

# Murphy & Buchal LLP

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October 11, 2005

## **BY E-MAIL AND FIRST CLASS MAIL**

Mr. Craig Wingert  
Fisheries Management Specialist  
National Marine Fisheries Service  
501 W. Ocean Blvd., Suite 4200  
Long Beach, CA 90802-4213

*Re: Central Coast Forest Association Delisting Petition*

Dear Mr. Wingert:

I represent the petitioners, who have asked me to respond to your e-mail of Wednesday, October 4, 2005 to Mr. Fabian Alvarado. As I understand your position, NMFS is assertedly unable to make a finding, pursuant to 16 U.S.C. § 1533(b)(3)(A), that the petition “presents substantial scientific or commercial evidence indicating that the petitioned action may be warranted” on account of the “Santa Cruz lab review of the petition”.

The fundamental question raised by the petition is whether it makes sense to list populations that the Santa Cruz laboratory describes as “populations at the southern extreme of their range [which] were at some time in the past founded and continually reinforced by straying migrants”. At the time of the listing, there was “no disagreement over the designation of the boundaries” for the Central Coast coho ESU, 61 Fed. Reg. 56145; the petition offers substantial evidence in support of such a disagreement.

As the District Court in Oregon has explained, “the standard for evaluating whether substantial information has been presented by an ‘interested person’ is not overly-burdensome, does not require conclusive information, and uses the ‘reasonable person’ to determine whether the substantial information has been presented to indicate the action may be warranted”. *Moden v. U.S. Fish & Wildlife Service*, No. 02-305-JO, slip op. at 17 (D. Or. Sept. 3, 2003). An independent review of the substance of the petition was conducted in 2004 by fisheries biologist Dr. Victor Kaczynski under the sponsorship of the California Farm Bureau and the California Forestry Association. Dr. Kaczynski independently confirmed the information, conclusions and recommendations of the petition.

From this perspective, your suggestion that the Santa Cruz lab review of the petition forecloses NMFS from concluding that reconsideration “may be warranted” does not withstand scrutiny. It is clear that the lab disagrees with some of the scientific conclusions in

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the petition, but the lab renders no opinion on whether the petition passes the legal standard of whether further consideration "may be warranted". Indeed, insofar as the lab suggests still further peer review, the lab's review may be interpreted as *supporting* a determination that further inquiry "may be warranted".

We of course do not agree with the lab's findings for reasons that have been elucidated in our responses to the lab's reviews. Furthermore, we have now confirmed that the "new molecular genetic data" mentioned by the lab do not indicate that coho salmon south of San Francisco "are native to the area." We believe that the lab draws unwarranted conclusions from these data and that NMFS geneticist Carlos Garza was precisely correct when he told us that the extant genetic data do not and cannot resolve the question whether the southern stocks are native one way or another. Mr. McCrary's letter of July 20<sup>th</sup> confirming this advice is, of course, part of the administrative record. Again, all petitioners must show at this juncture is that further inquiry "may be warranted".

My review of the file suggests that my clients have been extraordinarily patient in waiting nearly two years for a response to their petition, which by law ought to have been completed after ninety days. While I do appreciate that the parties have refined their positions over many months, and delved further into this matter than seems customary in connection with a 90-day review, my clients' patience is at an end. I am therefore authorized to state that unless NMFS publishes a favorable 90-day finding by the end of the month, litigation in the model of the *Moden* case above will follow to compel such a finding.

If you have any questions, please do not hesitate to call.

Sincerely,

James L. Buchal

cc: Fabian Alvarado