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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et
al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, et al.,

Defendants.

Civil No. 01-0640-RE (Lead Case)
CV 05-0023-RE
(Consolidated Cases)

**MONTANA AND THE BPA
CUSTOMER GROUP'S RESPONSE
TO NWF'S NOTICE REGARDING
INJUNCTION PROCEEDINGS**

The State of Montana and the BPA Customer Group (“Customer Group”) hereby submit a joint response to National Wildlife Federation’s (“NWF’s”) “Notice Regarding Injunction Proceedings.” While the issues raised by NWF’s filing are more appropriate for consideration in the remand process, in light of the inaccuracies contained in NWF’s submission, Montana and the Customer Group submit this brief response in efforts to set the record straight concerning the status of current operations, and the biological status of the affected species. We are particularly concerned that the Court have a balanced, scientifically, and factually proven account of current operations and their effect on the species because of the Court’s continuing jurisdiction and oversight of NOAA Fisheries’ administrative process in producing a new Biological Opinion for the Federal Columbia River Power System (“FCRPS”).

NWF asserts that while more could be done to aid fish under current operations, competing regulatory mandates prevent such measures from being implemented. Specifically, NWF complains that approximately 4.4 million acre feet of court-ordered spill allegedly did not occur in the spring of 2006 because of the federal operators’ efforts and on-going obligation to meet total dissolved gas (“TDG”) water quality criteria established by the States of Oregon and Washington and approved by EPA to protect the health of these fish. NWF further warns that these gas caps effectively negate the ability of this Court to order additional spill to benefit fish and argues in favor of their modification.

Contrary to the NWF’s claims, a careful analysis of the Corp’s actual spill data using the methodology advanced by the Fish Passage Center and relied on by NWF (see NWF’s Exhibit 1) reveals that the Corps spilled in *excess* of the Court’s orders by *twenty three percent* last year. See <http://www.cbr.washington.edu/dart/>. Indeed, the Fish Passage Center memorandum relied on by NWF completely fails to account for the frequent occurrence of actual spills in *excess* of

court-ordered amounts. *See* FPC memorandum, attached to NWF’s Notice as Ex. 1. Of course, not all spill is volitional, and not all spill is biologically beneficial. And, while daily spill statistics are informative, they do not by themselves meaningfully explain in-river conditions as survival levels are influenced by the cumulative effect of spill operations during the three to four week period that fish are present in the river at a given time. Thus, what level of spill occurs on a given day is less important than the overall in-river conditions for fish as they migrate, which includes, *inter alia*, the levels of dissolved gas to which these are exposed.

Nonetheless, even if we assumed *arguendo*, that NWF was correct in its calculations, the claimed reduction in spill of 4.4 million acre feet is a very small percentage of the total volume of court-ordered spill in light of the fact that the Court has ordered that approximately 90 million acre feet of water be spilled.

In addition, the current gas caps already waive the Clean Water Act (“CWA”) standards established to protect fish from gas bubble disease. Any increases in the current waivers also result in increased risk to fish and other aquatic species. NWF surely appreciates the biological necessity of these gas standards having litigated a protracted CWA lawsuit seeking to bring the Corps into compliance with applicable water quality standards for dissolved gas and temperature at the lower Snake River Dams. *NWF v. U.S. Army Corps of Eng’rs*, Civ. No. 99-442-FR (D. Or 1999), 384 F.3d 1163 (9th Cir. 2004). As NWF itself emphasized in litigation before this Court:

“There is no dispute that high dissolved gas levels can be harmful to juvenile salmon because of gas bubble disease. . . . As the Corps itself notes, spilling causes the river flows to plunge into the water below the dams, trapping air in the water and resulting in high concentrations of [TDG]. High TDG can injure or kill juvenile and adult salmon, as well as resident fish and other aquatic organisms.’ Dissolved gas percentages can vary throughout the river, but’[a]n area of particular interest is the near field immediately below the dams, where TDG[]can reach 170% saturation-high enough to cause near-instantaneous death.”

NWF's Memorandum in Support of Plaintiffs' Second Motion for Summary Judgment at 19 (dated July 20, 2000) (attached as Ex. A hereto).

Putting aside for the moment the question of whether these gas caps should be amended, the fact remains that the gas caps are a function of state law which this Court has no jurisdiction to change. The gas caps were established through a robust public process and were determined by both states to be a biological imperative for the health of these fish. NWF and others will have ample opportunity to make their case either in favor of or against any future changes to the TDG standards, but that process is one that is outside this Court's purview.

In addition to its assertions regarding spill, NWF also contends that additional flow is necessary to offset the adverse effects that hydropower operations allegedly have on the species. NWF states that it is not seeking further injunctive relief because it has heard from this Court a number of times that the Court is not inclined to award such interim relief, believing that issues related to increased flow are complicated, unproven, and thus better left to expert consideration in the on-going administrative process established for issuance of a new BiOp.

The Independent Scientific Advisory Board's ("ISAB's") cautionary views on the benefits to salmon of flow augmentation should continue to be given great weight by this Court. As this Court previously emphasized in denying NWF's request for additional flow during the injunction proceedings governing the '06 river operations, "many questions remain" regarding the "relationship between river flows and salmon production" and "[t]he prevailing flow-augmentation paradigm, which asserts that in-river smolt survival will be proportionally enhanced by any amount of added water, is no longer supportable." Opinion and Order issued in *NWF v. NMFS*, No. 01-0640-RE (Dec. 29, 2005) (Docket #1221 at 16) (quoting ISAB report).

In short, while fish survival is likely to improve in good water years, when natural weather conditions simultaneously yield increased turbidity and lower temperatures, the ISAB's admonitions must be heeded when determining whether additional modifications to current operations should be pursued. The ISAB's view has not changed and no new scientific studies have been produced that calls its concerns into question. Moreover, even when natural conditions improve and allow for increased fish passage and migration through the hydropower system, NOAA Science Center data demonstrates that salmonid survival is not strictly a function of flow and that the relationships that determine salmon survival, as salmon migrate through the hydropower system, are not well understood. *See* Ex. 3 to NWF's Notice (demonstrating that survival rates are variable at each dam and is dependent on a myriad of factors including avian predation).

In fact, NOAA Science Center research has consistently shown that survival of salmon and steelhead from smolt to adult (SAR) is largely dictated by ocean conditions. *See* Ex. B (attached hereto)(NOAA Fisheries' presentation to NW Power and Conservation Council, on July 12, 2006, explaining that the year of ocean entry is the best predictor of how well chinook salmon will survive to adulthood). This presentation demonstrates that lifecycle survivals were as high in the late 1990s and early 2000s as they were during the 1960s, and further illustrates that current smolt to adult survivals are as high now as they were before the Snake River Dams were built.

NWF relies on excerpts of the Comparative Survival Study ("CSS") in efforts to demonstrate that Snake River Chinook and Steelhead continue to decline. In reviewing these excerpts and NWF's representations about what they mean, the Court should be aware that the CSS study has come under increased scrutiny due to scientific concerns and criticisms from a

number of scientists, including the ISAB. These concerns are summarized in the ISAB Review of the 2005 Comparative Survival Studies' Annual Report and Applicability of Comparative Survival Studies' Analysis Results. See www.nwcouncil.org/library/isab/isab2006-3.htm (expressing concerns over *inter alia*, study design, sample size and protocol, PIT-tagging, and the formulas used to compute relative survival rates) (attached hereto as Ex. C).

Finally, NWF presents forecasts of expected adult returns for 2007 that it claims are likely to be as bad if not worse than last year's returns. The Court should be leery of such representations in light of the fact that the forecasts for predicted adult salmon and steelhead returns last year were far lower than the actual returns for most stocks. See Ex. 4 to NWF's Notice. The Court should also be leery of NWF's attempt to link these projections to the purported need for additional spill.

The forecasts that NWF relies on demonstrate that returns for Willamette Spring Chinook were also the lowest since 2000. Yet these fish are not subjected to FCRPS dams, and therefore exhibit lifecycle mortality that is independent of dam passage mortality. The fact that this stock of fish is experiencing low returns independent of hydropower operations, is likely explained by ocean conditions.

In short, existing data does not suggest that a significant departure from current hydro operations is either necessary to ensure the survival and recovery of the species or will enhance in-river survival rates. What the data does show is that there are factors other than hydro operations which are responsible for the species' decline- factors that must be taken into account in the development of the 2007 BiOp- yet, which are beyond the power of the 2007 BiOp to rectify.

DATED this 1st day of February, 2007.

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CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and Fed.R. Civ. P. 5(d), I certify that on February 1, 2007, the forgoing MONTANA AND THE BPA CUSTOMER GROUP'S RESPONSE TO NWF'S NOTICE REGARDING INJUNCTION PROCEEDINGS will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon all Parties enrolled to receive such notice. The following will be manually served by first class U.S. mail:

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