

suffered from record-high levels of water exports, increasing levels of contaminants, and an onslaught of invasive species, all affecting the numerous listed species reliant on the Delta's resources. Added to this deadly mix are the risks associated with climate change and earthquakes, which may lead to massive levee collapse and transformation of the Delta into an inland, deep-water appendage to San Francisco Bay.

The Delta and its listed species have encountered controversy in all three branches of government. The courts have found enforcement of state and federal ESA provisions insufficient, and restricted water project pumping. Gov. Schwarzenegger impaneled a task force to develop a new long-term "Delta Vision." Federal and state agencies have initiated development of a "Bay-Delta Conservation Plan," which will satisfy the requirements for a federal habitat conservation plan and a state "natural community conservation plan." The Legislature has since debated proposals for a water bond measure that includes funding for "Delta sustainability." The governor and the Legislature also have crossed swords over whether to take water supplies around the Delta via a "peripheral canal," defeated by voters more than a quarter century ago, which some suggest will help listed fish species avoid the conflict at the water project export pumps in the south Delta.

Then, there's climate change. The top of the watershed may see less snowpack, which means less cold water available later in the year. The Central Valley floor may see more intense summer heat, leading to greater reliance on irrigation diversions of water that otherwise flows to the Delta. Most importantly, sea level rise increases Delta salinity levels, increasing salinity farther upstream. The rise also threatens to overwhelm and drown the Delta islands created by levees and suffering from subsidence and oxidation of peat soils (with some islands as deep as 30 feet below the adjacent water level). An earthquake on a nearby fault could cause the collapse of numerous island levees simultaneously. The result would be a deep and deadly mix of contaminants flowing from upstream agriculture and an ecosystem fundamentally different than the one we created after the Gold Rush.

The year ahead is likely to provide much engaging debate about the Delta. ESA issues will be a central part of that debate, but not the only battleground. The Delta faces many challenges—ecosystem, water supply, water quality, recreation, fishing, levee system integrity, agriculture, land use, and development. Members of both the California Legislature and Congress have expressed a great deal of interest in Delta issues, suggesting that any one or more of these issues may draw the attention of lawyers who care about the Delta.

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NINTH CIRCUIT RATCHETS UP CONSULTATION OBLIGATIONS FOR FEDERAL AGENCIES

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In a decision with far reaching implications for the western United States, the Ninth Circuit Court of Appeals upheld a district court decision invalidating the 2004 biological opinion issued by the National Marine Fisheries Service (NMFS) for the operation and management of the Federal Columbia River Power System (FCRPS)—a set of dams and reservoirs along the Columbia and Snake rivers—finding that NMFS failed to comply with its consultation obligations under Section 7 of the ESA. *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917 (Apr. 24, 2008).

Under Section 7(a)(2) of the ESA, federal agencies, in consultation with NMFS, must ensure that actions they authorize, fund, or carry out do not jeopardize the continued existence of federally-listed species or result in the destruction or adverse modification of critical habitat. Following consultation, NMFS issues a biological opinion that includes a determination of

whether the proposed federal action will result in jeopardy to listed species or destruction or adverse modification of critical habitat. In the event that the proposed action is neither likely to jeopardize the species nor likely to result in destruction or adverse modification of critical habitat, NMFS may issue an incidental take statement that authorizes the federal agency to take a limited number of listed wildlife species otherwise subject to the take prohibition in Section 9 of the ESA.

The 2004 biological opinion, NMFS's third biological opinion concerning the FCRPS, analyzed the effects that the FCRPS would have on listed species of salmon and steelhead. The first two biological opinions, issued in 1993 and 2000, were challenged and subsequently invalidated by a United States district court. After NMFS's third consultation with the federal agencies regarding the FCRPS, NMFS issued its 2004 biological opinion, concluding that the proposed operation and management of the FCRPS would not jeopardize the listed species. The National Wildlife Federation challenged the 2004 biological opinion. After the parties filed cross-motions for summary judgment, a district court invalidated the 2004 biological opinion, again finding that NMFS had failed to comply with its obligations under the ESA. NMFS and the State of Idaho appealed this decision, and the Ninth Circuit affirmed the district court's judgment. The State of Idaho then filed a petition for rehearing, and in response, the Ninth Circuit affirmed its prior decision. The Ninth Circuit held that the 2004 biological opinion failed to properly analyze (1) whether the proposed federal activity would jeopardize the listed species and (2) whether the proposed federal activity would result in the destruction or modification of critical habitat. With regard to NMFS's jeopardy analysis, the Ninth Circuit found three fatal flaws.

The first flaw related to NMFS's determination that certain FCRPS operations mandated by Congress—such as operations relating to irrigation, flood control, and power generation—were nondiscretionary, and thus excluded from ESA review. The Ninth Circuit rejected NMFS's determination, noting that while Congress had imposed certain mandates, “the agencies retain[ed] considerable discretion in choosing what

specific actions to take in order to” achieve those mandates. As such, the court found that the project operations were discretionary, and thus could not be excluded from ESA review. In so doing, the Ninth Circuit distinguished the Supreme Court's recent holding in *National Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007) (*NAHB*), which held that Section 7 covers only discretionary agency actions and does not attach to actions that an agency is required by statute to undertake once certain specified triggering events have occurred. Specifically, the Ninth Circuit explained that the FCRPS operations were discretionary, and thus not subject to the limitation expressed in *NAHB*, because “[w]hen an agency, acting in furtherance of a broad Congressional mandate, chooses a course of action which is not specifically mandated by Congress and which is not specifically necessitated by the broad mandate, that action is, by definition, discretionary and is thus subject to Section 7 consultation.”

The second flaw identified by the court was NMFS's decision not to incorporate degraded baseline conditions into its jeopardy analysis. NMFS asserted that under the ESA jeopardy standard, it was only required to evaluate operational impacts against the pre-existing baseline. Thus, under NMFS's interpretation, operational effects would not jeopardize a species unless they were “appreciably” worse than the baseline conditions. The court found this approach antithetical to the purpose and intent of the ESA, because it would allow a listed species to be gradually destroyed “so long as each step to destruction [was] sufficiently modest.” Rejecting NMFS's interpretation, the court held that an agency action must be evaluated in the context of the existing baseline, and that if the “baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.” Applying this standard, the court concluded that NMFS's jeopardy analysis was deficient because NMFS failed to incorporate existing baseline conditions—such as existing FCRPS dams that were already endangering the fishes' survival and recovery.

The third flaw concerned NMFS's failure to consider the proposed actions' impact on the listed species'

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chances of recovery. NMFS, interpreting its own regulation, asserted that jeopardy only occurs when there is an appreciable reduction of *both* the likelihood of survival and the likelihood of recovery of listed species. The regulation at issue, 50 C.F.R. § 402.02, states that an agency action would likely jeopardize the continued existence of a species if it “would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild.” The court rejected NMFS’s interpretation, finding that it was not entitled to deference, because it read the “and recovery” language entirely out of the regulation. Instead, the Ninth Circuit concluded that, after considering the preamble and comments to the regulation as well as earlier biological opinions, the “only reasonable interpretation of the ‘jeopardy regulation’ required NMFS to consider recovery impacts as well as survival. Notably, however, in reaching this conclusion, the court based its analysis entirely on the regulation, declining to decide whether the ESA itself required NMFS to consider both survival and recovery.

In addition to NMFS’s flawed jeopardy analysis, the Ninth Circuit also found that NMFS violated the ESA because the biological opinion failed to ensure that proposed FCRPS operations would not destroy or adversely modify critical habitat for any listed fish. In practical terms, the Ninth Circuit’s decision will make it more difficult for agencies to authorize, fund, or carry out activities that affect listed species or designated critical habitat, and will likely foreclose any agency action that does not result in a net benefit to a species currently in jeopardy or approaching jeopardy. As a result, the ESA will become an even stronger weapon in the hands of parties seeking to halt activities with a federal nexus that may affect listed species. But it will also become a greater flashpoint for conflicts between conservation and other societal goals.

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On July 31, 2008, the U.S. Fish and Wildlife Service (USFWS) published its “Recovery Crediting Guidance,” which provides a framework within which to plan and develop a recovery credit system—a new mechanism for federal agencies to mitigate their actions on federal lands by conserving listed species on non-federal lands. 73 Fed. Reg. 44,767-44,772. The system implements recovery actions on private lands for a targeted species while creating a bank of credit that a federal agency may use to offset the adverse effects of its actions on federal lands. Significantly, it must provide a “net benefit to recovery” for the covered species, or “enhancement of a species’ current status by addressing the threats identified at the time of listing or in a current status review.”

The Endangered Species Act’s (ESA’s) stated purposes include providing “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “a program for the conservation of such endangered species.” 16 U.S.C. § 1531(b). The ESA defines conservation as the use of “all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” *Id.* § 1532(3). The ESA provides that the Secretary of the Interior shall develop and implement recovery plans for the conservation and survival of endangered and threatened species. *Id.* § 1533(f)(1). Furthermore, under Section 7 of the ESA, federal agencies are required to conserve threatened and endangered species and, in consultation with the Service, ensure that their actions do not jeopardize listed species or destroy or adversely affect critical habitat. *Id.* § 1536(a)(1).

The concept of recovery crediting arose in Texas when the Defense Department (Department) requested credit for conserving the endangered golden-cheeked warbler on private land adjacent to the Fort Hood