Legal Backgrounder

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ENDANGERED SPECIES ACT REQUIRES ENFORCEABLE MITIGATION AND CONSIDERATION OF CLIMATE CHANGE

by

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Adding another chapter to the long-running saga of the delta smelt and California's Central Valley Project (CVP), a recent federal court ruling may have far-reaching implications on certain aspects of the federal Endangered Species Act (ESA), 16 U.S.C. §§ 1531, *et seq*. Specifically, the court signaled that it will not permit boundless agency discretion in overseeing an adaptive management plan, which was designed to address complex or changing circumstances affecting protected species. In addition, the court suggested that an agency's failure to consider climate change as part of ESA consultation could prove fatal to the agency's ability to satisfy ESA requirements.

On December 14, 2007, the United States District Court for the Eastern District of California, in *Natural Resources Defense Council, et al. v. Kempthorne*, No. 1:05-cv-1207, issued an interim order and injunction requiring that the U.S. Fish and Wildlife Service (FWS) issue a new biological opinion with regard to the federally-managed CVP. The interim order followed the District Court's May 25, 2007, partial grant of summary judgment, holding that the FWS's initial biological opinion was arbitrary, capricious, and contrary to law. 506 F. Supp. 2d 322.

Background

Kempthorne concerned the effects of the operations and future expansion of the CVP on the delta smelt, a threatened species of fish. The delta smelt, a small, slender fish, ranging in length from two to three inches, is found throughout the Sacramento-San Joaquin Delta – the area impacted by the CVP. Historically one of the most common fish in the Delta, the population of the smelt has greatly fluctuated and more recently has shown marked decline. Its decline has been attributed to operation of the CVP, including entrainment losses in pumps, reductions in fresh water flow in the delta, and predation by invasive species. As a result, the delta smelt was listed as threatened under the ESA in 1993.

The CVP is one of the world's largest water diversion projects. The project provides residential, industrial and irrigation water throughout California. Operation of the CVP is subject to a series of

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cooperative agreements and a constantly evolving web of statutory, regulatory, contractual, and judicially-imposed requirements. Primarily managed by the United States Bureau of Reclamation (Bureau), the CVP operates subject to an extensive coordinated operating agreement between state and federal agencies. That agreement includes, among many other elements, constraints designed to protect various endangered species, including the delta smelt.

Anticipating increases in water diversions and construction of new CVP facilities in the Delta, the Bureau requested consultation with FWS under Section 7 of the ESA. Section 7 requires that each federal agency "insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat." To fulfill that "no jeopardy" obligation, the agency must consult with the FWS (or in some cases the National Marine Fisheries Service) whenever the federal action "may affect" a listed species. 16 U.S.C. § 1536(a)(2); *see* 50 C.F.R. part 402. As part of that consultation process, the consulting agency will prepare a biological opinion evaluating the effects of the proposed action on the survival of species and any potential destruction or adverse modification of critical habitat, using the "best scientific and commercial data available." 15 U.S.C. § 1536(a)(2).

Following consultation, FWS issued a revised biological opinion in 2005. In the revised biological opinion, the FWS found that although CVP operations would adversely impact the delta smelt, those impacts would be avoided or minimized through the combination of conservation measures and implementation of an adaptive management program. The conservation and mitigation elements of the biological opinion included a risk assessment matrix. That matrix incorporated a list of criteria, which if present, would require a designated working group, comprised of biological experts from federal and state agencies, to convene and consider whether and what protective measures may be necessary.

Although the working group could recommend potential corrective action to protect the species, the entire adaptive management plan process was designed to be flexible and reactive. Most importantly, it did not mandate any particular response. The decision about whether, and how, to respond to an exceeded trigger criterion was left to the discretion of the working group and other federal and state management level representatives. 506 F. Supp. 2d at 351-53. On the basis of those conservation and mitigation measures, and specifically the matrix, the FWS made a "no jeopardy" finding.

A coalition of environmental and sportsfishing groups filed suit challenging the FWS's "no jeopardy" finding as arbitrary, capricious, and contrary to law. The groups alleged that the FWS failed to consider the best available science; relied upon an overly flexible, uncertain, and inadequate adaptive management processes to monitor and mitigate potential operations of the CVP; failed to meaningfully analyze whether current and future operations of the CVP would jeopardize the continued existence of the delta smelt; and failed to consider the potential impact of climate change on the smelt's habitat. Central to the plaintiffs' arguments was that the entire mitigation process set out in the biological option was "discretionary, uncertain, and unenforceable."

An Adaptive Management Plan May Be Flexible As Long as There is Reasonable Certainty That Necessary Mitigation Measures Will Be Implemented

The plaintiffs' specific arguments were that under the adaptive management plan the working group had unfettered discretion over whether to meet or recommend mitigation measures, the recommendations

need not be followed, no standards were put in place to measure the effectiveness of actions taken, and no reconsultation was required if mitigation was unsuccessful. More to the point, the groups argued that "ultimately, no action is ever required." 506 F. Supp. 2d at 352.

The government countered that is was necessary that the adaptive management plan remain flexible given "the uncertainties surrounding delta smelt population abundance and dynamics …" *Id*. The court disagreed. Although the court recognized that there was a process that must be followed, it concluded that there was no requirement that the government do anything beyond making recommendations, whatever the circumstances, and no criteria prescribed when, if ever, the government must ever act on those recommendations. *Id.* at 356.

To the contrary, the court reasoned that mitigation requirements under the ESA must be "reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." 506 F. Supp. 2d at 351. Citing *National Wildlife Federal v. Babbitt*, 128 F. Supp. 2d 1274 (E.D. Cal. 2000), the court noted that there needed to be an acceptable balance between flexible discretion and reasonable certainty under the "well-defined" mitigation measures. Under the CVP biological opinion and matrix, however, the court observed that there was "*absolutely no* certainty that any needed smelt protection *actions* will be taken." 506 F. Supp. 2d at 355. The court characterized the matrix as merely "an organizational flow chart that prescribes that certain administrative processes (meetings) will be held whenever a trigger criterion is met or exceeded." *Id.*

Notwithstanding its ruling, the court recognized that adaptive management, properly designed and in the appropriate circumstances, may be beneficial and "that flexibility is a necessary incident of adaptive management." *Id.* at 256. However, if adaptive management is to be used, the "law requires that a balance be struck between the dual needs of flexibility and certainty." *Id.* The court suggested that such a balance is achievable, noting that "[i]ncorporting *some* ascertainable mitigation standards and enforceable mitigation measures is not inconsistent with avoiding unduly restrictive 'hard-wiring'" of an adaptive management plan. *Id.* at 355.

ESA Consultation May Now Require Consideration of Impacts of Climate Change on Protected Species

A novel issue raised by the plaintiffs in the case with regard to climate change, although not necessarily the central focus of the court's opinion, may have long-lasting impact on Section 7 consultations.

Specifically, the plaintiffs alleged that the biological opinion was flawed because the FWS failed to consider whether, and the extent to which, global climate change may adversely affect the delta smelt and its habitat. Those allegations referenced several studies on the potential effects of climate change on water supply reliability, as well as portions of the administrative record, which indicated that climate change was discussed at various environmental symposia attended by government staff and that FWS scientists "recognized the issue of climate change warranted further consideration." *Id.* at 368. The court further noted that the issue of climate change could be significant because the biological opinion's conclusions are "based in part on the assumption that the hydrology of the water bodies … will follow historical patterns for the next 20 years," and "extreme water temperatures can have dramatic impacts upon smelt abundance." *Id.* at 367-68.

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The government responded by arguing that the nature of available information regarding the impacts of climate change on precipitation was highly inconclusive. Rather than ignore the potential affects of climate change on the delta smelt, the government claimed that FWS had "responsibly refused to engage in sheer guesswork." *Id.* at 368. The court rejected those arguments, noting that the biological opinion included "no discussion [of] when and how climate change impacts will be addressed, whether existing take limits will remain, and probable impacts on CVP[] operations", nor did it include *any* meaningful discussion of impacts resulting from climate change. *Id.* at 369-70. That failure made it "impossible to determine whether the information was rationally discounted because of its inconclusive nature, or arbitrarily ignored." *Id.* at 369. According to the court, the "absence of *any* discussion" in the biological opinion addressing climate change represented "a failure to analyze a potentially 'important aspect of the problem.'" *Id.* at 370. The court concluded that this failure was arbitrary and capricious.

Just as the recent settlement in *State of California v. County of San Bernardino, et al.,* Civ. 07-00329 (Sup. Ct.), was interpreted as a potential paradigm shift as a result of global warming considerations, requiring evaluation of climate change under the California Environmental Quality Act (CEQA), the decision in *Kempthorne* may be at the forefront of a trend requiring climate change assessment during Section 7 consultations. Such a trend, if it develops, could have far-reaching consequences because of the potential impact of climate change on a wide range of species and their respective habitats.

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