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## National Wildlife Federation v. National Marine Fisheries Service

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***National Wildlife Federation v. National Marine Fisheries Service*, \_\_\_ F. Supp. 2d \_\_\_, 2016 U.S. Dist. LEXIS 59195, 2016 WL 2353647 (D. Or. May 4, 2016)**

**Jacob R. Schwaller**

The tide in the legal battle surrounding anadromous fish protections in the Columbia River watershed most recently swung in favor of the fish. In the latest iteration of *National Wildlife Federation v. National Marine Fisheries Service*, the Court found in a lengthy opinion that NOAA fisheries acted arbitrarily and capriciously when it issued its 2014 BiOp concluding that the FCRPS did not violate the ESA. The Court also ruled that the Corps violated NEPA by failing to prepare an environmental impact statement in connection with their records of decision implementing reasonable and prudent alternatives in the BiOp. This decision could open the floodgates to changes in hydropower management along the Columbia River watershed.

I. INTRODUCTION

In the most recent wave of the decades-long Columbia River litigation, the court in *National Wildlife Federation v. National Marine Fisheries Service* decided two questions posed by the plaintiffs.<sup>1</sup> The first question was whether or not the National Oceanic and Atmospheric Administration (“NOAA”)<sup>2</sup> acted arbitrarily and capriciously when it concluded that a 2014 Biological Opinion (“BiOp”) did not violate the Endangered Species Act (“ESA”). The second question was whether the United States Army Corps of Engineers (“Corps”) and United States Bureau of Reclamation (“BOR”) violated the National Environmental Protection Act (“NEPA”) by failing to prepare an environmental impact statement connected to their 73 reasonable and prudent alternatives described in the 2014 BiOp.<sup>3</sup> Because the court stated that “federal consulting and action agencies must do what Congress has directed them to do,”<sup>4</sup> a lengthy analysis was necessary to define those standards<sup>5</sup>. The court ultimately answered both questions affirmatively in favor of the plaintiffs.<sup>6</sup>

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1 *National Wildlife Federation v. National Marine Fisheries Service*, \_\_\_ F. Supp. 2d \_\_\_, 2016 U.S. Dist. LEXIS 59195, at \*n.1 (D. Or. May 4, 2016) (the plaintiffs in this case were National Wildlife Federation, Idaho Wildlife Federation, Washington Wildlife Federation, Sierra Club, Pacific Coast Federation of Fisherman’s Association, Institute for Fisheries Resources, Idaho Rivers United, Northwest Sport Fishing Industry Association, Salmon for All, Columbia Riverkeeper, NW Energy Coalition, Federation of Fly Fishers, and American Rivers. The state of Oregon joined as intervener-plaintiff, and the Nez Perce tribe joined as an amicus curiae).

2 The court chooses to refer to the National Marine Fisheries Service, which is the official agency under NOAA, as “NOAA fisheries” throughout the opinion.

3 *National Wildlife Federation*, 2016 WL 2353647, at \*6.

4 *Id.* at \*14.

5 *Id.* at \*14.

6 *Id.* at \*5, \*240-41.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The Columbia River is the fourth largest river in North America.<sup>7</sup> The river feeds the Federal Columbia River Power System (the “FCRPS”), which includes hydroelectric dams, powerhouses, and associated reservoirs on the Columbia and Snake Rivers.<sup>8</sup> Along with the Snake River, it also supports a vast ecosystem of anadromous salmonids, which make their way upriver annually to spawn.<sup>9</sup> Because of all of the obstructions along the watershed, it is difficult for the fishery and the FCRPS to coexist.<sup>10</sup> As early as 1991, the Snake River sockeye salmon was listed as “endangered” under the ESA.<sup>11</sup> Since then, 13 other species of Columbia or Snake River salmonids have been listed under the ESA as threatened or endangered.<sup>12</sup>

These listings occurred throughout the multiple iterations of litigation surrounding the FCRPS and the BiOps issued in 1992, 1993, 1995, 2000, 2004, 2008, 2010, and 2014.<sup>13</sup> Prior to this case, two other judges adjudicated these cases.<sup>14</sup> In 1994, Federal District Judge Malcolm F. Marsh stated that “the situation literally cries out for a major overhaul” because the action agencies were “too heavily geared toward maintaining the status quo.”<sup>15</sup> In 2003, Judge James A. Redden invalidated the 2000 BiOp, and subsequently invalidated the next three BiOps before stepping down.<sup>16</sup> In his last case, Judge Redden ordered NOAA fisheries to prepare a BiOp by 2014 that considered “more aggressive action, such as dam removal and/or additional flow augmentation and reservoir modification.”<sup>17</sup> This case was brought by the National Wildlife Federation (Plaintiffs), and challenged the sufficiency of the 2014 BiOp. As with the cases before it, this case was brought on the grounds that the most recent BiOp failed to use the best available science to present options that would maintain a sustainable fishery.<sup>18</sup> The Plaintiffs also argued that the Corps and BOR failed to prepare an environmental impact statement connected to their record of decision.<sup>19</sup>

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7 *Id.* at \*2.

8 *Id.* at \*7

9 *Id.*

10 The court describes the journey that the fish take annually, and that the fish must “attempt to survive” the FRCPS. *Id.*

11 *Id.* at \*7.

12 *Id.* at \*35.

13 *Id.* at \*37-42.

14 Idaho Dept. of Fish & Game v. NMFS, 850 F. Supp. 886 (D. Or. 1994); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196 (D. Or. 2003) (hereinafter *NMFS II*); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) (hereinafter *NMFS III*); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117 (D. Or. 2011) (hereinafter *NMFS IV*).

15 *Id.* at \*9 (citing *Idaho Dept. of Fish & Game*, 850 F. Supp. at 900 (emphasis removed)).

16 *Id.* at \*12.

17 *Id.* at \*12 (citing *NMFS III*, 524 F.3d at 925).

18 *Id.* at \*5

19 *Id.*

### III. ANALYSIS

The court broke down its discussion before going into a lengthy explanation of the scientific analysis that the defendants failed to implement. The court first explained the “Trending Toward Recovery Standard.”<sup>20</sup> As the court defined it, “[a] population of an endangered or threatened species are considered ‘trending toward recovery’ if certain measurements of population growth rates are expected to be anything greater than 1.0”<sup>21</sup> The court held that NOAA fisheries acted arbitrarily and capriciously by failing to recognize that slight increases in population growth rates (as they included in their 2014 BiOp) would not necessarily bring a species back from an “already precarious state.”<sup>22</sup> The court, in the full opinion, broke down the quantitative metrics used to determine if the fish were trending toward recovery, and pointed out that the metrics are flawed because they only assess growth and not “actual population numbers.”<sup>23</sup> By not acknowledging the dangers of sustained low abundance numbers—which could ultimately prove unsustainable—the court found that NOAA fisheries acted arbitrarily and capriciously.<sup>24</sup>

Second, the court examined the “Uncertain Habitat Benefits” found in the 2014 BiOp.<sup>25</sup> The court held that NOAA fisheries assumed too specific of numerical benefits when assessing habitat improvement, and the benefits described in the BiOp did not allow for any margin of error.<sup>26</sup> Instead, there would be too many “layers of uncertainty.”<sup>27</sup> The defendants argued that NOAA fisheries relied on the best available science, but the court countered that many independent scientists “repeatedly expressed criticism” and that NOAA fisheries could not state that they relied on the best available science without also addressing the criticism.<sup>28</sup> Additionally, NOAA fisheries relied on the completion of certain habitat restoration projects in the 2014 BiOp. However, the court showed that many of those projects were far behind schedule, and therefore determined that in relying on the occurrence of those projects, NOAA fisheries acted arbitrarily and capriciously.<sup>29</sup>

Third, the court assessed the impact of climate change on the Columbia River watershed, and found that NOAA fisheries analysis:

fail[ed] to properly analyze the effects of climate change, including: its additive harm, how it may reduce the effectiveness of the reasonable and prudent alternative options, particularly habitat actions that are not

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20 *Id.* at \*15.

21 *Id.* at \*15.

22 *Id.* at \*15.

23 *Id.* at \*61.

24 *Id.* at \*72.

25 *Id.* at \*17.

26 *Id.* at \*17.

27 *Id.* at \*103.

28 *Id.* at \*108.

29 *Id.* at \*123.

expected to achieve full benefits for decades, and how it increases the chances of an event that would be catastrophic for the survival of the listed endangered or threatened species.<sup>30</sup>

In the full opinion, the court broke the science down even further. The court included an analysis of how NOAA fisheries relied on recovery actions meant to offset the impact of the FCRPS, but did not recognize that those actions “will be diminished by climate change.”<sup>31</sup> The court also found that NOAA fisheries did not rely on any data regarding warming oceans, but instead assumed that recent ocean temperatures would remain stable.<sup>32</sup>

Finally, the court found that the environmental impact statements prepared in earlier BiOps were not sufficient to satisfy NEPA, and therefore the Corps needed to prepare a singular environmental impact statement with the 2014 BiOp. The court outlined that although there had been “years of underlying litigation” regarding BiOps in the Columbia River watershed, and although that litigation did not trigger NEPA, there was no reason the court could not instigate a NEPA analysis here.<sup>33</sup> Further, because of the ever-changing science in this case, the old EIS’s “fail to meet the Action Agencies’ NEPA obligations because they are outdated and do not consider all of the action in the [reasonable and prudent alternatives].”<sup>34</sup> Ultimately, the court found that the combined environmental impact statements from earlier BiOps were too broad, unrelated, or too specific, and that a single environmental impact statement was necessary in this case.<sup>35</sup>

#### IV. CONCLUSION

The court in *National Wildlife Federation* concluded with a harsh criticism of NOAA fisheries, the Corps, and BOR, for having “ignored the admonishments of Judge Marsh and Judge Redden to consider more aggressive changes to the FCRPS to save the imperiled listed species”<sup>36</sup> and stated that “the 2014 BiOp continues down the same well-worn and legally insufficient path taken during the past 20 years.”<sup>37</sup> Consequently, the court found that a full NEPA analysis would allow “innovative solutions to be considered” that “may finally be able to break through the bureaucratic logjam that maintains the status quo.”<sup>38</sup> As a final means of ensuring that some form of action happens in this case, the court

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30 *Id.* at \*21.

31 *Id.* at \*149.

32 *Id.* at \*152.

33 *Id.* at \*198. (the court cited the recent holding in *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 640-42 (9th Cir. 2014), stating “the ninth circuit held clearly and explicitly, for the first time, that action agencies adopting a record of decision implementing a biological opinion *must* prepare an EIS”) (emphasis original).

34 *Id.* at \*202.

35 *Id.* at \*211.

36 *Id.* at \*234.

37 *Id.* at \*27.

38 *Id.* at \*234.

retained jurisdiction so that the Federal defendants could develop more appropriate mitigation measures, produce a compliant BiOp, and prepare an environmental impact statement compliant with NEPA.<sup>39</sup> Perhaps, with this ruling, the necessary actions to protect the Columbia and Snake River salmonids have finally left port and are sailing into uncharted waters. But until the next BiOp, the issues in the Columbia River watershed will continue to tread water and stagnate.

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39 *Id.* at \*240.