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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Northwest Environmental Defense)	Civil No. 06-70430
Center, Public Employees for)	
Environmental Responsibility,)	REPLY IN SUPPORT OF
and Northwest Sportfishing Industry)	MOTION FOR IMMEDIATE STAY
Association,)	PURSUANT TO FRAP 18
Petitioners)	
)	URGENT MOTION UNDER
v.)	CIRCUIT RULE 27-3(b)
)	
Bonneville Power Administration,)	ACTION NECESSARY PRIOR TO
Respondent.)	MARCH 17, 2006
_____)	

I. THIS COURT HAS JURISDICTION OVER NEDC'S PETITION

A. BPA's Decision Not to Fund the Fish Passage Center is Subject to Review Under the Northwest Power Act.

BPA claims that this Court lacks jurisdiction because NEDC has not specified a final agency action for review. BPA Resp. at 14. The jurisdictional provision of the Power Act is not limited to “final agency action.” The Act broadly provides for challenges to “final actions and decisions taken pursuant to this chapter by the Administrator or Council, or the implementation of such final action” 16 U.S.C. § 839f(e)(5). At issue is that BPA “shall use the [BPA] fund . . . to protect, mitigate, and enhance fish and wildlife . . . in a manner consistent with . . . the program adopted by the Council.” 16 U.S.C. § 839b(h)(10)(A). NEDC specified that it seeks review of BPA’s decision to transfer the funding of the Fish Passage Center (FPC) to other entities. Am. Pet. at 1-2. BPA’s decision is evidenced by its actions requesting proposals, selecting the entities, and entering contracts.¹ NEDC Exhibits I, E (BPA selected” two entities to “replace” the FPC and “[i]mplementation details will be worked out over the next several weeks”); BPA Exhibit A, Delwiche Decl. ¶ 26. These are BPA actions or decisions. Whitman v. American Trucking Ass’ns, 531

¹See BPA Delwiche Decl ¶ 36 (BPA entered pre-award agreement with Battelle on February 9, 2006 and executed its contract on February 28, 2006), ¶ 38 (Pacific States signed contract on March 3, 2006). If necessary, NEDC can again amend its petition to include the latest action – execution of the contracts.

U.S. 457, 478 (2001) (“action” covers “comprehensively every manner in which an agency may exercise its power”). BPA characterizes these as “various steps” it has taken, but claims these actions cannot invoke this Court’s jurisdiction.² BPA Resp. at 14. The Power Act does not preclude judicial review of “a series of agency pronouncements rather than a single edict.” Barrick Goldstrike Mines, Inc. v. Browner, 215 F.3d 45, 48 (D.C. Cir. 2000) (cited in Forest Serv. Employees for Env. Ethics v. U.S. Forest Svc. “FSEEE,” 397 F.Supp.2d 1241, 1251 (D. Mont. 2005) (series of decisions to use chemical fire retardant).

B. NEDC Does Not Challenge a “Failure to Act.”

BPA argues NEDC challenges a “failure to act,” precluded by Norton v. Southern Utah Wilderness Alliance “SUWA”, 542 U.S. 55, 61-65 (2004). BPA Resp. at 16. SUWA expressly allows challenges to agency actions that are contrary to law:

The statutory directive that BLM manage “in accordance with” land use plans, and the regulatory requirement that authorizations and actions “conform to” those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan. Unless and until the plan is amended, such actions can be set aside as contrary to law pursuant to 5 U.S.C. § 706(2).

SUWA, 542 U.S. at 68. BPA has a similar directive in the Power Act to fund “consistent with” the Council’s Program. 16 U.S.C. § 839b(h)(10)(A). NEDC is not

²BPA provides no evidence to suggest that its decision to transfer funding and the actions it has taken to implement its decision are not final.

attempting to compel BPA to take a discrete action that it has failed to undertake. Rather, NEDC seeks review of BPA's action to discontinue funding of the FPC as not in accordance with the Power Act's consistency provision. Courts have rejected agency attempts to redraft challenges to unlawful agency actions as "failures to act" in order to apply SUWA. See FSEEE, 397 F.Supp.2d at 1250-51 (challenge to the decision to use fire retardant without complying with NEPA is not an action to compel NEPA); Environmental Protection Information Ctr. v. Blackwell, 389 F.Supp.2d 1174, 1211 (N.D. Cal. 2004) (SUWA not controlling because case involved challenge to an affirmative final agency action, not a failure to act).

II. NEDC REQUESTS A STAY, NOT A WRIT OF MANDAMUS.

BPA argues that NEDC asks this Court to afford mandamus by compelling BPA to act. BPA Resp. at 6. A petitioner may seek a stay of the agency decision pending review. Fed. R. App. Proc. 18. NEDC requests that this Court stay BPA's decision to not fund the FPC because it violates the Power Act. The stay is in the nature of equitable relief³, and the Court has the broad authority to grant it here.

A stay order, even if it requires BPA to take some sort of action in order to prevent continuing harm, does not make this an action for mandamus. Lester v. Parker, 235 F.2d 787 (9th Cir. 1956). Rejecting the contention that ordering the

³Heckler v. Lopez, 463 U.S. 1328, 1330 (1983) (request for stay involves balancing the equities).

defendants to produce papers constituted mandamus, this Court explained that “[t]he court here has done no more than to follow the recognized power of courts of equity in issuing injunctions, to make those injunctions effective by ancillary provisions, in aid of the injunction, which may require the defendant to do something.” Id. at 789-790; U.S. v. Oregon State Medical Soc., 343 U.S. 326, 333 (1952) (even if injunctive relief is “mandatory in form, it is to undo existing conditions, because otherwise they are likely to continue”); F.T.C. v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982) (equitable authority includes “any ancillary relief necessary to accomplish complete justice”). If BPA had not decided to follow the Committee Report, BPA would have renewed the FPC’s longstanding contract. Delwiche Decl. ¶¶8-19. BPA recently extended FPC’s contract and can extend again to comply with the stay order.⁴ Id. at ¶18. This Court has the authority to stay and to order BPA to extend the contract if necessary to make the stay effective.

III. NEDC IS ENTITLED TO A STAY PURSUANT TO FRAP 18.

A. NEDC is Likely to Succeed on the Merits.

BPA suggests this Court should defer to its “reasonable interpretation” of the fish and wildlife mitigation provisions. BPA Resp. at 17. Yet, BPA has not advanced

⁴BPA’s contract cases are inapposite as they involve contract disputes, not whether this Court has equitable authority to grant a stay that may require extending a contract. BPA Resp. at 7, n.3.

any interpretation that speaks with the “force of law.” U.S. v. Mead, 533 U.S. 218, 232 (2001). Deference does not extend to “agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.” Bowen v. Georgetown University Hospital, 488 U.S. 204, 212 (1988).

This Court looks to “the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.” Mead, 533 U.S. at 228 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)). BPA has made a unilateral decision to abolish the FPC (Delwiche Decl. ¶¶21, 25, 26); the decision is inconsistent with BPA’s previous, on-going support for the FPC; BPA’s area of expertise is power production and marketing, not fish and wildlife management; and, the purported rationale for this decision, the language of a non-binding Committee Report, is not persuasive. In particular, BPA is not entitled to deference because it has a consistent, longstanding practice of funding of the FPC. Delwiche Decl. ¶¶ 8-11, 18 (extending contract). Idaho Dep’t of Health & Welfare v. U.S. Dep’t of Energy, 959 F.2d 149, 153 (9th Cir.1992) (no deference to Idaho’s interpretation because it was belied by consistent, nine-year practice of allowing spent nuclear fuels into the state). Under the appropriate deference standard, BPA’s decision does not “reasonably interpret” the Northwest Power Act.⁵

⁵BPA also misconstrues this Court’s analysis, in NW. Res. Info. Ctr. v. NW. Power Planning Council, 35 F. 3d 1371 (9th Cir. 1994), of BPA’s role vis-a-vis

BPA claims its decision to abolish the FPC is based upon the “will of Congress” (BPA Resp. at 19); but the “will of Congress” is found first and foremost in statutory language, not in conference reports. The Supreme Court has established that conference reports lack the force of law because “the Constitution is quite explicit about the procedure that Congress must follow in legislating.” Am. Hosp. Ass’n v. Nat’l Labor Relations Bd., 499 U.S. 606, 616 (1990). Where Congress adopts a lump sum appropriation without statutorily restricting those funds “indicia in committee reports and other legislative history as to how the funds should be spent...do not establish any legal requirements on the agency.” Lincoln v. Vigil, 508 U.S.182, 193 (1993)(emphasis added). BPA claims a statement within a Committee Report to an Appropriations Act that does not even mention the FPC is “unequivocal congressional direction” to require abolishment of the FPC. BPA Resp. at 20.⁶ BPA’s

fish and wildlife. BPA Resp. at 18. First, that case concerned the equitable treatment provisions of the Act, not the consistency requirements at issue here. Second, BPA points to this Court’s discussion of the Power Act’s constraints upon the Council, but neglects to place it within the context of the Court’s discussion of how the Power Act also constrains BPA’s authority. “BPA *must* act consistently with the Council’s program but in the end has the final authority to determine its own decisions....Section 839 b(h)(11)(A)ii does not mean the Administrator and other agencies are *limited* to the program in exercising their authorities.” Id. at 1378 (emphasis added). In other words, BPA must act in accordance with the Council’s Program, and it may go beyond that Program if it so chooses.

⁶BPA’s reliance on Demby v. Schweiker and Mohasco Corp. v. Silver is misplaced because *both* indicate the plain language of an Appropriations Act is controlling, and Conference Committee Reports are legislative history only useful

interpretation is not reasonable because the Conference Report is not legally binding and does not provide Congressional approval for a decision that does not accord with the Power Act's consistency requirement.

BPA is using a spurious rationale to depart from the Council's Program. The Power Act requires BPA to fund in a "manner consistent with the Fish and Wildlife Program." 16 U.S.C. § 839b(h)(10)(A). The Council's Program specifically delineates the functions, form, and appropriate oversight of the FPC. NEDC Exhibit H at 27-29. BPA says it is acting "consistently" with this Program by adopting a substantially diminished and restructured substitute plan. In Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1069 (9th Cir. 1998), this Court admonished the agency for claiming it was acting consistently with a Forest Plan because its timber sale was consistent with most of "the old Forest Plan" and some of the "new Plan." The Court made it clear that consistency requires more than picking and choosing among "selected elements of two Plans." Id. Similarly, BPA has adopted selected elements of the Program, but has chosen to ignore other key elements of the Program.

BPA has executed contracts with Pacific States and Batelle to perform data analysis and collection functions. NEDC, Exhibit E. Pacific States and Battelle have data analysis experience, but little technical and public outreach experience; thus,

for clarifying ambiguous terms within Act. BPA Resp. at 20, n.7.

BPA is not fulfilling the FPC's *primary purpose*, the provision of "technical assistance and information to fish and wildlife agencies and tribes in particular, and the public in general . . ." NEDC's Exhibit H at 27. The FPC's website is one of the ways in which the FPC provides technical assistance and information. It is updated daily and there are approximately 400 data downloads from the FPC's website every single day. NEDC Exhibit Q. BPA claims Pacific States has experience "responding to public inquiries." BPA Exhibit A at 15. Pacific States' website reveals that its experience is woefully limited: there is little data posted by Pacific States and where it has posted data it is not readily accessible, nor is updated on a daily basis. See www.psmfc.org (last visited, 3/9/2006). Battelle has no data at all posted to its website. See www.battelle.org (last visited, 3/9/2006). See also Yakama Nation Declaration of Thomas K. Lorz ¶ 7. This is just one example of how the abolishment of the FPC will leave the Council's Program substantially unfulfilled, and thus, of how BPA is acting inconsistently with the Program.

BPA's substitute plan also does away with the Council's Oversight Board and restructures the Columbia Basin Fish and Wildlife Authority's policy management role. NEDC Exhibit H at 28-29. Under the Council's Program the Oversight Board and the Authority provide scientific oversight and assist in the coordination and prioritization of data analysis requests. Id. BPA has not established an alternative

oversight mechanism for Pacific States and Battelle, and its proposed substitute role for the Authority has not yet been adopted. BPA Exhibit A at 18. This failure to provide oversight is especially surprising because the analysis of fish data is a highly contentious issue. For example, the FPC has had to repeatedly, and successfully, defend the quality of its data analysis. NEDC, Exhibit Q. BPA's failure to implement oversight and coordination mechanisms is a glaring weakness in BPA's substitute plan and it is inconsistent with the Council's Program.

B. The Balance of Hardships Tips Sharply in NEDC's Favor.

Petitioners have asserted harm to fish for livelihood and recreation, procedural harm, and harm from the chilling effect on science and federal contractors.⁷ BPA does not assert any harm from a stay. BPA argues Petitioners have no harm because the two entities that BPA unilaterally selected will perform the same functions as the FPC. This assertion is not borne out by the facts as explained in NEDC's argument why BPA's decision is not consistent with the Program as well as the Yakama Nation's motion and declarations of Robert C. Lothrop and Thomas K. Lorz.

Petitioner NSIA asserts that its recreational and business interests in fish will be harmed because it will not have access to information the FPC has produced, made publicly available on the website, and for use in litigation. Hamilton Decl. ¶¶ 7-12.

⁷For these same reasons, Petitioners have standing.

Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947, 952 (7th Cir. 2000) (plaintiffs’ “informational injury” stemming from NEPA violation is a cognizable injury-in-fact) (citing Federal Election Commission (“FEC”) v. Atkins, 524 U.S. 11, 21-26 (1998)). This harm from loss of information at this critical point is irreparable.⁸

NEDC asserts harm to fish and its procedural right to participate in the public process that should have been undertaken to replace the FPC – formal amendment of the Program as required by the Power Act, 16 U.S.C. § 839b(h)(2)-839b(h)(5). Riskedahl Decl. ¶ 8. BPA tries to minimize the harm by relying upon the nonbinding congressional report (BPA Resp. at 13, n.6), but procedural harm is cognizable. Pac. NW Generating Coop v. Brown, 25 F.3d 1443, 1450 (9th Cir. 1994) (plaintiffs with economic interest in salmon have procedural interest in ESA compliance).

BPA also argues there is no “chilling effect” harm because several entities openly competed for the opportunity to take over the FPC’s contract. BPA Resp. at 13, n.6. If BPA and a few members of Congress succeed in defunding the FPC based on displeasure with the science it produces, the harm has already occurred. It is highly likely that the science coming from the new entities will be tempered for fear that they too will lose their federal contract money.

⁸BPA’s footnote regarding the Endangered Species Act (ESA) is a red herring. BPA Resp. at 9, n.4. The point is that the information the FPC produces is “available,” and the harm arises because BPA’s decision to terminate the FPC means the information will no longer be available to NSIA.

Respectfully submitted this 10th day of March, 2006

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PROOF OF SERVICE

I, the undersigned, hereby certify that true and correct copies of Petitioners' Reply in Support of Urgent Motion for Stay via electronic mail (without exhibits) and U.S. First Class Mail, postage prepaid, on March 10, 2006, to the following:

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EXHIBIT LIST

Exhibit Q Fish Passage Center Oversight Board Notes (July 22, 2004).