

California Department of Fish and Wildlife's EIR for Fish-Stocking and Hatchery Program Upheld

A court of appeal has held that the first-ever environmental impact report for the state's fish hatchery and stocking programs complies with CEQA, but also found that three of the EIR's mitigation measures constituted "underground regulations" in violation of the Administrative Procedure Act. [Center for Biological Diversity v. California Department of Fish and Wildlife](#), Third Appellate District Case No. C072486.

The Fish-Stocking Programs. Since the late 19th century, the Department of Fish and Wildlife has been required by statute to conduct a massive fish hatchery and stocking program. But hatchery trout introduced into mountain lakes contribute to declining amphibian populations, and hatchery salmon and steelhead are causing hybridization, which reduces the genetic diversity and strength of the fish species. As the result of a CEQA lawsuit, the Department was required to prepare its first EIR on the state-mandated program; the Department also decided to include in the EIR several other programs, including one that authorizes fish stocking in lakes and ponds by private aquaculture facilities.

The Program EIR. The Department prepared a program EIR that analyzed the program's species impacts on a statewide, rather than a site-by-site, basis. The EIR included protocols and plans for discovering and mitigating site-specific impacts at the nearly 1,000 water bodies the Department stocks and the 24 hatcheries it oversees. The EIR's baseline for environmental review, and its no-project alternative, was ongoing operation of the program as it had functioned from 2004-2008.

As for the private fish stocking programs, the EIR identified, and the Department adopted, new prerequisites and monitoring and reporting obligations for private vendors.

CBD's CEQA Challenge. The Center for Biological Diversity alleged the EIR was inadequate for failing to perform site-specific review for each fish stocking site; deferring formulation of protocols and management plans; using the current stocking enterprise as the environmental baseline; and failing to consider a reasonable range of alternatives, including cessation of all hatchery and stocking operations. The court rejected each of these claims.

First, the court found the EIR adequate because it analyzed "every impact that reasonably could occur by stocking fish in any water body in the state based on information currently known. . . . Site-specific analysis will likely not reveal any unanticipated impacts; instead, it will reveal whether the impacts discussed in the EIR are occurring at that site." The court further held that nothing in CEQA required that the later site-specific reviews occur in a public process.

Second, the court found that the EIR identified sufficient performance standards for the future development of aquatic biodiversity management plans and hatchery genetic management plans, so that mitigation of species impacts was not impermissibly deferred.

The court easily dispensed with CBD's third claim, stating: "CEQA and case authority hold the baseline for a continuing project is the current environmental condition including the project, even if the project has not undergone prior environmental review."

The court gave equally short shrift to CBD's argument that the range of alternatives studied in the EIR was inadequate, and particularly that a no-stocking alternative should have been analyzed, given that the Department was required by statute to stock millions of pounds of fish each year.

Association's APA Challenge. Finally, an aquaculture industry association challenged three of the EIR's mitigation measures as regulations adopted without complying with the notice and procedure requirements of the state Administrative Procedure Act. The court agreed.

The three mitigation measures required Department biologists to evaluate water bodies proposed for private stocking and reject permits if they found adverse effects to key species, and required private aquaculture facilities participating in one program to monitor and report the existence of invasive species at their facilities.

The APA defines a "regulation" as a rule or standard of general application and bars the state from approving regulations without public notice and an opportunity for public comment. The Department argued that two APA exemptions – for a regulation that "relates only to the internal management of the state agency" and for one that "embodies the only legally tenable interpretation of a provision of law" – shielded the three mitigation measures from the APA process. The court rejected these arguments and required compliance with the APA.

This case is most notable for its strong endorsement of program EIRs that do not include site-specific analysis, but instead set the rules for conducting them; its reiteration of case law holding that existing conditions, measured over a period of years, represent an acceptable baseline for CEQA review; and its approval of to-be-developed management programs as CEQA mitigation measures.

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