

BONNEVILLE POWER ADMINISTRATION

2011 AMENDMENT

To

2010 RECORD OF DECISION

following the

MAY 20, 2010, NOAA FISHERIES  
SUPPLEMENTAL BIOLOGICAL OPINION

to the

May 2008 FCRPS BIOLOGICAL OPINION

for

MANAGEMENT and OPERATION

of the

FEDERAL COLUMBIA RIVER POWER SYSTEM,

11 U.S. BUREAU OF RECLAMATION PROJECTS in the COLUMBIA BASIN,

and

ESA SECTION 10 PERMIT FOR  
JUVENILE FISH TRANSPORTATION PROGRAM

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ABBREVIATIONS, ACRONYMS, AND DEFINITIONS

2008/2010 BiOp	NOAA Fisheries' 2008 BiOp, as amended by NOAA's 2010 Supplemental BiOp.
2008 FCRPS BiOp	NOAA's May 2008 Biological Opinion for Operation of the Federal Columbia River Power System, 11 Bureau of Reclamation Projects in the Columbia Basin and ESA Section 10(a)(1)(A) Permit for Juvenile Fish Transportation Program. NOAA Fisheries, May 5, 2008.
2008 BPA ROD	BPA's ROD to implement the 2008 BiOp RPA and ITS.
2010 Supplemental BiOp	Supplemental Biological Opinion for operation of the Federal Columbia River Power System, 11 Bureau of Reclamation Projects in the Columbia Basin and ESA Section 10(a)(1)(A) Permit for Juvenile Fish Transportation Program. NOAA Fisheries, May, 2010.
2010 BPA ROD	BPA's ROD to implement the 2008/2010 BiOp RPA and ITS.
Action Agencies	U.S. Department of the Interior, Bureau of Reclamation (Reclamation), U.S. Army Corps of Engineers, Bonneville Power Administration, the agencies responsible for management and operation of federal hydroelectric projects in the Columbia and Upper Snake Rivers
Biological Opinion	A document that states the opinion of NOAA Fisheries as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. See 50 C.F.R. § 402.02
BiOp	biological opinion
BPA	Bonneville Power Administration
Corps	U.S. Army Corps of Engineers
ESA	Endangered Species Act, 16 U.S.C. 1531 <u>et seq.</u>

Federal Defendants	The Federal Defendants in the <u>National Wildlife Federation v. National Marine Fisheries Service</u> , 01-cv-640-RE (D. Or.), are NOAA Fisheries, the Army Corps of Engineers, and Bureau of Reclamation.
FCRPS	Federal Columbia River Power System
Jeopardize	“Jeopardize the continued existence of” means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02
NOAA Fisheries	National Marine Fisheries Service, an agency within the National Oceanic and Atmospheric Administration
Reasonable and Prudent Alternative (RPA)	Recommended alternative actions identified during formal consultation that can be implemented in a manner consistent with the purposes of the action, that can be implemented consistent with the scope of the federal agency’s legal authority and jurisdiction, that is economically and technologically feasible, and that NOAA Fisheries believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. See 50 C.F.R. § 402.02.
Reclamation	U.S. Bureau of Reclamation
ROD	Record of decision.
Spill	Water released from a dam over the spillway instead of being directed through the turbines.

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PROGRAM

I. Summary

In a 2010 Record of Decision, BPA decided to implement, in coordination with other federal agencies, NOAA Fisheries' 2008/2010 ten-year biological opinion RPA for operation and management of the federal hydroelectric projects in the Columbia and Snake Rivers. In August 2011, a federal district court declined to set aside the 2008/2010 BiOp RPA's habitat mitigation measures through 2013 but criticized the post-2013 habitat measures as indefinite and not reasonably certain to occur. The district court ordered a remand to NOAA Fisheries, directing NOAA Fisheries to issue a new or supplemental biological opinion by January 1, 2014. To avoid reliance on measures found by the court to be invalid, BPA amends its 2010 decision to implement, in coordination with other federal agencies and in collaboration with state agencies and tribes, NOAA Fisheries' 2008/2010 biological opinion RPA through 2013 or until such as time as the new or supplemental BiOp ordered by the court takes effect, whichever is later.

## II. Reasons for Decision

As described in Bonneville Power Administration's attached 2008 ROD at 1-3, the Bureau of Reclamation (Reclamation), U.S. Army Corps of Engineers (Corps), and Bonneville Power Administration (BPA) have various statutory responsibilities concerning the management and operation of the federal hydroelectric projects in the Columbia and Upper Snake Rivers. In addition, Reclamation operates reclamation projects in these rivers.

To meet responsibilities under the Endangered Species Act, these agencies (collectively the Action Agencies) consult with NOAA Fisheries. After consultation, NOAA Fisheries issues a biological opinion as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. After issuance of a biological opinion, BPA issues decision documents or records of decision.

NOAA Fisheries issued a biological opinion in 2008 and a supplemental BiOp in 2010 (collectively referred to as the 2008/2010 BiOp) on the operation of the Federal Columbia River Power System, 11 Bureau of Reclamation projects in the Columbia Basin, and a ESA Section 10(a)(1)(A) permit for juvenile fish transportation program. The 2008/2010 BiOp is a ten-year BiOp, covering the years from 2008 to 2018.

Most recently, BPA issued a June 11, 2010, Record of Decision providing that BPA will implement, in cooperation with the other Action Agencies, NOAA Fisheries' 2008/2010 BiOp's RPA and the terms, and conditions in the 2008/2010 BiOp Incidental Take Statement (ITS). In its 2010 ROD, BPA concluded that the 2008/2010 BiOp RPA and ITS are not likely to jeopardize listed species or result in the destruction or adverse modification of designated critical habitat.

To the extent not amended herein, this 2011 ROD incorporates by reference BPA's 2010 ROD and attaches it as an appendix. The 2010 ROD incorporates in turn BPA's ROD to implement the 2008 BiOp.

The 2008/2010 BiOp has now undergone judicial review. In National Wildlife Federation v. National Marine Fisheries Service, Case 3:01-cv00640-RE Document 1855, Slip Copy, 2011 WL 3322793 (D. Or. Aug. 2, 2011), Judge Redden left in place the BiOp, including the RPA's habitat mitigation measures through 2013, but criticized the NOAA Fisheries' reliance on post-2013 habitat mitigation actions as not reasonably certain to occur.

NOAA Fisheries relies on two types of habitat mitigation actions. The first includes specific identified projects scheduled to occur between 2008 and 2013. The second, however, includes broad, unidentified categories of projects that the Federal Defendants intend to develop and implement between 2013 and 2018. (Slip Op. at 12, 2011 WL 3322793 at 5.)

NOAA Fisheries updated various quantitative data, and identified specific habitat mitigation actions for 2010 through 2013. (Id. at 8, 2011 WL 3322793 at 4.)

But NOAA Fisheries has not identified any specific habitat projects after 2013. (Id. at 12, 2011 WL 3322793 at 5.)

NOAA Fisheries' reliance on undefined actions for such large survival increases is contrary to the ESA's requirements that mitigation must be specific, reliable, and certain to occur. (Id. at 14, 2011 WL 3322793 at 6.)

Judge Redden did not set aside the BiOp through 2013 but remanded the BiOp to NOAA Fisheries.

For the reasons above, I find that the no jeopardy decision for the entire ten-year term of the BiOp is arbitrary and capricious because NOAA Fisheries has failed to identify specific mitigation plans beyond 2013, that are reasonably certain to occur. Because the 2008/2010 BiOp provides some protection for listed species through 2013, however, I order NOAA Fisheries to fund and implement the BiOp until then. (Id. at 17 (emphasis in the original), 2011 WL 3322793 at 7.)

I will remand the BiOp to the action agencies and order NOAA Fisheries to keep this BiOp and its incidental take statement in place through 2013, when NOAA Fisheries' currently identified mitigation plans expire or are scheduled to be completed. The BiOp contains positive mitigation measures that provide adequate protection to the listed species through 2013. (Id. at 19, 2011 WL 3322793 at 8.)

Therefore, the court ordered that the 2008/2010 BiOp remain in place until December 31, 2013, the period over which the BiOp provides sufficiently specific mitigation actions and provides adequate protections for the listed species. Id. at 23, 2011 WL 3322793 at 10. The court also ordered that NOAA Fisheries produce a new or supplemental BiOp by January 1, 2014, to correct the 2008/2010 BiOp's reliance on post-2013 measures that the court concluded were unidentified and not reasonably certain to occur. Id. at 23, 2011 WL 3322793 at 10. The district court also required Federal Defendants to continue spring and summer spill in a manner consistent with the court's annual spill orders. Id. at 3, 22, 2011 WL 332793 at 2, 10. Federal Defendants have not sought a stay of the district court's remand order or grant of injunctive relief, and are moving forward in compliance with these measures on remand.

One practical effect of Judge Redden's opinion is to revise the temporal scope of the BiOp to run through 2013, to avoid reliance on post-2013 habitat measures that the court has rejected. Therefore, BPA amends its 2010 ROD to implement,

in cooperation with the other Action Agencies and in collaboration with state agencies and tribes, the 2008/2010 BiOp RPA through 2013, instead of through 2018, so that BPA's decision correspondingly relies only on habitat measures viewed by the court as reasonably certain to occur and providing adequate projection for the listed species through 2013.

### III. Decision

Based on the 2008 and 2010 BiOps and supporting documents, BPA's RODs following these BiOps, and to act consistent with the NWF v. NMFS August 2, 2011, opinion and order, it is my decision that BPA will implement, in cooperation with the other Action Agencies and in collaboration with state agencies and tribes, the 2008/2010 BiOp's RPA, including the terms and conditions in the 2008/2010 BiOp Incidental Take Statement, through December 31, 2013, or until such as time as the new or supplemental BiOp ordered by the court takes effect, whichever is later. The RPA's habitat mitigation measures through 2013 were not set aside by the court as unspecific or not reasonably certain to occur, and BPA will also consult with NOAA Fisheries respecting the new or supplemental BiOp.

Pending the new or supplemental BiOp, these actions will meet BPA's responsibilities under the ESA to avoid taking actions that are likely to jeopardize listed species or destroy or adversely modify critical habitat. These actions also further BPA's commitment to meet its responsibilities under the Northwest Power Act to protect species and also be consistent with BPA's multiple statutory responsibilities.

Issued in Portland, Oregon, this 15th day of December 2011.

/s/ Stephen J. Wright

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Stephen J. Wright  
Administrator and Chief Executive Officer



Appendix

BPA 2010 ROD following the 2010 FCRPS Supplemental BiOp