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RUFFLING FEATHERS: HOW FEDERAL WILDLIFE LAWS MAY IMPACT SITING AND OPERATION OF WIND ENERGY FACILITIES PART I: THE ESA

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Introduction

This is part I of a two-part series focusing on the federal laws that may regulate domestic wind farms with respect to migratory birds and federally listed endangered and threatened species. Specifically, in this article, we consider the implications of potential Endangered Species Act (ESA) regulation of wind farms and the tools available to the owners and operators of such facilities to streamline and assure compliance with the ESA. In the second installment, we address similar issues under the Migratory Bird Treaty Act.

Nature of Potential Effects

The ESA prohibits the unauthorized “take” of endangered species. By regulation, the Fish and Wildlife Service (Service) has extended that prohibition to most species listed as threatened under the ESA. “Take” is defined by the ESA as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1533. By regulation, the Service has defined “harm” as “an act which actually kills or injures” a listed species and may include “significant habitat modification where it actually kills or injures wildlife by impairing essential behavioral patterns such as

breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. The Supreme Court upheld this definition of “harm” in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*. There are two mechanisms for ESA compliance when take cannot be avoided. (It is worth noting that the ESA does not require that take be avoided, only that any take be authorized.) These mechanisms are described in some detail below.

In order to understand the ways in which the ESA may reach the construction and operation of wind generation facilities, it is important first to consider the biological question of how those facilities may affect the species protected under the ESA. Matching those potential biological effects to the extent of regulation then can give one a reasonable picture of the true extent of regulation and the points at which some form of permitting may be required. In general, the potential effects of wind facilities on listed species can be divided into three broad categories: (1) habitat impacts; (2) behavioral impacts; and (3) collisions of avian and other species with the facilities, including turbines, towers, and transmission lines. It should also be noted that the categories of potential effects overlap. For example, a behavioral impact, such as birds avoiding otherwise suitable habitat in proximity to turbines, might also be characterized as a habitat impact (i.e., the turbines are indirectly rendering the adjacent habitat unsuitable).

A thorough understanding of the nature, degree, and timing of the potential effects that a wind facility may have on listed species is a prerequisite to selecting the appropriate ESA compliance mechanism. In this

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regard, every project will be different and it is critical to perform site and project specific assessments with the aid of qualified biologists. Following is a brief review of the major categories of potential effects that wind generation facilities may have on species listed under the ESA:

Loss of Habitat. As noted above, the construction, operation, and maintenance of wind energy facilities have the potential to cause impacts to habitat utilized by protected avian and other species. Impacts to habitat occupied by listed species may be prohibited under the ESA's regulatory definition of "harm." A facility may directly remove habitat for listed species, avian or otherwise, through clearing within the footprints for turbines, substations, roads, and transmission lines. Estimating loss of habitat is typically fairly straightforward, with the facility footprint overlain on a layer indicating the location and extent of potential listed species habitat on the larger site. Having these layers of data early in facility design also allows for an iterative design process aimed at avoiding direct impacts to habitat wherever practicable. For example, turbine locations can be shifted to avoid nesting habitat for a listed songbird.

Habitat Fragmentation. It is well documented in scientific literature that many species are adversely affected not only by the direct destruction of their habitat, but also from the resulting fragmentation. The potential deleterious effects of fragmentation are numerous, including changing microclimate, increasing predation and parasitism, and driving species away from the increased habitat edge. Once again, early consultation with qualified biologists will be important for identifying and seeking to avoid and minimize potential habitat fragmentation effects.

Habitat Avoidance. Perhaps less common than fragmentation effects, habitat avoidance can nonetheless be a significant concern. Some species, such as sage grouse and perhaps whooping cranes, may choose to avoid areas with man-made infrastructure such as turbines, even where the habitat values of those areas have not been overtly affected. This avoidance behavior may have the effect of depriving a species of important areas of habitat and

could conceivably rise to the level of an effect regulated under the ESA.

Strikes and Collisions. Listed species may also be affected, and killed, by a variety of collisions associated with a wind facility. While the collision of most frequent concern is that of a listed bird or bat striking a spinning turbine, it is also possible that listed species may strike stationary components of a facility, including towers, transmission lines, fences, and buildings. In addition, listed species may suffer collisions with vehicles serving the facility.

It should be borne in mind that not all potential impacts to listed species rise to the level of a “take” as that term is defined under the ESA and its implementing regulations. Careful study and consultation with qualified biologists and legal counsel are advisable in order to assess, avoid, and minimize the potential impacts to listed species. If potentially regulated impacts cannot be practicably avoided, then careful consideration should be given to the appropriate ESA compliance mechanism.

Compliance Mechanisms Under the ESA

In the following paragraphs, we examine the three basic compliance mechanisms available to owners and operators of wind energy facilities under the ESA. First, the facility could be designed and implemented in such a way as to avoid impacts to listed species that might otherwise require either an ESA section 10 permit or a section 7 consultation. Second, if construction and operation of the facility involve sufficient exercises of federal discretionary authority, for example, via Army Corps of Engineers approval of a Clean Water Act section 404 permit, the facility could be authorized through an ESA section 7 consultation. Third, a section 10(a) incidental take permit could be obtained for the facility. Each of these compliance options is described in greater detail below.

Avoidance. As noted above, the ESA prohibits take of federally listed wildlife species. Absent a federal nexus, there is no obligation to consult with the Service or apply for an incidental take permit. Rather, whether an activity, such as construction and operation of a

wind energy facility, rises to the level of take and therefore requires ESA authorization is typically a determination made by the individual or entity undertaking that activity. This amounts to an evaluation of the relevant information and a balancing of risks. When a project proponent determines to pursue avoidance, it is accepting the risk and associated consequences that either the Service, through enforcement, or a third party, through an ESA section 11 lawsuit, may prove it wrong. Qualified experts often disagree as to whether a proposed activity could result in take of a listed species. As noted above, should the proponent of a wind energy facility choose to pursue an avoidance strategy, early coordination with a qualified biologist is critical to ensure that impacts to listed species are, indeed, avoided and minimized.

Interagency Consultation and the Incidental Take Statement. Section 7 of the ESA requires that federal agencies not carry out, authorize, or fund activities that will jeopardize the continued existence of a listed species in the wild or result in the adverse modification of designated critical habitat. Frequently, section 7 is triggered by a nonfederal party applying for a permit under another regulatory scheme (e.g., a Clean Water Act section 404 “wetlands” permit). Where a project involves no federal nexus, however, ESA section 7 does not apply. In Texas, for example, most wind farms were constructed and operate on private land without federal permitting and thus were not subject to the requirements of section 7 consultation. It should be noted that even where section 7 consultation is triggered, the “action area” for the purposes of consultation may not encompass the entire facility.

Incidental Take Permits and Habitat

Conservation Plans. Section 10(a)(1)(B) of the ESA authorizes the Service to issue permits allowing take of species that is incidental to an otherwise lawful, nonfederal activity (i.e., one not otherwise covered by a section 7 consultation). These permits are referred to as incidental take permits or ITPs. An applicant seeking such a permit must prepare a conservation plan (often referred to as a habitat conservation plan or HCP) demonstrating that adverse effects on the species will be minimized and mitigated to the maximum extent practicable. Development of an HCP

is a complex and time-consuming process involving mixed issues of law, policy, and science. Processing an HCP is often time-consuming and triggers preparation of an environmental document to comply with the National Environmental Policy Act (NEPA), and opportunity for public comment.

NEPA requires that federal agencies determine whether a proposed action will result in significant impacts to the human environment and review the alternatives to that action. The Service, in its HCP handbook, has determined that most HCPs will normally require preparation of an environmental assessment (EA), which examines the impacts of a proposed action to determine the significance of those impacts and whether further analysis by way of an environmental impact statement (EIS) is necessary. Where an HCP might otherwise require analysis under an EIS, analysis under an EA is appropriate if mitigation measures are in place as part of the original proposal that ensure that impacts do not rise to the level of significance. This is known as a “mitigated finding of no significant impact” or “mitigated FONSI.” In most cases, the applicant prepares the initial draft EA for the Service’s review. In some parts of the country, the EA is combined with the HCP in a document referred to as the “EA/HCP.”

Finally, the Service’s issuance of an incidental take permit is considered a federal action that triggers ESA section 7 consultation. The Service will conduct an “intra-Service” section 7 consultation to determine whether its issuance of an incidental take permit to an applicant would jeopardize the continued existence of the species covered by the permit and whether issuance of the permit would result in the destruction or adverse modification of designated critical habitat.

Recent Developments

Over the past 12 months, there have been many interesting developments on the topic of potential impacts of wind energy facilities on listed and other protected species. Below, we will cover (a) *Animal Welfare Institute v. Beech Ridge Energy, LLC*; (b) an HCP being developed by the American Wind Energy Association (AWEA) to benefit the whooping crane

and potentially the lesser-prairie chicken; (c) an HCP being developed in Humboldt County, California, and covering construction, operation, and decommissioning of a wind energy facility; (d) the approach of a North Dakota wind farm to the endangered whooping crane; and (e) the sage grouse controversy.

Animal Welfare Institute v. Beech Ridge Energy, LLC. On December 8, 2009, the U.S. District Court for the District of Maryland handed down a lengthy decision enjoining the operation of a wind energy facility in West Virginia until the wind energy developer applied for and received an ITP. In *Animal Welfare Institute v. Beech Ridge Energy, LLC*, plaintiffs alleged that construction and operation of the Beech Ridge wind energy facility would take endangered Indiana bats in violation of section 9 of the ESA. In its decision enjoining the construction and operation of the wind energy facility, the court found that studies conducted by the developer were insufficient to prove that Indiana bats would not be taken and, further, the court found that the record contained sufficient evidence that Indiana bats would, more likely than not, be taken as a result of construction and future operation of the facility. The court chose not to enjoin the construction phase for turbines already being built; however, the court enjoined operation of those turbines except during the time of year the bats were in hibernation. The court also enjoined construction of additional turbines until the developer obtained an ITP for the Indiana bat. In early 2010, the developer and the plaintiffs reached a settlement agreement, whereby the parties agreed, that, among other things, the developer would seek an ITP.

AWEA HCP Benefitting the Whooping Crane. In 2009, AWEA proposed, and was granted, an ESA section 6 grant to develop a programmatic HCP and an environmental impact statement to cover the industry for take of the whooping crane within a 200-mile corridor (the Central Flyway) used annually by whooping cranes to migrate from their wintering grounds on the Texas coast to their breeding grounds in Canada. The HCP may also benefit other species, such as the lesser-prairie chicken. While the AWEA HCP planning process is still in its infancy, it is evident

that this effort may forge new and exciting ground with respect to collaborative efforts among the industry.

Humboldt County HCP. On December 22, 2009, the Service published in the *Federal Register* a notice of intent to prepare an environmental impact statement in connection with Shell Wind Energy's proposed HCP to authorize take of marbled murrelet and northern spotted owl in connection with the construction, operation, maintenance, and decommissioning of the Bear River Ridge wind power project in Humboldt County, California. This will be the first wind energy development HCP in the lower 48 states.

North Dakota Wind Facility Approach to Whooping Crane. Basin Electric Power Cooperative (BECP) recently constructed a \$250 million wind generation facility in North Dakota. The BECP project is sited within the Central Flyway and, thus, BECP, in coordination with the Service, has agreed to place private biologists in the area during the whooping cranes' migration seasons for at least the first three years that the wind facility operates. According to the Service, if the biologists spot a whooping crane in the area, all turbines within a mile of the sighting will be shut down until the crane leaves the area.

Sage Grouse Wars. Over the past year or so, controversy has developed over the potential conflict between wind energy development in areas essential for the sage grouse, a chicken-like bird dependent upon sage brush and known for its elaborate courtship ritual. According to environmental groups and others concerned about the potential impacts of wind energy facilities on sage grouse, the sage grouse are threatened by wind energy development in several ways, including (1) loss of habitat; (2) avoidance of suitable breeding habitat because of the presence of turbines; and (3) striking transmission lines during flight. With this conflict in mind, at least one wind energy developer is looking at developing a candidate conservation agreement with assurances (CCA)—a tool under section 10(a)(1)(A) of the ESA which provides coverage for impacts to species not yet listed under the ESA, but that may become listed in the future. The purpose of a CCA is to provide assurances to the permit holder that, in return by

certain conservation and other actions taken by the permit holder, the Service will not require anything further from the permit holder if and when the species covered by the CCA becomes listed. Specifically, the permit holder is required to take actions that, if implemented across the species' range, would preclude the need to list the species. CCAs may become a more useful tool as environmental groups step up their listing efforts under section 11(g) of the ESA.

Conclusion

Although wind energy facilities have been operating around the United States for many years, there remains a need for a collaborated effort among the industry, the Service, and the scientific community to increase the collective knowledge of the effects of the industry upon listed species, migratory birds, and other wildlife, as well as a need for development of techniques to minimize any such effects. While some collaboration has already been achieved, much more is needed.

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Join Section efforts to plant one million trees by 2014. This project calls on ABA members to contribute to the goal of planting one million trees across the United States in the next five years. In addition to planting trees, the Section also intends, through public outreach and partnering efforts, to raise the nation's awareness of the multiple benefits of trees. To participate in the One Million Trees Project, please visit any of the information pages at our partners' Web sites linked from:

[www.abanet.org/envIRON/projects/
million_trees/home.shtml](http://www.abanet.org/envIRON/projects/million_trees/home.shtml)

NATIONAL RESEARCH COUNCIL ISSUES INTERIM SCIENTIFIC REPORT REGARDING WATER MANAGEMENT AND ENDANGERED SPECIES IN CALIFORNIA'S SACRAMENTO-SAN JOAQUIN DELTA

Paul S. Weiland

On March 19, 2010, the National Research Council's Committee on Sustainable Water and Environmental Management in the California Bay-Delta released the first of two reports regarding the Sacramento-San Joaquin Delta (Delta) in California. The report, entitled "A Scientific Assessment of Alternatives for Reducing Water Management Effects on Threatened and Endangered Fishes in California's Bay Delta," addresses two biological opinions issued by the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) under the Endangered Species Act that will affect the operations of the Central Valley Project and State Water Project, which serve 25 million Californians.

The effects of operating the Central Valley Project and State Water Project on listed and at-risk fishes in the Delta have generated significant debate in recent years. A multiyear drought, combined with water delivery reductions to protect listed species, sharpened the controversy in 2009 when many farmers in the Central Valley could no longer sustain long-lived crops, such as almonds, and were forced to destroy orchards to avoid the spread of diseases and pests. This and other deleterious effects of reduced water deliveries led members of California's congressional delegation to request an independent scientific review of the two biological opinions. After months of negotiation, the executive branch—through the U.S. Department of the Interior—reluctantly agreed to support a review of the opinions by a committee convened by the National Research Council (NRC).

While Congress initially sought a review that included evaluation of the scientific bases for the FWS and NMFS biological opinions (*see, e.g., H.R. 2977*), the final task statement posed the two principal questions to the committee:

- Are there any "reasonable and prudent alternatives" (RPAs), including but not limited

to alternatives considered but not adopted by FWS and NMFS, that would have lesser impacts to other water uses as compared to those adopted in the biological opinions and would provide equal or greater protection for the relevant fish species and their designated critical habitat?

- Are there provisions in the FWS and NMFS biological opinions to resolve potential incompatibilities between the opinions with regard to actions that would benefit one listed species while causing negative impacts on another?

In addition, the task statement instructed the committee, time permitting, to consider the effects of environmental stressors other than operation of the Central Valley Project and State Water Project on federally listed and other at-risk species in the Delta. The committee convened in Davis, California, in January 2010 to take testimony from a variety of stakeholders, including the Departments of the Interior and Commerce and the state of California, and to begin work on its first report.

The committee chose to address "scientific questions, assumptions, and conclusions" underlying RPAs set forth by FWS and NMFS, along with their respective biological opinions in its interim report (Report at 2).

Fish and Wildlife Service Reasonable and Prudent Alternative

The committee analyzed three components of the FWS RPA: (1) regulation of flows in the Old and Middle rivers (OMR), which create reverse flows in the estuary, due to operation of Central Valley Project and State Water Project pumps in the south Delta; (2) management of the mean position of X2 in the autumn, which is a measurement of the distance of the low salinity zone in the Delta from the Golden Gate Bridge; and (3) creation or restoration of tidal habitat for delta smelt.

The first component analyzed, regulation of OMR flows, is designed to limit the effects of water diversions on delta smelt by reducing water exports in the winter. The committee concluded that, "until better

monitoring data and comprehensive life-cycle and fish-movement models are available, it is scientifically reasonable to conclude that high negative OMR flows in winter probably adversely affect smelt” (Report at 39). But the committee went on to state that “available data do not permit a confident identification of the threshold values to use in the action,” and “do not permit a confident assessment of the benefits to the population of the action” (*Id.*). On balance, the committee found that “the concept of reducing OMR negative flows to reduce mortality of smelt at the SWP and CVP facilities is scientifically justified” (Report at 3). At the same time, it noted that “there is substantial uncertainty regarding the amount of flow that should trigger a reduction in exports” (*Id.*).

The second component that was analyzed, management of X2 in the autumn, was used as a surrogate measure of the quality and quantity of delta smelt habitat. That measure reflects an asserted relationship between a key delta smelt abundance index and the salinity and turbidity of delta waters. The committee noted that this component is controversial due to “the poor and sometimes confounding relationship between indirect measures of delta smelt population (indices) and X2” (Report at 40). The committee went on to state that “[t]he weak statistical relationship between the location of X2 and the size of smelt populations makes the justification difficult to understand,” and “although the position of X2 is correlated with the distribution of salinity and turbidity . . . the relationship of that distribution and smelt abundance indices is unclear” (*Id.* at 40–41). That stated, the committee did conclude that the “X2 action is conceptually sound in that to the degree that habitat for smelt limits their abundance, the provision of more or better habitat would be helpful” (*Id.* at 41).

The third and final component of the FWS RPA analyzed by the committee, the tidal habitat action, calls for creation or restoration of 8,000 acres of intertidal and associated subtidal habitat in the Delta and adjacent Suisun Marsh. The justification provided by FWS for this action is the large-scale loss of tidal wetlands in the Delta, which threatens delta smelt by reducing productivity at the base of the food web. The committee concluded that, “although the concept of

increasing and improving habitat to help offset other risks to smelt is conceptually sound, the scientific justification provided in the biological opinion is weak, because the relationship between tidal habitat and food availability for smelt is poorly understood . . .” (Report at 41). In the Report’s summary, the committee “finds that the conceptual foundation for this action . . . is weak” (*Id.* at 4).

The committee concluded that each component of the FWS RPA it analyzed is conceptually valid, but at the same time the committee determined that each RPA component that they analyzed is flawed to some extent. In light of the substantial economic and social costs associated with water export curtailments and the desire of stakeholders involved in the controversy to obtain rigorous, independent analyses of the biological opinion and its RPA, the committee arguably failed to fulfill its mandate by delivering an ambiguous message. As a result, all stakeholders engaged in the controversy—including the federal and state governments—have made the claim that the report validates their respective positions.

National Marine Fisheries Service Reasonable and Prudent Alternative

The committee recognized that the NMFS RPA is composed of a complex of diverse actions and limited its analysis to several components grouped as: (1) watershed and main-stem river actions, (2) actions to enhance salmon smolt survival near and when passing through the Delta, (3) actions to increase salmon survival when passing through the Delta’s Yolo Bypass, and (4) actions to increase floodplain habitat.

The committee concluded that the rationale for conducting watershed actions in and along tributaries and the main-stem rivers to meet the needs of specific listed species is well founded. At the same time, the committee stated that “it is difficult to ascertain to what extent, *or even whether*, the collective actions will appreciably reduce the risk to the fishes within the watershed or throughout the entire river system” (Report at 43 (emphasis added)). These seemingly contradictory statements can only be interpreted as indicating that while there is a rationale for conducting

watershed and main-stem river management actions to protect the species, the specific actions included in the RPA, save one, lack a basis in the available science. The committee does go on to describe one action in particular—alteration of Red Bluff Diversion Dam operations to improve fish passage—that it found to be “well-justified scientifically” (*Id.*). To determine the extent to which this action and others will contribute to improved survival of the listed species that the actions are designed to benefit, the committee recommends quantitative analysis using modeling tools.

The second set of actions analyzed include management of OMR flows to benefit salmonids, and management of water exports together with San Joaquin River flows to specifically benefit steelhead (Report at 43–45). The committee identified the same set of strengths and weaknesses in the NMFS RPA for OMR flows that it identified in the FWS RPA for OMR flows. Specifically, the committee concluded that “the strategy of limiting net tidal flows toward the pump facilities is sound, but the support for the specific flows targets is less certain” (*Id.* at 44). That said, the committee seemed even less certain that OMR flow restrictions would result in population-level benefits for salmon, stating, “[T]here is little direct evidence to support the position that this action alone will benefit the San Joaquin salmon . . .” (*Id.*).

Third, the committee analyzed an action designed to improve upstream passage through the Yolo Bypass. The committee characterized the action as “scientifically justified and prudent,” but raised concerns regarding NMFS’s failure to examine the effects of reducing Sacramento River flows to increase flows in the bypass and consider the consequences of increased bypass flows on mercury cycling (Report at 46). The committee concluded that the incomplete

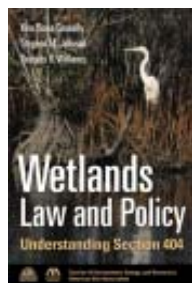
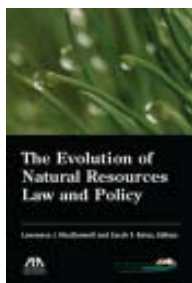
evaluation of the action in the opinion “exemplifies a general tendency throughout the discussion of the actions to focus on the biologically beneficial aspects but to not fully present how any conflicting consequences or potential for such consequences were considered” (*Id.*).

Fourth and finally, the committee analyzed floodplain habitat actions designed to increase the quantity and quality of the habitats necessary for the rearing of juvenile salmon. The committee concluded that the actions are “scientifically justified on the basis of a number of studies” and recommended early implementation of the actions (Report at 46).

Overall, the committee reached conclusions regarding the NMFS RPA that were similar to those reached regarding the FWS RPA. In both cases, the committee found that most actions proposed as part of the RPA were conceptually sound, but that those actions lacked a defensible basis in the available scientific data.

Modeling and Integration of the RPAs

The committee addressed two additional related issues in its interim report that provide a basis for assessing the FWS and NMFS RPAs, as well as a learning opportunity for the agencies. First, the committee devoted an entire chapter of the interim report to ecological modeling. The committee noted that complete life cycle models were not used in either biological opinion (Report at 25). The committee recommended that the development of such models “be given a high priority within the agencies” (*Id.* at 26). Overall, while the committee recognized that the agencies have not developed “a comprehensive modeling strategy,” it nonetheless complimented the agencies for “combining available modeling results with



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historical observations and peer-reviewed literature” (*Id.* at 31). Second, the committee focused briefly on the “lack of a quantitative analytical framework that ties [the RPAs] together within species, between smelt and salmonid species, and across the watershed” (*Id.* at 46). It stated that this type of analysis is necessary “to provide an objective determination of the net effect of the actions on the listed species and on water users” (*Id.*). The committee concluded that “[t]he lack of a systematic, well framed overall analysis is a serious deficiency” (*Id.*).

Conclusion

On balance, it is clear that the committee’s assessment of the biological opinions endorses certain approaches to conservation of listed fishes in the Delta made by the agencies, but calls into question most of the actual prescribed management actions. In light of this fact, it is somewhat surprising that NRC released a press release announcing the interim report with the headline “Most federal actions to protect endangered fishes in California Bay-Delta ‘scientifically justified,’ but additional clarification needed.” A careful review of the interim report demonstrates that the committee had concerns about the scientific basis for many of the actions it evaluated. In fact, the repeated use of the terms “scientifically justified” and “conceptually sound” is paradoxical given the tone and substance of the committee’s analysis of the individual actions in the RPAs. It is reasonable to infer that NRC was reticent to be overly critical of the resource agencies given the resource and time constraints within which they operate, even though the committee raised serious questions about the scientific basis for and the efficacy of most of the actions it reviewed. Unfortunately, in light of the uncharacteristically ambiguous message delivered by NRC and the committee, it is almost certain that stakeholders in the Delta will continue to litigate the legality of the FWS and NMFS biological opinions and RPAs.

Paul Weiland *is a partner at Nossaman LLP and counsel for the Coalition for a Sustainable Delta and Kern County Water Agency in the pending challenges to the biological opinions discussed in this article. The views expressed in this article are those of the author but not necessarily those of any client he represents.*

U.S. FISH AND WILDLIFE SERVICE ISSUES ITS DRAFT STRATEGIC PLAN FOR RESPONDING TO CLIMATE CHANGE

Jason Insdorf

The U.S. Fish and Wildlife Service (FWS) signaled in its latest budget that climate change would become a central component in its mission to protect the nation’s fish and wildlife heritage. In its February 10, 2010 edition, the *New York Times* reported that climate change would be “the theme” for FWS’s \$1.65 billion discretionary budget plan for fiscal 2011 (<http://www.nytimes.com/gwire/2010/02/10/10greenwire-obama-budget-retools-fws-for-warming-world-75474.html>). As stated by Chris Nolin, head of the FWS budget division, “Our primary focus is reorienting the agency so we can address climate change. We need to start looking at climate change in everything we do.”

To “reorient” FWS to address climate change, the agency issued its draft strategic plan for dealing with climate change on September 21, 2009. “Rising to the Challenge: Strategic Plan for Responding to Accelerating Climate Change” (the plan) and its accompanying “5-Year Action Plan” are the fish and wildlife component of an overarching Department of the Interior (DOI) climate change strategy announced by Ken Salazar in a Secretarial Order, issued on September 14, 2009 (<http://www.fws.gov/home/climatechange/pdf/SecOrder3289b.pdf>). The plan sets out a basic framework for how FWS intends to respond to climate change over the next several years from a legal, policy, science, and management standpoint. The plan was open for comments from the public up through November 23, 2009. FWS expressed its intention to update the plan regularly as its experience and knowledge grow.

Although acknowledging that the primary purpose of the plan is to lay out a vision and provide direction for the organization, and noting that it is only meant to be a “starting point for action and discussion,” the plan is nevertheless ambitious—calling for “progressive approaches and bold action” centered around three strategies: adaptation, mitigation, and engagement. To perhaps avoid the potential for the document to

become a “paper tiger,” FWS committed itself to seven “bold” undertakings that range from becoming climate neutral to applying new approaches to education and conservation.

Former FWS director Sam Hamilton called the plan a “fundamental shift in how we do conservation work.” Due to the multiple pronged approach set out in the plan along with the absence of clear means to set priorities, it is difficult to determine exactly what that “shift” in work is. However, Hamilton may have provided a clue when he stated that FWS is going “more into the landscape way of doing business.”

Assuming this is a high priority, the plan sets out “landscape-oriented objectives” to be achieved through strategic habitat conservation (SHC). Referring to “adaptation” as its central strategy, FWS outlines SHC as a framework for supporting the adaptation of fish and wildlife to climate change in terrestrial, freshwater, and marine habitats by promoting habitat connectivity and integrity, management of genetic resources, and reduction of the susceptibility to diseases, pathogens, and pests. To carry this out, FWS plans to establish landscape conservation cooperatives (LCCs), which will involve working with partners to gather and disseminate the science and information it needs to guide its management decisions. In addition, FWS plans to spearhead a National Biological Inventory and Monitoring Partnership, as called for in draft climate change legislation before Congress, to provide complete and objective information for adaptation efforts and landscape level conservation for the next 50–100 years. The plan refers to this partnership as “the most consequential and crucial conservation endeavor of the 21st century.”

FWS did not address in detail to what degree the plan will alter the legal landscape related to climate change. As has been widely publicized, the Bush administration was very explicit about its position that the nation’s environmental laws were not meant to regulate climate change. While the Obama administration seems to have departed somewhat from this position, it has been criticized for, among other things, retaining a federal rule promulgated pursuant to the ESA that forbids the government from invoking the ESA to restrict

emissions of greenhouse gases to protect the polar bear and its habitat.

Objective 1.7 of the plan does, however, call for FWS to evaluate all fish and wildlife service laws, regulations, and policies to identify barriers to and opportunities for successful implementation of climate change plans. Action 1.7.3 calls for the National Climate Team to issue a comprehensive report outlining priorities for changes in FWS’s legal, regulatory, and policy framework.

While the plan may have far-reaching consequences for how FWS responds to what it deems the “greatest threat” to its mission (referring to climate change), it remains to be seen whether FWS can balance the interests of its various stakeholders in the face of what are likely to be wide-reaching budgetary, scientific, and political uncertainties over the next several years. Already, environmental groups are challenging several DOI fish and wildlife decisions related to climate change in court.

For a full text version of the FWS strategic plan for climate change, see http://www.fws.gov/home/climatechange/strategic_plan.html.

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U.S. FISH AND WILDLIFE SERVICE PROPOSES MAJOR REVISION TO BULL TROUT CRITICAL HABITAT DESIGNATION

**Jason T. Morgan
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“We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made . . . The cycle of litigation appears endless . . .”

—U.S. Fish & Wildlife Service, Final Rule Designating Bull Trout Critical Habitat (2005)

On January 13, 2010, the U.S. Fish and Wildlife Service (FWS) issued a proposed rule to revise its 2005 designation of critical habitat for threatened bull trout (*Salvelinus confluentus*). 75 Fed. Reg. 2270. The proposal represents a dramatic increase in river miles and lake and reservoir acres designated as critical habitat under section 4 of the Endangered Species Act (ESA). The proposed critical habitat is located in Montana, Idaho, Oregon, Washington, and Nevada.

One of the primary goals of the ESA is to protect threatened or endangered species by conserving the ecosystems upon which those species depend. To that end, section 4 of the ESA requires FWS to designate critical habitat at the same time that it lists a species as threatened or endangered. Unlike the decision to list a species, which is based solely on biology, the designation of critical habitat requires a careful consideration of economic impacts, impacts to national security, and other impacts relevant to specifying any particular area as critical habitat.

The proposed rule’s large-scale revision of critical habitat is typical of the Service’s litigation-driven critical habitat designations. Indeed, FWS has a checkered past with critical habitat designations, often refusing to designate critical habitat at all unless forced to do so by litigation. The Service’s unwillingness to designate critical habitat results from its “long held policy position” that critical habitat designations are “unhelpful, duplicative, and unnecessary” (*see New*

Mexico Cattle Growers Ass’n v. U.S. Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001)), and funding limits imposed by Congress via the annual appropriations process.

Critical habitat designations do not create wildlife preserves, but instead provide benefit through the section 7 consultation process. That process requires federal agencies to ensure that any action, authorized, funded, or carried out by a federal agency, will not adversely modify or destroy critical habitat. But section 7 also requires federal agencies to ensure that those same actions do not jeopardize the continued existence of the species. Thus, FWS commonly reasons, much of the benefit as well as the burden of a critical habitat designation is coextensive, and thus duplicative, of the original listing decision.

The proposed revisions to the 2005 bull trout critical habitat designation highlight the Service’s uneasy relationship with the critical habitat process. In 2005, FWS designated critical habitat for five bull trout evolutionary significant units (ESUs), including approximately 3,828 miles of streams and 143,218 acres of lakes in Idaho, Montana, Oregon, and Washington, and 985 miles of shoreline paralleling marine habitat in Washington. This designation was significantly smaller than the area proposed in 2004, and reflected the Service’s determination in 2005 that many of the areas occupied by the bull trout did not meet the definition of critical habitat because they were already adequately managed, or that the economic benefits of excluding critical habitat outweighed the environmental benefits of designation.

The Alliance for the Wild Rockies, Inc., and the Friends of Wild Swan sued the Service over the 2005 bull trout designation alleging that the Service’s exclusions were improper or otherwise failed to consider the best scientific and commercial data available. During the pendency of that suit, allegations emerged that a Department of the Interior political appointee had improperly influenced a number of critical habitat designations, including the bull trout designation. Rather than litigating the issue, FWS asked for a voluntary remand to revise the rule. The currently proposed revisions are a marked departure from the previous rule. In the new rule, FWS is proposing to designate 22,679 miles of streams

(compared to 3,828 in 2005), including 929 miles of currently unoccupied habitat, and 533,426 acres of lakes and reservoirs (compared with 143,218 acres in 2005). Thus, the proposed revisions would dramatically increase the area designated vis-à-vis the 2005 rule.

The proposed rule also apparently retreats from the Service's previous conclusion that certain areas do not meet the definition of critical habitat because they are already adequately managed. At the same time, the proposed rule leaves open the possibility of excluding significant areas covered by habitat conservation plans or other conservation agreements under the economic balancing required by section 4 of the ESA.

Along with the proposed revisions, FWS produced a draft economic analysis to evaluate the economic impacts of the critical habitat designation. That analysis estimates the annualized incremental cost to be \$5 million to \$7 million. Much of that cost is attributable to federal agency costs of considering critical habitat, as well as potential dam modification to improve bull trout passage. Despite the Service's assurances that much of the cost will be borne by federal agencies, the proposed rule also explains that timber operations, farming, energy projects, and a host of other activities may impact bull trout critical habitat, and that those areas may require special management as a result.

The Service's original 2005 designation prognosticated that a court-ordered remand, such as the one that occurred here, would "in turn foster a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations." Once the Service issues its final rule, the regulated community will decide whether the Service's prediction was correct.

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