

## **Ninth Circuit Affirms Judge Redden's Remand of NMFS's 2004 Biological Opinion for Federal Columbia River Power System**

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On April 9, 2007, the U.S. Court of Appeals for the Ninth Circuit upheld a controversial ruling by Judge James A. Redden of the U.S. District Court for the District of Oregon that had required the National Marine Fisheries Service (NMFS) to revise its 2004 biological opinion for dam operations on the Columbia and lower Snake rivers (*National Wildlife Federation v. NMFS*, 9th Cir. No. 06-35011). Although this decision does not concern a hydroelectric project licensed by the Federal Energy Regulatory Commission, the court's ruling will have wide-ranging implications on Pacific Northwest water and power operations.

The Endangered Species Act (ESA) requires federal action agencies, such as the Army Corps of Engineers and Bureau of Reclamation (operators of the subject dams) to consult with federal fisheries agencies to assess potential risk to listed species and appropriate mitigation measures, culminating in a formal biological opinion ("BiOp"). In this case, NMFS issued a BiOp in 2004 for continued operations of the Federal Columbia River Power System (FCRPS), which was challenged by environmental groups. Judge Redden found the 2004 BiOp wholly deficient and ordered NMFS to try again.

The Ninth Circuit agreed with Judge Redden that the 2004 BiOp "contained structural flaws that rendered it incompatible with the ESA." The prime deficiency in the BiOp was the assumption that existing FCRPS dams were constructed under Congressional authorization that predated ESA, and therefore, NMFS must consider them part of the environmental baseline for ESA purposes. The court rejected this analysis and held that the NMFS improperly used a hypothetical "reference operation" in its jeopardy analysis to omit analysis of the effects of related operations that NMFS deemed "nondiscretionary." According to the court, "[a]ll aspects of FCRPS operations, and any dam maintenance or structural modifications, are within the agencies' discretion...."

Moreover, the Ninth Circuit agreed with Judge Redden that the 2004 biological opinion "impermissibly failed to incorporate degraded baseline conditions into its jeopardy analysis," by evaluating the effects of the dams' operations compared to the reference operation, rather than analyzing whether the dams' effects, in combination with baseline conditions, "would tip the species into jeopardy." The Ninth Circuit emphasized that it was not requiring NMFS to include the entire environmental baseline in the "agency action" subject to review. However, the court did conclude that the "continued operation of FCRPS dams constitutes an 'existing human activity' that endangers the fishes' survival and recovery," which must be analyzed by NMFS in its BiOp.

Further, the court affirmed Judge Redden's finding that the 2004 BiOP failed to adequately consider the impact of FCRPS dam operations on the listed species' chances of recovery. The court criticized NMFS's approach of assessing the impact on survival and recovery together, stating that the agency must assess impacts to survival and recovery independently.

The Ninth Circuit also held that "NMFS violated the ESA by failing to ensure that proposed FCRPS operations would not destroy or adversely modify critical habitat for any listed fishes." According to the court, the NMFS's critical habitat determination was inadequate because it did not consider the short-term impact of FCRPS dam operations on listed species' life cycles and migration patterns, improperly relied on projected long-term improvements to critical habitat, and rendered its analysis with insufficient information.

Finally, the Ninth Circuit affirmed the lower court's remand order, which required NMFS to provide a "failure report" to the district court if it believes the agencies will be unable to develop a proposed action that avoids jeopardy to listed fishes and mandated that the agencies consult with interested tribes and states. Specifically, the court concluded that Judge Redden's collaboration requirement was "justified" because it would reasonably ensure that NMFS complied with the ESA requirement that agencies "use the best scientific and commercial data available" in their decision-making.

In summary, the court rejected NMFS's claim that it need only analyze whether continued operation of the existing dams would make matters appreciably worse for salmon. Instead, the court held that NMFS must ensure that the dams not only do not jeopardize salmon, but that operations plans provide for their recovery. This case raises questions about the status of other existing dams subject to ESA consultation requirements.

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