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HON. MICHAEL H. SIMON

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, *et al.*,

Defendants.

Case No. 3:01-CV-00640-SI

THREE STATES' BRIEF RE PROPOSED NEPA PROCESS TIMETABLE

INTRODUCTION

Intervenor-Defendant States of Idaho, Montana and Washington (Three States) have a keen interest in the environmental impact statement that will result from this Court's direction that Federal Defendants comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, with respect to continued operation of the Federal Columbia River Power System. The Three States have participated actively in the Endangered Species Act component of this litigation and will be involved integrally in the NEPA remand process. The selection and analysis of the EIS alternatives will demand their active participation and a concomitant commitment by them of substantial resources.

The Three States agree that it is important to make timely progress on a sound FCRPS biological opinion (BiOp). They also agree NEPA will be an important process for identifying and evaluating the "innovative solutions" this Court referenced in its discussion of the utility of the NEPA process. Dkt. 2065 at 145. Furthermore, because the ultimate FCRPS BiOp, and associated reasonable and prudent alternatives (mitigation), will be informed by the NEPA process, the two analyses are linked and must be appropriately sequenced.

At the same time, the unique nature of the current remand is relevant to the immediate issue before this Court. Operation of the FCRPS, including mitigation activity, is an *ongoing* action, not a proposed *future* action. The mandated NEPA analysis thus will capture activity that even now is occurring. The common NEPA paradigm—*i.e.*, examination of planned, but unconsummated agency action—is thus not a neat fit.

Even more important, the remand timetable—for both NEPA and the BiOp—should be designed to reasonably encourage a thorough and considered analysis. It should veer towards a hastier approach only where necessary to avoid demonstrable risks to the listed species. The

Three States do not presume to second-guess the federal agencies on their documented estimation of a reasonable pace for the NEPA process. By contrast, tethering the NEPA timetable to the expiration of the current BiOp (December 31, 2018) risks short-circuiting the NEPA process with no countervailing necessity in terms of demonstrated risk to listed salmonids. That is especially true if the NEPA process genuinely takes the requisite "hard look" at *all* factors implicating the effects of the FCRPS on listed salmonids (as well as other fish and wildlife species), as the Court has admonished.

ARGUMENT

I. THE CURRENT ESA CONSULTATION TIMETABLE IS INAPPROPRIATE FOR USE IN THE NEPA REMAND PROCESS

In the ordinary case, a NEPA analysis and associated ESA consultation is best undertaken sequentially or concurrently. ESA consultation, simply put, produces a reasonably prudent alternative whose proposed implementation by an action agency triggers the NEPA process. *E.g.*, *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 602, 642-44 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 948, 950 (2015). Federal Defendants' opening brief acknowledges this approach. Dkt. 2070 at 18. This, however, is not the ordinary case. The FCRPS consultation has worked its way through five biological opinions over a 13-year period, with multiple supplemental complaints and four summary judgment decisions on the merits. Dkt. 396 (remanding 2000 BiOp); Dkt. 986 (remanding 2004 BiOp); Dkt. 1855 (remanding 2008 and 2010 BiOps); Dkt. 2065 (remanding in part 2014 BiOp). The NEPA issue, first appeared after the third of those decisions in Plaintiffs' seventh supplemental complaint (Dkt. 1928 ¶¶ 100-103, 111-114), and over six years into the 2008 BiOp set to terminate in December 2018, presumably in response to the holding in the then-recently issued *San Luis & Delta-Mendota Water Authority*.

This Court's decision reset the deadline for a new biological opinion to March 1, 2018, ten months prior to the ending term of the current BiOp. Dkt. 2065 at 148. It left *unresolved* the deadline for completing the NEPA process and requested Federal Defendants and Plaintiffs to submit briefs setting forth their proposed timing for that process. *Id.* at 146. The challenge here is to coordinate the two processes in connection with the remand. In that regard, the Three States believe the process and schedule should be consistent with the underlying principle that animates the requirement for both the coordinated processes. If NEPA is to fulfill its purpose of identifying and vetting options that ultimately help inform the BiOp analysis, the BiOp remand framework and timing should not force that process. Rather than driving NEPA, the BiOp consultation should flow along with, and proceed from, the NEPA process.

NEPA requires agencies to consider the direct and indirect effects of major federal actions on the "human environment" (which is to "be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment" (40 C.F.R. § 1508.14)). Where major federal actions involve rivers and/or dams, studied effects include impacts on water quality; aquatic/terrestrial species (whether listed or not); flood control; shoreline vegetation or plant ecology generally; river sedimentation or channelization; navigation; other aquatic activities; the regional economy; physical infrastructure such as roads or housing; social infrastructure (*e.g.*, human population growth/reduction, employment, demands on governmental or private sector services). *See generally* Daniel R. Mandelker, *NEPA Law and Litigation* §§ 10:35, 10:36 (2d ed. 2015). ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), in contrast, asks only whether a specific proposed federal action will jeopardize a listed species' survival or adversely modify critical habitat. Direct or indirect effect on the "human

environment" is not relevant.[1] Thus, tethering NEPA to an ESA consultation deadline turns the process inside out. It runs the risk of unnecessarily forcing a truncated NEPA process, thereby diminishing its overall efficacy with respect to informing FCRPS operations under the next BiOp.[2]

II. A PRESUMPTION OF REGULARITY ATTENDS THE FEDERAL DECLARANTS' NEPA TIMETABLE ESTIMATES

The Three States have no desire for delay. Instead, they seek an expeditious process that is thorough and fully engages the region as a whole. In that regard, Federal Defendants submitted declarations from a Regional Director of the Bureau of Reclamation, and a Director of Programs for the United States Army Corps of Engineers, explaining why five years is necessary. Dkt. 2071, 2072. Plaintiffs submitted no opposing declarations refuting the federal declarants. After consulting with their own participants in the regional BiOp consultation process ordered by Judge Redden, the Three States believe the estimates provided by these declarations are indeed reasonable. Moreover, Plaintiffs do not provide any compelling basis for why a five-year NEPA process would present some new risk to listed fish. That is not to say that

[1] Indeed, the Court of Appeals has noted the differing breadth of the two statutes. *See Home Builders Ass'n of N. Cal. v. USFWS*, 616 F.3d 983, 992 (9th Cir. 2010) ("While NEPA's regulations expressly require consideration of cumulative impacts, neither ESA nor its implementing regulations do so. . . . It is sensible to require a more thorough analysis under NEPA than under ESA. NEPA imposes requirements before the government takes action that might have negative consequences for the environment; ESA imposes requirements before the government takes action that will *protect* the environment."); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010) ("The decision to list a species as endangered or threatened is made without reference to the economic effects of that decision.").

[2] While Federal Defendants' opening brief acknowledged the utility of a sequenced process, they were somewhat vague on the relationship of their proposed five-year NEPA process to the BiOp process (which this Court has required to be completed by March 1, 2018). After consulting with Federal Defendants, the Three States understand Federal Defendants will propose a short term BiOp to bridge the time between expiration of the current BiOp and a longer term BiOp connected to the full NEPA process. While not an ideal approach in a normal setting, it seems reasonable given the unique circumstances for this remand and will ultimately provide for the most thorough and useful NEPA process.

a pedestrian pace is warranted. But the federal agencies' reasoned approach to a thorough and prompt pace should not be second guessed where there is no compelling reason to reject their views, particularly where a shorter timeline risks compromising the utility of the undertaking.

This perspective is in concert with case law. The period needed to complete the NEPA process for a particular major federal action is a question of fact, which may include (as it does here) estimates concerning the time that may be expended addressing potentially difficult technical issues. This Court should give substantial weight to the federal declarants' estimate under the factors set out in 50 C.F.R. § 1501.8. The declarants' judgment, informed by 68 years of collective experience with their agencies, enjoys a presumption of regularity. *See, e.g., Alaska Wilderness Recreation & Tourism Ass'n v. Morrison,* 67 F.3d 723, 727 (9th Cir.1995) ("We find that it makes sense to distinguish the strong level of deference we accord an agency in deciding factual or technical matters from that to be accorded in disputes involving predominately legal questions."); *Pasadena Research Labs. v. United States*, 169 F.2d 375, 381-82 (9th Cir. 1948) (presumption that public officers "'have properly discharged their official duties'" applied "not only to the methods used by the Government chemists and analysts in handling the vials, but also to the care and to the absence of tampering on the part of the postal employees through whose hands the shipments passed").

As noted above, the Three States appreciate the need for expedition in completing the NEPA process. In that regard, this Court may wish to consider identifying an initial period for completing the scoping process, which they believe should be consistent with the federal declarants' estimate, and then assessing whether their 30-month estimate for preparation of the draft EIS is appropriate in light of the alternatives identified. Dkt. 2070 at 8-11. Plaintiffs assign 11 months to this component. Dkt. 2074 at 15-1. The 19-month difference accounts for 63.3%

of the overall disparity between the two proposals. A similar reassessment can occur after issuance of the EIS with respect to the amount of time necessary for issuance of agency records of decision where the proposals differ by four or five months.[3]

III. THIS COURT SHOULD CONSIDER THE INTERESTS OF AFFECTED SOVEREIGNS IN REVIEWING FEDERAL DEFENDANTS' PROPOSED TIMETABLE

CEQ regulations require consultation here with, *inter alia*, four States and over a dozen tribes at both the scoping (50 C.F.R. § 1501.7(a)(1)) and draft EIS comment (*id.* § 1503.1(a)) phases. From the Three States' perspective, that consultation will be productive only to the extent that adequate time exists to devote their available resources to it. In that regard, the Bureau of Reclamation declarant's comparison of the FCRPS NEPA process with the Klamath River NEPA process is instructive. The Klamath process involved four dams impounding 2.9% of the water impounded by the 14 FCRPS dams, and affecting a geographic area 30% the size of the area affected by the FCRPS. Dkt. 2071 ¶ 14. Issuance of the EIS occurred three years after the process commenced and involved five Bureau employees working full-time in the NEPA process, and another 20 to 30 employees working part-time but with the process as their primary responsibility. *Id.* ¶ 20. Available resources, in other words, affected the amount of time necessary to generate the Klamath EIS. That is hardly a novel proposition but nevertheless is an important consideration.

[3] The other significant time difference between the proposals relates to the scoping process. Federal Defendants allot 12 months; Plaintiffs allot three months. *Compare* Dkt. 2070 at 6-7, *with* Dkt. 2074 at 14. The Three States believe that, given the far-reaching impact of FCRPS operations and the potential number of possible alternatives, setting aside a period sufficient to allow for careful scoping is critical. *See generally* George Cameron Coggins & Robert L. Glicksman, *Public Natural Resources Law* § 17:48 (2d ed. Westlaw June 2016 Update) ("As a rule of thumb, the smaller the proposal, the fewer the alternatives to it that the EIS must consider."). Truncating Federal Defendants' proposed scoping period, particularly by 75%, thus may prejudice the quality and utility of the eventual EIS.

Needless to say, the Bureau of Reclamation pulled the laboring oar in the Klamath NEPA process. The fact remains, however, that other governmental entities—two States and six tribes—were involved and thus expended their own resources. Dkt. 2071 ¶¶ 14, 18. Here, various state political subdivisions (*e.g.*, counties, municipalities, or irrigation districts) will have a keen interest in the NEPA process beyond the four states and numerous tribes. The existence of a substantial number of interested and competent participants, together with the federal action agencies commitment to a continuing and iterative process, gives credence to the timing estimates provided by the federal agency declarants. *Id.* ¶ 6 (Central Valley Project NEPA process) and ¶¶ 16-18 (Klamath NEPA process); Dkt. 2072 ¶ 23 (Columbia River System Operation Review NEPA process) and ¶ 25 (Lower Snake River Juvenile Salmon Migration Study NEPA process). Any timetable should be sensitive to practical reality that it must accommodate the affected sovereigns' limited resources. There is, in sum, a direct relationship between the process's pace and the sovereigns' capacity to participate meaningfully.

This Court should approve a NEPA timetable consistent with the foregoing analysis.

DATED: July 1, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 1, 2016, the foregoing 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.

I FURTHER CERTIFY that on July 1, 2015, the foregoing was forwarded to the following person by U.S. Mail, first class postage prepaid:

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