Legal Framework for NAS OCAP Reasonable and Prudent Alternative

This panel's charge is to determine whether there are any RPAs that FWS or NMFS did not offer that "1) would have lesser impacts to other water uses as compared to those adopted in the biological opinions, and 2) would provide equal or greater protection for the relevant fish species and their designated critical habitat given the uncertainties involved."

A RPA is defined as "alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the [relevant FWS or NMFS] Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat".[1] Please see Section 11.1 of the NMFS OCAP Biological Opinion, Reasonable and Prudent Alternative Overview (pages 575-581), to understand the goals and objectives of the existing RPAs. Any RPA identified by this panel must meet all four of the ESA regulatory requirements for a RPA. This paper will focus on the requirements that the RPA be within the scope of the federal agency's authority, and that it must be likely to avoid jeopardizing a listed species.

A. Agency's scope of authority

Valid RPA elements include modifications to an action, facility, or operation that are within the direct control of the action agency or that the action agency can order. RPA elements where the action agency shares some responsibility or control over an action, operation, or facility count as valid RPA elements only if they are ***reasonably certain to occur*.**[2] Measures that are completely outside the control of the action agency or that consist merely of an action agency's encouragement to another entity to take certain actions are not valid elements of a RPA. For further discussion on this issue, see NMFS Opinion pp. 718-726.

B. Avoidance of Jeopardy or Adverse Modification

A RPA must avoid the likelihood of jeopardy to all listed species. The ESA provides that a federal agency must "**ensure"** that its actions are not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat.[3] Regulations define jeopardize as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both survival and recovery of a listed species in the wild…"[4]

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[1] 50 CFR § 402.02

[2] National Wildlife Federation v. National Marine Fisheries Service, 481 F.3d 1224, 1241, fn. 16 (9th Cir. 2007) "It may well be that the agencies lack the power to guarantee the improvements in question. However, if this is the case, the proper course is to exclude them from the analysis and consider only those actions that are in fact under agency control or otherwise reasonably certain to occur." Moreover, since a federal court has ruled that USBR has no discretion to modify certain CVP contracts that entitle the contractors to specified water deliveries from the Sacramento River, *see Natural Resources Defense Council v. Kempthorne,* 621 F. Supp. 2d 954 (E.D. Cal. 2009), even USBR's discretion over water operations is limited.

[3] 16 U.S.C. § 1536(a)(2)

[4] 50 C.F.R. § 402.02

The Services evaluate "destruction or adverse modification" of critical habitat by determining if the action results in the direct or indirect alteration that appreciably reduces the conservation value of critical habitat. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical."[5]

FWS and NMFS have determined that the RPAs in their current biological opinions will meet ESA standards for avoiding the likelihood of jeopardy. Since part of the NAS charge is to consider whether there are other RPAs that can provide **equal or greater protection** to listed species, any alternative RPA must also, at a minimum, avoid the likelihood of jeopardizing listed species, as well as the destruction or adverse modification of critical habitat.

Controlling case law prescribes important analytical steps and assumptions that must be part of the evaluation of an RPA. In analyzing effects of an action, the consulting agency must:

- Resolve uncertainty in favor of the species[6]
- Be "reasonably certain" that any mitigation identified will, in fact, occur[7]
- Consider impacts on recovery, as well as survival[8]
- Consider impacts on survival and recovery in both the short and long term[9]

The requirement to resolve uncertainty in favor of the species is particularly significant in reviewing potential RPAs for the OCAP consultations. In a highly complex system like the Delta, and when dealing with complex life cycles like those of anadromous fish, there is bound to be substantial uncertainty as to the impacts and interactions of changes to the system. Resolving uncertainty in favor of the species is akin to the "precautionary principle:" provide a margin for error in case the hoped-for outcome of a measure does not materialize. Only by using such "institutionalized caution,"[10] can a federal agency fulfill its duty to "ensure" that its action is not likely to jeopardize any listed species.

While uncertainty must be resolved in favor of the species, it is not necessary that the consulting agency conclusively establish that a RPA will avoid jeopardizing the species. It may be that best available information simply does allow for conclusive findings. With regard to the OCAP biological opinions, this is particularly true in light of uncertainty about future effects of climate change. In such a situation, if it is possible to do so, the consulting agency's duty is to develop a

[5] The definition of "destruction or adverse modification of critical habitat" in current section 7 regulations has been invalidated by several court cases (in 5th, 9th, and 10th Circuit Courts). In the interim, until a new definition is provided in the section 7 regulations, the Services are using the language from the ESA.
[6] *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988); *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987)
[7] National Wildlife Federation v. National Marine Fisheries Service, 481 F.3d 1224, 1241 (9th Cir. 2007)
[8] National Wildlife Federation v. National Marine Fisheries Service, 524 F.3d 917, 931 (9th Cir. 2008)
[9] Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1094 (9th Cir. 2005)
[10] TVA v. Hill, 437 U.S. 153 (1978)

RPA that is based on best available information and that, in the professional judgment of the agency's experts, is likely to avoid jeopardizing a listed species.[11]

In addition, the effects of the action being considered – here, the withdrawal of water from the Sacramento Bay Delta to serve agricultural, municipal, and industrial uses – must be considered in the context of 1) the status of the species; 2) the environmental baseline; and 3) other activities beyond the control of the action agency that are likely to help or hinder the survival and recovery of the listed species.[12] In other words, once the effects of activities and conditions in the baseline are accounted for, the anticipated effects from carrying out the proposed action must be aggregated with the existing conditions and the cumulative effects of future state and private actions reasonably certain to occur (or, in the words of the Ninth Circuit "the present and future human and natural contexts") to determine if the proposed action or RPA will avoid likely jeopardizing the species at issue. In the OCAP consultations, the context is key. First, several of the affected species are severely depressed and continuing to decline. Second, particularly given the large geographic extent of the action area, the environmental conditions affecting the survival and recovery of listed fish (*e.g.*, a sharp decline in extent of suitable habitat for spawning, rearing, and migrating; likely adverse effects of climate change and future growth and development on these habitats; degraded water quality from intense land use and warmer temperatures; alteration of tidal influence by radical modification of the natural Delta) place great stress on aquatic species even before the effects of the water projects are considered. Given this context, there is little margin for a federal action to place additional stress on already highly imperiled species.[13] It is not sufficient for the water projects merely to cause *less* harm to listed species than they did in the past. If necessary to avoid the likelihood of jeopardy, an action agency must use the full range of its discretion to minimize harm to listed species.[14]

[11] See, e.g., Greenpeace Action v. Franklin, 14 F.3d 1324, 1336 (9th Cir. 1993) "that evidence is not dispositive does not mean that agencies may not rely on it"; S.W. Center for Biological Diversity, 2002 WL 1733618 at *8 (D.D.C. 2002) "agencies may not delay completion of consultation because the available data is not conclusive, and must rely on 'even inconclusive or uncertain data if that is the best available.'"

[12] 50 C.F.R. § 402.02, 402.14(g)

[13] *See National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 930 (9th Cir. 2008)

[14] 51 Fed. Reg. at 11937 (June 3, 1986)