



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
One Blackburn Drive
Gloucester, MA 01930-2298

July 3, 2003

Mr. Richard J. Mannix
Attorney at Law
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20002-2595

Dear Mr. Mannix,

Thank you for your March 28, 2003, request on behalf of Atlantic Salmon of Maine ("ASM") pursuant to Section 515 of Public Law 106-554 ("Section 515") for correction of: (1) the draft biological opinion to the U.S. Army Corps of Engineers ("ACOE") on the proposed modification of existing permits authorizing the installation and maintenance of fish pens within the State of Maine ("draft ACOE BiOp") and (2) the Final Biological Opinion on the U.S. Environmental Protection Agency's ("EPA") Proposed Approval of the State of Maine's Application to Administer the National Pollution Discharge and Elimination System ("NPDES") Permit Program ("Final EPA BiOp"). The National Oceanic and Atmospheric Administration ("NOAA") received the request on March 31, 2003. The Responsible Office is the office of the Regional Administrator, Northeast Region, within the National Marine Fisheries Service ("NOAA Fisheries"). On May 30, 2003, I sent you an update on the request and noted that a response would be issued by July 3, 2003. My office has completed its review of ASM's request in light of the NOAA Information Quality Guidelines ("Guidelines") and has the following response.

Regarding the Final EPA BiOp, the Guidelines divide NOAA information products into seven categories. The Final EPA BiOp is categorized as a Natural Resource Plan under the Guidelines and, as such, must: (1) be developed according to published standards, (2) use information of known quality or from sources acceptable to the relevant scientific and technical communities, (3) be based on the best available scientific information, and (4) present information in the proper context. The ASM request for correction of the Final EPA BiOp focuses on several scientific papers.¹ The King Study concluded that significant genetic differences exist between North

¹ King, T.L., W.B. Schill, B.A. Lubinski, M.C. Smith, M.S. Eackles, and R. Coleman. 1999. Microsatellite and mitochondrial DNA diversity in Atlantic salmon with emphasis on small coastal drainages of the Downeast and Midcoast of Maine. USGA-BRD-Leetown Science Center, Kearneysville, West Virginia ("the King Study");

Utter, F.M., K. Hindar and N. Ryman. 1993. Genetic effects of aquaculture on natural salmonid populations. Pages 144-165 in K. Heen, R.L. Monahan, and F. Utter, editors. Salmon aquaculture. Fishing News Books, Oxford ("the



American and European Atlantic salmon. The Utter Study, the Verspoor Study, and the Youngson Study (collectively termed the “Precautionary Principle Studies” in ASM’s request) present the negative effects of outbreeding depression caused by infiltration of wild salmon rivers by salmon from non-native, genetically-divergent populations. NOAA Fisheries used those studies to develop the Final EPA BiOp, which concluded that the EPA’s proposed delegation of the NPDES permit program, subject to the condition (among others) prohibiting use of non-North American salmon, is not likely to jeopardize the continued existence of the endangered distinct population segment (“DPS”) of Atlantic salmon in Maine, but may adversely affect them.

The Final EPA BiOp was developed according to published standards, which include Section 7 of the ESA, its case law and legislative history, and the consultation regulations at 50 CFR part 402. At the time the EPA BiOp was finalized, the King Study and the “Precautionary Principle Studies” represented the best available scientific information. The Final EPA BiOp recognized the lack of absolute certainty regarding the effects of escaped non-North American salmon, but proceeded consistent with the direction of the House Conference Report on the 1979 amendments to the ESA² to give the benefit of the doubt to the listed species.

Those studies in the Final EPA BiOp with which ASM takes issue are of known quality and from sources acceptable to the relevant scientific and technical communities. NOAA Fisheries and the U.S. Fish and Wildlife Service (collectively, “the Services”) relied on them during the public process to list the DPS and subjected them to rigorous public and scientific scrutiny. As part of that public process, the Services requested an external peer review of the proposed rule to list the DPS as endangered along with the 1999 Status Review, both of which cite the King Study and the “Precautionary Principle Studies.” While the peer review panel made suggestions on how Dr. King could improve the analysis in his 1999 paper, it supported the rationale and conclusions of the Services’ work. In response to comments received from the peer review panel, Dr. King made improvements to his work which further refined his analysis, but did not change the study’s conclusions. The King study and other work were subsequently published in peer-reviewed scientific journals.³ Those studies support the conclusion reached in his 1999 paper and the Final

Utter Study”);

Verspoor, E. 1997. Genetic diversity among Atlantic salmon (*Salmo salar* L.) populations. ICES Journal of Marine Science 54: 965-973 (“the Verspoor Study”);

Youngson, A.F. and E. Verspoor. 1998 Interactions between wild and introduced Atlantic salmon (*Salmo salar*). Can. J. Fish. Aquat. Sci. 55(supp. 1): 153-160 (“the Youngson Study”).

² H.R. Conf. Rept. No. 697, 96th Cong., 2d Sess., 12 (1979).

³ King, T.L., A.P. Spidle, M.A. Eackles, A.B. Lubinski and W. B. Schill. 2000. Mitochondrial DNA diversity in North American and European Atlantic salmon with emphasis on the Downeast rivers of Maine. J. Fish. Biol. 57(3): 614-630.

King, T.L., S.T. Kalinowski, W.B. Schill, A.P. Spidle, and B.A. Lubinski. 2001. Population structure of Atlantic

EPA BiOp.

Since the time the EPA BiOp was finalized, the National Research Council (“NRC”) has reviewed the King Study and critiques of it, in addition to other scientific papers on Atlantic salmon genetics.⁴ The NRC report resulting from that review confirmed the conclusions of the King Study. The NRC report also stated that “it is possible for wild populations to ‘resist’ genetic infiltration by farm fish, but that potential drops as the number of wild salmon becomes small, relative to the number of farm fish” (page 21), further bolstering NOAA Fisheries’ use of the King Study and the “Precautionary Principle Studies” in the Final EPA BiOp.

Furthermore, if NOAA Fisheries were writing the Final EPA BiOp today, it would use the best available scientific information, which includes the NRC report, peer-reviewed journal articles, and the peer review report from the listing process. That information would lead to the same conclusion as the King Study and the “Precautionary Principle Studies” led to in the actual Final EPA BiOp. Therefore, your request for correction of the Final EPA BiOp is denied.

Regarding the draft ACOE BiOp, since 1999, the NRC has issued its report⁵ on the genetic status of Atlantic salmon in Maine, and Dr. King and others have published studies on that topic in peer-reviewed scientific journals.⁶ It is NOAA Fisheries’ policy and a requirement of the ESA to use the best available scientific and commercial information when writing a BiOp. This policy will be followed as we finalize the ACOE BiOp.

A request for correction under Section 515 cannot be used as a means to secure a particular decision from NOAA Fisheries regarding the final outcome of the BiOp prior to the completion of the deliberative process generating the document. Nor does Section 515 amend or repeal any other statutory or regulatory mandates governing the production of the ACOE BiOp. The ESA consultation procedures at 50 CFR part 402 provide a process for an applicant to submit comments on a draft BiOp. Section 402.14(g)(5) provides that an applicant must submit comments on a draft BiOp to the action agency. Those regulations also indicate, however, that an applicant may submit a copy of its comments to the consulting agency. As a result, as NOAA Fisheries finalizes the draft ACOE BiOp pursuant to the ESA and the consultation procedures, NOAA Fisheries will consider ASM’s concerns regarding the draft ACOE BiOp’s reliance on the King Study as applicant comments on that document.

You may file an appeal of this denial, as outlined in Part III.D.1 of the Guidelines, within 30

salmon (*Salmo salar* L.): A range-wide perspective from microsatellite DNA variation. *Mol. Ecol.* 10(4): 807-821.

⁴ National Research Council. 2002. Genetic Status of Atlantic Salmon in Maine. Washington, DC: National Academy Press (“the NRC report”).

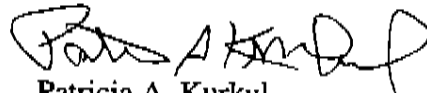
⁵ See note 4.

⁶ See note 3.

calendar days of the date of this correspondence. Your appeal must include: (1) the requestor's name, current home or business address, and telephone number or electronic mail address; (2) a copy of the original request and any correspondence regarding the initial denial (including a copy of this document); and (3) a statement of the reasons why you, the requestor, believe this decision is in error.

The complete appeal must be submitted to: NOAA Section 515 Officer, NOAA Executive Secretariat, Herbert C. Hoover Building - Room 5230, 14th and Constitution Avenue, NW, Washington, D.C. 20230.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia A. Kurkul". The signature is stylized and cursive.

Patricia A. Kurkul
Regional Administrator