

U.S. District Judge James Redden has once again found the National Marine Fisheries Service's Biological Opinion for operations of the Columbia River hydropower system inadequate to satisfy the Endangered Species Act. This is the third time in a decade that Judge Redden has been asked to review a Columbia River BiOp, the third presidential administration to try its hand at a BiOp for the system, and the third time Judge Redden has found NMFS's efforts insufficient.

In 2003, Judge Redden struck down a 2000 BiOp finding that operation of the system would not jeopardize ESA-listed salmon, finding that the mitigation measures the BiOp relied upon were not reasonably certain to occur. *National Wildlife Federation v. NMFS*, 254 F. Supp. 2d 1196 (D. Or. 2003). In 2005, he found the next attempt unacceptable because under the G.W. Bush administration NMFS had unlawfully limited consultation to avoid considering many of the effects of the hydropower system. That opinion is not published, but the Ninth Circuit's affirmance is. *National Wildlife Federation v. NMFS*, 524 F.3d 917 (9th Cir. 2008).

Once again, NMFS went back to the drawing board, and once again it failed to do its job properly. The latest BiOp was issued in 2008 and then supplemented in 2010 because it was obviously not going to satisfy Judge Redden in its earlier form. And, as NMFS should have foreseen, it still doesn't.

In his [latest decision](#), Judge Redden found that the 2008/2010 BiOP still doesn't adequately ensure that the mitigation projects on which it relies for its no-jeopardy finding will occur or do enough to improve conditions for salmon. NMFS and the agencies responsible for Columbia River operations specifically identified mitigation projects only through 2013, but the BiOp purports to cover operations through 2018. For the period beyond 2013, it simply promised that projects would be developed to make needed improvements in habitat quality and fish survival. That promise was not supported by scientific review of specific projects because none were identified.

Judge Redden properly found that there was simply no factual basis for NMFS to conclude that the commitment to find and implement unidentified mitigation measures fulfilled the ESA's mandate that federal agencies "insure that their actions are not likely" to jeopardize listed species. Wishful thinking, even good-faith wishful thinking is just not enough.

Despite his conclusion that the 2008/2010 BiOp violates the ESA, Judge Redden did not vacate it. Because it is better than its predecessor and no one argued that the hydropower system should be shut down, Judge Redden left the current BiOp in place through 2013, concluding that the identified mitigation plans would be adequate to protect the listed species to that point. Essentially, he's given NMFS and the operating agencies two and a

half years to come up with a valid BiOp.

And he's given them another warning. Not only must they identify specific mitigation measures, they must provide better scientific support for the conclusion that those measures will in fact avoid jeopardy.

. . . I continue to have serious reservations about NOAA Fisheries' habitat mitigation plans for the remainder of this BiOp. Everyone agrees that habitat improvement is vital to recovery and may lead to increased fish survival, but the lack of scientific support for NOAA Fisheries' specific survival predictions is troubling. Although the BiOp concludes that these specific survival improvements are necessary to avoid jeopardy, NOAA Fisheries' own scientists, the independent scientists who reviewed the 2008 BiOp, and the Independent Scientific Advisory Board have expressed skepticism about whether those benefits will be realized.

And, as Judge Redden has long been demanding, the BiOp must consider

whether more aggressive action, such as dam removal and/or additional flow augmentation and reservoir modifications are necessary to avoid jeopardy.

While working on a new BiOp, the federal agencies must report annually to Judge Redden and must continue spilling water over the dams in spring and summer.

Hat tip: [Endangered Species and Wetlands Report](#).