

9-1-2004

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2004 U.S. Dist. LEXIS 15239 (D. Or. July 29, 2004)

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Kevin Kennedy, Court Report, Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2004 U.S. Dist. LEXIS 15239 (D. Or. July 29, 2004), 8 U. Denv. Water L. Rev. 256 (2004).

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that it would substantially alter its approach based on the remanded opinion. Further, the court found there was no basis to conclude continuing with the instant action would adversely affect the remanded proceedings or other concurrent proceedings involving the Upper Snake River. Accordingly, the court denied the motion to stay the proceedings.

Kevin Kennedy

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2004 U.S. Dist. LEXIS 15239 (D. Or. July 29, 2004) (holding a report on the effects of a proposed curtailment of water spills on salmon habitat constituted arbitrary and capricious action).

The National Marine Fisheries Service ("NMFS") issued a biological opinion ("BioOp") in December 2000 pursuant to the Endangered Species Act ("ESA"). The BioOp addressed the effects of the Federal Columbia River Power System ("FCRPS") on salmon Evolutionary Significant Units ("ESUs"). The report concluded that FCRPS operations threatened a number of ESUs and proposed a Reasonable and Prudent Alternative ("RPA") to mitigate the effects on the salmon. The National Wildlife Federation and various environmental groups (jointly "NWF") challenged the BioOp on grounds that the RPA's conclusions relied on federal, state, and private mitigation actions not reasonably certain to occur. The United States District Court for the District of Oregon granted NWF summary judgment and remanded the BioOp to the NMFS to compose a report based upon reliable data. However, the court allowed the BioOp to remain in effect during the remand period.

During this remand period, the United States Army Corps of Engineers ("Corps") and the Bonneville Power Administration ("BPA") issued proposals to modify the summer spill program. On July 1, 2004 the NMFS issued its findings on the FRCPS plan and approved the reduced the spill proposals. A week later, the Corps committed itself to the spill modifications set forth in the plan. On July 9, 2004 the NWF filed an amended complaint under the Administrative Procedure Act ("APA") alleging that the NMFS and the Corps illegally changed the spill program. The NWF sought a preliminary injunction to enjoin the Corps from implementing the spill proposals and to require the NMFS to withdraw their report approving the Corps' action.

The test regarding whether to grant a preliminary injunction involves a balancing of "the plaintiff's likelihood of success against the relative hardship to the parties." The court qualified this test, stating that under the ESA, "the balance of hardships and public interest tipped heavily in favor of the protected species." The court thus held the standard only required that the plaintiff show a future ESA violation was likely to occur.

The Corps and the NMFS defended the spill curtail on the basis of mitigation measures, including a 100,000 acre foot release from the Brownlee Reservoir. The court rejected their reasoning because the mitigation plan incorrectly assumed that the water released from Brownlee Dam would be “new water” from an additional source, and not water already assumed released under the original spill program. Additionally, the court found the NMFS made an unfounded assumption that the Brownlee release occur at a uniform rate over 21 days, when in fact, no such agreement existed and prior releases of Brownlee water had not been uniform.

The court thus found the NMFS report to be arbitrary and capricious, because the NMFS based its conclusions upon unsupported data. The court weighed the danger to the salmon against public interest and enjoined the Corps from curtailing the summer spills. The court declined to order the NMFS to withdraw their report based on the court’s conclusion that enjoining the Corps alone created a sufficient remedy. Thus, the court granted in part and reversed in part the NWF’s motion for preliminary injunction.

Kevin Kennedy

West Virginia Rivers Coalition v. Envtl. Prot. Agency, No. 03-1022, 2004 U.S. Dist. LEXIS 2574 (E.D. Pa. 2004) (dismissing as moot West Virginia Rivers Coalition’s request for a declaratory judgment compelling EPA to issue water quality standards for manganese and iron; partially granting the West Virginia Rivers Coalition motion for summary judgment and ordering the Environmental Protection Agency to consider the effect of 3-methyl-4-chlorophenol on humans and fish; denying the West Virginia Rivers Coalition motion for summary judgment regarding the Environmental Protection Agency’s decisions to approve state Water Quality Standards when based on appropriate evidence; (3); and allowing the West Virginia Rivers Coalition to file a claim for attorney’s fees).

The West Virginia Rivers Coalition (“WVRC”), a nonprofit environmental group, brought this suit in the United States District Court for the Eastern District of Pennsylvania in response to the Environmental Protection Agency’s (“EPA”) approval of several Water Quality Standards (“WQSs”) proposed by the state of West Virginia. The WVRC sought summary judgment that the approval of these standards violated the Clean Water Act (“CWA”) because the approvals were arbitrary, capricious, and an abuse of discretion. The WVRC also sought a declaratory judgment to force the EPA to comply with nondiscretionary procedures of the CWA.

The first two WQSs challenged by the WVRC concern the level of manganese and iron. In October 1993, West Virginia proposed an increase in the allowable level of these pollutants and submitted the