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## Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 254 F. Supp. 2d 1196 (D. Or. 2003)

Brett Johnson

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issue.

Therefore, the court ordered the EPA to take final action and comply with the CWA's ninety-day requirement commencing at the date of the court order.

*Gerritt James Koser*

**Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 254 F. Supp. 2d 1196 (D. Or. 2003)** (holding agency issuing a biological opinion in accordance with the Endangered Species Act must consider all areas that directly or indirectly affect the endangered species due to the proposed action and not just the immediate action area).

The dispute in this case arose over whether a biological opinion issued by the National Marine Fisheries Service, a sub-agency of the National Oceanic and Atmospheric Administration ("NOAA"), properly considered all of the effects that the Federal Columbia River Power System ("FCRPS") would have on endangered and threatened salmon and steelhead in the Columbia River basin. The United States District Court for the District of Oregon held that NOAA's report was arbitrary and capricious.

FCRPS consists of fourteen dams located in the Snake River basin and the upper and lower Columbia River basin. On December 21, 2000, following consultation in accordance with section 7 of the Endangered Species Act ("ESA"), NOAA issued a biological opinion ("2000BiOp") that addressed effects FCRPS's future actions would have on endangered salmon and steelhead in the Columbia River basin. NOAA's opinion concluded that FCRPS's proposed actions would indeed jeopardize several endangered and threatened species of salmon and steelhead; however, NOAA proposed another action FCRPS could pursue that would not further jeopardize the endangered fish. The 2000BiOp included short and long-term federal actions to modify hydro-power operations to improve the survival of salmon passing through the dams, as well as short and long-term federal actions that would decrease FCRPS's impact on habitat, hatchery, and harvest of the endangered fish. NOAA also developed its 2000BiOp considering the effects of FCRPS's operations in coordination with other ongoing Federal and regional processes. The action area in NOAA's 2000BiOp included only the immediate area where FCRPS's actions would directly affect the endangered salmon; NOAA's action area did not include areas where FCRPS's actions would indirectly affect the endangered salmon. NOAA further concluded that if the recommendations failed to limit the negative impact on the fish, referring back to consultation under section 7 would be necessary. National Wildlife Federation ("NWF") along with several environmental and conservation organizations filed suit against NOAA, arguing that NOAA's "no-jeopardy" conclusion was arbitrary and capricious.

NWF argued that (1) NOAA failed to consult under section 7 for several of the federal mitigation actions; and (2) the states, regions, treaty tribes, and private parties were not certain to act in accordance with 2000BiOp as NOAA asserted. NWF further contended that the 2000BiOp did not rationally connect NOAA's "no-jeopardy" conclusion with available information. NOAA argued that NWF defined the action area too broadly, that consultation was only necessary in regards to the immediate action area which the NOAA narrowly defined, and the proposed federal action occurred outside the action area and did not require section 7 consultation. NOAA further contended that any non-federal actions do not need to be reasonably certain to occur.

The court stated that 50 C.F.R. Section 402.02 required NOAA to assess the biological impact of FCRPS's operations on "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." Based on this regulation, the court held that even though it must give a great deal of deference to NOAA, more than just the immediate action area would be directly or indirectly affected by FCRPS's proposed actions; therefore NOAA's defined action area was arbitrary and capricious. The court also stated that NOAA specifically relied on off-site federal actions that had not undergone section 7 consultation and non-federal mitigation actions that are not reasonably certain to occur, and that the ESA required NOAA to rely solely on mitigation actions that have already undergone section 7 consultation. Thus, the court granted NWF's motion for summary judgment on the claim that the no-jeopardy conclusion in the 2000BiOp was arbitrary and capricious, and remanded the case in order to give NOAA the opportunity to reevaluate its plan and consider only mitigating actions that are reasonably certain to occur, as well as actions that have already undergone section 7 consultation.

*Brett Johnson*

**New Jersey v. Gloucester Env'tl. Mgmt. Servs., Inc., 264 F. Supp. 2d 165 (D.N.J. 2003)** (enforcing consent decree and directing finalization of a permit for pretreated landfill effluent to be discharged through a groundwater extraction system).

At issue in this case was the enforcement of a consent decree for closure and remediation of a landfill located in Gloucester Township, New Jersey. The GEMS Phase II Trust ("Trust"), established to oversee remediation of the Gloucester Environmental Management Services, Inc. ("GEMS") landfill, moved to enforce the consent decree concerning remediation of the landfill in the United States District Court for the District of New Jersey. Pursuant to the consent decree, the Trust constructed a groundwater extraction system and sought to discharge pretreated effluent through the sewage collection system for final treatment at Camden County Municipal Utilities Authority's