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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COLUMBIA RIVER ALLIANCE FOR
NURTURING THE ENVIRONMENT,

Plaintiff,

v.

NATIONAL MARINE FISHERIES
SERVICE, et al.,

Defendants.

NO. C00-231R

ORDER DENYING MOTIONS TO
TRANSFER AND TO DISMISS

NORTHWEST ENVIRONMENTAL
ADVOCATES, et al.

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE,

Defendant.

NO. C00-235R

(consolidated)

THIS MATTER comes before the court upon two motions by the
defendants: a motion to transfer and a motion to dismiss for lack

1 of subject matter jurisdiction. Having reviewed the papers filed
2 in support of and in opposition to these motions, the court denies
3 them.

4 5 I. BACKGROUND

6 Plaintiffs are environmental and commercial fishing organiza-
7 tions that challenge the National Marine Fisheries Service's
8 ("NMFS") Biological Opinion ("BiOp") evaluating the U.S. Army
9 Corps of Engineers' ("Corps") Lower Columbia River Channel Deepen-
10 ing Project ("Project").¹ Defendants are the NMFS and the inter-
11 vening Ports of Oregon and Washington ("Ports").² The plaintiffs
12 contend that the BiOp for the Project represents an abdication of
13 NMFS' responsibilities to protect salmon and steelhead stocks
14 listed pursuant to the Endangered Species Act ("ESA").

15
16 Defendants move to transfer this case to the District of
17 Oregon, contending that it is substantially related to several
18

19
20 ¹ The court finds that oral argument on these motions is
unnecessary due to the detailed briefing by the parties.

21 ² This case consolidates two cases, one brought by
22 Northwest Environmental Advocates, American Rivers, Trout
23 Unlimited, Pacific Coast Federation of Fishermen's Associations,
and the Institute for Fisheries Research (collectively, "NWEA"),
24 and another brought by Columbia River Alliance for Nurturing the
Environment ("CRANE").

25 ³ The "Ports of Oregon" are the Ports of St. Helens and
Portland. The "Ports of Washington" are the Ports of Vancouver,
26 Kalama, and Longview.

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1 cases presided over by District Judge Malcolm F. Marsh and that
2 other convenience factors weigh in favor of a transfer. Defen-
3 dants also move to dismiss this case for lack of subject matter
4 jurisdiction, contending that plaintiffs' challenge to the BiOp is
5 not ripe for review and that plaintiffs lack standing to bring
6 this suit.
7

8 II. ANALYSIS

9 A. Defendants' Motion to Transfer

10 The defendants move to transfer this case to Judge Marsh in
11 the District of Oregon pursuant to 28 U.S.C. 1404(a):
12

13 For the convenience of the parties and witnesses, in the
14 interest of justice, a district court may transfer any
15 civil action to any other district or division where it
16 might have been brought.

17 The defendants contend that the interests of justice would be
18 served by a transfer because Judge Marsh has presided over a
19 number of cases under the ESA involving salmon in the Columbia
20 River. They also argue that it would be more convenient for
21 several witnesses and certain parties to have this case heard in
22 Portland rather than in Seattle.

23 The court finds that it would not be in the interests of

24 _____
25 Plaintiffs also move to strike portions of the Ports'
26 reply brief. This unopposed motion is granted: the Ports' reply
brief inappropriately cited unpublished Ninth Circuit opinions that
have no precedential value.

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1 justice to transfer this case. As plaintiffs note, their chal-
2 lenge to the BiOp for the Project is neither a continuation of the
3 cases before Judge Marsh involving the operation of federal dams
4 on the Columbia and Snake Rivers, nor is it sufficiently related
5 to Judge Marsh's continuing jurisdiction over Columbia River
6 salmon harvests. The present case involves how deepening a river
7 channel will affect salmon and steelhead. The channel involved is
8 below the dams that are at issue in the cases before Judge Marsh;
9 those cases do not raise issues that overlap with this case. See,
10 e.g., Trout Unlimited v. NMFS, No. 00-262-MA (D. Or.); see also
11 Idaho Steelhead and Salmon Unlimited v. United States Army Corps
12 of Engineers, CV 99-170-MA (D. Or.) (dealing with eradication
13 Caspian terns that feed upon salmon). Justice is not served by
14 transferring "all things salmon" to Judge Marsh, even though he
15 may have developed expertise in applying the ESA to this broad
16 array of matters.

18 The court also finds that the defendants have failed to "make
19 a strong showing of inconvenience to warrant upsetting the plain-
20 tiff's choice of forum." Dacker Coal Co. v. Commonwealth Edison
21 Co., 805 F.2d 834, 843 (9th Cir. 1986) (noting that forum non
22 conveniens considerations are helpful in deciding transfer motions
23 under 28 U.S.C. § 1404). Neither private nor public factors weigh
24 strongly in favor of transfer. See id. (listing private and
25 public factors to be considered). The parties agree that review

26 ORDER

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1 in this case will be based primarily on the administrative record.
2 That record has already been filed with the court. Furthermore,
3 numerous parties (including NMFS and its regional administrator)
4 reside in this district, any inconvenience to Portland residents
5 in driving to Seattle is minimal, and much of the Project area
6 lies in this district.

7 The court denies defendants' motion to transfer.

8
9 B. Defendants' Motion to Dismiss

10 In considering a Fed. R. Civ. P. 12(b)(1) motion to dismiss,
11 the court considers whether the court has subject matter jurisdic-
12 tion over the plaintiffs' claim. "[G]eneral factual allegations
13 of injury resulting from the defendant's conduct may suffice, for
14 on a motion to dismiss we 'presum[e] that general allegations
15 embrace those specific facts that are necessary to support the
16 claim.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 561
17 (1992).

18 The Ports contend that plaintiffs' challenge to the BiOp is
19 not yet ripe for review. NMFS contends that the plaintiffs lack
20 standing to bring this suit. Their arguments are, however, based
21 on the same rationale. All the defendants argue that the court
22 has no jurisdiction to review the NMFS' BiOp for the authorized
23 Project because plaintiffs will not suffer injury and the record
24 will not be sufficiently developed for review until after the
25 Corps has issued a Record of Decision ("ROD") officially imple-

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1 menting the Project. The court disagrees.

2 1. Final Agency Action

3 As a preliminary matter, the defendants face an uphill battle
4 in seeking to dismiss plaintiffs' challenge to NMFS' BiOp because
5 the defendants concede that the BiOp constitutes "final agency
6 action" by NMFS, regardless of the precise manner in which the
7 Corps ultimately implements the authorized Project.

8 In Bennett v. Spear, the Supreme Court held that a biological
9 opinion for a water project constituted "final agency action,"
10 regardless of the fact that the BiOp did not conclusively deter-
11 mine the manner in which the water would be allocated. Bennett v.
12 Spear, 520 U.S. 154, 177 (1997). The Court noted that two condi-
13 tions must be satisfied for an agency action to be "final":
14 (1) the action must mark the "consummation" of the agency's
15 decisionmaking process; and (2) the action must be one by which
16 "rights or obligations have been determined" or from which "legal
17 consequences will flow." Id. at 177-78.

18 First, there is no question that the BiOp constitutes the
19 consummation of NMFS' involvement in this matter. Pursuant to
20 Section 7 of the ESA, the Corps was required to enter into formal
21 consultation with the NMFS regarding the effect of the Project on
22 protected species. See 50 C.F.R. § 402.14(a). As a result of
23 this consultation, the NMFS issued a no jeopardy BiOp and inciden-
24 -
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26

1 tal take statement ("ITS").⁵ See 50 C.F.R. § 402.14(h)-402.14(i).
2 NMFS need not issue additional determinations.

3 Second, "rights or obligations have been determined" by and
4 "legal consequences will flow" from NMFS' ⁶ By statute, the
5 Secretary of the Army was authorized to proceed with the Project
6 only if he received a favorable report on the Project from the
7 Corps by the end of 1999. See Water Resources Development Act of
8 1999, § 101(b)(13), 106 Pub. L. 53, 113 Stat. 260 (Aug. 17, 1999).
9 The Corps' favorable report was necessarily based, in part, upon a
10 determination that the Project would not jeopardize the continued
11 existence of species protected by the ESA. See 16 U.S.C.
12 § 1536(a)(2) (requiring agencies to ensure that any actions taken
13 not violate ESA). On December 23, 1999, after NMFS issued its "no
14 jeopardy" BiOp and ITS for the Project, the Corps submitted a
15 favorable report on Project feasibility to the Secretary of the
16 Army for transmittal to Congress. The States of Oregon and Wash-
17 ington have since appropriated \$20 million in fulfillment of cost-
18 share requirements for the Project. The Corps may now implement
19 the Project consistent with the terms and conditions of NMFS' BiOp
20 and ITS and without further consultation with NMFS. See, e.g.,

21
22
23 ⁵ The ITS sets forth the alternatives, measures, terms, and
24 conditions under which the proposed action may proceed. See 50
25 C.F.R. § 402.14(i). An ITS accompanies a BiOp if NMFS makes a
26 determination of "no jeopardy" to a species or suggests
implementation of reasonable and prudent alternatives ("RPAs").
See id.

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1 Bennett, 520 U.S. at 177-78; Ramsey v. Kantor, 96 F.3d 434, 444
2 (9th Cir. 1996) (noting that ITS is functional equivalent of
3 federal permit when action subject to consultation would be pro-
4 hibited without ITS).

5 That NMFS' BiOp constitutes final agency action does not
6 predetermine the court's determination of the separate ripeness
7 and standing inquiries. Nevertheless, finding final agency action
8 necessarily informs the constitutional inquiries: regardless of
9 how the Corps uses the BiOp, the BiOp marked the consummation of
10 the NMFS' consultation regarding the ESA, and immediate legal
11 consequences have flowed from the issuance of the BiOp.

12 2. Ripeness

13 The Ports argue that this case will not be ripe for review
14 until the Corps issues an ROD implementing the plan. The court
15 disagrees.
16

17 The ripeness requirement is designed "to prevent the courts,
18 through avoidance of premature adjudication, from entangling
19 themselves in abstract disagreements over administrative policies,
20 and also to protect the agencies from judicial interference until
21 an administrative decision has been formalized and its effects
22 felt in a concrete way by the challenging parties." See Abbott
23 Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967), overruled on
24 other grounds, Califano v. Sanders, 430 U.S. 99, 105 (1977). In
25 determining ripeness, the court examines both the fitness of the
26

1 issues for judicial decision and the hardship to the parties of
2 withholding court consideration. See id. at 149. "A case is
3 generally considered ripe if: (1) the relevant issues are suffi-
4 ciently focused to permit judicial resolution without further
5 factual development; and (2) the parties would suffer a hardship
6 by the postponement of judicial action." National Resources
7 Defense Council v. Houston, 146 F.3d 1118, 1131 (1998).

8 Plaintiffs' challenge to NMFS' BiOp is sufficiently focused
9 to permit judicial resolution without further factual development.
10 The "no jeopardy" BiOp has set the legal floor for how the Project
11 must be implemented in order to comply with the ESA. Because the
12 plaintiffs contend that this floor violates the ESA's require-
13 ments, the fact that the Corps may choose to integrate further
14 safeguards into the Project, i.e., assure greater environmental
15 safeguards in light of the BiOp,⁶ in no way affects the court's
16 examination of the proper baseline.

17
18 As the Supreme Court has noted, "[a] biological Opinion of
19 the sort rendered here alters the legal regime to which the action
20 agency is subject." Bennett, 520 U.S. at 169. Although the Corps
21 has the power to deviate from the BiOp, it would run "substantial
22

23
24 * The ESA regulations provide that "[f]ollowing the
25 issuance of a biological opinion, the Federal agency shall
26 determine whether and in what manner to proceed with the action in
light of its section 7 obligations and the Service's biological
opinion." 50 C.F.R. § 402.16(c).

1 risk" that its "inexpert" rationale for doing so would be viewed
2 as arbitrary. Id. Similarly, although the Corps is "technically
3 free to disregard" the terms and conditions of an ITS and proceed
4 with a proposed action, it does so "at its own peril" because it
5 would no longer be able to claim an exemption from the ESA's
6 prohibition on "taking" endangered species. Id. (citing 16 U.S.C.
7 § 1540(a)).

8
9 The Ports speculate that the Corps may choose to implement
10 the Project in a way wholly inconsistent with the BiOp--e.g., by
11 not implementing the Project at all or expanding the Project--
12 thereby rendering the BiOp moot or triggering additional consulta-
13 tions with NMFS. Perhaps. But these speculations differ greatly
14 from the record before the court. The Ports have not shown how
15 the BiOp is more or less likely to be mooted than any other final
16 agency action and have presented no indication that the Corps will
17 likely expand the Project beyond the present BiOp's coverage.
18 The practical reality is that the NMFS' BiOp served as a signifi-
19 cant basis for Congressional authorization of the Project and will
20 provide the ESA guidelines for its modification and implementa-
21 tion. The court has before it the entire administrative record
22 with respect to the BiOp.

23 In addition, the plaintiffs would suffer a hardship by the
24 postponement of judicial action while defendants would gain no
25 benefit therefrom. In its consulting role, NMFS serves as the
26

1 effective "last word" on ESA compliance. If that determination
2 violates the ESA nothing that the Corps could do in the future
3 would remedy the illegality of NMFS' BiOp. The BiOp has already
4 been instrumental in securing Congressional authorization for the
5 Project. Plaintiffs need not run the additional risk of "bureau-
6 cratic momentum" building for the Project through the Corps'
7 utilization of a possibly flawed BiOp. Cf. Northern Cheyenne
8 Tribe v. Hodel, 851 F.2d 1152, 1157 (noting that "[b]ureaucratic
9 rationalization and bureaucratic momentum are real dangers, to be
10 anticipated and avoided"); Massachusetts v. Watt, 716 F.2d 946
11 (1st Cir.1983) (Breyer, J.) ("Once large bureaucracies are commit-
12 ted to a course of action, it is difficult to change that
13 course--even if new, or more thorough, NEPA statements are pre-
14 pared and the agency is told to 'redecide.'").

15
16 Furthermore, examining the BiOp now creates no hardship on
17 the defendants. If the BiOp is held to be illegal, the Corps need
18 not waste resources by proceeding as planned and having the Pro-
19 ject enjoined at the eleventh hour. If the BiOp is held to be
20 legal, then the court's determination will have no effect whatso-
21 ever on the Corps' planning.

22 The court finds that plaintiffs have carried their burden of
23 demonstrating that their challenge to NMFS' BiOp is ripe for
24 adjudication.

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1 3. Standing

2 To demonstrate standing, the plaintiffs must show (1) they
3 have suffered an "injury in fact" that is (a) concrete and partic-
4 ularized and (b) actual or imminent, not conjectural or hypotheti-
5 cal; (2) the injury is fairly traceable to the challenged action
6 of the defendant; and (3) that it is likely, as opposed to merely
7 speculative, that the injury will be redressed by a favorable
8 decision. Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.,
9 120 S. Ct. 693, 704 (2000). NMFS argues that the plaintiffs
10 cannot show standing until the Corps issues an ROD implementing
11 the Project. This argument lacks merit.

12
13 Plaintiffs allege that the implementation of the Project in
14 accordance with the inadequate limitations of the BiOp will injure
15 their aesthetic, conservation, recreational, commercial, scien-
16 tific, and procedural interests. (NWEA Complaint ¶¶ 5, 7; CRANE
17 Complaint ¶¶ 7.) NMFS contends, first, that these allegations
18 fail to satisfy the "injury in fact" element of standing because
19 any interests asserted by the plaintiffs are purely conjectural
20 until the Corps makes a final determination on implementing the
21 Project. This argument overlooks, however, both the proper stan-
22 dard of review and the "imminence" of the injury to be redressed.

23 In Bennett, the court noted that, for the purposes of a
24 motion to dismiss, general factual allegations of injury resulting
25 from the defendant's conduct may suffice, and that the court will
26

1 presume that general allegations embrace those specific facts that
2 are necessary to support the claim. See Bennett, 520 U.S. at 168.
3 Given the Bennett petitioners' allegation that the amount of water
4 would be reduced by compliance with a BiOp and that they would be
5 adversely affected thereby, it was "easy to presume specific facts
6 under which petitioner's will be injured--for example, by the
7 [action agency's] distribution of the reduction pro rata among its
8 customers." Id. Thus, the complaint alleged the requisite injury
9 in fact.

10
11 Similarly, the court can presume specific facts under which
12 the plaintiff will be imminently injured: the Corps will base its
13 implementation and any modifications of the Plan on a deficient
14 BiOp. That injury can be and should be corrected immediately.
15 See Bennett, 520 U.S. at 167-68 (rejecting contention that there
16 was no injury in fact because action agency had yet to actually
17 reduce amount of water allocated to petitioners); see also Idaho
18 Conservation League v. Mumma, 956 F.2d 1508, 1515 (9th Cir. 1992)
19 ("[T]hat the injury be 'threatened' rather than 'actual' does not
20 defeat the [NEPA] claim."); Sierra Club, Lone Star Chapter v.
21 Cedar Point Oil Co., 73 F.3d 546, 556 (5th Cir. 1996) ("That this
22 injury is couched in terms of future impairment rather than past
23 impairment is of no moment.")⁷

24
25 ⁷ The court is unpersuaded by NMFS' attempt to distinguish
26 Bennett. NMFS contends that in Bennett the action agency had

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1 NMFS also contests compliance with the second and third
2 standing requirements, contending that any injury suffered by the
3 plaintiffs is neither "fairly traceable" to NMFS' BiOp, nor
4 "redressable" by a favorable judicial ruling because the Corps
5 retains the ultimate responsibility for determining whether and
6 how a proposed action shall go forward, and this determination
7 necessarily takes place only after an ROD issues.* This argument
8 fails. The BiOp has a determinative effect upon the Corps'
9 decisionmaking and setting aside the BiOp would likely alter how
10 and whether the Project is implemented.

11
12 The Corps should be "to put it mildly, keenly aware of the
13 virtually determinative effect" of the BiOp upon the Project: NMFS
14 is providing an expert opinion regarding compliance with the ESA.
15 Bennett, 520 U.S. at 169-70. Given this, and given plaintiffs'
16 allegation that with a different BiOp the Corps might not be
17 implementing the Project or would proceed in a different manner,

18
19 already decided to restrict lake levels in accordance with the BiOp
20 but had yet to choose the allocation system for doing so, while
21 here the Corps cannot yet follow the BiOp's recommendations because
22 it has yet to implement the Project. The court disagrees. Here,
23 as in Bennett, it is clear that any decisions that the Corps makes,
24 including whether to implement the Project and in what form, must
25 be guided by the BiOp. See Bennett, 520 U.S. at 169 (noting that
26 "while the Service's Biological Opinion theoretically serves an
'advisory function,' in reality it has a powerful coercive effect
on the action agency") (citation omitted); 50 C.F.R. § 405.15(a).

27
28 The court notes that NMFS has apparently conceded the
second prong of the standing test by not arguing it in its reply
brief.

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1 it is not difficult to conclude that the plaintiffs have met their
2 modest burden at this stage of the litigation of alleging an
3 injury "fairly traceable" to the BiOp that will "likely" be re-
4 dressed if the BiOp is set aside. Bennett, 520 U.S. at 170-71.

5 The court finds that plaintiffs have carried their burden of
6 showing that they have standing to bring this suit.

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8
9 III. CONCLUSION

10 Defendants' motions to transfer and to dismiss are DENIED.

11 DATED at Seattle, Washington this 4th day of August, 2000.

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13 
14 BARBARA JACOBS ROTHSTEIN
15 UNITED STATES DISTRICT JUDGE
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