



JUDGE EXPLAINS SANDY RIVER HATCHERY RELEASE RULING; EXPRESSES CONCERN OVER HIGH HATCHERY STRAY RATES

Posted on Friday, May 31, 2013 (PST)

The available options for legal relief could well have done more harm than good for wild, protected salmon and steelhead, according to a May 16 opinion and order issued by Portland U.S. District Court Judge Ancer L. Haggerty.

The 35-page document explains in detail why Haggerty in March denied a request from fish conservation groups to halt the release of juvenile fish this year from northwest Oregon's Sandy Hatchery.

The plaintiffs in the ongoing lawsuit say the hatchery fish's presence negatively affects wild fish that are born in the Sandy River basin and return there to spawn.

The explanation of his March 21 decision said that the Oregon Department of Fish and Wildlife did not through its Sandy Hatchery operations violate provisions of the Endangered Species Act, thus the state agency could not be enjoined from releasing smolts into Sandy River basin "at this time," the judge said.

The approval of an Hatchery Genetic Management Plan, and a biological opinion, by NOAA Fisheries for the hatchery last year essentially shielded the state from ESA sanctions, the judge said.

The mid-May court product elaborates on the five-sentence order issued in March denied the injunction request but said plaintiffs in the case – the Native Fish Society and McKenzie Flyfishers -- were "likely to succeed on the merits of their National Environmental Policy Act and § 7 ESA claims against federal defendants..." In that order Haggerty said the court would "issue a formal opinion shortly."

That formal opinion says that NOAA Fisheries may have violated ESA and National Environmental Policy Act provisions.

That will be determined in the coming months during legal arguments over allegations that the approved operation of the Sandy Hatchery causes "take" of naturally produced Lower Columbia River chinook, Lower Columbia River coho, Columbia River chum, and Lower Columbia River steelhead in violation of the ESA, NEPA and the Administrative Procedures Act.

"The court could have required NMFS to cease disbursement of Mitchell Act funds to ODFW for the Sandy Hatchery, or the court could have required NMFS to withdraw its approval of the HGMPs" in an injunctive relief order, Haggerty said.

But, Haggerty surmised, that appropriated funding has been used primarily for monitoring the coming and goings of the released hatchery fish, not for the actual propagation.

"...it is quite possible that restricting such funds would be counterproductive and could cause harm to listed species by crippling monitoring and mitigation efforts.

“Given the uncertain consequences of restricting Mitchell Act funds, the court concluded that such an injunction might cause additional harm to listed species, would not be in the public interest, could possibly run counter to plaintiffs' interests, and that the balance of equities tipped decidedly against the issuance of such relief,” the judge said.

Likewise, negating the HGMP, despite its flaws, would add to the uncertainty about impacts to wild fish. HGMPs are intended to outline operations that NOAA has endorsed as minimizing impacts on protected native fish.

“It is possible that ODFW would have released the smolts anyway, as they have each year in the past without an HGMP,” the May 16 opinion says. “Alternatively, it is possible ODFW would decide not to release any smolts, but might also decide not to conduct monitoring and mitigation measures that are necessary to reduce take caused by returning hatchery fish.

“Given this uncertainty and the fact that ODFW voluntarily chose to reduce the number of Chinook released by one third (from an already reduced total), the court concluded that it was unclear whether the harm caused by the release of a reduced number of fish would be more or less harmful than the issuance of an injunction,” the judge said.

During oral arguments March 20, state attorneys agreed that the state would release only 132,000 spring chinook smolts, down from a planned release of 200,000. Hatchery chinook have been observed to have the greatest straying rate – tendency to head upstream to spawn with wild fish – among the stocks produced at the hatchery.

The HGMPs as approved allow the release of approximately 1 million hatchery smolts into the Sandy basin each year: 300,000 spring chinook, 500,000 coho, 160,000 winter steelhead, and 75,000 summer steelhead.

Spring chinook, coho and winter steelhead wild stocks that return to the basin are protected from take. Summer steelhead are not native to the basin and are intended solely to fuel sport fisheries.

Plaintiffs in the case contend that take has resulted from genetic introgression when stray rates have been excessively high, by the placement of weirs which harass fish and have caused an increase in the proportion of redds downstream from weirs, and by taking wild fish and using them for broodstock. Weirs are being employed by the state to sort fish, removing hatchery fish but setting captured wild fish free so that they can continue on their spawning journey. The Native Fish Society says the weirs disrupt natural spawning patterns.

“Additionally, given the excessively high stray rates over the past few years, plaintiffs contend that ODFW will be unable to maintain the stray rates allowed under the HGMPs,” the judge said. “Plaintiffs contend that NMFS' BiOp violates § 7 of the ESA because NMFS failed to consider important aspects of the problem by failing to consider impacts from weirs and problems with stray rates, by relying on mitigation that is not reasonably certain to occur....”

The May 16 opinion and order says that “NMFS cannot be said to have ignored that uncertainty or the potential downsides to weir use” in its BiOp regarding Sandy Hatchery operations and that “the BiOp does not ignore stray rates and contains a table outlining the number of wild and hatchery spawners.

“However, the BiOp minimizes the Hatchery's terrible track record with respect to stray rates and makes little effort to address how or why NMFS expected a dramatic reduction in stray

rates. Given some of the recent stray rates, one might have expected thorough analysis regarding the Hatchery's problems and the rationale behind why proposed solutions should work," Haggerty wrote.

"The BiOp cites increased acclimation, but does not analyze why or how increased acclimation (some acclimation has been used in the past) would yield the needed improvements," the judge said of the process of taking the fish from the hatchery and acclimatizing them for a time streamside in areas where they would return as adults for recapture.

"During oral argument, NMFS counsel provided a cogent and reasoned explanation of this issue, but NMFS failed to provide the same analysis in the BiOp.

"Given the magnitude of this issue, and the scant attention it received in the BiOp, the court finds that it is likely plaintiffs' will succeed on this claim on the merits."

Haggerty's opinion and order also said "it was a clear error of judgment not to prepare an EIS.

"The HGMPs are controversial, of uncertain effect, involve a unique ecologically critical geographic area, and may adversely affect four listed species. The uncertainty in particular is barely addressed in the EA," Haggerty said. Under NEPA, and environmental assessment is conducted to determine whether a more rigorous assessment – an environmental impact statement – must be conducted to evaluate the effects of a particular action. In the evaluation of the Sandy Hatchery operation, NOAA Fisheries determined that an EIS was not necessary.

"As discussed above, ODFW has failed miserably at containing stray rates in the past and reducing them dramatically is far from certain, yet the EA treats the reductions almost as a given.

"In light of the fact that this uncertainty adversely affects four listed species, the decision not to prepare an EIS is somewhat baffling," the judge said.

"Despite the apparent flaws in the BiOp and the EA, the court determined not to issue an injunction preventing the 2013 release of hatchery smolts," Haggerty wrote.

Haggerty ordered the parties involved in the lawsuit to confer and submit by June 4 a proposed schedule for arguing the issues in the lawsuit.

For more information, see CBB, March 8, 2013, "Groups Ask Judge To Halt Sandy River Hatchery Releases This Spring In Wild Vs. Hatchery Case"

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