



06-CV-01462-BOND

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SALMON SPAWNING &  
RECOVERY ALLIANCE,  
WILD FISH CONSERVANCY,  
NATIVE FISH SOCIETY, and  
CLARK-SKAMANIA FLYFISHERS,

Plaintiffs,

v.

D. ROBERT LOHN, in his official  
capacity, NATIONAL OCEANIC  
AND ATMOSPHERIC  
ADMINISTRATION'S 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  
& WILDLIFE SERVICE,  
DIRK KEMPTHORNE, in his official  
capacity, and UNITED STATES  
DEPARTMENT OF THE INTERIOR,

Defendants.

No. C06-1462RSL

ORDER ON MAY 1, 2008 LETTER

This matter comes before the Court *sua sponte*. On March 20, 2008, the Court granted defendants' cross-motion for summary judgment (Dkt. #43) and entered judgment in favor of defendants and against plaintiffs (Dkt. #44). Plaintiffs did not file a motion for reconsideration or appeal the judgment and the case is now closed.

On May 5, 2008, however, this Court received a letter addressed to the undersigned and  
ORDER ON MAY 1, 2008 LETTER

1 the Honorable Marsha J. Pechman dated May 1, 2008 from James L. Buchal, counsel for the  
2 plaintiff in Columbia Snake River Irrigators Association v. D. Robert Lohn, et al., (C07-  
3 1388MJP), a case currently pending in this district before Judge Pechman. For the public record,  
4 a copy of this letter is attached to this order.

5 Mr. Buchal writes "to note serious concern that conduct of the National Marine Fisheries  
6 Service (NMFS) which has come to light in the context of the CSRIA v. Lohn case has  
7 undermined the reliability of this Court's recent decision in [this] case." The basis for this  
8 "serious concern" stems from a Recovery Science Review Panel ("RSRP") report that purports  
9 to criticize NMFS' harvest decisions. In his letter, Mr. Buchal contends that in response to the  
10 RSRP report, scientists at NMFS' Montlake Lab in Seattle prepared a 38-page document that  
11 was withheld in response to CSRIA's Freedom of Information Act ("FOIA") request, which in  
12 turn prompted the action now pending before Judge Pechman. This 38-page document is being  
13 reviewed *in camera* by Judge Pechman.


14 Mr. Buchal goes on to state in his letter that "[w]e strongly suspect that the Montlake  
15 scientists agreed, at least in part, with the RSRP's critiques . . . [and that] both the RSRP report  
16 and the scientific opinions and recommendations of the Montlake scientists were omitted from  
17 the Administrative Record certified by NMFS for review in [this] case. Thus Judge Lasnik  
18 never had the benefit of the 'whole record' when he recently approved NMFS' Puget Sound  
19 chinook decisionmaking."

20 These are extremely serious allegations to present to this Court simply on the basis of  
21 counsel's strong suspicions. Although post-judgment intervention is disfavored, Mr. Buchal and  
22 his client, if they deem it appropriate in accordance with Fed. R. Civ. P. 11, may of course move  
23 to intervene and seek relief from judgment under Fed. R. Civ. P. 60(b) based on newly  
24 discovered evidence. But, it is highly inappropriate for counsel, who has not appeared in this  
25 case, to send a letter to this Court speculating about the contents of documents currently being  
26 reviewed *in camera* by another federal district court judge, either as a way to influence the

1 outcome of this case, or the case currently pending before Judge Pechman. See Cochran v.  
2 Celotex Corp., 125 F.R.D. 472, 473 (C.D. Ill. 1989) ("Counsel in this and all other cases pending  
3 before this court are admonished that it is improper to communicate with any court by means of  
4 correspondence – the appropriate method of communicating with a court is by means of  
5 motion.").

6 Accordingly, the May 1, 2008 letter is being docketed in this case only for the purpose of  
7 making the document public. The Court will not take any further action on the letter and the  
8 parties in this case need not file any response.

9  
10 DATED this 7<sup>th</sup> day of May, 2008.

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14 Robert S. Lasnik  
15 United States District Judge  
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May 1, 2008

**BY FIRST CLASS MAIL**

Chief Judge Robert S. Lasnik  
U.S. Courthouse  
700 Stewart Street  
Seattle, WA 98101-9906

Judge Marsha J. Pechman  
U.S. Courthouse  
700 Stewart Street  
Seattle, WA 98101-9906

RECEIVED  
MAY 05 2008  
Judge Robert S. Lasnik

Re: *CSRIA v. Lohn*, No. CV 07-1388-MJP  
*Salmon Spawning & Recovery Alliance v. Lohn*, No. CV 06-01462-RSL

Dear Judges Lasnik and Pechman:

I write to note serious concern that conduct of the National Marine Fisheries Service (NMFS) which has come to light in the context of the *CSRIA v. Lohn* case has undermined the reliability of this Court's recent decision in the *Salmon Spawning & Recovery Alliance* case. By way of review for the benefit of Judge Lasnik, back in 2001 a blue-ribbon panel of outside scientists (the Recovery Science Review Panel (RSRP)) advised NMFS in some detail concerning scientific issues relating to salmon harvest, ultimately concluding that NMFS' harvest decisions generally "demean scientific common sense".

The RSRP report triggered severe criticism from entities interested in the harvest of endangered species, ultimately prompting NMFS to repudiate the outside scientists. In the meantime, questions concerning the scientific merit of the outside panel's wide-ranging critiques had been referred to agency scientists at NMFS' Montlake Lab in Seattle, which is structurally isolated from the NMFS policymakers for the purpose of permitting the agency scientists to provide independent and unbiased scientific advice.

Those scientists ultimately prepared a 38-page report that NMFS withheld in response to CSRIA's FOIA request, triggering the *CSRIA v. Lohn* litigation. The report was initially described in NMFS' *Vaughn* index (Item 14(b)) as a "report that provides

comments and opinions regarding the RSRP's recommendations and ways to facilitate implementation of those recommendations". We strongly suspect that the Montlake scientists agreed, at least in part, with the RSRP's critiques.

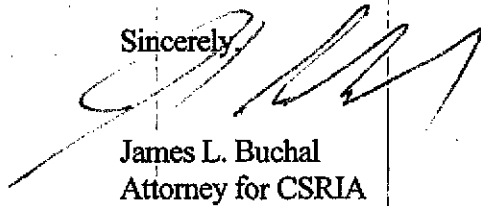
In the Second Declaration of Mr. Lockhart, filed April 22, 2008, NMFS now admits that these recommendations "affected NMFS' adoption of recovery plans and biological opinions pertaining to the listed salmonids". (2d Lockhart Decl. ¶ 23.) This would include the biological opinion concerning Puget Sound chinook recently approved by Judge Lasnik in the *Salmon Spawning & Recovery Alliance* case. (See *id.*) However, both the RSRP report and the scientific opinions and recommendations of the Montlake scientists were omitted from the Administrative Record certified by NMFS for review in that case. Thus Judge Lasnik never had the benefit of the "whole record" when he recently approved NMFS' Puget Sound chinook decisionmaking.

NMFS has now attempted to re-write its *Vaughn* index to describe the document as a mere "draft report", omitting any reference to "ways to facilitate implementation of th[e] RSRP] recommendations", and claiming that "NMFS made a final policy decision against fully drafting, finalizing, and releasing the contemplated report". Such conduct underscores the degree to which this agency feels it can play fast and loose with its certifications to this Court. The Montlake report and related documents are presently before Judge Pechman for *in camera* review.

We understand that in *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114 (9th Cir. 1988), the court articulated a broad conception of the "deliberative process" privilege in permitting the Forest Service to withhold portions of draft environmental impact statements and Washington Office opinions and recommendations "aimed at improving the draft Forest Plans and draft EISs". *Id.* at 1123. In a concurring opinion, Judge Pregerson stated that the withheld materials were "not factual", and warned that "the opinion could be misconstrued to protect from disclosure virtually every document that does not constitute a final decision". *Id.* at 1124. We hope that will not happen here.

Congress charged NMFS to make critical decisions under the Endangered Species Act upon the basis of the best science, and provided NMFS with internal, independent scientists to provide that science. To the extent NMFS is permitted to withhold such scientific materials used in its Endangered Species Act decisionmaking from this Court (and the public) without adverse consequence, neither this Court nor the public can have confidence in the effectiveness of judicial review of NMFS decisions—or the decisions themselves.

Sincerely,



James L. Buchal  
Attorney for CSRIA

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cc: Kayla Stahman (courtesy copy also by e-mail)  
Eric Redman (e-mail only)  
Robert Lee Gulley (e-mail only)  
Michael Grossman (e-mail only)  
Tribal Attorneys (e-mail only)  
Lucinda Gryzenia (e-mail only)