

The Environmental Counselor

February 2010

Court Orders Closer Look at Human Cost of Protecting Endangered Fish [\[FN*\]](#)
Jessica Ferrell [\[FN**\]](#)

U.S. District Court Judge Oliver Wanger has ordered the Bureau of Reclamation (Reclamation) to analyze the impacts on the human environment of water diversions meant to protect the delta smelt, a tiny fish found only in the Sacramento-San Joaquin Estuary that is listed as threatened under the Endangered Species Act (the ESA). [\[FN1\]](#) Combined with a three-year drought in California, plaintiffs allege that the water restrictions have had adverse economic and environmental consequences throughout the state. Addressing claims related to the Central Valley Project and State Water Project (the Projects) under the National Environmental Policy Act (NEPA), the court ruled in favor of plaintiff water districts and against defendant-intervenor environmental groups. [San Luis & Delta-Mendoza Water Authority v. Salazar, 2009 WL 3823934 \(E.D. Cal. 2009\)](#) (“Delta Smelt”).

Neither the USFWS nor Reclamation have performed any NEPA analyses in association with the U.S. Fish & Wildlife Service's (USFWS or the Service) opinions regarding the need for water diversions, or Reclamation's adoption of the Service's suggested mitigation measures. As a result of the court's opinion and order, Reclamation must now conduct an environmental assessment (an EA) and, potentially, an environmental impact statement (an EIS), to evaluate the environmental consequences of actions that the plaintiffs maintain “reallocate hundreds of thousands of acre-feet of water annually--enough water to serve the needs of millions of people--from the current reasonable and beneficial municipal, industrial, agricultural, and other uses.” [\[FN2\]](#) The water districts successfully argued that the Services had failed to analyze the impact that diversions to help the smelt would have on groundwater resources, air quality, local streams and wildlife, and soil erosion, as well as job loss, fallowed land, and “significant degradation of the human environment.” [\[FN3\]](#) Pending Reclamation's NEPA analysis, the plaintiffs have asked the court to enjoin the federal defendants from implementing flow restrictions on Project operations. [\[FN4\]](#) Judge Wanger will hear oral argument on that motion later this month.

Legal Background

Consultation requirements under the ESA

Section 7 of the ESA requires federal agencies to “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....” [\[FN5\]](#) Whenever a federal action may affect a federally listed species, the agency planning the action must consult with the appropriate Service. [\[FN6\]](#)

After consultation and analysis, the Service prepares a Biological Opinion (a “BiOp”). [\[FN7\]](#) The Service evaluates the effects of the proposed action on the survival and recovery of species and any potential destruction or adverse modification of critical habitat in the BiOp. [\[FN8\]](#) The BiOp includes a summary of the information upon which the opinion is based, a discussion of the effects of the action on listed species or critical habitat, and the consulting agency's opinion on “whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat....” [\[FN9\]](#) If the Service concludes in the BiOp that jeopardy is not likely and there will not be adverse modification of critical habitat, or that there is a “reasonable and prudent alternative” (an “RPA”) to the agency action that avoids jeopardy and adverse modification and that the incidental

taking of listed species will not violate § 7(a)(2), then the Service can issue an Incidental Take Statement (an ITS). If followed, the ITS exempts the action agency from the prohibition of takings set forth in § 9 of the ESA. [\[FN10\]](#)

Evaluation requirements under NEPA

Under NEPA, all federal agencies must evaluate the potential environmental consequences of any proposed “major Federal action[] significantly affecting the quality of the human environment.” [42 U.S.C.A. § 4332\(C\)](#). According to federal regulations implementing NEPA, most “major federal actions” typically fall within the following categories: (1) “[a]doption of official policy ...”; (2) “[a]doption of formal plans ...”; (3) “[a]doption of programs ...”; and (4) “approval of specific projects[.]” [40 C.F.R. § 1508.18](#). The agency may prepare an EA to determine whether a full EIS is needed, or just prepare an EIS. An EA must identify all reasonably foreseeable impacts, analyze their significance, and address alternatives to the proposed action. [40 C.F.R. §§ 1508.8, 1508.9, 1508.27](#). If, based on the EA, the lead agency determines that the actions as proposed will not significantly affect the environment, considering its context and intensity, then it may issue a Finding of No Significant Impact and forego preparation of an EIS. Otherwise, an EIS must be completed. That document must contain an evaluation of a proposed action’s environmental impacts and alternatives. [\[FN11\]](#)

Compliance with NEPA is evaluated under the Administrative Procedure Act, [5 U.S.C.A. § 706\(2\)\(A\)](#), so long as: (1) there is “final agency action”; and (2) “[p]laintiffs can show that they have suffered a legal wrong or will be adversely affected within the meaning of the statute[.]”

Factual Background

The *Delta Smelt* cases include five of several related to potential adverse impacts of ongoing operations of the Projects. *See, e.g., J. Ferrell, Federal Court Requires Wildlife Services to Analyze Climate Change Effects During ESA Consultations, Marten Law Group Environmental News (May 7, 2008); J. Kray, Small Fish Causes Big Splash in California as State Ponders Water Rationing to Protect Endangered Species, Marten Law Group Environmental News (Sept. 26, 2007) (discussing related cases).*

The Central Valley Project is one of the world’s largest water storage and transport systems. It includes an extensive system of dams, tunnels, canals and 22 reservoirs that store and regulate water for California’s Central Valley southward. In an average year, it delivers 7 million acre-feet of water, irrigating over 3 million acres of farmland and providing drinking water to approximately 2 million consumers. The State Water Project delivers an average of 3 million acre-feet annually, providing water to approximately 20 million Californians and more than 600,000 irrigated acres if agricultural land. [\[FN12\]](#)

In its BiOp completed pursuant to the ESA in 2008, the USFWS determined that Project operations would jeopardize the continued existence of the delta smelt and/or adversely modify the species’ critical habitat. Accordingly, the Service proposed certain operating restrictions on the projects as an RPA. The restrictions designed to reduce entrainment of smelt during key periods by controlling and reducing water flows in the Delta. In the 2008-09 water year, implementation of the RPA reduced pumping by more than 300,000 acre feet. The RPA also provides that, inter alia, the California Department of Water Resources will create or restore 8,000 acres of intertidal and subtidal habitat in the Delta and Suisun Marsh within 10 years, and that Reclamation will monitor and evaluate implementation of the RPA components to ensure protection of the smelt. Neither the USFWS nor Reclamation prepared any NEPA documentation in connection with the BiOp or RPA.

Plaintiffs the San Luis & Delta District, State Water Contractors, and Metropolitan Water District of California (collectively, Plaintiffs), moved for summary judgment under NEPA, arguing that issuance and/or implementation of the BiOp is a “major federal action” under NEPA that will harm the human environment and that, as a result, the USFWS or Reclamation should have conducted an EA under NEPA. Plaintiffs argued that the reduction of water supplies under the RPA caused water supply shortages in the San Joaquin Valley which, in turn, caused and threatened

to cause environmental effects including “worsening of groundwater basin overdraft, land subsidence, decreased groundwater recharge, threatened violation of state-adopted basin plan water quality objectives, reductions in crop yields, reduced agricultural employment, endangerment of permanent crops, and decreased air quality.” [FN13]

Analysis

As a threshold inquiry, the court first considered whether a NEPA analysis is required for a BiOp. Only one court has applied [40 C.F.R. § 1508.18\(b\)\(4\)](#)-- identifying “approval of specific projects, such as construction of management activities located in a defined geographic area” as a “major federal action” category--to require NEPA analysis of a federal wildlife Service’s issuance of a BiOp and associated incidental take statement (ITS). In [Ramsey v. Kantor, 96 F.3d 434 \(9th Cir. 1996\)](#), the court found that the BiOp and ITS issuance constituted major federal actions triggering NEPA compliance, because the ITS-- a functional equivalent of a permit to “take” a listed species--“is a prerequisite for a project with adverse impact[s] on the environment” and, therefore, “issuance of that permit [is a] major federal action and the federal agency involved must conduct an EA and possibly an EIS before granting it.” [FN14] The *Delta Smelt* court read *Ramsey* to stand for the principles that, although a BiOp may qualify as a major federal action under NEPA, it does not so qualify as a matter of course. In *Ramsey*, the federal defendants argued that the issuance of an ITS, without additional federal involvement in a state project, was insufficient to federalize the project for purposes of NEPA. By contrast, in *Delta Smelt*, the court considered projects operated by Reclamation.

Another key factor to determine whether the action is major and federal under NEPA is whether it is binding upon the action agency. [FN15] In [Westlands Water Dist. v. U.S. Dept. of Interior, Bureau of Reclamation, 850 F. Supp. 1388, 1422 \(E.D. Cal. 1994\)](#), the court found that BiOps are not generally binding, nor do they “invariably” require completion of an EIS. Rather, an ad hoc analysis is required. The federal defendants in *Delta Smelt* argued that issuance of the BiOp is not a major federal action because the BiOp is a suggestion, and is not binding on Reclamation. Accordingly, it is not a formal plan or approval under the applicable NEPA regulations. Plaintiffs argued that the BiOp and RPA/ITS constitute “management activity” and a “formal plan” under the regulations, and also had a “powerful coercive effect” on Reclamation in light of the severe consequences of violating the ESA. [FN16] The court found that Reclamation was not required to take the USFWS’ suggestions set forth in its RPA, but did so nonetheless, and reduced 2008-09 water deliveries by several hundred-thousand acre feet.

The court determined that, under the ESA, the USFWS provided an opinion on the consequences of the Projects on the smelt. Reclamation was not bound by it unless and until it elected to implement the RPA. Once Reclamation did, as the agency responsible for “Project operations,” it became the appropriate lead agency for purposes of NEPA. With that in mind, the court noted that Reclamation, which proposed the action in the form of an Operations and Criteria Plan (the OCAP) to the USFWS, triggered preparation of the BiOp. Reclamation has ongoing statutory authority to implement operations described in the OCAP. It also has “greater expertise [than the USFWS] concerning the alleged adverse environmental effects ... identified by Plaintiffs allegedly occur[ing] as a result of reduced water deliveries under Reclamation’s water supply contracts.” [FN17] Still, the court noted the USFWS’ extensive role in formulating, planning and implementing the RPA, “with full knowledge that no NEPA compliance had been undertaken. This is not a shell game in which the agencies may leave the public to guess which agency has taken major federal action.” The court found it “a close call” as to whether the USFWS’ issuance of the BiOp is a major federal action under NEPA, but decided that it need not make that call because Reclamation was joined as a party and its actions (adoption and implementation of the USFWS’ RPA) must be evaluated under NEPA.

Conclusion

As a result of the *Delta Smelt* opinion, Reclamation must perform a NEPA analysis related to one of several controversial, long-running disputes over water supplies in central California. ESA issues in the San Joaquin Valley have been vetted over the course of several years. Yet the balance between protecting the smelt and providing water for agriculture, consumers, and industry remains elusive. Additional evaluation under NEPA, existing obligations under federal and state water contracts, and the water needs of millions of people complicate conservation issues in the

delta. On December 22, 2009, the federal government took steps to address the worsening water crisis in California by releasing an interim plan. The plan is designed to strengthen and coordinate the federal government's actions with the state's, and to work toward meeting water needs while ensuring sound ecosystems and water quality. While the federal plan is largely aspirational, Reclamation's pending NEPA analysis, as well as other cases related to the Projects and their impacts on listed species and the human environment, will likely have significant consequences on water use in California.

[FN*]. © 2009 Marten Law Group. All rights reserved. Reprinted with permission. Marten Law Group provides the material and information contained in this article for informational purposes only. This article is not a substitute for legal advice. Please contact your legal counsel for specific advice and/or information.

[FN**]. Jessica **Ferrell** practices environmental and natural resource litigation at Marten Law Group. She can be contacted by telephone at 206-292-2636, or by e-mail at jferrell@martenlaw.com.

[FN1]. *In re Delta Smelt Consolidated Cases*, Order, Nos. 09-00407, - 00422, -00631, -00892, -00480 (E.D. Cal. Dec. 9, 2009).

[FN2]. *San Luis & Delta-Mendoza Water Authority v. Salazar*, 2009 WL 3823934 (E.D. Cal. 2009), at *19 (E.D. Cal. Nov. 13, 2009) (“*Delta Smelt*”).

[FN3]. 2009 WL 3823934, at *19 (E.D. Cal. Nov. 13, 2009) (citing *Natural Resources Defense Council v. Kempthorne*, 69 Env't. Rep. Cas. (BNA) 1095, 2008 WL 5054115, at *27 (E.D. Cal. 2008), superseded in part, 621 F. Supp. 2d 954 (E.D. Cal. 2009).

[FN4]. *Delta Smelt*, Motion for Preliminary Injunction, Docket 433 Nos. 09-00407, -00422, -00631, -00892, -00480 (E.D. Cal. Dec. 3, 2009).

[FN5]. [16 U.S.C.A. § 1536\(a\)\(2\)](#).

[FN6]. *Thomas v. Peterson*, 753 F.2d 754, 763, (9th Cir. 1985).

[FN7]. See *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management*, 273 F.3d 1229, 1239, (9th Cir. 2001).

[FN8]. [16 U.S.C.A. § 1536\(a\)-\(b\)](#).

[FN9]. *National Wildlife Federation v. National Marine Fisheries Service*, 481 F.3d 1224 (9th Cir. 2007), for additional opinion, see, 230 Fed. Appx. 659 (9th Cir. 2007) and opinion amended and superseded, 524 F.3d 917 (9th Cir. 2008) (citing 50 C.F.R. § 402.14(h)(3)).

[FN10]. [16 U.S.C.A. § 1536\(b\)\(4\)](#).

[FN11]. [42 U.S.C.A. § 4332\(C\)](#).

[FN12]. California Department of Water Resources, California State Water Project and the Central Valley Project (last visited Dec. 9, 2009).

[FN13]. *Delta Smelt*, 2009 WL 3823934 at *13.

[FN14]. [Ramsey v. Kantor](#), 96 F.3d 434, 444 (9th Cir. 1996).

[FN15]. [Delta Smelt](#), 2009 WL 3823934 at *8 (citing [Westlands Water Dist. v. U.S. Dept. of Interior, Bureau of Reclamation](#), 850 F. Supp. 1388 (E.D. Cal. 1994) [Westlands Water Dist. v. U.S. Dep't of Int.](#), 850 F. Supp. 1388, 1422 (E.D. Cal. 1994)).

[FN16]. [Delta Smelt](#), 2009 WL 3823934 at *11-12 (quoting Plaintiffs' Motion and citing criminal and civil liability provisions of the USA, [16 U.S.C.A. §§ 1536\(a\), -\(o\)](#)).

[FN17]. [Delta Smelt](#), 2009 WL 3823934 at *13-14 & nn. 10-11 (citing multiple federal register noticing regarding proposed water supply project changes in the San Joaquin Valley and surrounding areas).

258 Env Couns Article III

END OF DOCUMENT