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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs-Appellants,

and

STATE OF OREGON,

Intervenor-Plaintiff.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendants,

and

NORTHWEST IRRIGATION UTILITIES, et al.,

Intervenor-Defendants.

No. CV01-640-RE (Lead Case)
Case No. CV05-0023-RE
(Consolidated Cases)

INLAND PORT & NAVIGATION GROUP'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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COLUMBIA SNAKE RIVER IRRIGATORS ASSOCIATION, et al.,

Plaintiffs,

v.

CARLOS M. GUTIERREZ, et al.,

Defendants.

I. Introduction.

The Inland Ports & Navigation Group (IPNG) is comprised of public ports and members of the tug and barge industry. It represents the interests of commerce and navigation on the Columbia River system in this matter. IPNG supports solutions and collaboration to protect salmon in the Columbia River while maintaining a viable navigation channel for commerce on the River. IPNG opposes the Motions for Summary Judgment pending before this court, and submits this brief to identify discrete issues that merit consideration in light of IPNG's interests.

Plaintiffs' contention that under Section 401 of the Clean Water Act, the several states adjoining the Columbia and Snake Rivers must certify that the incidental take statement for Federal Columbia River Project System (FCRPS) does not violate water quality standards is wrong because Endangered Species Act incidental take statements are not Clean Water Act "licenses and permits" subject to Section 401 jurisdiction. Plaintiffs' novel interpretation of Section 401 also would give individual states unprecedented veto power over federally administered dam operations. Finally, no Clean Water Act provision may "affect or impair" the Army Corps of Engineers' Congressionally delegated duty to maintain navigation on the Columbia and Snake Rivers.

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II. Undisputed Factual Background.

After completion of the Bonneville Dam in 1937, the United States Army Corps of Engineers issued a report addressing development of the Columbia and Snake Rivers to Lewiston, Idaho for slack water navigation, flood control and other purposes. H.R. 704, 75th Cong., 3d Sess. 8-11 (1938) (report of the Board of Engineers for Rivers and Harbors). The notion of the development of an inland navigation system to Lewiston, Idaho was later approved by Congress. In 1945, Congress not only authorized construction of the McNary Dam, it authorized the development of an inland navigation system on the Snake River:

> Snake River, Oregon, Washington and Idaho: The construction of such dams as are necessary, and open channel improvements for purposes of providing slack water navigation and irrigation in accordance with the plans submitted in House Document Numbered 704, Seventy-Fifth Congress, with such modifications as do not change the requirement to provide slack-water navigation as the Secretary of War may find advisable after consultation with the Secretary of the Interior and such other agencies as may be concerned . . .

Rivers and Harbors Act of 1945, § 2 (1945).

Five years later, Congress authorized construction of the John Day and The Dalles Dams, pursuant to Section 204 of the Rivers and Harbors Act of 1950. These dams were authorized "for the benefit of navigation and the control of destructive flood waters . . ." In 1962, Congress passed the Flood Control Act of 1962 which amended all earlier acts establishing the dams on the Columbia and Snake Rivers and specifically mandated

> [t]hat the depth and width of the authorized channel in the Columbia-Snake River barge navigation project shall be established as fourteen feet and two hundred and fifty feet, respectively, at minimum regulated flow.

Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1193 (1962). This Act explicitly protects navigation by establishing a 14 foot by 250 navigation channel "at minimum regulated flow" subject to Corps' jurisdiction. IPNG's members are direct

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beneficiaries of these federal laws established to preserve commerce on the Columbia and Snake Rivers.

III. Plaintiffs' Clean Water Act Claim Fails.

A. Section 401 does not Apply to Incidental Take Statements.

Plaintiffs argue that the incidental take statement issued for the operations of the FCRPS and implementation of the reasonable and prudent alternatives (RPAs) in the 2008 BiOp is invalid because none of the states issued water quality certifications for this statement under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. Plaintiffs are wrong because incidental take statements do not address state water quality standards – the subject matter of Section 401 – and are not "permit[s] or license[s]" subject to federal Clean Water Act jurisdiction.

Section 401 specifies that

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act [33 USCS §§ 1311, 1312, 1313, 1316, 1317].

33 USC §1341 (a)(1).[1]

Under Section 401, "an applicant for a federal license for any activity that may result in a discharge into the navigable waters of the United States must apply for a certification from the state in which the discharge originates (or will originate) that the licensed activity will comply with state and federal water quality standards." *American Rivers v. FERC*, 129 F.3d 99, 102 (2d

[1] Similarly, Oregon's delegated and approved program mirrors the federal requirement that limits its certification authority to "license[s] or permit[s] to conduct any activity that may result in discharge to navigable waters." *See* OAR 340-048-0015.

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Cir. 1997) (citing *P.U.D. No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994)).

Section 401 gives authority to individual states with delegated Clean Water Act programs to review "activities . . . which may result in any discharge into the navigable waters" for compliance with state water quality standards. *See* 33 U.S.C. 1341(a)(1). Plaintiffs acknowledge that Section 401 does not define a "federal license or permit." *See* Plaintiffs Memorandum in Support of Summary Judgment, at p. 54.[2] When construing a statutory term,[3] the implementing agency's interpretation of that term is given strong deference. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (implementing agencies entitled to deference in reasonable interpretations of a statute).

The Environmental Protection Agency (EPA) implements the Clean Water Act. The EPA has indicated that the scope of 401 certifications are in fact limited to activities that may result in a discharge.

> EPA has identified five Federal permits and/or licenses that authorize activities that may result in a discharge to the waters: permits for point source discharge under section 402 and discharge of dredged and fill material under section 404 of the Clean Water Act; permits for activities in navigable waters that may affect navigation under sections 9 and 10 of the Rivers and Harbors Act (RHA); and licenses required for hydroelectric projects issued

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[2] Regulations do not clarify the term "license or permit" any more than the statute: "License or permit means any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into the navigable waters of the United States." 40 CFR §121.1(a)

[3] Plaintiffs argue that two cases support the proposition that an incidental take statement is a "license or permit" under Section 401. However, neither case is on point. In *Bennett et al. v. Spear et al*, 520 U.S. 154 (1997), the Court held that the petitioners had standing and could proceed with the ESA citizen suit and APA claims without deciding or holding that an incidental take statement was a permit or license under the Clean Water Act, Section 401. In *Ramsey v. Kantor*, 96 F.3d 434 (9th Circ. 1996), the Court held that the incidental take statement was equivalent to a "major federal action" for purposes of NEPA. The Court did decide the meaning of "license or permit" under Section 401.

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> under the Federal Power Act. There are likely other Federal permits and licenses, such as permits for activities on public lands, and Nuclear Regulatory Commission licenses, which may result in a discharge and thus require 401 certification. Each State should work with EPA and the Federal agencies active in its State to determine whether 401 certification is in fact applicable.

EPA, Water Quality Handbook, Ch.7.6.3. (2007).[4]

The EPA correctly has construed "permits and licenses" to be limited to those permits or licenses that regulate actual discharges to navigable waters. Plaintiffs point to no authority, nor does IPNG know of any authority, that extends the scope of Section 401 certifications to activities outside of those that result in a "discharge." Nor do Plaintiffs argue that FERC exceeded its authority to license these dams (that is, "discharge") without prior 401 certification. *See* 16 U.S.C. § 797(e) (vesting FERC under the Federal Power Act with authority to issue licenses for hydropower). This incidental take statement is not a "license or permit" subject to Clean Water Act jurisdiction because it does not authorize a discharge into navigable waters. The Court should deny Plaintiffs' summary judgment motion.

B. Individual States Cannot Veto or Impede the Application of Federal Law.

Plaintiffs' novel interpretation of Section 401 of the Clean Water Act would result in granting the states unprecedented and unauthorized control over the implementation of Clean Water Act.

1. Individual State Consultations under Section 401 for Incidental Take Permits Would Grant the States Unequal and Unauthorized Decision-Making Power.

Under Plaintiffs' novel interpretation of Section 401, each state will separately apply its own water quality regulations to the incidental take statement issued for dam operations. The

[4] Available at http://www.epa.gov/waterscience/standards/handbook/chapter07.html#section6.

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result would be that individual state water quality regulations would determine what operations could or could not occur in the Columbia and Snake River.

Congress has already acted to prevent undue influence by one state over another when addressing fish and wildlife matters by passing the Northwest Power Act, 16 U.S.C. §839. The purpose of the Northwest Power Act is to account for and bring order to competing stakeholder interests on the Columbia River by creating a program to

> protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries. Because of the unique history, problems, and opportunities presented by the development and operation of hydroelectric facilities on the Columbia River and its tributaries, the program, to the greatest extent possible, shall be designed to deal with that river and its tributaries as a system.

16 U.S.C. §839b(h)(1)(A).[5]

The Northwest Power Act establishes "a unique structure of cooperative federalism"[6] that creates a system of ordered decision making to account for a broad range of interests. Plaintiffs' proposed requirement that each state must provide Section 401 certifications for incidental take statements would enable one state to veto the will of other stakeholders in the system, and would frustrate and undermine the Northwest Power Act, in at least three ways.

First, Northwest Power Act requires collaboration among the states and stakeholders in matters pertaining to the protection of fish and wildlife on the Columbia River. *See* 16 U.S.C. §

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[5] The Northwest Power Act also strives to "provide for the participation and consultation of the Pacific Northwest States, local governments, consumers, customers, users of the Columbia River System (including Federal and State fish and wildlife agencies and appropriate Indian tribes), and the public at large within the region in—providing environmental quality." 16 U.S.C. §839(3); *see also Northwest Resource Info. Center*, 25 F.3d at 875 ("The appellants reply that the specific authorization of citizen suits under the Endangered Species Act, 16 U.S.C. § 1540(g), takes precedence over the jurisdictional provision of the Northwest Power Act. To the contrary, the Endangered Species Act is of a general character governing citizen suits throughout the United States. The Northwest Power Act is explicit in its jurisdictional requirements for the administration of the Columbia River Power System.") (emphasis added).

[6] *Northwest Environmental Defense Center v. BPA*, 477 F.3d 668, 685 (9th Cir. 2006).

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839a(a)(3). (This Court has also instructed the parties to work collaboratively on such matters. *See* Overview of NOAA Fisheries Columbia Basin Consultations (May 5, 2008)). For the past two years, the four states, seven tribes and four federal agencies have collaborated on the FCRPS. *Id.* The 2008 FCRPS Biological Opinion furthers this effort by utilizing a Regional Implementation Oversight Group to address issues germane to the BiOp. *See* 2008 FCRPS Biological Opinion, Response to Comments, Comment 22-A, at p. 44 (May 5, 2008). Requiring a Section 401 certification process would be contrary to, and could reverse, this collaborative process which, by design, allows for significant -- but not obstructionist -- state participation.

Second, majority decision making would be vitiated. The Act requires a majority vote on decisions implemented by the Northwest Electric Power and Conservation Planning Council (Council). *See* 16 U.S.C. § 839b(c)(2). Were Plaintiffs' incidental take statement certification scheme to be adopted, each state would rely on its own certification process to determine whether, or under what conditions, dams should operate. As a result, instead of majority-vote decision making, each state would be given the power to veto consensus decisions made by other stakeholders. Further, the Act carves out and does not preempt state control over certain functions of state law, such as water appropriations. *See e.g.*, 16 U.S.C. §839g(h). However, it does not specifically include a similar savings clause for state Clean Water Act certifications under Section 401.

Third, Plaintiffs' Section 401 certification argument would violate the intent of the Fish and Wildlife Program unanimously created by the Northwest Power Planning Council. The Council develops the *Columbia River Basin Fish and Wildlife Program* that considers recommendations made by the states' fish and wildlife agencies, tribes, and other interested parties. *See e.g.*, Northwest Power and Conservation Council's Columbia River Basin Fish and

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Wildlife Program, at p. 5, (Draft for Public Review, Council Doc. 2008-11, 9/2/08). The Council develops the Program and monitors its implementation by the BPA, Corps of Engineers, Bureau of Reclamation, FERC and its licensees.[7] *Id.* The Fish and Wildlife Program embraces and adopts the objectives of the 2008 BiOp,[8] and strives to be "consistent with the biological objectives of this program and with the efforts to meet ESA requirements in the FCRPS Biological Opinion and state and federal water-quality standards under the Clean Water Act."[9] *Id.* at p. 64. To implement the program, states work collaboratively on the regulatory issues affecting the FCRPS.[10] Any requirement for a state-by-state Section 401 certification process would frustrate the purpose of this Program and be contrary to the unified, ordered, and collaborative process established for its implementation.

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[7] The Draft 2008 can be found at: http://www.nwcouncil.org/library/2008/2008-11.pdf.

[8] *See* 2008 Draft, at p. 57 ("In turn, the Council's Mainstem Plan is now built on recognizing these plans and biological opinions as containing the baseline objectives and measures for the mainstem portion of the Council's fish and wildlife program.")

[9] "One of the overarching objectives for the program is the recovery of ESA-listed anadromous and resident fish affected by development and operation of the hydrosystem. Federal hydrosystem operations to benefit fish now are focused on listed populations through the objectives in NOAA Fisheries' 2008 Biological Opinions on the Operation of the Federal Columbia River Power System ..." 2008 Draft, at p. 60.

[10] *See* Letter from State of Oregon Department of Fish and Wildlife to B. Booth, Northwest Power and Conservation Council, Attachment 1, *Summary of Recommendations for Amendments to the Columbia River Basin Fish and Wildlife Program by the State of Oregon* (April 4, 2008)("Integrate Program the with the Clean Water Act. The Council should recognize that the Columbia River and many of its tributaries are currently listed as water quality-limited water bodies. Pollutants adversely affect several beneficial uses including a healthy functioning ecosystem, fish passage and migration. The Council should support the region in meeting its collective Clean Water Act responsibilities and identifies measures that address water quality.") (emphasis added). Full comments can be found at: http://www.nwcouncil.org/fw/program/2008amend/view.asp?id=89.

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2. The Corps' Duty to Maintain Navigation Supersedes the Requirements of the Clean Water Act Requirements.

On different grounds, but under the same principle, the Eighth Circuit in *In re Operation of the Missouri River System Litigation*, 418 F.3d 915 (8th Cir. 2005) rejected an attempt by one state to claim that state water quality standards trumped the Corps' delegated authority to control waters flows on the Missouri River.[11] The Eighth Circuit also confirmed in that same case that under the Clean Water Act, the Corps' authority (and duty) to maintain navigation is paramount to any conflicting requirements in the Clean Water Act. This navigational primacy is found in Section 511 of the Act, which states that the Clean Water Act "shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army . . . to maintain navigation . . . ." 33 U.S.C. § 1371(a) (emphasis added). As stated by the Eighth Circuit, "[o]n its face, §1371(a) exempts the Corps, which operates under the authority of the Secretary of Army, from complying with the CWA when its authority to maintain navigation would be affected." *In re Operation of the Missouri River System Litigation, supra*, 418 F.3d at 918 (emphasis added).

The Flood Control Act of 1962 mandates that the Corps maintain a navigation channel of fourteen feet by 250 feet "at minimum regulated flow" on the Columbia and Snake Rivers. The Clean Water Act must be implemented so that this channel is not affected. Regardless of the outcome of Plaintiffs' motion, the Corps' delegated duty to maintain a "minimum regulated flow" for navigation on the Columbia and Snake Rivers must be preserved.

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[11] The Missouri River case involved a claim by North Dakota that the Corps' proposal to release water from Lake Sakakawea would violate state water quality standards by increasing temperature in the Lake. Among the Court's holding in that case was that "North Dakota cannot enforce its state water quality standards against the Corps, a federal agency, unless Congress has unequivocally waived the federal government's sovereign immunity from suit." *Id.* at 917 (citations omitted).

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IV. Dam Breaching is Not an Option Available to the Parties, Corps or the Court.

The Nez Perce Tribe, an amicus party, continues to advocate for the breach of the Snake River dams. Because the dams have been created pursuant to an act of Congress, their continued existence is a political, not a legal, issue. *See Nat'l Wildlife Fed'n v. United States Army Corps of Eng'rs*, 384 F.3d 1163, 1179 (9th Cir. 2004) ("[T]he creation of dams is a matter of policy that is within the province of Congress, not the courts."). The Endangered Species Act, and the Clean Water Act for that matter, does not "expand the powers conferred on an agency by its enabling act." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992). Absent any grant of authority by Congress to breach the dams, dam breaching remains a policy question subject to legislative action and cannot be an action reasonably certain to occur under the authority granted to the acting agencies. Therefore, dam breaching does not qualify as a reasonable and prudent alternative requiring consideration in the 2008 BiOp.

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V. Conclusion.

Plaintiffs filed this case in 2001. They have waited seven years to raise a novel theory in support of their attempt to affect the implementation of the FCRPS BiOp. No case has ever held that an incidental take statement is a "permit or license" for purposes of Clean Water Act jurisdiction. Plaintiffs' theory is contrary to the Clean Water Act, EPA guidance documents, the Northwest Power Act, and principles of federalism. It would also have the affect of impairing navigation on the Columbia River in contravention to the Flood Control Act of 1962 and Section 511 of the Clean Water Act.

The 2008 BiOp presents a comprehensive, rational, and reasoned analysis for protection of salmonid species in the Columbia River. The reasonable and prudent alternative proposed exceeds the jeopardy and adverse modification standards under the Endangered Species Act. For the reasons set forth above, Plaintiffs' motion should be denied.

Dated this 24th day of October 2008.

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