsh v. Oregon Natural Res. Council*, 490 U.S.  
360, 378 (1989); *see also Sierra Club v. Marsh*, 976 F.2d 763, 769 (1<sup>st</sup> Cir. 1992) (“This

standard of review is highly deferential; the court must presume the agency action to be valid.”).  
 1 The agency, however, must articulate a rational connection between the facts found and the  
 2 conclusions reached. *Midwater Trawlers Co-op v. Dep’t of Commerce*, 282 F.3d 710, 716 (9<sup>th</sup>  
 3 Cir. 2002).

4 Moreover, the fact that the record contained “evidence supporting a different scientific  
 5 opinion does not render the agency’s decision arbitrary and capricious.” *Wetlands Action*  
 6 *Network v. U. S. Army Corps of Eng’rs*, 222 F.3d 1105, 1120-21 (9<sup>th</sup> Cir. 2000) (the fact that the  
 7 record contained “evidence supporting a different scientific opinion does not render the agency’s  
 8 decision arbitrary and capricious”) (citing *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333  
 9 (9<sup>th</sup> Cir. 1992) (“To set aside the Service’s determination in this case would require us to decide  
 10 that the views of Greenpeace’s experts have more merit than those of the Service’s expert’s, a  
 11 position we are unqualified to take.”)). Thus, this Court should not weigh conflicting expert  
 12 opinions and determine which one is “more persuasive.” *Marsh*, 490 U.S. at 378 (“When  
 13 specialists express conflicting views, an agency must have discretion to rely on the reasonable  
 14 opinions of its own qualified experts even if, as an original matter, a court might find contrary  
 15 views more persuasive”); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9<sup>th</sup> Cir. 1993)  
 16 (deference to a reasoned federal agency’s decision “is especially appropriate where . . . the  
 challenged decision implicates substantial agency expertise.”).

## 17 ARGUMENT

### 18 A. NMFS Complied With Its Regulations In Evaluating Whether The RMP Satisfied The Requirements Of Limit 6.

19 Plaintiffs assert that NMFS failed to comply with its own regulations in approving the  
 20 RMP thus rendering NMFS’s approval *per se* illegal. Pls’ Mem. at 21. They argue that NMFS  
 21 failed to comply with its regulations by using a meaning of “viable” salmon population in its  
 22 evaluation of the RMP that is not tied to the VSP Paper as required by Limit 4. *Id.* According to  
 23 Plaintiffs, whether the meaning NMFS attached to the term is reasonable is “irrelevant to this  
 24 Court’s determination.” *Id.* at 23. In their view, the inquiry ends at NMFS’s alleged violation of  
 the 4(d) Rule. *Id.*

25 The principal flaw with Plaintiffs’ argument is that NMFS did not violate its own  
 26 regulations in its review of the RMP. First, contrary to Plaintiffs’ claim, NMFS’s determination  
 27 is governed by the requirements of Limit 6, rather than the requirements of Limit 4. The

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 Benjamin Franklin Station, P.O. Box 7369  
 Washington, D.C. 20044-7369

determination required under Limit 6 is whether the RMP will appreciably reduce the likelihood of survival and recovery of the Puget Sound Chinook. 50 C.F.R. 223.203(b)(6)(i). In making that determination, NMFS must “take[] comment” on how the RMP “addresses” the criteria in Limit 4. 50 C.F.R. § 223.203(b)(6)(iii). Second, to the extent that Limit 4’s requirements apply to the review of an RMP, NMFS properly found that the RMP utilized the viable population concept in a manner consistent with the concepts in the VSP Paper. Thus, Plaintiffs’ argument is without merit.

### 1. NMFS’s Approval Of The RMP Is Governed By Limit 6

Plaintiffs argue that NMFS failed to comply with Criterion B of Limit 4 in its evaluation of the RMP by using a meaning of “viable” salmon population that is not tied to the VSP Paper. Pls’ Mem. at 21. To set up this argument, Plaintiffs suggest that Limit 4 sets out “general requirements” for fishery management plans and that Limit 6 simply provides “additional” requirements for RMPs, *i.e.*, that the approval of the RMP is governed equally by both Limits. Pls’ Mem. at 4. NMFS’s approval of the RMP, however, is governed by the requirements of Limit 6, rather than the requirements of Limit 4.

In the preamble to the final regulation, NMFS made clear that each limit was tied to a specific, discrete program. 65 Fed. Reg. at 42,424. The preamble to the proposed rule states that Limit 4 applies to state Fishery Management and Evaluation Plans. 65 Fed. Reg. at 175. Limit 6 applies to joint state and tribal plans developed under *U.S. v. Washington* and *U.S. v. Oregon*. *Id.* at 178. Further, NMFS explained that where joint agreement between a state and tribe is required, Limit 6 applies, rather than Limit 4. 65 Fed. Reg. at 177.

While there is overlap, the 4(d) Rule creates two distinct Limits that are tailored and applicable to two different circumstances. Limit 4 sets out nine specific criteria that a FMEP “must adequately address.” 50 C.F.R. 223.203(b)(4)(A)(i). By contrast, the only determination required under Limit 6 is whether the RMP will appreciably reduce the likelihood of survival and recovery of a threatened ESU. 50 C.F.R. § 223.203(b)(6)(i). In making that determination, NMFS also must “take[] comment” on how the RMP “addresses” the criteria in Limit 4. 50 C.F.R. § 223.203(b)(6)(iii).<sup>12</sup> Limit 6 does not specify what weight NMFS must afford the

<sup>12</sup> NMFS did so by soliciting public comment on its proposed analysis of the RMP in April 2004. AR 006. Further, NMFS responded to the comments in March 2005. 70 Fed. Reg. 12,194 (Mar. 11, 2005) (AR 009).  
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1 criteria or require NMFS to disapprove the RMP if it does not strictly comply with each and  
 2 every detail of each and every criterion.

3 Moreover, Limit 6 states that NMFS's review of the RMP is to be "pursuant" to the Limit  
 4 for tribal resource management plans. 50 C.F.R. § 223.203(b)(6)(i). With respect to approval of  
 5 these tribal plans, NMFS is required only to ensure that the plan will not appreciably reduce the  
 6 likelihood of survival and recovery of affected threatened ESUs.<sup>13</sup> 50 C.F.R. § 223.204. Out of  
 7 deference to tribal sovereignty, NMFS intentionally did not specify any other standards for  
 8 approval of the plan. 65 Fed. Reg. at 42,434 ("The limit for tribal plans applies that same  
 9 standard [will not appreciably reduce the likelihood of survival and recovery] but without  
 10 specific requirements or standards, in deference to tribal sovereignty and the government-to-  
 11 government basis on which NMFS interacts with tribes"). Thus, by specifying in Limit 6 that  
 12 NMFS's analysis of the RMP must be made pursuant to the limit for Tribal harvest management  
 13 plans, NMFS ensured that tribal sovereignty would not be limited by imposing specific  
 14 requirements or standards simply because the RMP was a plan submitted jointly with a state.

15 In short, Limit 6 is a hybrid of the Tribal Limit and Limit 4, because it deals with joint  
 16 state-tribal resource management plans. The primary standard for NMFS's Limit 6  
 17 determination is the same as for tribal RMPs – the plan must not appreciably reduce the  
 18 likelihood of survival and recovery of affected threatened ESUs. In the context of that  
 19 determination, NMFS examines the RMP for how well it addresses the criteria of Limit 4.  
 20 Accordingly, under Limit 6, the paramount issue before the Court is whether NMFS was  
 21 arbitrary and capricious in determining that the RMP would not appreciably reduce the  
 22 likelihood of the survival and recovery of Puget Sound Chinook. The reasonableness of NMFS's  
 23 analysis of how the RMP addresses particular criteria in Limit 4 is an appropriate inquiry for this  
 24 Court only in the context of that determination, not as a separate independently enforceable  
 25 requirement.

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 28 **2. NMFS Reasonably Considered Carrying Capacity In Its Use Of The  
 Concept Of A Viable Population.**

Plaintiffs assert that Criterion B of Limit 4 Rule "very specifically ties the meaning of a

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<sup>13</sup> Further, in accordance with the Tribal Limit, NMFS must make this determination in government-to-government consultation with the sovereign tribes. 50 C.F.R. § 223.204(b)(1).

1 ‘viable’ salmon population to one source: the VSP Paper.”<sup>14</sup> Pls’ Mem. at 22. Plaintiffs argue  
 2 that NMFS’s viable thresholds have no connection to the VSP Paper’s definition of a viable  
 3 population because they are based on an estimate of current carrying capacity of the habitat.<sup>15</sup>  
 4 *Id.* at 21. Thus, they conclude that NMFS failed to comply with its regulations in approving of  
 5 the RMP.

6 Plaintiffs’ argument misunderstands the relationship between the VSP Paper and  
 7 NMFS’s determination. As used in NMFS’s evaluation of the RMP, the upper or “viable”  
 8 threshold<sup>16</sup> represents a level of spawning escapement needed to maximize the productivity of  
 9 the naturally spawning populations given the particular capacity (quantity and quality) of habitat  
 10 available to them. *See, e.g.*, 007 at C 10-12. This threshold is based on the biological principle  
 11 of density dependency, recognized by the VSP paper. *See* AR 241 at 68-69.<sup>17</sup>

12 Criterion B of Limit 4, that Plaintiffs allege has been violated, simply directs NMFS to  
 13 evaluate whether the “concept” of viable threshold in the RMP is consistent with the general  
 14 “concepts” in the VSP Paper. 50 C.F.R § 223.203(b)(4)(i)(B). In fact, Criterion B does not  
 15 specify, restrict, or direct what methodology, definition, or analysis an FMEP must employ so

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16 <sup>14</sup> The VSP Paper defines a viable population as “an independent population of any Pacific salmonid . . . that  
 17 has a negligible risk of extinction due to threats from demographic variation (random or directional), local  
 18 environmental variation, and genetic diversity changes (random or directional) over a 100-year time frame.” AR 241  
 19 at 2. It further notes that “management actions ultimately need to be related to population and ESU viability,” which  
 20 populations “will almost always be smaller than the scale of an ESU.” *Id.* at 2.

21 <sup>15</sup> The VSP Paper explains that “carrying capacity” measures “the size of a population sustainable by the  
 22 environment.” AR 241 at 68.

23 <sup>16</sup> The “critical” threshold generally represents a boundary below which uncertainties about population  
 24 dynamics increase and therefore the risk of extinction. AR 007 at C-6. NMFS developed the “critical” threshold  
 25 from a consideration of genetic, demographic, and spatial risks factors for each population. AR 58 at 6. For larger  
 26 populations, NMFS estimated the critical threshold using a Ricker population-recruit model. For smaller populations  
 27 and for populations for which NMFS was unable to estimate Ricker functions, NMFS used the generic guidance in  
 28 the VSP Paper to set the “critical” threshold. *Id.* at 7. In most cases, the RMP set the low abundance threshold,  
 which triggers extraordinary fisheries conservation measures, intentionally above what would be defined by the VSP  
 Paper as the “critical” threshold. AR 003 at 24.

<sup>17</sup> This relationship is described in terms of a “spawner-recruit” curve. The curve shows that, as the number  
 of spawners increases (moves right on the horizontal axis) from the origin, there is an increase in the number of  
 recruits (returning offspring), as shown on the vertical axis. *See* AR 70 at 55 Fig. A3. When the carrying capacity  
 of the spawner’s habitat is reached, the production of recruits is maximized. At even higher levels of spawners, the  
 production reaches a maximum or, under some circumstances, production can actually reduce the total number of  
 recruits produced. *See, e.g., id.* at 88 Fig. A11.

1 long as the “concept” of viable threshold in the plan is consistent with the “concepts” in the VSP  
2 Paper. Thus, even assuming strict compliance with Criterion B to be a requirement for approval  
3 of an RMP, the issue would be whether NMFS’s use of “carrying capacity” was consistent the  
4 concepts of the VSP Paper.

5 The VSP concept consists of two components: 1) principles for identifying population  
6 substructure in Pacific salmonid ESUs, and 2) general principles for establishing biological  
7 guidelines to evaluate conservation status of these populations. AR 241 at 2. The paper  
8 identifies and discusses four parameters for evaluating the conservation status of a population  
9 (abundance, growth rate or productivity, spatial structure, and diversity) that are “reasonable  
10 predictors” of viability. *Id.* at 11. It also provides general guidelines for evaluating each of  
11 these parameters. *See e.g.*, AR 241 at 14-15 (viable and critical population guidelines). In short,  
12 as Criterion B itself acknowledges, the VSP Paper is simply a “framework” for evaluating viable  
13 populations; it does not proscribe how those evaluations must be applied.

14 The VSP Paper itself expressly recognizes that “carrying capacity” is an important part of  
15 its viability framework. The VSP Paper explained that “[c]apacity parameters are important for  
16 evaluating population viability in that they describe the scope of a population or some  
17 component of a population to exceed requisite abundance thresholds.” AR 241 at 69. Thus, on  
18 the face of the VSP Paper, NMFS’s use of carrying capacity in evaluating the RMP is certainly  
19 consistent with the concepts in the VSP Paper.

20 In addition, NMFS developed the viability threshold by using either the generic guidance  
21 levels from the VSP Paper or by a method developed in the RAP, a document that NMFS  
22 developed specifically to be consistent with the VSP Paper. The VSP Paper is not population  
23 specific, and it does not assess an action’s effects over time. In discussing the VSP Paper in the  
24 preamble to the 4(d) Rule, NMFS recognized that the implementation of Criteria B in Limit 4  
25 would go beyond the four corners of the VSP Paper:

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Where possible, NMFS has endeavored to provide numerical guidelines for viability thresholds. However, VSP generally does not provide generic quantitative criteria that can be applied to all salmonid populations because the thresholds vary by species and location. This means that applying the VSP principles will require population- and ESU-specific evaluations.

65 Fed. Reg. at 42,429-30.<sup>18/</sup> To provide population- and ESU-specific evaluations for harvest management purposes, in the RAP, NMFS extended the general concept of a viable population in the VSP Paper to specific populations by addressing the risks to those populations from harvest management decisions. AR 58 at 2. In the RAP, NMFS explained that:

[the] VSP describes four elements that must be considered when determining whether a population could be considered viable: population size, trends in abundance and productivity, diversity and spatial structure. RAP addresses the first three elements. It incorporates abundance and productivity through its use of thresholds, and stock recruit dynamics and addresses diversity, in part, by operating at the population level.

AR 58 at 4. With respect to viability thresholds, it further explained that:

The VSP paper identifies threshold abundance levels as one of several indicators of population status... . The VSP paper provides several rules of thumb that are intended to serve as guidelines for setting population specific thresholds ... However, since they are general, and not population specific, threshold determinations for selected “populations” should be made by considering both the rules of thumb, and other more population-specific information.

*Id.* at 5-6. The RAP then identified the two approaches that had been previously taken to establish the viability thresholds for the RER analysis in two previous BiOps: (1) generic thresholds from the VSP Paper<sup>19/</sup> or (2) the level of escapement required to achieve a maximum sustainable level given current productivity and capacity restraints on the population.<sup>20/</sup> *Id.* at 7. NMFS expressly found that the RAP was “consistent” with the “concepts” of the VSP Paper. *Id.* at 4. That finding is entitled to deference by this Court.<sup>21/</sup>

<sup>18</sup> Indeed, the VSP Paper expressly recognized that additional population specific methodologies will need to be developed to apply its concepts. AR 241 at 2.

<sup>19</sup> The RAP suggests that a range of 250 to 2,500 spawners per year represents “a low risk of extinction, i.e., a viable threshold.” AR 58 at 6, relying on the VSP Paper, AR 241 at 60-61 (emphasis in original). All of the “viable” thresholds calculated by NMFS were within or above that range. AR 003 at 28 (Table 8).

<sup>20</sup> According to NMFS, “[a]s applied in RAP to date, the MSY level represents a maximum sustainable level given current productivity and capacity restraints on the population, and is not intended to represent a potential recovery level for the population.” AR 58 at 7.

<sup>21</sup> The Court “must give substantial deference to an agency’s interpretation of its own regulations.” *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *Nigro v. Sullivan*, 40 F.3d 990, 996 (9<sup>th</sup> Cir. 1994) (an agency’s interpretation of its regulations is entitled to a “high degree of deference” unless it is plainly erroneous or inconsistent with the regulation). Further, reviewing courts accord substantial deference to an agency’s scientific methodology. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066 (9<sup>th</sup> Cir. 2004) (citing *United States v. Alpine Land and Reservoir Co.*, 887 F.2d 207, 213 (9<sup>th</sup> Cir.1989)); *Davis v. EPA*, 348 F.3d 772, 781 (9<sup>th</sup> Cir. 2003) (noting in the Clean Air Act context that acceptance or rejection of a particular scientific model and the results obtained from it are interpretations of scientific evidence to which the court must reasonably defer).

1 In the ERD, NMFS grounded its evaluation of the “viable” and “critical” thresholds in  
 2 the VSP Paper and the RAP. NMFS incorporated the guidelines regarding these thresholds  
 3 directly from the VSP Paper. AR 003 at 24. However, NMFS explained that its evaluation of  
 4 these guidelines in the context of the RMP evaluation reflect “a level of spawning escapement  
 5 associated with rebuilding to recovery, consistent with current environmental conditions.” AR  
 6 003 at 25. NMFS further found that the populations’ inability go beyond the current conditions  
 7 to attain a status where they can be delisted depends on changes in sources of mortality other  
 8 than harvest. AR 003 at 25; AR 003-37. NMFS specifically found it is unlikely that current  
 9 environmental conditions would change during the remaining period of the plan (*i.e.*, until April  
 10 30, 2010) to an extent that higher productivity could be expected – regardless of further harvest  
 11 constraints. AR 58 at 10; AR 7 at 3-24 n.2, 3-45 (“[w]ith the [RMP] only covering the next five  
 12 fishing seasons, it is likely that abundance and survival conditions will be similar to those in  
 13 recent years”).<sup>22</sup>

14 NMFS used “critical” and “viable” thresholds based on methods in the RAP to derive  
 15 RERs using a simulation model. AR 196 at 19.<sup>23</sup> An RER establishes a standard for total  
 16 fishing-related mortality for a population. The RER is the highest exploitation rate which: (1)  
 17 the percentage of escapements below the *critical* threshold differed no more than 5% from that  
 18 under no-fishing conditions over a 25-year period; and (2) either the *viable* threshold was met  
 19 80% of the time or the percentage of escapements less than the *viable* threshold differed no more  
 20 than 10% from that under no-fishing conditions at the end of the 25-year period. AR 58 at 9-10.  
 21 These criteria identify exploitation rates that will “not appreciably increase the number of times a  
 22 population will fall below the critical threshold and also not appreciably reduce the prospects of  
 23 achieving recovery.” *Id.* at 10.

24 In evaluating the risks posed by the RMP to viability of Puget Sound Chinook

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25 <sup>22</sup> Plaintiffs claim the exploitation rates developed by NMFS “allowed harvest to be managed to produce the  
 26 long term result of a population no larger than could be achieved today, under current conditions.” Pls’ Mem. at 9;  
 27 *see also id.* at 24 (claiming exploitation rates approved by NMFS will prevent growth in populations above that  
 28 threshold). Plaintiffs’ argument misunderstands the RMP and NMFS’s analysis. By setting limits on exploitation  
 rates, the RMP was designed to take advantage of improvements in habitat conditions that would support *larger*  
 populations than can be supported today. AR 15 at 141 (“when the productivity conditions for [a] population  
 improve due to recovery actions,” escapement levels will usually increase as well).

<sup>23</sup> The process for deriving the RERs including a discussion of the modeling is set out in AR-196 at 19-21.  
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1 populations, NMFS compared the RERs to the expected exploitation rates. Among additional  
 2 information considered in making its risk assessment, NMFS also compared recent (1999-2002)  
 3 escapements with the pre-listing (1990-1998) average escapements to see whether escapement  
 4 was increasing, decreasing, or stable. AR 003 at 26-27. All of the populations had stable to  
 5 increasing trends in escapement. *Id.* at 27, 29 (Table 9).

6 In summary, NMFS's use of the "current conditions" in evaluating the "viability"  
 7 threshold is consistent with the concepts in the VSP Paper. Moreover, NMFS's decision to use  
 8 RAP, which included carrying capacity, to develop population-specific analyses of the viability  
 9 risks posed by the RMP, was reasonable. Finally, NMFS explained why it elected to include  
 10 "current conditions" in its consideration of viability risks. Thus, NMFS was not "arbitrary and  
 11 capricious" in using "current conditions" in determining that the RMP complied with Limit 6.

12 **B. NMFS Adequately Considered the TRT's Draft Recommendations  
 13 In Evaluating Thresholds In The RMP.**

14 Plaintiffs also allege that NMFS's determination regarding the RMP was arbitrary and  
 15 capricious because it did not use the TRT's "planning ranges" as benchmarks to evaluate the  
 16 RMP's thresholds. Pls' Mem. at 7. They argue that the TRT developed these applying the VSP  
 17 Paper and, thus, were the proper data to use as viability thresholds in setting the RERs. *Id.*  
 18 Plaintiffs' argument is without merit.

19 First, Plaintiffs want the Court to decide that the TRT viability ranges are better than the  
 20 thresholds developed by NMFS under the RAP. Under principles of APA review, however, it is  
 21 for NMFS, not the Court, to make judgments about which science is best. *Wetlands Action*  
 22 *Network v. U. S. Army Corps of Eng'rs*, 222 F.3d 1105, 1120-21 (9<sup>th</sup> Cir. 2000) (the fact that the  
 23 record contained "evidence supporting a different scientific opinion does not render the agency's  
 24 decision arbitrary and capricious"). The Court must uphold NMFS's decision unless NMFS  
 25 "relied on factors which Congress has not intended it to consider, entirely failed to consider an  
 26 important aspect of the problem, offered an explanation for its decision that runs counter to the  
 27 evidence before the agency, or is so implausible that it could not be ascribed to a difference in  
 28 view or the product of agency expertise." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9<sup>th</sup>  
 29 Cir. 2004) (citing *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.  
 30 29, 43 (1983)).

31 Second, the TRT did not develop the "planning ranges" for use as standards in harvest  
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1 management. In April 2002, the TRT transmitted its preliminary delisting guidance, Planning  
 2 Ranges and Preliminary Guidelines for Delisting and Recovery of the Puget Sound Chinook  
 3 Salmon Evolutionary Significant Unit (AR 070-01). The Guidelines included planning ranges  
 4 for the Puget Sound Chinook in the recovered state to help “planners evaluate the magnitude of  
 5 effort that will be needed from each population to achieve recovery.” AR 70-01 at 1; *see also*  
 6 AR 70 at 1. The recovery ranges set out in the document are referred to as “planning targets.”  
 7 AR 70-01 at 1. The TRT expressly cautioned that the “numbers and technical recommendations  
 8 are “likely to change.” AR 70 at 1. The TRT also made clear that the planning ranges “are  
 9 related to, but they are not the same as, population viability criteria.” Thus, Plaintiffs’ attempt to  
 10 elevate the planning ranges to something they are not is without merit.

11 Finally, NMFS did consider the TRT’s planning ranges. AR 003 at 68 (“The preliminary  
 12 delisting and recovery criteria recommendation provided by the TRT ... have been used to assist  
 13 in the evaluation of the harvest management strategy represented by the RMP.”); AR 003 at 38  
 14 (TRT preliminary recovery goals “can provide a useful contrast between current productivity and  
 15 the level of potential productivity associated with recovery.”). The TRT preliminary guidance,  
 16 however, presented population persistence probabilities over 100 years. NMFS recognized that  
 17 those levels are not going to be obtained until changes are made particularly in the habitat arena.  
 18 *See, e.g.*, AR 003 at 37 (achieving the TRT’s recovery goals, “is dependent on an increase in  
 19 productivity (recruitment)” relative to current status”); *id.* (the evidence “suggests that marine,  
 20 freshwater, and estuary habitat quality and quantity is the primary constraint on productivity”).  
 21 NMFS explained why it did not apply the planning ranges in its evaluation of the RMP:

22 For most populations, [the “viability” and “critical” criteria] are well below the  
 23 escapement levels associated with recovery, but achieving these goals under  
 24 current conditions is a necessary step to eventual recovery when habitat and other  
 25 conditions are more favorable.

26 AR 003 at 25 (emphasis added).

27 Thus, NMFS considered the TRT preliminary planning ranges and explained they were  
 28 not applicable to the RAP analysis of the RMP. NMFS in its expert judgment decided to rely on  
 the generic guidance from the VSP Paper or population- and environment-specific viability  
 thresholds developed pursuant to the RAP. Further, it set out the reasons it did rely on the  
 “planning ranges.” Nothing more is required. *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568,  
 1571 (9th Cir. 1993) (under APA principles of review of agency action, deference to a reasoned

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1 federal agency's decision "is especially appropriate where . . . the challenged decision implicates  
 2 substantial agency expertise."). Thus, NMFS decision was not "arbitrary and capricious" and  
 3 must be upheld.

4 **C. NMFS Adequately Considered The Potential Use Of  
 5 Management Tools To Minimize Take.**

6 Plaintiffs assert that the Criterion H of 4(d) Rule requires that any harvest plan include  
 7 restrictions on fisheries to minimize the take of listed species, including time, size, gear, and area  
 8 restrictions. Pls' Mem. at 13. They argue that NMFS departed from the alleged requirement in  
 9 the 4(d) Rule by failing to evaluate whether the fisheries could be designed or operated in a  
 10 manner that would minimize the take. *Id.* at 27. They further argue that NMFS determined that  
 11 RMP satisfied Criterion H by meeting other obligations in the 4(d) Rule. *Id.*

12 Criterion H in Limit 4 directs NMFS to assess whether an FMEP adequately addresses  
 13 "restrictions on resident and anadromous species fisheries that minimize any take of listed  
 14 species, including time, size, gear, and area restrictions." 50 C.F.R. § 223.203(b)(4)(i)(H). In  
 15 the preamble to the 4(d)Rule NMFS explained that:

16 Depending on the fisheries location and circumstance, specific angling  
 17 regulations may be detailed in the FMEP (e.g., minimum length and bag limits for  
 18 trout fisheries). In other cases (e.g., some salmon fisheries), the specific  
 19 regulations may be adopted once the exploitation rate or catch quota is  
 20 determined by examining pre-season run forecasts.

21 65 Fed. Reg. at 42,446.<sup>24</sup>

22 To address Criterion H, the RMP provided for using the annual fishing regime to  
 23 determine the appropriate regulations for species quotas, bag limits, time/area restrictions and  
 24 gear requirements based on pre-season forecasts:

25 Because of annual variability in abundance among the various populations, there  
 26 is no single fishing regime that can be implemented from one year to the next to  
 27 achieve the management objectives for all Puget Sound chinook units. The co-  
 28 managers have, at their disposal, a range of management tools, including gear  
 restrictions, time/area closures, catch or retention limits, and complete closures of  
 specific fisheries. Combinations of these actions will be implemented in any  
 given year, as necessary, to insure that management objectives are achieved.

AR 016-01 at 35; *see also, id.* at 37. Contrary to Plaintiffs' argument, NMFS stated that, while  
 the RMP's rebuilding exploitation rates, upper management thresholds, low abundance

<sup>24</sup> Criterion H does not require that a FMEP address each fishing restriction available to reduce take or that the  
 plan minimize take as much as possible.

1 thresholds, and critical exploitation rate ceilings are the primary elements of the plan, “[t]ime,  
 2 size, gear and area and retention restrictions are all among the actions taken to ensure that  
 3 salmon fishing-related mortality is consistent with these management objectives.” AR 003 at 84-  
 4 85. NMFS found that these actions have previously included closure of directed salmon  
 5 fisheries in terminal areas; restrictions on or delays of fisheries to protect naturally spawning  
 6 Chinook; closures and size limits to protect spring Chinook in recreational fisheries; closed  
 7 spawning grounds; required non-retention of Chinook; and closures around river mouths. *Id.* at  
 8 85; *see also* AR 007 at 3-64-65 (discussing use of selective fishing gear). In addition, NMFS  
 9 acknowledged the co-managers are testing mark-selective fishing in some fisheries and,  
 10 “[d]epending on the success of these fisheries, they might be expanded in the future.” AR 007  
 11 (Vol. 1) at 3-65.

12 Washington and the individual treaty tribes are responsible for regulation of harvest in  
 13 fisheries under their authority, consistent with the principles and procedures set forth in the  
 14 Puget Sound Management Plan. AR 003 at 83. The Pacific Salmon Commission, Pacific  
 15 Fishery Management Council, and North of Falcon meetings provide the forums for coordination  
 16 among the jurisdictions impacting Puget Sound Chinook populations. *Id.* at 84. The fishery  
 17 regimes developed each year as an outcome of these planning forums help to ensure that  
 18 fisheries are consistent with the management objectives and approach described in the RMP.  
 19 The co-managers evaluate monitoring data regarding the effects of harvest and provide NMFS  
 20 with post-season reports. AR 82. They also notify NMFS regarding their annual regulatory  
 21 actions.

22 NMFS had confidence that the co-managers would develop appropriate regulations  
 23 because:

24 the co-managers have instituted additional management measures under low  
 25 abundance conditions in the past to decrease fishery impacts. The demonstrated  
 26 willingness of the co-managers to constrain fisheries over the past 15 years. . .  
 27 gives NMFS some confidence in their future response to a population with a  
 28 declining status.

70 Fed. Reg. 12,194, 12,198 (Mar. 11, 2005) (AR 009).

Accordingly, NMFS’s determination that the requirements of Criterion H were  
 adequately addressed is supported by the record and should be affirmed.

**D. NMFS Reasonably Found That The Status Of Populations In The Five  
 Regions Were Sufficiently On The Path To Recovery.**

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1 Plaintiffs argue that NMFS was arbitrary and capricious in finding that the RMP would  
2 not appreciably reduce the likelihood of survival and recovery because it approved the Plan  
3 despite the fact that two of the TRT's five regions did not have two viable populations. Pls'  
4 Mem. at 25. They argue that NMFS improperly approved the RMP because harvests in the  
5 Puget Sound and Canada will appreciably reduce the likelihood of recovery in two of the Puget  
6 Sound Chinook's five Regions, the Georgia Strait and Hood Canal Regions. *Id.* at 10.

7 The TRT recommends that an ESU-wide recovery scenario should include at least two-  
8 to- four viable Chinook salmon populations in each of the five geographic regions within Puget  
9 Sound, depending on the historical biological characteristics and acceptable risk levels within  
10 each region. AR 70-01 at 12; AR 003 at 68. With respect to this guidance, NMFS analyzed  
11 each region first to identify potential areas of concern and second to evaluate the likelihood of  
12 that risk occurring. AR 003 at 68. NMFS found that the RMP is sufficiently protective to  
13 provide at least two viable populations in each of the five regions.

#### 14 **1. Georgia Strait and Hood Canal Regions**

15 NMFS determined the implementation of the RMP will adequately protect Chinook  
16 salmon populations in the Georgia Strait Region. The Region consists of two populations, the  
17 North and South Nooksack river populations. AR 003 at 68. NMFS found that these  
18 populations had an elevated level of risk when compared to NMFS's standards. *Id.* However,  
19 NMFS found that both populations had exhibited increasing escapement trends since listing. *Id.*,  
20 *id.* at 29 Table 9. Further, NMFS found that hatchery-origin spawners also contributed  
21 effectively to the natural spawning areas, buffering harvest-induced genetic risks to the  
22 populations. *Id.* Indeed, NMFS found that the escapement of hatchery-origin fish may benefit  
23 natural-origin fish by capitalizing on favorable survival conditions in some years. *Id.* Finally,  
24 NMFS found that risks posed were mitigated in part by the low anticipated SUS (*i.e.*, U.S.  
25 fishing south of Canada) exploitation rate. *Id.*

26 NMFS likewise concluded that the RMP's management objectives are adequately  
27 protective of the Hood Canal Region of the ESU. AR 003 at 76. The Hood Canal Region  
28 consists of two populations: the Skokomish River and the Mid-Hood Canal rivers populations.  
*Id.* at 74. NMFS identified potential concerns about harvest impacts on the spatial structure of  
the Mid-Canal rivers population and the low abundance in two of the rivers. *Id.* In analyzing the

1 potential likelihood of those risks occurring, NMFS found that the Mid-Canal rivers had  
2 exhibited increasing escapement levels since listing. *Id.*; *id.* at 76. NMFS also found that the  
3 production of the hatchery-origin fish that share the ecological and genetic traits of the natural-  
4 origin population is likely to ameliorate the potential risks to this population. *Id.* at 75. Finally  
5 NMFS found that protection of the population would be aided by the annual monitoring and  
6 evaluation actions applied in the RMP to track population status and harvest impacts. *Id.* at 76.

7 NMFS concluded that “the RMP’s management objectives are adequately protective of  
8 the geographic distribution, life history characteristics, and genetic diversity of the populations  
9 within the Hood Canal Region of the ESU.” *Id.* at 76. NMFS fully laid out the basis for its  
10 conclusions which lie well within its scientific expertise. Thus, this determination is entitled to  
11 deference by this Court. *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993)  
12 (deference to a reasoned federal agency’s decision “is especially appropriate where . . . the  
13 challenged decision implicates substantial agency expertise.”).

## 14 2. South Puget Sound Region Populations

15 Plaintiffs also argue that NMFS failed to show that the Cedar and Sammamish River  
16 populations would be sustained and improved. Pls’ Mem. at 25. These populations comprise  
17 two of the six populations in the Lake Washington Management Unit in the South Puget Sound  
18 Region. AR 003 at 72. NMFS “found that the proposed RMP is anticipated to contribute to the  
19 stabilization or rebuilding of all populations within this region.” *Id.* (Emphasis added). NMFS  
20 did identify a concern for the Cedar and Sammamish River populations, “primarily due to  
21 anticipated low abundance under the implementation of the RMP.” *Id.* NMFS fully evaluated  
22 and explained its assessment of the risks underlying those concerns. *Id.* at 72-74.

23 Since listing, the average escapement for the Cedar River population was considered  
24 stable, while that for the Sammamish River population was increasing; each exceeded the VSP  
25 guidance for a critical threshold of 200 fish but remained below the VSP guidance for a viable  
26 threshold. AR 003 at 60, 72-73.

27 NMFS found that under the RMP “the co-managers will continue to meet or exceed the  
28 critical threshold of 200 natural spawners for both populations.” AR 003 at 73. NMFS was  
29 concerned that the populations “could experience very low abundance in the next several years,  
30 below the critical thresholds,” but found that “a substantial contribution of stray hatchery-origin

1 fish to the natural escapement in the Sammamish River tributaries . . . may lessen demographic  
 2 concerns that may arise regarding low escapement for that population.” *Id.* NMFS also found  
 3 that protective measures in the RMP, “imposed to safeguard the Cedar River population . . . will  
 also incidentally benefit the Sammamish River population.” *Id.*

4 Based on these considerations, NMFS concluded that despite potential risks that the  
 5 Cedar River and Sammamish River populations may experience under the [RMP], the RMP is  
 6 still expected to provide sufficient protection for four of the six populations in the South Puget  
 7 Sound Region.” AR 003 at 74. NMFS stated that identifying the Cedar River and Sammamish  
 8 River populations as a concern “is considered a precautionary approach, as information suggests  
 9 that the escapements estimated for these systems are likely conservative.” *Id.* at 74. Thus,  
 10 nothing in the record supports Plaintiffs’ view that the RMP will not sustain these populations.  
 11 NMFS fully laid out the basis for its conclusions which lie well within its scientific expertise.  
 12 Thus, this determination is entitled to deference by this Court. *Mt. Graham Red Squirrel v.*  
*Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993).

13 **E. In Issuing Its Biological Opinion, NMFS Considered Both The Likelihood Of**  
 14 **The Puget Sound Chinook ESU’s Survival And Its Recovery.**

15 Plaintiffs assert that NMFS applied the wrong jeopardy standard in its Biological  
 16 Opinion. Pls’ Mem. at 27. They argue that the Biological Opinion is arbitrary and capricious  
 17 because NMFS failed to consider the independent goals of survival and recovery. *Id.* Plaintiffs  
 18 further argue that NMFS failed to consider the best available science by rejecting “the VSP  
 Paper’s concepts and the TRT’s substantial work applying those concepts.” *Id.*

19 **1. Jeopardy Standard**

20 The term “jeopardize the continued existence of” is defined by regulation to mean “to  
 21 engage in an action that would be reasonably expected, directly or indirectly, to reduce  
 22 appreciably the likelihood of both the survival and recovery of a listed species.” 50 C.F.R. §  
 23 402.02. The Ninth Circuit recently held that this regulation requires the consulting agency to  
 24 consider recovery impacts as well as survival.<sup>25</sup> *Nat’l Wildlife Fed’n v. NMFS*, 481 F.3d 1224,

25  
 26 <sup>25</sup> The Ninth Circuit in *Nat’l Wildlife Fed’n v. NMFS* expressly declined to decide whether the ESA requires  
 27 NMFS to consider both survival and recovery in its jeopardy analysis as the Ninth Circuit had held with respect to  
 the definition of “adverse modification” in *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378  
 F.3d 1059, 1066 (9th Cir. 2004). *Nat’l Wildlife Fed’n v. NMFS*, 481 F.3d at 1237. Instead, the Ninth Circuit found  
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1238 (9<sup>th</sup> Cir. 2007). However, Plaintiffs are incorrect in their assertion that the Biological Opinion failed to look at both survival and recovery.

2 Just as NMFS's regulations require it to examine whether an action is likely reduce  
3 appreciably the likelihood of both the survival and recovery of a listed species, to approve an  
4 RMP under Limit 6, NMFS must determine that implementing the RMP "will not appreciably  
5 reduce the likelihood of survival and recovery of affected threatened ESUs." 50 C.F.R. §  
6 223.203(b)(6)(i). As Plaintiffs concede, the Biological Opinion is "intimately linked to the  
7 ERD" and its analyses "are identical, or reasonably so" to those in the ERD. Pls' Mem. at 14.  
8 Because the analysis for approving the RMP in the ERD clearly examines the Puget Sound  
9 Chinook ESU's prospect for survival and recovery, Plaintiffs' argument that the Biological  
10 Opinion failed to consider the independent goals of survival and recovery lacks merit.

11 Anticipating that its argument that the Biological Opinion did not consider recovery  
12 would fail, Plaintiffs also argue that NMFS's Biological Opinion is unlawful because it failed to  
13 address the "prospects for true recovery" Pls' Mem. at 29 (emphasis added). To support this  
14 contention Plaintiffs rely on the "the same reasons that NMFS's evaluation was contrary to the  
15 4(d)Rule." *Id.*

16 The Ninth Circuit has held that NMFS must "conduct a full analysis" of the "risks" of  
17 recovery. *National Wildlife Federation v. NMFS*, 481 F.3d at 1238. The Ninth Circuit explained  
18 that requiring:

19 some attention to recovery issues does not improperly import the ESA's separate  
20 recovery planning provisions into the section 7 consultation. Rather it simply  
21 provides some reasonable assurance that the agency action in question will not  
22 appreciably reduce the odds of success for future planning, by tipping a listed  
23 species too far into danger."

24 *Id.* at 1241.<sup>26</sup> As discussed above, NMFS's ERD and Biological Opinion analyze the risks to  
25 recovery through the RERs.<sup>27</sup> It also recognized that attaining the levels where the ESU could

26 that NMFS violated the regulation in considering only survival in the jeopardy analysis. *Id.* at 1237-38.

27 <sup>26</sup> The Ninth Circuit observed that "recovery impacts alone may not *often* prompt jeopardy finding." *National  
28 Wildlife Federation v. NMFS*, at 1238.

29 <sup>27</sup> For example, in the North Puget Sound Region, NMFS found that seven of the ten populations would likely  
30 rebuild with fishing prescribed by the RMP. AR 003 at 30. Two of the other three populations are already above  
31 their identified viable thresholds, and all three have increasing escapement trends since listing. *Id.* Further, NMFS  
32 recognized that the viability thresholds for most ESUs are well below the escapement levels associated with  
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1 be delisted will not occur until actions occur in other sectors. *Id.* NMFS concluded that  
 2 achieving the “viability” and “critical” criteria under current environmental conditions is a  
 3 “necessary step” to eventual recovery when habitat and other conditions are more favorable. *Id.*  
 4 Further, the RMP commits to periodically revising its management objectives (exploitation rate  
 5 ceilings and escapement threshold) as new information on productivity becomes available from  
 6 changes in habitat or other environmental factors. AR 15 at 9 and 6. NMFS will also revise its  
 RERs as new information becomes available. AR 196 at 64.

7 Thus, contrary to Plaintiffs’ argument, NMFS adequately considered the impacts of the  
 8 RMP on recovery withing the context of the jeopardy determination.

## 9 2. Best Available Science

10 Plaintiffs argue that the VSP Paper and TRT “planning ranges”<sup>28</sup> constitute the “best  
 11 available science” and that NMFS “ignored” and did not “respect” the TRT’s work. Pls’ Mem.  
 12 at 30. Plaintiffs’ argument is really just a reprise of its arguments regarding this information in  
 13 the context of their challenge to the RMP itself. Accordingly, it must fail for the reasons set out  
 14 above.<sup>29</sup> In addition, the argument is premised on a misunderstanding regarding the significance  
 of the “best available science” requirement.

15 The ESA requires that a biological opinion must be based on the “best scientific and  
 16 commercial data available.” 16 U.S.C. § 1536(a)(2). The “best available science” requirement  
 17 is intended to prevent “the haphazard implementation, on ‘the basis of speculation or surmise.’”  
 18 *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 954 (9<sup>th</sup> Cir. 2003) (quoting *Bennett v.*  
 19 *Spear*, 50 U.S. 154, 176 (1997)). It directs an agency to make a decision based on “available”  
 20 data. *Brower v. Evans*, 257 F.3d 1058, 1070 (9<sup>th</sup> Cir. 2001) (finding that NOAA determination  
 21 that there was insufficient information to make a determination violated the best available  
 22 evidence standard); *Conner v. Burford*, 848 F.2d 1441, 1554 (9<sup>th</sup> Cir. 1988) (rejecting an

23 recovery. *Id.* at 25. *See also e.g., supra* at 25; AR 002 at 8 (“For individual populations, NMFS has determined that  
 24 exploitation at or below NMFS-derived rebuilding exploitation rates will not appreciably reduce the likelihood of  
 rebuilding that population, assuming current conditions and based on specific risk criteria.”).

25 <sup>28</sup> The TRT expressly stated that its Guideline document “is a draft, and numbers and technical  
 26 recommendations in it are likely to change.” AR 70 at 1.

27 <sup>29</sup> *See supra* at 24-26; *see also* AR 002 at 36 (“In conducting this evaluation, NMFS takes into account the  
 28 recommendations of the TRT.”)

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1 agency's claim that it had insufficient information to make a decision as violating the best  
2 scientific evidence standard). What the requirement does not do is to allow the Court to deviate  
3 from the record review requirements by selecting among competing views. *Aluminum Co. v.*  
4 *Bonneville Power Admin.*, 175 F.3d 1156, 1162 (9<sup>th</sup> Cir. 1999) (rejecting an argument "cloak[ed]  
5 . . . in terms of the obligation to use 'the best scientific and commercial data available'" which  
6 was in effect an effort to argue the scientific merits); *Building Indus. Ass'n v. Norton*, 247 F.3d  
7 1241, 1246-47 (D.C. Cir. 2001) (fact that studies were imperfect is "insufficient to undermine  
8 those authorities' status as the 'best scientific ... data available,'" because that standard is not the  
9 equivalent of the "best scientific data possible"). The "best available science" requirement  
10 simply requires NMFS to identify and assess the available, relevant information. Then, it must  
11 apply that information of varying weight and relevance in deciding whether to approve an RMP.  
12 That is what NMFS did here.

13 Plaintiffs' argument at bottom is not that NMFS did not use the best available science but  
14 that they disagree with NMFS's conclusions as to what constitutes the best available science. In  
15 effect, Plaintiffs are using the best available science requirement to ask this Court to substitute  
16 its judgment for that of NMFS's regarding the merits of using the TRT planning ranges.  
17 Plaintiffs' attempt should be rejected.

18 Further, Plaintiffs' argument that NMFS did not use the "best available science" is  
19 unfounded. As discussed above, NMFS fully considered both the VSP Paper and the 2002 TRT  
20 recommendations. Indeed, its evaluation of the "critical" and "viable" thresholds was consistent  
21 with the concepts in the VSP Paper. *See supra* at 19-24. Further where population-specific were  
22 not available, NMFS used the generic guidance in the VSP Paper to set these thresholds. *See*  
23 *supra* at 11. Similarly, NMFS used the TRTs recommendations regarding population structure.  
24 NMFS elected not to rely on the TRT "planning ranges"; however, it fully explained its reasons  
25 for not doing so. The fact that the record contained "evidence supporting a different scientific  
26 opinion does not render the agency's decision arbitrary and capricious." *Wetlands Action*  
27 *Network v. U. S. Army Corps of Eng'rs*, 222 F.3d 1105, 1120-21 (9<sup>th</sup> Cir. 2000). Accordingly,  
28 NMFS determinations must be upheld.

**F. NMFS's Duty To Reinitiate Consultation Has Not Been Triggered.**

1 Plaintiffs assert that NMFS should have reinitiated consultation on the RMP on four  
2 grounds: (1) that the impacts of Canadian harvest are greater than NMFS anticipated; (2) the  
3 adoption of a Puget Sound Recovery Plan; (3) NMFS's decision to base ESA protection on the  
4 difference between marked and unmarked salmon; and (4) that fish harvest data show a "gloomy  
5 assessment" of data on salmon returns. Pls' Mem. at 31-35. They argue that these reasons  
6 require the reinitiation of consultation pursuant to 50 C.F.R. § 402.16(b). *Id.* at 31.

7 Reinitiation of consultation is required under 50 C.F.R. § 402.16(b) if "new information  
8 reveals effects of the action that may affect listed species or critical habitat in a manner or to an  
9 extent not previously considered." But in this case, Limit 6 and the RMP Biological Opinion  
10 contain provisions that influence any evaluation as to whether consultation needs to be  
11 reinitiated. First, the Biological Opinion itself states that to consider certain information  
12 generated during the life of the RMP does not require reinitiation of consultation:

13 NMFS recognizes the co-managers adaptive management process outlined in the  
14 RMP. Consistent with an adaptive management approach, a change in the  
15 exploitation rate or rates proposed in the RMP will not be considered grounds to  
16 re-initiate this consultation as long as the change in the exploitation rate or rates  
17 are within the risk criteria NMFS used in its evaluation.... Additionally, a change  
18 in the escapement goal or goals proposed in the RMP will not be considered  
19 grounds to re-initiate this consultation as long as the change in escapement goal  
20 or goals are based on the best estimates of the productivity and capacity of the  
21 system. Prior to determining whether re-initiation is necessary, NMFS will  
22 review the change in the exploitation rate or escapement goal and document its  
23 findings.

24 AR 2 at 40.

25 Second, as discussed above, Washington and the individual treaty tribes use an annual  
26 process to establish regulations for the harvest in fisheries under their authority. *See supra* at 27.  
27 The co-managers regularly evaluate monitoring data regarding the effects of harvest and provide  
28 NMFS with post-season reports. AR 82. This adaptive management process enables changes to  
be made to ensure that the RMP remains consistent with its objectives. Moreover, Limit 6  
requires NMFS, on a regular basis, to evaluate the effectiveness of the joint plan in protecting  
and achieving a level of salmonid productivity commensurate with conservation of listed  
salmonids. 50 C.F.R. § 223.203(b)(6)(v). If the plan is not effective, NMFS must identify the  
changes that must be made and request that the changes be made. *Id.* If the responsible agency  
does not make changes to respond adequately to the "new information", NMFS must initiate the

1 process to withdraw the authorization. *Id.* Thus, the RMP and Limit 6 establish an  
2 administrative process through which new information will be addressed.

3 For these reasons, not every piece of “new” information will necessarily rise to the level  
4 of a re-initiation trigger.

### 5 **1. Canadian Harvest**

6 Plaintiffs assert that while NMFS knew that Chinook catch had been increasing in  
7 Canada for several years, it was not learned until 2006 that Canada had begun changing the  
8 timing of its fisheries. Pls’ Mem. at 31-32. Plaintiffs argue that because the impacts of  
9 Canadian harvest were greater than NMFS anticipated, it had an obligation to reinitiate  
10 consultation on the RMP. *Id.*

11 In 1999, the United States agreed to an annex to the Pacific Salmon Treaty between  
12 Canada and the United States, Annex IV, Chapter 3, in which both countries agreed to restrict  
13 their salmon harvests to limit each country’s harvest of Chinook originating in the other country.  
14 AR 231. That treaty will expire at the end of 2008. *Id.* at 15. The United States has no control  
15 over the Canadian management of its fisheries. *Salmon Spawning & Recovery Alliance v.*  
16 *Gutierrez*, No. C05-18777RSM, 2006 WL 2620421 (W.D. Wash. Sept. 12, 2006) (dismissing  
17 ESA challenge to NMFS’s and Department of State’s involvement in Pacific Salmon Treaty for  
18 lack of standing because defendants did not cause Canadian overfishing), *appeal pending*, No.  
19 06-35979 (9<sup>th</sup> Cir.). Negotiations for a new annex have already begun.

20 In July 28, 2006, the Pacific Salmon Commission issued a technical committee report,  
21 Pacific Salmon Commission Joint Technical Committee Report (“CTC report”). AR 274. The  
22 CTC report looked at potential changes in the average harvest of numerous Chinook populations  
23 by Canadian fisheries in the most recent years in which data was available (2002-04) from  
24 averages of earlier years. *Id.* at 55. The only Puget Sound populations with appreciable  
25 increases were the Nooksack and Skagit spring Chinook. *Id.* at Table Exec. 2, p. viii and Table  
26 7-2, p. 59. These increases do not undermine NMFS’s approval of the RMP under Limit 6, nor  
27 the BiOp’s no-jeopardy conclusion.

28 Increased impacts of Canadian harvest, even to the level where the RERs were exceeded,  
was not an “effect to listed species or critical habitat that was not considered in the biological  
opinion” that would trigger reinitiation of consultation. Indeed, in the Biological Opinion,

1 NMFS expressly recognized the possibility of such an effect occurring. In discussing the  
2 impacts of Canadian harvest, NMFS stated:

3 Modeling exercises by the co-managers demonstrate the potential for the total  
4 exploitation to exceed the RMP's rebuilding exploitation rate in several  
5 management units within the proposed duration of the RMP.

6 AR 002 at 12. Further NMFS explained how such a possibility would be addressed:

7 Harvest in some coastal fisheries in British Columbia, Canada, has increased  
8 recently, approaching the limits agreed to by the United States under Annex IV,  
9 Chapter 3, of the Pacific Salmon Treaty. Increased impacts on Puget Sound  
10 chinook salmon associated with Canadian fisheries may contribute to total  
11 exploitation rates that exceed the proposed RMP's rebuilding exploitation rate.  
12 During preseason planning, if the total exploitation rate for a management unit is  
13 projected to exceed the RMP's rebuilding rate for a given management unit, the  
14 co-managers propose to constrain their fisheries such that either the RMP's  
15 rebuilding exploitation rate is not exceeded *or* the RMP's critical exploitation rate  
16 is not exceeded.

17 *Id.* The ERD also recognized that there will be seasons in which some populations exceed their  
18 RERs and found the RMP's proposed responses to such instances to be adequate. AR 003 at 13-  
19 14 and 48. *See also* AR 15 at 35-36 and 201-08.

20 Under the RMP, the co-managers prepare a post-season report, including comparing the  
21 estimated exploitation rates with the plan's target exploitation rates, and use that information for  
22 planning the next season. AR 15 at 58-59 and 34-35. The co-managers give NMFS the annual  
23 report. AR 003 at 82. In accordance with Limit 6, NMFS uses the post-season reports to  
24 evaluate the effectiveness of the RMP's implementation in meeting its objectives and conserving  
25 the ESU. 50 C.F.R. § 223.203(b)(6)(v). If NMFS identifies a lack of effectiveness, NMFS  
26 works collaboratively with the co-managers on how the RMP needs to be altered or  
27 strengthened. *Id.* Only after this is done and if the co-managers do not adequately change the  
28 plan, would NMFS propose to withdraw its Limit 6 approval of the plan. The duty to reinstate  
consultation on NMFS's initial approval of the RMP arises only after this collaborative  
adjustment process fails and NMFS is considering withdrawing its approval.

Finally, the increased Canadian harvest on the two populations did not trigger reinstatement  
because it reflects annual impacts and is only a piece of a comprehensive whole year class  
("brood-year") productivity evaluation that requires multi-year data and is done every five years.  
AR 003 at 80-81 and the RMP, AR 15 at 59. It would be premature to reinstate based on the  
CTC Report, because until its data is incorporated into the brood-year analysis, its significance is

1 not known, and so is not the basis for reconsideration of the ERD, nor does it indicate whether  
2 any alteration of the RMP is needed.

3 Thus, for these reasons the information in the CTC report did not trigger the reinitiation  
4 of consultation under 50 C.F.R. § 402.16(b).

## 5 **2. Puget Sound Recovery Plan**

6 Plaintiffs argue that the “formal adoption” of the Puget Sound Recovery Plan constituted  
7 new information under 50 C.F.R. § 402.16(b). Pls’ Mem. at 33. They assert that the fisheries  
8 are having a greater impact than NMFS acknowledged in the BiOp because those fisheries are  
9 “slowing the progress toward these recovery objectives.” *Id.* “Formal adoption” of the  
10 Recovery Plan that was largely completed when the Biological Opinion issued hardly constitutes  
11 “new information.” Regardless, the RMP cannot be fairly said to be “slowing the progress  
12 towards the progress” of the Plan’s recovery objectives when the RMP is incorporated in, and an  
13 integral part of, the Recovery Plan.

14 In 2007, after NMFS issued its Biological Opinion for its decision on the RMP, NMFS  
15 adopted a Puget Sound Recovery Plan. 72 Fed. Reg. 2493 (Jan. 19, 2007). The recovery plan  
16 consisted of a comprehensive plan submitted by a regional forum of interests, Shared Strategy  
17 for Puget Sound (AR 269), and a supplement prepared by NMFS to include all of the ESA-  
18 required elements (AR 270). The Shared Strategy plan “lays out long-term recovery goals and  
19 but its primary focus is on the next ten years of actions to place this region on a path towards  
20 recovery.” AR 269 at xviii. The Shared Strategy plan explained the reasons for its short-term  
21 focus:

22 This is because the ultimate success of the plan depends on the various authorities  
23 stepping up to commit to implement the strategies and actions described in the  
24 plan. The ten-year time frame is a reasonable period of time to ask for  
25 commitments and to begin to see progress and results.

26 *Id.* The ten-year period ends in 2015. The RMP expires on April 30, 2010.

27 The Shared Strategy plan incorporates the RMP as the salmon harvest component of the  
28 Recovery Plan. AR 269 at 420. In so doing, the Plan expressly states that if there were a  
conflict between the plan and the RMP, the “RMP shall take precedence.” AR 269 at 420. In  
the supplement to the Shared Strategy plan, NMFS endorsed the plan’s incorporation of the  
RMP as an integral part of the plan.

1 NMFS agrees with the approach to harvest described in Volume I of the  
2 [Recovery Plan], which relies upon the harvest Resource Management plan  
3 (RMP) developed by the co-managers and approved by NMFS in 2005. Most of  
4 the individual watershed plans included in Volume II also incorporate the RMP  
5 by reference. Management of fisheries as described is intended to contribute to  
6 integrated, comprehensive protection and restoration of at-risk Chinook salmon  
7 populations and provide surplus fish for harvest, while minimizing the likelihood  
8 for harm to natural-origin fish populations. The RMP provides details regarding  
9 harvest actions to help recover Chinook salmon populations, including recent  
10 program modifications and measures applied to reduce the risk of harm to wild  
11 Chinook salmon while providing treaty tribal and non-tribal harvest opportunity  
12 on stronger salmon stocks (hatchery Chinook and non-listed salmon species).

13 AR 270 at 21.

14 Plaintiffs' argument that this new information "revealed effects of the action that may  
15 effect listed species ... in a manner or to an extent not previously considered" is wholly without  
16 merit. The RMP is directly incorporated as an element of the recovery strategy, *i.e.*, it cannot be  
17 reasonably said to slow the progress of a plan in which it is a significant element. Indeed, the  
18 Draft Implementation Schedule in the Shared Strategy plan to which the Plaintiffs refer, *see* Pls'  
19 Mem. at 32-33, shows that the principal tasks for the co-managers to be "ongoing." AR 269 at  
20 472. Further, the Recovery Plan's adoption of a 10-year horizon as a reasonable period to "ask  
21 for commitments and to begin to see progress" does mean significant changes will have occurred  
22 on the ground during the remaining life of the RMP (April 30, 2010). Indeed, the recovery  
23 process is expected to take "many decades." *Id.* at 16; *see id.* (discussing implementation of a  
24 50-to 100-year plan). It is well understood that habitat changes, which are most critical here,  
25 require time to implement and even longer time for the benefits to be realized.

26 Thus, for these reasons, the "formal adoption" of the Recovery Plan is simply not an  
27 event that triggers reinitiation in this case.

### 28 **3. Hatchery Fish**

Plaintiffs argue that NMFS's decision in 2005 to distinguish between marked and  
unmarked salmon in terms of ESA protection is "new information" within the meaning of 50  
C.F.R. § 402.16(b). Pls' Mem. at 33. They claim that this new information should have  
triggered reinitiation of consultation because had NMFS had this information when it issued the  
BiOp, it would have been able to evaluate whether the RMP adequately protected un-marked  
fish. *Id.* at 34.

In 2005, NMFS amended the existing 4(d) regulations, including the rule for Puget  
Sound Chinook, to apply their protections to both natural fish and to hatchery fish that have an  
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Motion For Summary Judgment Benjamin Franklin Station, P.O. Box 7369  
Washington, D.C. 20044-7369

1 intact adipose fin. 70 Fed. Reg. at 37,195; 50 C.F.R. § 223.203(a). Reinitiation of consultation  
 2 under 402.16(b) is triggered only if the “effects of the action that may affect listed species or  
 3 critical habitat in a manner or to an extent not previously considered.” Before NMFS’s 2005  
 4 status review, almost all Puget Sound Chinook hatchery fish were not listed, so that their take  
 5 was not prohibited.<sup>30</sup> After the 2005 revisions, take of identifiable (marked) hatchery was still  
 6 not prohibited. A fisher cannot distinguish between a hatchery fish with an intact adipose fin  
 7 and a natural fish. Both before and after the 2005 4(d) amendment, a fisher had to treat a fish  
 8 with an intact adipose fin as though its take was prohibited. Thus, the amended 4(d) rule made  
 9 effectively no change to the prohibitions applicable to fishers, and, therefore, no change in the  
 10 conduct of the fisheries.

11 Further, as discussed above, the co-managers annually review the monitoring data to  
 12 assess the effectiveness of the RMP and the regulatory mechanisms implemented by the  
 13 respective sovereigns. If actual indications arise that the lack of specific protection of unmarked  
 14 fish were hindering the fisheries from meeting their management objective, the co-managers  
 15 have tools to address the problem:

16 The co-managers have, at their disposal, a range of management tools, including  
 17 gear restrictions, time/area closures, catch or retention limits, and complete  
 18 closures of specific fisheries. Combinations of these actions will be implemented  
 19 in any given year, as necessary, to insure that management objectives are  
 20 achieved.

21 AR 016-01 at 35.

22 Thus, the change in the 4(d) Rule does not cause the RMP to affect the Puget Sound  
 23 Chinook ESU in a manner or to an extent that was not previously considered.

#### 24 4. Escapement Data

25 Plaintiffs assert that a March 2006 e-mail from a NMFS scientist presents a “gloomy  
 26 assessment” of the data on salmon returns for key populations in the Hood Canal and Georgia  
 27 Strait regions. Pls’ Mem. at 34. Plaintiffs argue that this e-mail confirms that the impact of  
 28 fisheries is greater than predicted in the ERD and Biological Opinion and that the RPM’s  
 management scheme is not capable of responding to that change. *Id.* at 35. Accordingly, they

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30 In 1999, NMFS had found five of 38 Puget Sound Chinook hatchery stocks “essential for recovery” and listed them. 64 Fed. Reg. at 14,313 & 14,325. The 4(d) Rule prohibited (with limits) take of all listed salmon, including these five stocks. 50 C.F.R. § 223.203(a) (2003); 65 Fed. Reg. at 42,472.

1 conclude that the escapement data reported in the March 2006 e-mail required NMFS to  
reinitiate consultation. Pls' Mem. at 34-35.

2 The e-mail to which Plaintiffs refer states that:

3 overall the news is pretty good, but this preliminary look does highlight some  
4 areas that deserve a closer look. Of course, there are a variety of factors that  
could contribute to the patterns observed. I realized that this is only part of the  
5 picture since the information on exploitation rates is not yet available.”

6 AR 272. However, the e-mail also expressed concerns about returns to the South Fork Nooksack  
7 River and the Mid Hood Canal rivers populations (as well as the South Fork Stillaguamish River  
8 population). *See id.* The author stated that the returns for these populations were lower than  
9 NMFS had anticipated and below critical levels in recent years. *Id.*; *see also* AR 272-01. Thus,  
10 while “overall the news is pretty good, . . . this *preliminary look* does highlight some areas that  
11 deserve a closer look.” *Id.* (emphasis added). The e-mail requested a meeting with the co-  
managers “to discuss the results and get [their] feedback and ideas.”

12 As discussed above, because of the adaptive management approach in the RMP, NMFS  
13 made clear that a change in escapement will not necessarily be a basis for reinitiating  
14 consultation. AR 2 at 40. Here, NMFS’s subsequent analysis found that the 2005 escapement  
15 for the South Fork Stillaguamish and South Fork Nooksack were probably higher than the  
16 original escapement estimates suggested. Moreover, as a result of the discussions, the co-  
17 managers initiated a review their forecasting methods and revised components of fishery  
management models.

18 Thus, once again, Plaintiffs have failed to identify a legitimate basis for requiring  
19 reinitiation of consultation.

20 **CONCLUSION**

21 For the reasons stated herein, Defendants request the Court to deny Plaintiffs’ Motion for  
22 Summary Judgment and to grant Defendants’ Cross-Motion for Summary Judgment.

23 Respectfully submitted this 29th day of May, 2007.

24 MATTHEW J. McKEOWN  
25 Acting Assistant Attorney General  
26 Environment & Natural Resources Division  
United States Department of Justice

27 SETH M. BARSKY  
Assistant Section Chief

28 Environment and Natural Resources Division  
Benjamin Franklin Station, P.O. Box 7369  
Washington, D.C. 20044-7369

28 Defs’ Opp. To Pls’  
Motion For Summary Judgment

Wildlife & Marine Resources Section

/s/ Robert L. Gulley  
ROBERT L. GULLEY  
Senior Trial Attorney  
Wildlife & Marine Resources Section  
United States Department of Justice  
Ben Franklin Sta., P.O. Box 7369  
Washington, D.C., 20044-7369  
PHONE:(202) 305-0500  
FAX: (202) 305-0275

Attorneys for Defendants

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Environment and Natural Resources Division  
Benjamin Franklin Station, P.O. Box 7369  
Washington, D.C. 20044-7369  
(202) 305-0500

**CERTIFICATE OF SERVICE**

1 I hereby certify that on May 29, 2007, I electronically filed the foregoing with the Clerk  
2 of the Court for the Western District of Washington at Seattle using the CM/ECF system which  
3 will send notification of such filing to all attorneys of record in this matter, and I further certify  
4 that I have not caused service by any other means.

5  
6 /s/ Robert L. Gulley

7 Robert L. Gulley  
8 United States Department of Justice  
9 Ben Franklin Sta., P.O. Box 7369  
10 Washington, D.C., 20044-7369  
11 TELEPHONE:(202) 305-0500  
12 FAX: (202) 305-0275

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Environment and Natural Resources Division  
Benjamin Franklin Station, P.O. Box 7369  
Washington, D.C. 20044-7369  
42 (202) 305-0500