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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Northwest Environmental Defense)
Center, Public Employees for)
Environmental Responsibility,)
and Northwest Sportfishing Industry)
Association,)
Petitioners)

PETITION FOR REVIEW

v.)

Bonneville Power Administration,)
Respondent.)
_____)

Northwest Environmental Defense Center (“NEDC”), Public Employees for Environmental Responsibility (“PEER”), and Northwest Sportfishing Industry Association (“NSIA”) (collectively “Petitioners”) hereby petition this Court to review the Bonneville Power Administration’s (“BPA”) decision to transfer the

work and funding of the Fish Passage Center to another entity in violation of Section 839b(h) of the Pacific Northwest Electric Power Planning and Conservation Act (“the Northwest Power Act”). 16 U.S.C. § 839b(h). BPA’s decision is inconsistent with the Fish and Wildlife Program, or, in the alternative, exceeds BPA’s statutory authority by unilaterally amending the Fish and Wildlife Program.

I. BACKGROUND

1. In the Northwest Power Act, Congress required that the Pacific Northwest Electric Power Planning and Conservation Council (“the Council”) promptly develop and adopt a program to protect, mitigate, and enhance fish and wildlife (“the Fish and Wildlife Program”). 16 U.S.C. § 839b(h)(1)(A). The Act further requires the Council to develop and adopt the Fish and Wildlife Program on the basis of recommendations, supporting documents, and views and information obtained through public comment and participation, and consultation with the agencies, tribes, and customers. 16 U.S.C. § 839b(h)(2)-839b(h)(5). Congress also mandated that the Administrator of BPA shall use BPA funds to protect, mitigate, and enhance fish and wildlife “in a manner consistent with . . .the program adopted by the Council under this subsection” 16 U.S.C. § 839b(h)(10)(A).

2. In 2000, the Council adopted the Columbia River Basin Fish and Wildlife Program (“2000 Program”). In 2003, the Council adopted the Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program (“2003 Mainstem Amendments”). These documents comprise the Council’s Fish and Wildlife Program.

3. The 2003 Mainstem Amendments expressly call “for the continued operation of the Fish Passage Center (Center).” The primary purpose of the Center “is to provide technical assistance and information to fish and wildlife agencies and tribes in particular, and the public in general, on matters related to juvenile and adult salmon and steelhead passage through the mainstem hydrosystem.” The 2003 Mainstem Amendments require that the “Center shall continue to provide an empirical database of fish passage information for use by the region”

4. The 2003 Mainstem Amendments require that “the Center shall” conduct smolt monitoring; gather, analyze, and make available monitoring and research information related to fish passage; provide technical information necessary to assist the agencies and tribes in formulating in-season flow and spill requests; and generally provide technical assistance to coordinate recommendations for storage and river operations to avoid potential conflicts between anadromous and resident fish.

5. The 2003 Mainstem Amendments require that “[o]peration of the Center shall include funds for a manager and for technical and clerical support in order to perform its stated functions.”

6. In November 2005, Congress adopted the Energy and Water Development Appropriations Bill for Fiscal Year 2006. Pub. Law 109-103.

Specific to the BPA, Congress states:

Expenditures from the Bonneville Power Administration Fund, established pursuant to Public Law 93-454, are approved for official reception and representation expenses in an amount not to exceed \$1,500. During fiscal year 2006, no new direct loan obligations may be made.

H.R. 2419-30; PL 109-103. The Appropriations Act does not in any way reference or seek to alter funding for the Fish Passage Center; funding that has occurred for many years consistent with the Fish & Wildlife Program, as amended by the 2003 Mainstem Amendments.

7. In a Conference Report, the committee of conference states:

The Bonneville Power Administration may make no new obligations in support of the Fish Passage Center. The conferees call upon Bonneville Power Administration and the Northwest Power and Conservation Council to ensure that an orderly transfer of the Fish Passage Center functions (warehouse smolt monitoring data, routine data analysis and reporting and coordination of the smolt monitoring program) occurs within 120 days of enactment of this legislation.

H.R. 109-275. The Conference Report language specific to BPA and the Center appears nowhere in the adopted Appropriations Act. See PL 109-103.

8. Nonetheless, in reliance upon the Report language, BPA states that “Congress passed legislation (House Report 109-275), which forbids BPA from making additional obligations in support of the Fish Passage Center.” BPA website http://www.efw.bpa.gov/Integrated_Fish_and_Wildlife_Program/programsolicitation.aspx (last visited Jan. 13, 2006). BPA states that it “has decided to implement this requirement through the issuance of this Program Solicitation.” Id.

9. On December 8, 2005, BPA issued a “Program Solicitation for Key Functions previously performed by the Fish Passage Center.”

10. The BPA has no legal authority to unilaterally amend the Fish & Wildlife Program, as amended by the 2003 Mainstem Amendments. The Fish & Wildlife Program, as amended by the 2003 Mainstem Amendments, has not been amended in any event.

II. JURISDICTION AND VENUE

11. This Court has jurisdiction under 16 U.S.C. § 839f(e)(5), which provides “[s]uits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the

Administrator or the Council, or the implementation of such final actions . . . shall be filed in the United States court of appeals for the region.”

12. Venue is properly vested in this Court for this petition for review because the claims arise in the District of Oregon. The BPA and the Council have offices in Portland, Oregon.

III. PARTIES

13. The Petitioners are the Northwest Environmental Defense Center (NEDC), Public Employees for Environmental Responsibility (PEER) and Northwest Sportfishing Industry Association (NSIA). These organizations and their members have legally protectable interests in the protection and enhancement of fish and wildlife and their habitat on and in the Columbia River and its tributaries, as well as in the statutory public participation procedures for adoption and amendment of the Fish and Wildlife Program. These interests are and will be impaired by BPA’s unilateral transfer of the work and funding for the Fish Passage Center to another entity in violation of the Act and the Fish & Wildlife Program, as amended by the 2003 Mainstem Amendments.

14. The Respondent is the Bonneville Power Administration (BPA), a federal agency required to use funds to protect, mitigate, and enhance fish and

wildlife “in a manner consistent with . . .the program adopted by the Council under this subsection” 16 U.S.C. § 839b(h)(10)(A).

IV. VIOLATION OF LAW SUBJECT TO REVIEW

15. The BPA’s unilateral decision to issue a Program Solicitation for Key Functions previously performed by the Fish Passage Center and to stop funding the Center and transfer its functions to another entity of BPA’s choosing, in reliance upon Conference Report language that exists nowhere in the Appropriations Bill adopted by Congress, violates the Northwest Power Act’s requirement that BPA use funds in a manner consistent with the Fish and Wildlife Program, which requires operation and funding for the Fish Passage Center.

Respectfully submitted this 20th day of January, 2006.

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PROOF OF SERVICE

I, the undersigned, hereby certify that true and correct copies of Petitioners' Petition for Review were transmitted via U.S. First Class Mail, postage prepaid, on January 21, 2006, to the following:

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