

Endangered Species Committee Newsletter

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POLAR BEAR LISTING MOVES QUICKLY TO LITIGATION

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On May 14, 2008, the U.S. Fish and Wildlife Service (USFWS) listed the polar bear as threatened under the federal Endangered Species Act (ESA). The decision followed fifteen months of deliberation by USFWS, culminating with a court order requiring a listing decision. Consistent with the proposed listing in January 2007, USFWS concluded that the loss of sea ice threatens and will likely continue to threaten polar bear habitat, and this loss of habitat puts the polar bear at risk of becoming endangered within the foreseeable future.

Although the listing decision was supported by a voluminous and thorough set of findings and responses to comments, Secretary of the Interior Dirk Kempthorne was somewhat equivocal in his support of the listing decision: “While the legal standards under the ESA compel me to list the polar bear as threatened, I want to make clear that this listing will not stop global climate change or prevent any sea ice from melting.” See U.S. Department of the Interior News Release, *Secretary Kempthorne Announces Decision to Protect Polar Bears under Endangered Species Act* (May 14, 2008). Concerned that the listing decision and the ESA might be “abused to make global warming policies,” the Secretary also issued interim rules along with the listing decision to limit the scope of the listing decision, and “protect the polar bear while

limiting the unintended harm to the society and economy of the United States.”

First the Secretary limited the scope of the ESA’s Section 9 take prohibition for the polar bear. Unlike with endangered species, for threatened species the Secretary under Section 4(d) may by rule extend all or only a part of the take prohibitions of Section 9 to the listed species. For the threatened polar bear, the Service promulgated an interim “4(d) Rule” that generally extended the take prohibitions to polar bears, but specifically excluded activities authorized or exempted under the existing protections of the Marine Mammal Protection Act (MMPA). Based on this rule, Native subsistence activities, U.S. military activities, and oil and gas activities authorized under the MMPA may all continue without fear of liability under the ESA. The interim 4(d) Rule also excludes activities authorized under the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

Second, the Secretary broadly excluded from the take prohibition activities occurring outside of Alaska. Specifically, the regulation excludes “any taking of polar bears that is incidental to, but not the purpose of, carrying out an otherwise lawful activity within any area subject to the jurisdiction of the United States except Alaska.” See 73 Fed. Reg. 28,305 (May 15, 2008). The apparent intent of this rule is to prohibit ESA citizen suits against greenhouse gas (GHG) producers in the lower forty-eight states, based on a theory that those greenhouse gas emissions are causing a take of listed species.

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Third, in addition to the 4(d) Rule, USFWS issued a memorandum detailing the Service’s policy that it does not intend to consult under Section 7(a)(2) of the ESA for the impact of GHG emitting projects on the polar bear. See U.S. Geological Survey Memorandum, *The Challenges of Linking Carbon Emissions, Atmospheric Greenhouse Gas Emissions, Global Warming, and Consequential Impacts* (May 14, 2008). USFWS conceded that global warming may have anthropogenic causes, but concluded that the causal link between any particular carbon emitting project and the impacts on a particular species are too attenuated. Unless the causal connection between the particular project and the impact to a particular species can be demonstrated with reasonable certainty, the Service will not consult under Section 7 of the ESA.



Collectively, the 4(d) rule and the USFWS’s policy statement reflect the current administration’s position that the ESA was “never intended to regulate climate change.” Environmental groups wasted no time in challenging the 4(d) Rule. Within days of the listing, the Center for Biological Diversity (CBD) and other environmental plaintiffs amended their existing complaint in the Northern District of California to include challenges to the 4(d) rule based on the Administrative Procedure Act and the National Environmental Policy Act. Originally filed to compel the listing decision, CBD’s amended complaint further alleged that the Secretary should have listed the polar bear as endangered rather than threatened, and that the Secretary should have designated critical habitat for the polar bear. On July 16, 2008, following the expiration of the 60-day notice period, CBD amended its complaint again to include challenges to the 4(d) rule under the ESA and claims that the Secretary failed to promulgate a list on measures for nonlethal deterrence under the MMPA. (The lawsuit does not challenge the Secretary’s policy that consultation under Section 7(a)(2) is not required for the impact greenhouse gas emissions on the polar bear. Because the policy is not a formal rule, that challenge must await project-specific application.)

On Aug. 4, 2008, the State of Alaska filed a separate lawsuit in the U.S. District Court for the District of Columbia attacking the validity of the listing decision.

Among other errors, Alaska contends that the listing decision was not based on the best available science, failed to consider existing conservation efforts, failed to justify its decision to the state under Section 4(i), improperly found that polar bears are likely to become endangered in the “foreseeable future,” and that polar bears will likely adapt to the loss of the sea ice. The State of Alaska also filed claims under the APA and the MMPA, claiming that the Service failed to properly alert the public and obtain comment on the designation of polar bears as “depleted” under the MMPA.

USFWS, meanwhile, is moving to promulgate the interim 4(d) Rule as a final rule. However, if CBD is successful in its claims that the polar bear should be listed as endangered, rather than threatened, USFWS cannot benefit from the flexibility provided under Section 4(d). Meanwhile, the fate of the Secretary’s carefully crafted rules to protect the polar bear while making “certain the ESA isn’t abused to make global warming policies,” will likely be decided by the federal courts in either Northern California or Washington, D.C.

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The Endangered Species Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor Paul Weiland at (949) 833-7800 or pweiland@nossaman.com.

CALIFORNIA SEEKS TO ADDRESS SUSTAINABILITY IN THE DELTA FOR LISTED SPECIES

Alf Brandt
California State Assembly Committee on Water, Parks & Wildlife

California once again has taken center stage in the debate over management of listed species and water resources. Last year, both state and federal courts restricted operations of the state and federal water projects to protect listed salmon and Delta smelt, a native species unique to the Sacramento-San Joaquin River Delta (Delta) and listed as threatened under both the state and federal ESA. Controversy over federal Judge Oliver Wanger’s (E.D. Cal.-Fresno) order directing the Delta operations of the water projects continues, as conditions that require the water projects to reduce Delta pumping continue to arise.

The Delta, formed by the confluence of the Sacramento and San Joaquin Rivers before flowing through the Carquinez Strait to San Francisco Bay, is the most valuable estuary ecosystem on the west coast of North America or South America, and is home to several listed species, both aquatic and terrestrial. The Delta smelt, which make an annual Delta migration from fresh water for spawning to brackish water to grow, have received much of the attention arising out of the court decisions. At the same time, the Delta is the literal and figurative heart of the most sophisticated water conveyance system in the world. The Delta takes fresh water from the Sierra Nevada and Sacramento Valley and moves that water south, via the federal Central Valley Project (CVP) and the State Water Project (SWP) to San Francisco Bay Area communities, San Joaquin Valley farms, and a growing Southern California.

While the Delta/ESA conflict has continued—and been managed—for more than fifteen years, the Delta’s ecosystem collapse has pushed it to a starring role in California water politics. Almost a year ago, the California Department of Fish and Game reported record low numbers of Delta smelt (down to an index of 25 from a record low index in 2006 of 341). In recent years, the Delta and its fragile ecosystem have

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'

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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INTERIOR UNVEILS NEW MECHANISM FOR CONSERVATION OF LISTED SPECIES ON NON-FEDERAL LAND

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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

Military Reservation. These off-base recovery actions were banked for future use in order to offset impacts associated with training missions on the base. This worked because the Department's recovery tasks on private lands provided a net conservation benefit to the warbler, and allowed the Department to accrue sufficient conservation credits to offset the adverse effects of its future actions. The Texas example and its success led to the USFWS's formal Recovery Crediting Guidance. The Guidance, in turn, is based on a commitment to implement recovery actions outlined in a particular species' recovery plan or alternative Service-approved document. USFWS considers these recovery credits to be part of recovery implementation leading towards the downlisting or delisting goals of a threatened or endangered species.

While heralded by the Department of the Interior as the latest addition to the ever-expanding repertoire of mechanisms available to conserve species under the ESA, a leading environmental group fears the system could undermine federal actions to safeguard imperiled species. Defenders of Wildlife issued a press release on Aug. 1, 2008 criticizing the policy: "The guidance ... is so vague, and so lacking in specific direction and safeguards, that it may actually allow or encourage federal agencies to duck their conservation responsibilities by shifting the burden of safeguarding these species to private landowners." Whether these concerns ring true will depend on the rigor with which this new policy is implemented, the effectiveness of the measures imposed on private lands, and the ongoing accountability of the federal agencies for protecting those species. If recent court decisions are any indicator (the Ninth Circuit decision in *National Wildlife Federation v. National Marine Fisheries Service*, *supra*, being one example), federal agencies will undoubtedly receive a higher level of scrutiny when attempting to employ this new mitigation strategy to fulfill their obligations under Section 7.

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WHEN FEDERAL AND STATE RULES COLLIDE: COURT RULES NO "NO SURPRISES" UNDER THE CALIFORNIA ESA

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On July 17, 2008, the California Supreme Court issued a decision that could significantly impact development in California and upset expectations of public and private developers who have completed Habitat Conservation Plans (HCPs) under the federal Endangered Species Act (ESA) with corresponding permits from the state under the California Endangered Species Act (CESA). In *Environmental Protection and Information Center v. California Department of Forestry and Fire Protection*, 2008 Cal. LEXIS 8802 (July 17, 2008) (*EPIC*), the court ruled on various challenges by environmental groups to several regulatory approvals, which implemented the 1996 Headwaters Agreement. In a key part of the decision, the court held that "no surprises" regulatory assurances limiting the obligation of landowners to mitigate future impacts to endangered species may not be provided in permits issued under CESA. While the decision does not directly impact agreements under the federal ESA, it substantially limits the degree to which those agreements can be used to satisfy counterpart state law requirements. Consequently the decision may have a chilling effect on potential future California HCPs, which now appear to offer a much lower return on the time and resource investment required to complete them.

Under Section 2080 of the California Fish and Game Code, "take" of listed species is prohibited. However, the California Department of Fish and Game (CDFG) may authorize take through issuance of an Incidental Take Permit (ITP) under Section 2081(b)(2) if such take is incidental to an otherwise lawful activity and so long as "the impacts of the authorized take shall be minimized and fully mitigated" and those measures are "roughly proportional in extent to the impact of the authorized taking on the species." CDFG may also authorize take under the Natural Community

Conservation Planning (NCCP) Act. However, NCCPs can only be initiated for large landscape areas, must address ecosystem integrity and function, and must provide for conservation of the covered species. Under Section 2820 of the NCCP Act, an NCCP must mitigate for project impacts and contribute to recovery of the covered species.

Like state law, Sections 9(a)(1) and 10(a)(B) of the federal ESA prohibits the “taking” of federally-listed species, and allows permits to be issued for take incidental to lawful activities. Under Section 10(a)(2)(B), for non-federal development, the U.S. Fish and Wildlife Service (USFWS) (or the National Marine Fisheries Service (NMFS)) can issue an ITP only after the project applicant prepares an HCP that “minimizes and mitigates” the impact on the species “to the maximum extent practicable” and so long as issuance of the permit would not “appreciably reduce the likelihood of the survival and recovery of the species in the wild.”

USFWS and NMFS have developed “regulatory assurance” rules that have created incentives for landowners to enter into long-term HCPs by limiting the uncertainty associated with potential future changed circumstances. The No Surprises Rule (50 C.F.R. §§ 17.22 and 17.32) provides that “no additional land use restrictions or financial compensation will be required of the permit holder with respect to species covered by the permit, even if unforeseen circumstances arise...” 69 Fed. Reg. 71,723 at 71,724 (Dec. 10, 2004). Under the companion Permit Revocation Rule (50 C.F.R. §§ 17.22 and 17.32) a permit may not be revoked “unless continuation of permitted activity would be inconsistent with [the requirement not to appreciably reduce the likelihood of survival and recovery of the species] and the inconsistency has not been remedied in a timely fashion.” In upholding the assurances rules in 2007 after a decade of litigation, the U.S. District Court for the District of Columbia held that the assurances rules mean that USFWS and NMFS cannot revoke the ITP “unless continuation of the permit puts a listed species in jeopardy of extinction.” *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31 (D.D.C. 2007).

The effect of providing such regulatory assurances has been dramatic. As noted in the USFWS’s Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35,241 (June 1, 2000), between 1982 and 1992 USFWS and NMFS issued only fourteen ITPs. Between 1994 and 2000, after the assurances policies were implemented, USFWS and NMFS had issued two-hundred and sixty ITPs. Those ITPs covered more than twenty million acres of land and provided conservation for approximately two hundred listed species. The number of HCPs country-wide was recently tallied at 545 HCPs, which protect more than forty million acres. As noted by USFWS and NMFS, an HCP provides the flexibility USFWS and NMFS and applicants need to “resolve issues between economic development and species conservation.” *See Notice of Availability of a Draft Addendum to the Final Handbook for Habitat Conservation Planning and Incidental Take Permitting Process*, 64 Fed. Reg. 11,485 (Mar. 9, 1999). In California, this premise has been carried over into the state permitting process as well, with both permittees and regulatory agencies relying on the terms of HCPs to fulfill the requirements of CESA and obtain long-term coverage under both federal and state law.

The Headwaters Agreement was a landmark settlement reached between the Pacific Lumber Company (PALCO) and the federal and state governments. That agreement provided for the long-term logging and conservation management of over 200,000 acres of timberland in Humboldt County. Among other things, the agreement set forth the process for PALCO to complete a Sustained Yield Plan (essentially a “master” logging plan) and an HCP. The HCP was to provide the basis for incidental-take coverage under the federal ESA, as well as incidental take coverage under CESA. The necessary regulatory approvals were obtained in early 1999, and several environmental groups promptly sued.

The Headwaters regulatory approvals were highly interrelated, and the CESA ITP incorporated by reference the terms and conditions of the HCP. Specifically, CDFG found that the HCP satisfied the

requirements of CESA to minimize and “fully mitigate” the impacts to listed species associated with the covered logging activities. Both the HCP and the ITP were issued for a fifty-year term. The HCP Implementation Agreement included “no surprises” assurances, which provided that if anticipated changed circumstances occurred, then PALCO would implement additional specified mitigation measures prescribed in the HCP, but no other additional measures would be required by CDFG or the federal agencies without PALCO’s consent. Further, the no surprises assurances provided that in case of unforeseen circumstances, no commitment of additional land, water, or natural resources and no additional restrictions on the use of such resources would be imposed without PALCO’s consent. (Under the HCP, for example, a wildfire caused in whole or in part by timber operations constitutes a “changed circumstance” if it burns 5,000 acres or less; a wildfire that burns more than 5,000 acres is considered an “unforeseen circumstance.”)

Among other procedural and substantive challenges regarding the Sustained Yield Plan, environmental plaintiffs argued that such “no surprises” assurances were inconsistent with CDFG’s statutory mandate under CESA to ensure that the impacts of take authorized under a CESA ITP are “fully mitigated.” The California Supreme Court agreed, finding that the California Legislature, in enacting the relevant provisions of CESA, “intended that a landowner bear no more—but also no less—than the costs incurred from the impact of its activity on listed species,” including the impacts of future activities. The court found that the Implementing Agreement went too far in exempting from mitigation the impacts of future changed and unforeseen circumstances resulting from PALCO’s own activities (e.g. fires originating from timber operations, or floods exacerbated by timber harvesting) that might necessitate additional mitigation measures to meet CESA’s “fully mitigate” standard. While the court emphasized that permit holders are not obligated under CESA to “mitigate the impacts of the natural disasters themselves when it did not contribute to them,” the Court found that because the ITP is valid for fifty years, it is debatable whether the extreme events covered by the permit are truly unforeseen, and

when a permit holder’s activities exacerbate the impacts, it must fully mitigate the impact “guided by the principal of rough proportionality.”

The court distinguished between CESA and the NCCP Act, which provides regulatory assurances comparable to those provided pursuant to the federal ESA for HCPs. The court rejected PALCO and CDFG’s argument that the “explicit provision for regulatory assurances in [one] statute does not imply a lack of authority to grant regulatory assurances in the other,” observing that the “natural inference” of the inclusion of regulatory assurances in the NCCP Act was that the Legislature did not intend to provide such assurances under CESA. The court also noted that the HCP included various “adaptive management” measures, but found that the relationship between these provisions and the no surprises assurances was unclear. The court left open the question on remand of whether these adaptive management provisions could satisfy the “fully mitigate” standard, notwithstanding the no surprises assurances.

No surprises clauses have been a significant inducement for large projects to enter into HCPs, and the use of HCPs to obtain ITPs under the federal ESA and CESA has preserved millions of acres of land. However, in the wake of the court’s decision in *EPIC*, private parties in California may not enjoy the same level of certainty as is available under federal law, and those seeking long-term incidental take coverage now face the arduous task of completing a combined HCP/NCCP if they hope to obtain those same assurances.

The *EPIC* case also raises a larger question about the incongruity between federal and state species laws, and how federal efforts to provide comprehensive protections and certainty through the HCP process may be hampered under such circumstances. As construed by the *EPIC* court, CESA arguably has the unintended consequence of undermining the broad conservation objectives of ESA section 10 by deterring potential HCP applicants from obtaining a costly and time-intensive federal permit that will have limited dividends under state law. Instead, applicants will likely seek to obtain the minimal requisite incidental take coverage through the ESA section 7 consultation

process and corresponding CESA 2081 process and avoid the HCP/NCCP process altogether if possible. The *EPIC* decision may thus provide a cautionary tale to lawmakers in other states seeking to draft legislation that complements or enhances the species protection afforded by the federal ESA.

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**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY,
AND RESOURCES**

Calendar of Section Events

16th Section Fall Meeting

Sept. 17-20, 2008
Phoenix, Arizona

**The Basic Practice Series—An
Introduction to the Practice of
Environmental Law**

Sept. 19-20, 2008
Phoenix, Arizona
(Cospponsored with the ABA Young Lawyers
Division)

27th Annual Water Law Conference

Feb. 19-20, 2009
San Diego, California

**38th Annual Conference on
Environmental Law**

March 12-15, 2009
Keystone, Colorado

***For more information, see the
Section Web site at
www.abanet.org/environ/.***

**INTERIOR AND COMMERCE PROPOSE
RULE CHANGES TO STREAMLINE
SECTION 7 CONSULTATION PROCESS**

**Christian Marsh
Briscoe Ivester & Bazel LLP**

Described as “common sense modifications,” the U.S. Fish & Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) proposed on Aug. 15 to formally revise the rules governing agency consultations under Section 7 of the Endangered Species Act (ESA). See *Interagency Cooperation Under The Endangered Species Act*, 73 Fed. Reg. 47,868-47,875 (Aug. 15, 2008). In responding to what some agencies have called a “burdensome” process, the proposed rule changes seek to streamline and clarify the circumstances under which federal agencies must consult with USFWS or NMFS on federal agency actions that “may affect” threatened and endangered species or destroy or adversely modify designated critical habitat.

The most dramatic and controversial changes concern the initial triggers for consultation. Under the statute and current regulations, federal agencies must consult with USFWS or NMFS on any proposed federal action that “may affect” a listed species or result in the “destruction or adverse modification” of designated critical habitat where that action involves “discretionary Federal involvement or control.” 50 C.F.R. §§ 402.03, 402.14(a); see also *National Home Builders v. Environmental Protection Agency*, 127 S. Ct. 2518 (2007). Under the current rules, the federal agency determines that its proposed action “may affect,” but is nonetheless “not likely to adversely affect” the species or critical habitat, the agency may seek the “concurrence” of USFWS or NMFS. 50 C.F.R. § 402.14(b).

Based on the presumption that certain actions are not anticipated to result in “take” or other adverse affects, the proposed rule would allow action agencies to decline to consult where the action will have “no effect”; where the action is an “insignificant contributor to any effects”; or the effects (i) cannot be “meaningfully identified or detected”; (ii) are “wholly

beneficial”; or (iii) the risks of “jeopardy” or “adverse modification . . . is remote.” According to the notice, the proposed rule would allow “action agencies to determine the effects of their own actions, without concurrence from the [USFWS or NMFS], in some very specific narrow situations.” While the notice explains that this would eliminate many “unnecessary consultations,” it presupposes that action agencies have the depth and expertise, or the inclination to make those “adverse effect” determinations. As often occurs in California, action agencies tend to defer to USFWS or NMFS even in cases that do not appear to be borderline cases.

The proposed rule also creates a new sixty-day deadline for concluding informal consultations. Before the sixty-day period expires, USFWS or NMFS may extend the time for an additional sixty days. But if the wildlife agency does not respond, the action agency may terminate the consultation after providing written notice. While these additional rules governing informal consultation may focus the consulting agencies on concluding their efforts in a timely manner, the power to unilaterally terminate informal consultations—a power which action agencies enjoy today—may be little solace to an action agency looking for honest feedback about whether the proposed action may adversely affect listed species or critical habitat. If the action agency has any doubts, it may resolve those doubts by simply initiating formal consultations, which would do little to streamline the process.

The proposed regulations make minor changes to the definitions of “cumulative effects” and the “effects of the action” as those terms are defined in the current regulations. *See* 50 C.F.R. § 402.02. The language added to the definition of “cumulative effects” is ostensibly designed to more clearly distinguish between the definition of cumulative effects under NEPA on the one hand (which applies to all “reasonably foreseeable” future actions whether federal or non-federal) and the ESA on the other (which applies only to past, present and future non-federal actions that are “reasonably certain to occur”). The rule also proposes to change the definition of “indirect effects” to include only those effects for which the proposed action is an “essential cause,” as opposed to the old language,

which simply said that indirect effects “are those that are caused by the proposed action.” The rule adds that, “If an effect will occur whether or not the action takes place, the action is not a cause of the direct or indirect effect.” And the determination of whether the effect is “reasonably certain to occur must be based on clear and substantial information.” According to the notice, these changes would allow action agencies “to determine more readily the effects of the action . . . thereby focusing consultation on those effects that can be *meaningfully addressed*.” Thus, the notice explains, action agencies would not be required to consult on the effects of their actions on global climate change and species affected by climate change like the recently-listed polar bear because individual projects could not be found to “cumulatively” or “indirectly” effect the global climate.

Finally, the proposed changes would allow some other environmental document—e.g., an environmental assessment or impact statement prepared under the National Environmental Policy Act (NEPA)—to function as the agency’s “biological assessment.” While meant to increase the efficiency for the federal action agency, this change is unlikely to have much practical effect given the often and seemingly disparate analyses provided in NEPA documents versus biological assessments.

Thus far, some commenters have heralded the changes as better streamlining the consultation process. Others argue that the changes weaken the process or are unlawful under the statute. The public has been provided an unusually short period of time—just thirty days—to comment on the proposed regulations. Comments are due by Sept. 15, 2008.

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