

**PLEASE CONSIDER  
THE ENVIRONMENT:  
NEPA ENVIRONMENTAL REVIEW  
AND ESA CONSULTATION IN  
SAN LUIS & DELTA-MENDOTA  
WATER AUTHORITY V. SALAZAR**

I. INTRODUCTION

The first Earth Day was celebrated April 22, 1970.<sup>1</sup> It has since become an annual event observed worldwide to highlight the importance of environmental stewardship.<sup>2</sup> The environmental movement arose out of a growing concern about the impacts of pollution, development, and other human activities on the natural world.<sup>3</sup> By the time Earth Day materialized, a number of major federal statutes had already been enacted to combat the ills of environmental degradation.<sup>4</sup> The environmental movement appears now to be an enduring force that has had a clear impact on the landscape of American society, politics, and law.<sup>5</sup>

The enduring legacy of the environmental movement is evidenced by two major environmental statutes that came into being during the heart of this movement: the National Environmental Policy Act<sup>6</sup> (“NEPA”) and

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<sup>1</sup> *About Earth Day Network*, EARTH DAY NETWORK, <http://www.earthday.org/about-earth-day-network> (last visited Jan. 16, 2013).

<sup>2</sup> *See id.*

<sup>3</sup> *See Earth Day: The History of a Movement*, EARTH DAY NETWORK, <http://www.earthday.org/earth-day-history-movement> (last visited Jan. 16, 2013).

<sup>4</sup> *See generally* Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392; *see generally* Water Quality Act, Pub. L. No. 89-234, 79 Stat. 903 (1965); *see generally* Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926; *see generally* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

<sup>5</sup> *See Earth Day: The History of a Movement*, *supra* note 3.

<sup>6</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970); *see* 42 U.S.C. § 4321 (2012) (“The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the

the Endangered Species Act<sup>7</sup> (“ESA”). NEPA and the ESA each require government actors to review potential impacts to the environment.<sup>8</sup> Occasionally, however, the workings of these two statutes meet, where the narrow focus of the ESA and the broad policy of NEPA can come into conflict.<sup>9</sup>

A recent lawsuit, *San Luis & Delta-Mendota Water Authority v. Salazar*,<sup>10</sup> is one such instance where the ESA and NEPA converge.<sup>11</sup> This case challenges the notion that the government’s species preservation efforts mandated by the ESA cannot take into consideration the detrimental impacts those efforts might have on the environment as a whole, and the public in particular.<sup>12</sup>

Central to this matter are two major California water storage and distribution projects—the federal Central Valley Project (“CVP”) and the

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understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.”); *see also* 40 C.F.R. § 1500.1(a) (2012) (“The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains ‘action-forcing’ provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.”).

<sup>7</sup> Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884; *see* 16 U.S.C.A. § 1531(b) (“The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.”).

<sup>8</sup> *See* 42 U.S.C. § 4332(2)(C) (2012) (requiring NEPA environmental review for “major federal actions significantly affecting the quality of the human environment”); *see* 16 U.S.C. § 1536(a)(2) (2012) (requiring ESA consultation to ensure that agency actions do not detrimentally impact threatened and endangered species).

<sup>9</sup> *See generally* *Pac. Legal Found. v. Andrus*, 657 F.2d 829 (6th Cir. 1981) (finding NEPA does not require agency to prepare an EIS before listing species as endangered pursuant to ESA); *see generally* *Douglas Cnty. v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995) (finding NEPA does not require agency to prepare an EIS before designating critical habitat pursuant to ESA); *see generally* *Catron Cnty. Bd. of Comm’rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996) (finding NEPA does not require agency to prepare an EIS before designating critical habitat pursuant to ESA).

<sup>10</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026 (E.D. Cal. 2009).

<sup>11</sup> *Id.* at 1030 (action brought by Plaintiffs claiming that agencies’ actions pursuant to ESA require NEPA environmental review).

<sup>12</sup> *See id.*; *see* *San Luis & Delta-Mendota Water Auth. v. Salazar*, 2009 WL 1575169 at p. \*5-8 (E.D. Cal. 2009).

State Water Project (“SWP”)—and a two-inch minnow—the delta smelt.<sup>13</sup> The CVP and SWP are two of the largest water storage and distribution systems on the planet.<sup>14</sup> Together, these projects provide approximately ten million acre-feet of water annually to more than 22 million people and 3.6 million acres of irrigated farmland.<sup>15</sup> The delta smelt is a threatened species of fish protected by the ESA.<sup>16</sup> It is only found in the Sacramento-San Joaquin River Delta,<sup>17</sup> and its decline has been attributed to impacts from CVP and SWP operations.<sup>18</sup>

*San Luis* is a challenge brought by water users<sup>19</sup> (“Plaintiffs”) against the U.S. Fish and Wildlife Service (“Fish and Wildlife”) and the U.S. Bureau of Reclamation (“Reclamation”)—together as “Defendants”—to stop the implementation of measures designed to protect the delta smelt that have significantly decreased the water supply available to farms and rural communities in California’s San Joaquin Valley.<sup>20</sup> Among the challenges brought by the Plaintiffs is the claim that Fish and Wildlife failed to conduct an environmental review required by NEPA prior to issuing the reasonable and prudent alternative<sup>21</sup> (“RPA”) recommended

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<sup>13</sup> *San Luis*, 686 F. Supp. 2d at 1030.

<sup>14</sup> *California State Water Project and the Central Valley Project*, DEPARTMENT OF WATER RESOURCES, <http://www.water.ca.gov/swp/cvp.cfm> (last modified April 29, 2008).

<sup>15</sup> *Id.*

<sup>16</sup> See Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Delta Smelt, 58 Fed. Reg. 12,854 (Fish and Wildlife Service Mar. 5, 1993) (to be codified at 50 C.F.R. pt. 17).

<sup>17</sup> *See id.*

<sup>18</sup> *See id.*; see also BUREAU OF RECLAMATION, BIOLOGICAL ASSESSMENT ON THE CONTINUED LONG-TERM OPERATIONS OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT 7-21 (August 2008), available at [http://www.usbr.gov/mp/cvo/OCAP/sep08\\_docs/OCAP\\_BA\\_Aug08.pdf](http://www.usbr.gov/mp/cvo/OCAP/sep08_docs/OCAP_BA_Aug08.pdf) [hereinafter BIOLOGICAL ASSESSMENT 2008].

<sup>19</sup> State and federal water contractors that receive water deliveries from the CVP and SWP for agricultural and residential uses. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1030 (E.D. Cal. 2009); *see San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 863 (E.D. Cal. 2010).

<sup>20</sup> *See San Luis*, 686 F. Supp. 2d at 1030; *see San Luis & Delta-Mendota Water Auth. v. Salazar*, 2009 WL 1575169 at p. \*5-8 (E.D. Cal. 2009); *see also California Releases Water Project Report*, WESTERN FARM PRESS, Jul. 23, 2012, available at <http://westernfarmpress.com/irrigation/california-releases-water-project-report>. Millions of residential water users in southern California are also affected. *See Bettina Boxall, U.S. Tightens Tap on Water from N. Calif.*, LOS ANGELES TIMES, Dec. 16, 2008, available at <http://articles.latimes.com/2008/dec/16/local/me-water16>.

<sup>21</sup> 50 C.F.R. § 402.02 (2012) (“Reasonable and prudent alternatives (RPAs) refer to 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 Director believes would avoid the

by Fish and Wildlife in the 2008 biological opinion<sup>22</sup> (“BiOp”).<sup>23</sup> No NEPA environmental review was conducted at any point during the preparation, issuance, or implementation of the BiOp.<sup>24</sup>

The United States District Court for the Eastern District of California ruled in favor of the Defendants on the claim against Fish and Wildlife, finding that Fish and Wildlife was not required to conduct any NEPA environmental review or prepare an environmental impact statement<sup>25</sup> (“EIS”) prior to issuing the BiOp.<sup>26</sup> In reaching this decision, the court determined that *Ramsey v. Kantor*,<sup>27</sup> the only case to rule that a wildlife agency was required to prepare an EIS for the issuance of a BiOp, was factually distinguishable from the circumstances in *San Luis* and refused to apply *Ramsey’s* functional equivalency analysis.<sup>28</sup> The functional equivalency analysis, Plaintiffs argued, would establish that Fish and Wildlife’s conduct is subject to NEPA’s environmental review requirements because it approves a project by a permit, making it a major federal action under NEPA regulations.<sup>29</sup>

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likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.”).

<sup>22</sup> *Id.* (“Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.”). “Service” refers to either Fish and Wildlife or the National Marine Fisheries Service, which are the consulting agencies for ESA Section 7(a)(2). *Id.* Fish and Wildlife and the National Marine Fisheries Service will be referred to as “wildlife agencies” when their reference is in connection with ESA consultation.

<sup>23</sup> *San Luis*, 686 F. Supp. 2d at 1030.

<sup>24</sup> *Id.* at 1031.

<sup>25</sup> 40 C.F.R. § 1508.11 (2012); 40 C.F.R. § 1502.1 (2012) (“The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.”)

<sup>26</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 966 (E.D. Cal. 2010).

<sup>27</sup> *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996).

<sup>28</sup> *See San Luis*, 760 F. Supp. 2d at 964 (distinguishing *Ramsey*); *see San Luis*, 686 F. Supp. 2d at 1037 (same).

<sup>29</sup> *San Luis*, 686 F. Supp. 2d at 1037.

Plaintiffs appealed this ruling to the United States Court of Appeals for the Ninth Circuit.<sup>30</sup> The outcome of this appeal could significantly alter the approach wildlife agencies take towards species protection. On one hand, a ruling in favor of the Defendants will likely maintain the current approach, where steps must be taken to preserve threatened and endangered species no matter the cost.<sup>31</sup> On the other hand, a ruling in favor of the Plaintiffs could require wildlife agencies and government actors undertaking activities that impact protected species to consider the impacts of species protection efforts on humans and the overall environment, requiring the identification and consideration of alternative methods of species protection that are less impactful to the environment and human populations. Such a requirement would be a significant deviation from the status quo that could alleviate some of the recent reductions in water deliveries commanded in the name of species protection<sup>32</sup> and provide relief to the farmers and rural communities affected by water reductions.<sup>33</sup> At the time of this writing, the Circuit Court has not yet issued a decision on the matter.<sup>34</sup>

This Comment will explore one of the NEPA issues appealed to the Ninth Circuit Court of Appeals—whether Fish and Wildlife’s issuance of the BiOp requires NEPA environmental review—and determine that Fish and Wildlife has an obligation to conduct NEPA environmental review. Section II will provide background information on the ESA, NEPA, and recent delta smelt litigation. The next three sections will explore whether Fish and Wildlife’s 2008 BiOp is a “proposal[] for . . . major Federal action[] significantly affecting the quality of the human environment.”<sup>35</sup> Section III discusses the agency conduct in question as a proposal for modified project operations. Section IV considers the significance of the

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<sup>30</sup> See Opening Brief and Response of Appellees and Cross-Appellants San Luis & Delta-Mendota Water Authority and Westlands Water District at 5, *San Luis & Delta-Mendota Water Auth. v. Salazar*, 11-16624 (9th Cir. Feb. 10, 2012) [hereinafter Plaintiffs’ Brief 1] (the NEPA issue being appealed by the Plaintiffs is whether Fish and Wildlife must perform environmental review before issuing its BiOp and RPA).

<sup>31</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (“The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”); *but see* 16 U.S.C. § 1536(h)(1) (2012) (providing for an exemption by the ESA Committee for actions whose benefits outweigh the benefits from species protection measures).

<sup>32</sup> Boxall, *supra* note 20; *California Releases Water Project Report*, *supra* note 20.

<sup>33</sup> See generally Katie Paul, *Dying on the Vine*, NEWSWEEK, Aug. 23, 2009, available at <http://www.thedailybeast.com/newsweek/2009/08/23/dying-on-the-vine.html>.

<sup>34</sup> See General Docket, *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 11-16624 (9th Cir. Jan. 14, 2013).

<sup>35</sup> 42 U.S.C. § 4332(2)(C) (2012).

environmental impacts of the proposed changes to CVP and SWP operations. Section V evaluates Fish and Wildlife's issuance of the BiOp as a major federal action and applies *Ramsey's* functional equivalency analysis to the *San Luis* case.

## II. SETTING THE STAGE: FEDERAL ENVIRONMENTAL LAWS AND THE DELTA SMELT CASES

### A. *Endangered Species Act*

Under the ESA, species in need of protection are listed as threatened or endangered,<sup>36</sup> which makes it illegal for any person<sup>37</sup> to "take" a member of a protected species.<sup>38</sup> All federal agencies are required to engage in consultation with Fish and Wildlife or the National Marine Fisheries Service when an action of the agency might impact a listed species.<sup>39</sup> The purpose of the consultation process is to ensure that agency actions<sup>40</sup> will not jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of its critical habitat.<sup>41</sup>

The wildlife agency must prepare a BiOp expressing its opinion regarding the impact to the species.<sup>42</sup> If a jeopardy opinion is issued, the wildlife agency will include in the BiOp any RPAs that can be taken by the action agency that will not jeopardize the species and allow the proposed action to move forward as modified.<sup>43</sup> In addition to the wildlife agency's opinion concerning jeopardy and any RPAs, an incidental take statement<sup>44</sup> ("ITS") will be provided along with the

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<sup>36</sup> 16 U.S.C. § 1533(a)(1) (2012).

<sup>37</sup> 16 U.S.C. § 1532(13) (2012) ("The term 'person' means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.").

<sup>38</sup> 16 U.S.C. §§ 1538(a)(1)(B)-(C) (2012). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (2012). "Harm" has been further defined by regulation to include significant habitat modification. 50 C.F.R. § 17.3 (2012).

<sup>39</sup> See 16 U.S.C. § 1536(a)(2) (2012); see 50 C.F.R. § 402.02 (2012).

<sup>40</sup> 16 U.S.C. § 1536(a)(2) (defining "agency action" to include "any action authorized, funded, or carried out" by a federal agency).

<sup>41</sup> *Id.*

<sup>42</sup> 16 U.S.C. § 1536(b)(3)(A) (2012); 50 C.F.R. § 402.14(h)(3) (2012).

<sup>43</sup> 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

<sup>44</sup> 50 C.F.R. § 402.02 ("Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or

BiOp.<sup>45</sup> The ITS permits the taking of a listed species if it is incidental to the implementation of the action.<sup>46</sup> Any takings that occur through conduct that is consistent with the terms and conditions of the ITS are not prohibited under the ESA.<sup>47</sup> Without an ITS, the taking of a listed species would be a violation of the ESA and the agency's action would not be permitted.<sup>48</sup>

### *B. National Environmental Policy Act*

NEPA is the United States' basic national charter for environmental protection.<sup>49</sup> NEPA declared the policy of the United States towards human interaction with the environment.<sup>50</sup> The provisions of NEPA are characterized as "action forcing" and are designed "to make sure that federal agencies act according to the letter and spirit of the Act"<sup>51</sup> by making "decisions that are based on understanding of environmental consequences, and tak[ing] actions that protect, restore, and enhance the environment."<sup>52</sup>

To implement the policy established by NEPA, all federal agencies are required to include a detailed statement—an EIS—addressing potential environmental impacts and possible alternatives with "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."<sup>53</sup> If the elements of this statutory requirement are satisfied, then an EIS should be prepared for the underlying agency conduct.<sup>54</sup> An EIS is intended to enhance the decision making process, rather than "to rationalize or justify decisions already made."<sup>55</sup>

Public comments are to be affirmatively solicited "from those persons

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applicant.").

<sup>45</sup> 16 U.S.C. § 1536(b)(4) (2012); 50 C.F.R. § 402.14(i)(1) (2012).

<sup>46</sup> See 16 U.S.C. § 1536(b)(4); see 50 C.F.R. § 402.14(i)(1).

<sup>47</sup> See 50 C.F.R. § 402.14(i)(5) (2012); see 16 U.S.C. § 1536(o) (2012).

<sup>48</sup> See 16 U.S.C. § 1536(o)(2).

<sup>49</sup> 40 C.F.R. § 1500.1(a) (2012).

<sup>50</sup> 42 U.S.C. § 4321 (2012) ("The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.").

<sup>51</sup> 40 C.F.R. § 1500.1(a).

<sup>52</sup> 40 C.F.R. § 1500.1(c) (2012).

<sup>53</sup> 42 U.S.C. § 4332(2)(C) (2012).

<sup>54</sup> *Id.*

<sup>55</sup> 40 C.F.R. § 1502.5 (2012).

or organizations who may be interested or affected.”<sup>56</sup> The agency preparing the EIS must respond to comments before a final EIS is prepared.<sup>57</sup> In response to the comments submitted, the agency may modify the proposed action or alternatives to the action, or develop new alternatives not previously considered.<sup>58</sup> In general, the EIS process is intended to make available for public officials the best information possible to yield better agency decisions and to foster excellent agency actions.<sup>59</sup>

### C. Delta Smelt Litigation

#### 1. *Natural Resource Defense Council v. Kempthorne*

*Natural Resource Defense Council v. Kempthorne*<sup>60</sup> and the *San Luis* case are products of Reclamation’s and the California Department of Water Resources’ (“DWR”) proposal for the continued operation of the CVP and SWP.<sup>61</sup> In *Kempthorne*, environmental interest groups challenged the 2005 BiOp that evaluated project operations and impacts on the delta smelt.<sup>62</sup>

In 2004, an update to the Long-Term Central Valley Project and State Water Project Operations Criteria and Plan (“OCAP”) was prepared by Reclamation that described the management practices of the two projects.<sup>63</sup> The OCAP described the circumstances applicable to the

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<sup>56</sup> 40 C.F.R. § 1503.1(a)(4) (2012).

<sup>57</sup> 40 C.F.R. § 1503.4(a) (2012). The agency may also accept comments on a final EIS prior to actually making its decision. 40 C.F.R. § 1503.1(b) (2012).

<sup>58</sup> 40 C.F.R. § 1503.4(a) (2012).

<sup>59</sup> 40 C.F.R. §§ 1500.1(b)-(c) (2012) (“(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. (c) Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.”).

<sup>60</sup> *Natural Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007).

<sup>61</sup> *See id.* at 328; *see San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1030 (E.D. Cal. 2009).

<sup>62</sup> *See Kempthorne*, 506 F. Supp. 2d at 328-329.

<sup>63</sup> *Id.* at 328.



coordinated operations of the projects from 1991 through 2003.<sup>64</sup> Reclamation and DWR proposed to continue to operate the CVP and SWP as it was described in the OCAP.<sup>65</sup> Due to the presence of several endangered and threatened species in the projects' operations area, including the delta smelt, a biological assessment<sup>66</sup> was prepared to evaluate the potential impact of the continued operations of the projects on the protected species.<sup>67</sup>

The biological assessment was submitted to Fish and Wildlife and the National Marine Fisheries Service for evaluation.<sup>68</sup> Fish and Wildlife concluded that the continued operation of the projects *would not* jeopardize the delta smelt and prepared the 2005 BiOp.<sup>69</sup> Reclamation and DWR were allowed to proceed with the continued operation of the projects as planned.<sup>70</sup>

Environmental interest groups challenged Fish and Wildlife's "no jeopardy" findings as arbitrary, capricious, and contrary to law.<sup>71</sup> The district court found the 2005 BiOp to be unlawful and inadequate.<sup>72</sup> The BiOp was remanded to Fish and Wildlife and interim protective measures were put in place to protect the delta smelt while a new BiOp was prepared.<sup>73</sup> It was found that this could result in a reduction of almost 600,000 acre-feet of water available for users of CVP and SWP water in an average year, and over 1 million acre-feet in a wet year.<sup>74</sup>

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<sup>64</sup> See BIOLOGICAL ASSESSMENT 2008, *supra* note 18, at 1-2.

<sup>65</sup> See BUREAU OF RECLAMATION, LONG-TERM CENTRAL VALLEY PROJECT AND STATE WATER PROJECT OPERATIONS CRITERIA AND PLAN BIOLOGICAL ASSESSMENT xlix, 1-10 (June 30, 2004) available at [http://www.usbr.gov/mp/cvo/OCAP/OCAP\\_BA\\_6\\_30\\_04.pdf](http://www.usbr.gov/mp/cvo/OCAP/OCAP_BA_6_30_04.pdf) [hereinafter BIOLOGICAL ASSESSMENT 2004].

<sup>66</sup> 50 C.F.R. § 402.02 (2012) ("Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.").

<sup>67</sup> See BIOLOGICAL ASSESSMENT 2004, *supra* note 65, at xlix.

<sup>68</sup> *Id.*

<sup>69</sup> See *Natural Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 328 (E.D. Cal. 2007). The National Marine Fisheries Service likewise prepared a BiOp pertaining to the affected species under its jurisdiction. See *Pac. Coast Fed'n of Fishermen's Ass'n v. Gutierrez*, 606 F. Supp. 2d 1122, 1127 (E.D. Cal. 2008).

<sup>70</sup> See *Kempthorne*, 506 F. Supp. 2d at 328.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 387-388.

<sup>73</sup> See *Natural Res. Def. Council v. Kempthorne*, 2007 WL 4462391 at p. \*1-5 (E.D. Cal. 2007).

<sup>74</sup> DAVID SUNDING ET AL., ECONOMIC IMPACTS OF THE WANGER INTERIM ORDER FOR DELTA SMELT Executive Summary (Dec. 8, 2008) available at <http://sustainabledelta.com/pdf/BEC.FinalReport.8Dec08.pdf>.

## 2. *San Luis & Delta-Mendota Water Authority v. Salazar*

The *San Luis* case was initiated after Fish and Wildlife returned in 2008 with a revised BiOp that determined project operations as proposed were “likely to jeopardize the continued existence of the delta smelt.”<sup>75</sup> In accordance with ESA requirements, the 2008 BiOp included an RPA that, if followed, would allow Reclamation and DWR to operate the water projects—as modified by the RPA—in such a way that it should not jeopardize the delta smelt or adversely modify its critical habitat.<sup>76</sup> The RPA includes operational measures “designed to reduce entrainment of smelt during critical times of the year by controlling and reducing water flows in the Delta.”<sup>77</sup> Reclamation accepted the BiOp and RPA and implemented the components presented therein.<sup>78</sup> The components that made up the RPA require management of water flows to achieve desirable in-stream flows and maintain water quality levels<sup>79</sup> and creating or restoring habitat for the Delta smelt.<sup>80</sup> The requirement to manage negative flows in the Delta limited the volume of water that could be exported through the projects to water users to the south.<sup>81</sup> This loss in pumping capacity resulted in an estimated loss of 300,000 acre-feet in water year 2008-09 alone,<sup>82</sup> even after certain restrictive components of the RPA were partially enjoined for a portion of that water year.<sup>83</sup>

In the *San Luis* lawsuit, the water users challenged the 2008 BiOp<sup>84</sup> on several grounds.<sup>85</sup> Among them was the claim that Fish and Wildlife

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<sup>75</sup> See *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1030 (E.D. Cal. 2009).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See FISH AND WILDLIFE SERVICE, FORMAL ENDANGERED SPECIES ACT CONSULTATION ON THE PROPOSED COORDINATED OPERATIONS OF THE CENTRAL VALLEY PROJECT (CVP) AND STATE WATER PROJECT (SWP) 280-283 available at [http://www.fws.gov/sfbaydelta/documents/SWP-CVP\\_OPs\\_BO\\_12-15\\_final\\_OCR.pdf](http://www.fws.gov/sfbaydelta/documents/SWP-CVP_OPs_BO_12-15_final_OCR.pdf) [hereinafter BIOLOGICAL OPINION] (Components 1 and 2 set standards for negative flows to reduce delta smelt entrainment; Component 3 requires the maintenance of X2, which is where the salinity concentration of water in the Delta is two parts per thousand, to be located at an approximate point upstream of the Golden Gate).

<sup>80</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 864-865 (E.D. Cal. 2010).

<sup>81</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 2009 WL 1575169 at p. \*8 (E.D. Cal. 2009).

<sup>82</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1050 (E.D. Cal. 2009).

<sup>83</sup> See *San Luis*, 2009 WL 1575169 at p. \*23-24.

<sup>84</sup> See *San Luis*, 760 F. Supp. 2d at 863.

<sup>85</sup> See *id.* at 867.

violated NEPA by failing to conduct any environmental review prior to issuing the 2008 BiOp.<sup>86</sup> Throughout the relevant time at issue in *San Luis*, no NEPA environmental document<sup>87</sup> of any kind was prepared by any agency.<sup>88</sup> Plaintiffs argued that an EIS was required before Fish and Wildlife issued the BiOp because the changes to CVP and SWP operations required by the BiOp and RPA amounted to “major federal actions”<sup>89</sup> under NEPA and the impacts to the environment resulting from water delivery reductions caused by implementation of the RPA were significant.<sup>90</sup> A preliminary injunction was ordered by the court on May 29, 2009, which stopped Reclamation from implementing a portion of the RPA.<sup>91</sup>

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<sup>86</sup> *San Luis*, 686 F. Supp. 2d at 1030.

<sup>87</sup> 40 C.F.R. § 1508.10 (2012) (“Environmental document includes the documents specified in 40 C.F.R. § 1508.9 (environmental assessment), 40 C.F.R. § 1508.11 (environmental impact statement), 40 C.F.R. § 1508.13 (finding of no significant impact), and 40 C.F.R. § 1508.22 (notice of intent).”).

<sup>88</sup> *San Luis*, 686 F. Supp. 2d at 1031.

<sup>89</sup> 40 C.F.R. § 1508.18 (2012) (“Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.”).

<sup>90</sup> See *San Luis*, 686 F. Supp. 2d at 1030.

<sup>91</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 2009 WL 1575169 at \*23-24

On November 13, 2009, the district court ruled on certain claims in the case,<sup>92</sup> but declined to rule on the NEPA claim against Fish and Wildlife.<sup>93</sup> The court stated that it was a “close call,” but one that did not need to be decided.<sup>94</sup> Plaintiffs’ renewed NEPA claim against Fish and Wildlife was affirmatively denied by the court on December 19, 2010.<sup>95</sup> The district court refused to apply *Ramsey* because it determined *Ramsey* to be factually distinguishable from the circumstances in *San Luis*.<sup>96</sup> The court stated that “[i]n *Ramsey*, the NEPA obligation was imposed on the [wildlife] agency’s issuance of a biological opinion *in part because there was no federal action agency to comply with NEPA.*”<sup>97</sup> In *San Luis*, Reclamation was identified as the relevant action agency because it was ultimately responsible for carrying out project operations, and any NEPA environmental review obligations would fall on it, rather than Fish and Wildlife.<sup>98</sup>

Ruling on other challenges to the 2008 BiOp and RPA, the court found in favor of the Plaintiffs and remanded the BiOp to Fish and Wildlife.<sup>99</sup> The court enjoined the implementation of some components of the RPA, but not others.<sup>100</sup> Final Judgment was entered March 29, 2011,<sup>101</sup> and amended on May 27, 2011, requiring the preparation of a new delta smelt BiOp.<sup>102</sup> The court ordered Fish and Wildlife to have a new BiOp

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(E.D. Cal. 2009).

<sup>92</sup> *San Luis*, 686 F. Supp. 2d at 1051 (ruling in favor of the Plaintiffs on their claim that *Reclamation* violated NEPA by failing to conduct any environmental review before adopting and implementing the RPA contained in the 2008 BiOp).

<sup>93</sup> *Id.* at 1044.

<sup>94</sup> *Id.*

<sup>95</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 966 (E.D. Cal. 2010).

<sup>96</sup> *See id.* at 964 (distinguishing *Ramsey*); *see also San Luis*, 686 F. Supp. 2d at 1037 (same).

<sup>97</sup> *San Luis*, 760 F. Supp. 2d at 964 (emphasis added).

<sup>98</sup> *San Luis*, 686 F. Supp. 2d at 1043-1044; *San Luis*, 760 F. Supp. 2d at 964. The district court did determine that Reclamation was required to prepare an EIS prior to implementing the changes outlined in the RPA. *San Luis*, 686 F. Supp. 2d at 1051.

<sup>99</sup> *San Luis*, 760 F. Supp. 2d at 970.

<sup>100</sup> *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 2009 WL 1575169 at \*23-24 (E.D. Cal. 2009) (preliminary injunction of Component 2); *see Consol. Delta Smelt Cases*, 812 F. Supp. 2d 1133, 1204 (E.D. Cal. 2011) (injunction of Component 3); *see Consol. Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1026, 1071 (E.D. Cal. 2010) (refusing to address arguments for enjoining Components 1 and 3; refusing to grant injunction of Component 2 absent a showing by Plaintiffs that delta smelt are not within imminent risk of entrapment by Project pumping facilities).

<sup>101</sup> *Delta Smelt Consol. Cases*, 2011 WL 1740308, at \*1 (E.D. Cal. 2011).

<sup>102</sup> *Id.* at \*8 (extending date by which the BiOp must be completed).

completed by December 1, 2013.<sup>103</sup>

Both sides filed appeals in this case.<sup>104</sup> The NEPA issue appealed by the Plaintiffs, and the subject of the following discussion, is whether Fish and Wildlife must perform NEPA environmental review before issuing its BiOp and RPA.<sup>105</sup> The Ninth Circuit Court of Appeals heard oral arguments on September 10, 2012,<sup>106</sup> but has not issued its decision.<sup>107</sup>

### III. A MODEST PROPOSAL: FISH AND WILDLIFE'S ISSUANCE OF THE 2008 BIOP, RPA, AND ITS

The issue appealed by Plaintiffs is whether NEPA environmental review is required for the *issuance* of the 2008 BiOp, RPA, and ITS.<sup>108</sup> One question that must be considered is whether the issuance of the BiOp triggers NEPA environmental review because it is a "proposal."<sup>109</sup> In a broader sense, the question is whether NEPA obligations should attach to the development of project operation modifications that are prepared by Fish and Wildlife, but for the use of Reclamation to direct the management of water in the CVP and SWP.

NEPA is designed to ensure that the impacts of an agency action are considered prior to the decision to act which will result in those consequences.<sup>110</sup> Fish and Wildlife's potential NEPA action here is the

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<sup>103</sup> *Id.*

<sup>104</sup> Appellants' Opening Brief at 1-2, *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 11-16624 (9th Cir. Dec. 5, 2011) [hereinafter Defendants' Brief 1]; Plaintiffs' Brief 1, *supra* note 30, at 5.

<sup>105</sup> Plaintiffs' Brief 1, *supra* note 30, at 5.

<sup>106</sup> General Docket, *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 11-16624 (9th Cir. Jan. 14, 2013).

<sup>107</sup> *See id.*

<sup>108</sup> Plaintiffs' Brief 1, *supra* note 30, at 5.

<sup>109</sup> 42 U.S.C. § 4332(2)(C) (2012) (requiring an EIS to be included in "every recommendation or report on *proposals* for . . . major Federal actions significantly affecting the quality of the human environment.") (emphasis added); 40 C.F.R. § 1508.23 (2012) ("Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists."); *Proposal Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/proposal> (last visited Jan. 16, 2013) ("Proposal: an act of putting forward or stating something for consideration.").

<sup>110</sup> *See* 40 C.F.R. § 1502.5 (2012) ("The [EIS] shall be prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made.").

issuance of the BiOp, rather than the implementation of it. If NEPA is determined to attach to Fish and Wildlife's issuance of the BiOp, then the agency will be asked to consider in its own decision making process the impacts that will ultimately result from another agency's impact-causing action.<sup>111</sup> Requiring NEPA environmental review would force Fish and Wildlife to "take a 'hard look'" at the potential impacts of any changes to project operations that it proposes to Reclamation.<sup>112</sup>

NEPA requires an EIS to be included with every recommendation or report prepared by the agency encouraging or advising the acceptance and implementation of the proposal.<sup>113</sup> NEPA attaches to an action during the decision making process, prior to an agency actually making a decision to act on a proposal.<sup>114</sup> An agency does not have to finalize an EIS until a recommendation or report on a proposal for action is released.<sup>115</sup> However, the agency should know early in the process whether an EIS will be required for its conduct, and allow enough time to initiate the NEPA environmental review process.<sup>116</sup> When an EIS is required, it should be finalized and included with any recommendation or report on a proposal for action.<sup>117</sup> A plan, program, or project capable of being immediately undertaken or implemented must exist in order for there to be a proposal.<sup>118</sup>

Here, Fish and Wildlife is responsible for the preparation and issuance of the BiOp with the accompanying RPA and ITS.<sup>119</sup> Fish and Wildlife provided Reclamation with its opinion on the impacts of CVP and SWP operations on the delta smelt, as well as an RPA and ITS that would allow the projects to be operated—as modified—without violating the ESA, which Reclamation subsequently implemented.<sup>120</sup> As the district

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<sup>111</sup> See *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1042 (E.D. Cal. 2009) ("Reclamation proposed the action (in the form of the [OCAP]) to [Fish and Wildlife], which triggered the preparation of the BiOp. Reclamation has the ongoing statutory authority to implement project operations as proscribed by the OCAP.").

<sup>112</sup> *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989) ("NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action....").

<sup>113</sup> See 42 U.S.C. § 4332(2)(C).

<sup>114</sup> See 40 C.F.R. § 1502.5.

<sup>115</sup> See *Kleppe v. Sierra Club*, 427 U.S. 390, 405-406 (1976) ("[U]nder the first sentence of [NEPA Section] 102(2)(C) the moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a proposal for federal action.'").

<sup>116</sup> See 40 C.F.R. § 1502.5; see 40 C.F.R. § 1508.23 (2012).

<sup>117</sup> 40 C.F.R. § 1502.5; 40 C.F.R. § 1508.23.

<sup>118</sup> See *Kleppe*, 427 U.S. at 400.

<sup>119</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1030 (E.D. Cal. 2009).

<sup>120</sup> *Id.*

court found, these modifications to project operations, required by the RPA, represent a change in the procedures or standards used to operate the projects.<sup>121</sup>

However, the district court found that Fish and Wildlife was not required to prepare an EIS prior to issuing the BiOp because Reclamation was the more appropriate agency to prepare the EIS.<sup>122</sup> Reclamation was found to have the ultimate authority to implement the prescribed actions, thus making it the party best suited for conducting NEPA environmental review.<sup>123</sup> The court stated:

The appropriate focus is ‘Project operations,’ and Reclamation is the appropriate lead agency. Reclamation proposed the action (in the form of the Operations and Criteria Plan (“OCAP”)) to [Fish and Wildlife], which triggered the preparation of the BiOp. Reclamation has the ongoing statutory authority to implement project operations as prescribed by the OCAP.<sup>124</sup>

The court reasoned that any environmental impacts would be the result of changes to project operations that would be implemented by Reclamation.<sup>125</sup> The court did acknowledge that Fish and Wildlife “played a key role in formulation, planning, and implementation of the RPA, with full knowledge that no NEPA compliance had been undertaken.”<sup>126</sup> Whether Fish and Wildlife’s issuance of the BiOp demanded preparation of an EIS was determined to be a “close call,” but one that need not be made.<sup>127</sup> In fact, the focus should be placed on Fish and Wildlife’s “formulation, planning, and implementation of the RPA.”<sup>128</sup> Fish and Wildlife’s *issuance* of the BiOp must be analyzed under NEPA because it is the RPA that actually *proposes* changes to the project operations.<sup>129</sup>

The CVP is a project controlled by Reclamation,<sup>130</sup> but the changes to its operations outlined by the RPA were prepared by Fish and Wildlife.<sup>131</sup>

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<sup>121</sup> *Id.* at 1049.

<sup>122</sup> *Id.* at 1044; *see* 40 C.F.R. § 1508.16 (2012) (“Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.”).

<sup>123</sup> *San Luis*, 686 F. Supp. 2d at 1044.

<sup>124</sup> *Id.* at 1042.

<sup>125</sup> *See id.* at 1043 (“Reclamation has the ongoing statutory authority to implement project operations as proscribed by the OCAP.”).

<sup>126</sup> *Id.* at 1044.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See* 42 U.S.C. § 4332(2)(C) (2012).

<sup>130</sup> *See* BIOLOGICAL ASSESSMENT 2008, *supra* note 18, at 1-2.

<sup>131</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1030 (E.D. Cal. 2009).

Those changes in project operations, for the purpose of protecting the delta smelt, differ from Reclamation's original proposal to continue the operations of the CVP and SWP as described in the OCAP.<sup>132</sup> The modifications made by the RPA should be viewed as a new proposal, recommending a new action, that was prepared by a different federal agency—Fish and Wildlife.<sup>133</sup> Fish and Wildlife presented a series of changes to project operations for the purpose of fish protection that it wanted Reclamation to accept.<sup>134</sup> Fish and Wildlife recommended a proposal for action that Reclamation subsequently implemented.<sup>135</sup> This is clearly the type of proposal contemplated by NEPA's environmental review requirement.<sup>136</sup> The appellate court should look at Fish and Wildlife's issuance of the BiOp and RPA—the underlying reason for Reclamation's modified project operations—as the subject of NEPA obligations because the RPA actually proposed the changes to the CVP and SWP operations implemented by Reclamation.

#### IV. OF FISH, FARMS, AND THE HUMAN ENVIRONMENT

To determine whether NEPA environmental review attaches to Fish and Wildlife's issuance of the BiOp, the court must decide whether it is a "major federal action significantly affecting the quality of the human environment."<sup>137</sup> This question can be broken down into two parts—one relating to the action and one relating to the impacts. The analysis here begins with a discussion of the environmental impacts of Fish and Wildlife's BiOp and RPA.

##### A. *Quality of the Human Environment*

Under NEPA, federal actors must consider environmental impacts,<sup>138</sup> but the harm that is being experienced by Plaintiffs due to the water supply restrictions caused by delta smelt protection efforts are more akin to economic and social impacts, rather than impacts to the natural environment.<sup>139</sup> One might also recognize that the demand for NEPA environmental review in *San Luis* is itself a challenge to species

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<sup>132</sup> *Id.* at 1049.

<sup>133</sup> *Id.*

<sup>134</sup> *See id.*

<sup>135</sup> *Id.* at 1030.

<sup>136</sup> *See* 42 U.S.C. § 4332(2)(C) (2012); *see* 40 C.F.R. § 1508.23 (2012).

<sup>137</sup> 42 U.S.C. § 4332(2)(C).

<sup>138</sup> *Id.*

<sup>139</sup> *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 2009 WL 1575169 at p. \*5-8 (E.D. Cal 2009).



protection efforts, which has a clear impact on the natural environment.<sup>140</sup> In light of these outward inconsistencies, one might wonder why NEPA should be implicated in the first place.

The statute itself dictates that NEPA environmental review is required for all “major federal actions significantly affecting the quality of the human environment.”<sup>141</sup> While the language of NEPA clearly considers an interrelationship between human activity and the environment,<sup>142</sup> NEPA itself does not define “quality of the human environment.”<sup>143</sup> NEPA regulations state “[h]uman environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.”<sup>144</sup> This broad language is qualified by the condition that “economic or social effects are not intended by themselves to require preparation of an [EIS]. When an [EIS] is prepared and economic or social and natural or physical environmental effects are interrelated, then the [EIS] will discuss all of these effects on the human environment.”<sup>145</sup> Without environmental impacts, the economic or social effects of water supply reductions might not otherwise require environmental review.<sup>146</sup>

In *San Luis*, the underlying condition is the impact of CVP and SWP operations on the delta smelt, which undoubtedly requires preparation of an EIS if the other NEPA elements are met.<sup>147</sup> An EIS that includes impacts to the delta smelt must also consider the economic and social impacts to farms and rural communities.<sup>148</sup> Although the regulations will only require consideration of economic and social impacts when identifiable environmental impacts are present, it is consistent with NEPA to evaluate those other impacts because they, too, are a part of the human environment.<sup>149</sup> Consideration of impacts to humans will “encourage productive and enjoyable harmony between man and his

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<sup>140</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1030 (E.D. Cal. 2009) (seeking an injunction of implementation of the RPA).

<sup>141</sup> 42 U.S.C. § 4332(2)(C).

<sup>142</sup> NEPA purports to provide means to “encourage productive and enjoyable harmony between man and his environment” and to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321 (2012).

<sup>143</sup> *See generally* 42 U.S.C. §§ 4321-4335 (2012).

<sup>144</sup> 40 C.F.R. § 1508.14 (2012).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See id.*

<sup>148</sup> *See id.*

<sup>149</sup> *See id.*

environment” and further the goals of NEPA.<sup>150</sup>

### *B. Significantly Affecting*

To be considered in an EIS, the impacts must be the “effects” of an agency action.<sup>151</sup> A causal connection is required here, demonstrating that these effects are connected to Fish and Wildlife’s species protection measures set out in the RPA.<sup>152</sup> Beyond that, the total impact on the environment of all the effects considered must be “significant.”<sup>153</sup>

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<sup>150</sup> 42 U.S.C. § 4321 (2012).

<sup>151</sup> See 42 U.S.C. § 4332(2)(C) (2012); see 40 C.F.R. § 1508.3 (2012) (“Affecting means will or may have an effect on.”).

<sup>152</sup> See 40 C.F.R. § 1508.8 (2012) (“Effects include:

- (a) Direct effects, which are caused by the action and occur at the same time and place.
- (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.”).

<sup>153</sup> 40 C.F.R. § 1508.27 (2012) (“Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

The environmental impacts resulting from the limited operations of the CVP and SWP can be fairly traced to the conduct of Fish and Wildlife because the limited pumping capacity is a direct result of the modifications to project operations required by the RPA, which was prepared by Fish and Wildlife and implemented by Reclamation.<sup>154</sup> The impacts stemming from a restricted water supply are clearly an indirect result of Fish and Wildlife's RPA.<sup>155</sup>

There is a causal connection between the project operation changes proposed by the RPA and the impacts to farms and rural communities; the district court arrived at the same conclusion.<sup>156</sup> That finding does not appear to be erroneous, nor is it an issue that either side disputed in the appellate briefs.<sup>157</sup>

Regarding significance, the Ninth Circuit has held, and the district court reiterated, that an EIS may be necessary “where there are substantial questions about whether a project may cause significant degradation of the human environment.”<sup>158</sup> The district court found that there were substantial questions about whether the changes in project operations may “cause significant degradation of the human environment” because of acknowledged risks associated with restricted Delta exports.<sup>159</sup> Impacts from pumping reductions include groundwater overdraft, air quality and soil erosion problems, fallowed land, and loss of agricultural jobs.<sup>160</sup> None of the parties argued in the appellate briefs

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(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.”)

<sup>154</sup> See *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1050 (E.D. Cal. 2009) (“First, it is undisputed that implementation of the RPA reduced pumping by more than 300,000 AF in the 2008-09 water year.”).

<sup>155</sup> See *id.* (describing impacts from water supply restrictions).

<sup>156</sup> See *id.*

<sup>157</sup> See Defendants' Brief 1, *supra* note 104; see Plaintiffs' Brief 1, *supra* note 30.

<sup>158</sup> *San Luis*, 686 F. Supp. 2d at 1049.

<sup>159</sup> *Id.* at 1050.

<sup>160</sup> *Id.* at 1050.

that this determination was in error.<sup>161</sup> Therefore, it should be found that Fish and Wildlife, by preparing and issuing the BiOp, engaged in an activity that significantly affects the quality of the human environment.

V. FISH AND WILDLIFE'S ISSUANCE OF THE BiOP:  
A MAJOR FEDERAL ACTION

Whether the issuance of the BiOp is considered a “major federal action” for NEPA purposes was a significant inquiry in the district court<sup>162</sup> and is the key issue in the NEPA appeal. NEPA regulations provide that “[a]ctions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals.”<sup>163</sup> If an agency plays a role in either bringing to fruition or providing for the extension of a project or program, or the agency produces or makes changes to a rule, regulation, plan, policy, or procedure, then the agency will have acted.<sup>164</sup> For purposes of NEPA, “major” and “significant” are used synonymously and both are used to describe impacts of an action, rather than the action itself.<sup>165</sup> In this regard, any federal action that *significantly* affects the quality of the human environment must also be a *major* federal action.

NEPA imposes obligations on “all agencies of the Federal Government,” including the obligation to conduct environmental

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<sup>161</sup> See Defendants' Brief 1, *supra* note 104; see Plaintiffs' Brief 1, *supra* note 30; see Answering and Reply Brief of Defendant-Intervenors-Appellants, *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 11-16624 (9th Cir. Apr. 27, 2012); see Reply and Response Brief for the Federal Defendants-Appellants, *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 11-16624 (9th Cir. Apr. 27, 2012); see Reply Brief of Appellees and Cross-appellants *San Luis & Delta-Mendota Water Authority and Westlands Water District, San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 11-16624 (9th Cir. May 25, 2012).

<sup>162</sup> See *San Luis*, 686 F. Supp. 2d at 1035-1049.

<sup>163</sup> 40 C.F.R. § 1508.18(a) (2012).

<sup>164</sup> See *id.*

<sup>165</sup> The first sentence of the CEQ definition of “major federal action” states that it includes “actions with effects that may be major.” 40 C.F.R. § 1508.18 (2012). “Effects” is used synonymously with “impacts” for purposes of NEPA. 40 C.F.R. § 1508.8 (2012). This puts the focus not on the action itself, but on the results of the action in determining if it is a “major” action. Additionally, “Major reinforces but does not have a meaning independent of significantly.” 40 C.F.R. § 1508.18. This suggests that a major action will have a significant impact or effect on something. Likewise, in order for an action to be significantly affecting the environment, it must be a major action by definition.

review.<sup>166</sup> NEPA regulations define “federal agency” to include all agencies of the federal government.<sup>167</sup> To satisfy the “federal” portion of “major federal action,” the action must be “potentially subject to Federal control and responsibility.”<sup>168</sup> As long as there is sufficient involvement from the federal agency, an action should be deemed “federal.”

The regulations include a subsection that encompasses the elements “federal” and “action.”<sup>169</sup> As described in the regulations, “[f]ederal actions tend to fall into one of the following categories: (1) adoption of official policy . . . . (2) adoption of formal plans . . . . (3) adoptions of programs . . . . (4) approval of specific projects.”<sup>170</sup> Activities conducted by a federal agency that fall into one of these categories will satisfy the “federal action” requirement of NEPA.

#### A. *Fish and Wildlife’s Approval of Modified CVP and SWP Operations*

The fourth category of federal actions considers the “approval of specific projects.”<sup>171</sup> The other three categories require the *adoption* of something.<sup>172</sup> In contrast to the others, what is contemplated in the fourth category is the “approval” of a specific project.<sup>173</sup> These two words—adoption and approval—appear to be practically synonymous, but that would mean these two distinct words have the same definition in the same section of the regulation.<sup>174</sup> “Approval” would not have been used in the fourth category unless it was intended to mean something different than “adoption.”

The Merriam-Webster definition of “approve” includes “to have or express a favorable opinion of,” “to accept as satisfactory,” and “to give formal or official sanction to: ratify.”<sup>175</sup> As opposed to adoption, which contemplates acceptance and putting into practice,<sup>176</sup> approval only

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<sup>166</sup> 42 U.S.C. § 4332(2) (2012).

<sup>167</sup> 40 C.F.R. § 1508.12 (2012) (“It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office.”).

<sup>168</sup> 40 C.F.R. § 1508.18.

<sup>169</sup> 40 C.F.R. § 1508.18(b) (2012).

<sup>170</sup> *Id.* (emphasis added).

<sup>171</sup> 40 C.F.R. § 1508.18(b)(4) (2012) (emphasis added).

<sup>172</sup> *See* 40 C.F.R. § 1508.18(b)(1) (2012) (adoption of official policy); *see* 40 C.F.R. § 1508.18(b)(2) (2012) (adoption of formal plans); *see* 40 C.F.R. § 1508.18(b)(3) (2012) (adoption of programs).

<sup>173</sup> 40 C.F.R. § 1508.18(b)(4).

<sup>174</sup> *See* 40 C.F.R. § 1508.18(b).

<sup>175</sup> *Approve Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/approve> (last visited Jan. 16, 2013).

<sup>176</sup> *Adoption Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/>

considers an expression of satisfaction.<sup>177</sup> Approval would mean that the subject being considered meets the necessary standards to move forward to implementation. Implementation or enactment by the approving agency is not necessary; a party can present a proposed project to a government entity for its approval, but the government entity does not construct or manage the project, it simply expresses approval and allows the other party to continue with its project.<sup>178</sup>

Defendants argued before the district court that the BiOp cannot be a major federal action because it is merely a suggested course of action, and it could only constitute an “approval of management activities” if it was binding on Reclamation, meaning Reclamation would not have the option to disregard the RPA and follow a different course of action.<sup>179</sup> The district court’s discussion states that a BiOp is not binding because the action agency is responsible for deciding how to move forward with a proposed action after ESA consultation and has the ability to reject a suggested RPA.<sup>180</sup> This, however, should not be dispositive of whether issuance of the BiOp is an approval.

If the BiOp is binding upon Reclamation, there should be little doubt that the issuance of the BiOp is an approval of the RPA-modified project because the RPA *will* be implemented.<sup>181</sup> However, approval of something, like a project, does not necessarily mean that it *must* be enacted; rather, approval simply means that it *may* be enacted.<sup>182</sup> Circumstances can change after a project is approved to move forward that might prohibit the actual construction or management of it.<sup>183</sup>

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dictionary/adopt (last visited Jan. 16, 2013); *Adopting Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/adopt> (last visited Jan. 16, 2013); *Adopt Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/adopt> (last visited Jan. 16, 2013).

<sup>177</sup> *Approve Definition*, *supra* note 175.

<sup>178</sup> *See* Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1328 (4th Cir. 1972) (outlining process for Department of Transportation to approve funding for highway construction carried out by third-party contractors under supervision of state highway department).

<sup>179</sup> *See* San Luis & Delta-Mendota Water Auth. v. Salazar, 686 F. Supp. 2d 1026, 1037-1038 (E.D. Cal. 2009).

<sup>180</sup> *See id.* at 1040.

<sup>181</sup> *Cf. id.* at 1037-1038 (arguing that “the BiOp cannot possibly constitute major federal action because it is not binding upon Reclamation” but is “merely a suggested course of action.”).

<sup>182</sup> *Compare Approve Definition*, *supra* note 175 with *Require Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/require> (last visited Jan. 16, 2013) and *Compel Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/compel> (last visited Jan. 16, 2013).

<sup>183</sup> *See generally* Marisa Lagos, *CA State Prison Projects Funded but not Completed*,

With the issuance of the BiOp, Fish and Wildlife officially stated to Reclamation that the continued operations of the projects could go forward if the RPA was followed.<sup>184</sup> In essence, what Fish and Wildlife did through the act of issuing the BiOp was officially sanction Reclamation's proposed project subject to the modification presented in the BiOp. By issuing the BiOp, Fish and Wildlife announced that the proposed continued long-term coordinated operation of the CVP and SWP could go forward on the condition that Fish and Wildlife's delta smelt protection measures be implemented to comply with the ESA.<sup>185</sup> Fish and Wildlife determined that the project, as modified, would not violate the ESA and satisfied the minimum standards to proceed.<sup>186</sup> This is clearly the *approval* of a project because Fish and Wildlife provided official sanction to the modified project operations. At this point, implementation of the RPA was the choice of Reclamation, with Fish and Wildlife having approved of the modified CVP and SWP project operations.

### B. Ramsey Revisited

Only the fourth category of NEPA actions is necessary for *San Luis's* Fish and Wildlife evaluation—"approval of specific projects."<sup>187</sup> The regulation describes this category as follows: "Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions *approved by permit* or other regulatory decision as well as federal and federally assisted activities."<sup>188</sup> Plaintiffs argued in the district court that Fish and Wildlife's issuance of the BiOp fell into this category, making it a major federal action.<sup>189</sup> They argued that the BiOp approved a specific project—CVP and SWP—because it was the functional equivalent of a permit, but the district court rejected this argument.<sup>190</sup>

The functional equivalency analysis comes from *Ramsey*,<sup>191</sup> which, as the court pointed out, is "[t]he only court that has applied [the approval

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SAN FRANCISCO CHRONICLE, Jan. 3, 2011, available at <http://www.sfgate.com/politics/article/CA-state-prison-projects-funded-but-not-completed-2462560.php>.

<sup>184</sup> See BIOLOGICAL OPINION, *supra* note 79, at 279.

<sup>185</sup> *Id.*

<sup>186</sup> See *id.*

<sup>187</sup> 40 C.F.R. §1508.18(b)(4) (2012).

<sup>188</sup> *Id.* (emphasis added).

<sup>189</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1037 (E.D. Cal. 2009).

<sup>190</sup> *Id.*

<sup>191</sup> See *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996).

of specific projects category] to *require* NEPA analysis for a biological opinion.”<sup>192</sup> It found *Ramsey* to be factually distinguishable and determined that the functional equivalency analysis was inapplicable to the *San Luis* case.<sup>193</sup>

The functional equivalency analysis that was established in *Ramsey* is directly applicable to *San Luis* because, like *San Luis*, *Ramsey* also dealt specifically with a wildlife agency’s approval of another’s proposed conduct following ESA consultation.<sup>194</sup> Accordingly, the Ninth Circuit Court should turn to the precedent it set in *Ramsey* to determine that an EIS is required by Fish and Wildlife.

*Ramsey* involved, among other things, salmon fishing on the Columbia River.<sup>195</sup> The National Marine Fisheries Service issued a BiOp and ITS on the impact of in-river salmon fishing under the Columbia River Fish Management Plan.<sup>196</sup> Consistent with the requirements of the plan and the ITS, the states of Oregon and Washington established rules to govern salmon fishing in the river.<sup>197</sup> Plaintiffs challenged the taking of protected salmon authorized by the states of Oregon and Washington, as well as the issuance of the BiOp with the accompanying ITS.<sup>198</sup>

One of the issues on appeal in *Ramsey* was whether the National Marine Fisheries Service was required by NEPA to prepare an EIS prior to issuing the BiOp and ITS.<sup>199</sup> The question with which the appellate court was wrangling was whether there was sufficient federal involvement in the in-river salmon fishing activity to constitute a *federal* action.<sup>200</sup> The court stated:

It is clear, however, both from our cases and from the federal regulations, *see* 40 C.F.R. § 1508.18, that if a *federal permit* is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action and the federal agency involved must conduct an EA and possibly an EIS before granting it.<sup>201</sup>

The National Marine Fisheries Service did issue the BiOp and ITS, which at minimum should provide a sufficient federal nexus for that

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<sup>192</sup> *San Luis*, 686 F. Supp. 2d at 1036 (emphasis added).

<sup>193</sup> *Id.* at 1037.

<sup>194</sup> *See id.* at 1030 (Fish and Wildlife’s approval of Reclamation’s proposed operations of CVP and SWP by issuing a BiOp and RPA); *see Ramsey*, 96 F.3d at 439 (NMFS’s approval of state government’s proposed fishing plan by issuing a BiOp and ITS).

<sup>195</sup> *Ramsey*, 96 F.3d at 438.

<sup>196</sup> *Id.* at 439.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 439-440.

<sup>200</sup> *Id.* at 443.

<sup>201</sup> *Id.* (emphasis added).



activity, that is, the preparation and issuance of the BiOp and ITS. Although federal involvement was limited only to the National Marine Fisheries Service's activity, the court nonetheless determined that a major federal action existed for NEPA environmental review.<sup>202</sup>

The appellate court's main point was the fact that the activity, fishing for protected salmon, was able to proceed only because of the ESA takings exemption that was provided by the ITS.<sup>203</sup> The Columbia River fisheries contained a variety of protected and non-protected salmon that intermingled, making it practically impossible to catch non-protected salmon without also taking protected salmon.<sup>204</sup> In the absence of an ITS that permitted the states to authorize salmon fishing, no manner of salmon fishing could be conducted that did not violate the ESA.<sup>205</sup> In its ruling for the plaintiffs, the appellate court stated:

We conclude that the federal appellees' position is untenable. Using current methods, it is *all but impossible* to fish for salmon that are not listed without incidentally taking salmon that are listed. Indeed, in previous years, the start of the fishing season has been delayed until the [ITS] was issued. We conclude that the incidental take statement in this case is functionally equivalent to a permit because the activity in question would, for all practical purposes, be prohibited but for the [ITS]. Accordingly, we hold that the issuance of that statement constitutes major federal action for purposes of NEPA.<sup>206</sup>

Contrary to the district court's statement that "[i]n *Ramsey*, the NEPA obligation was imposed on the [wildlife] agency's issuance of a biological opinion in part because there was no federal action agency to comply with NEPA,"<sup>207</sup> the *Ramsey* court makes no mention of the lack of a federal action agency to prepare an EIS having any impact on its decision.<sup>208</sup>

The district court implies that if some other federal agency had implemented the salmon fishing regulations rather than the states, then that agency would have been required to prepare an EIS, and not the National Marine Fisheries Service.<sup>209</sup> While it might be true that the

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<sup>202</sup> *Id.* at 444.

<sup>203</sup> *See id.*

<sup>204</sup> *Id.* at 438.

<sup>205</sup> *See id.* at 444.

<sup>206</sup> *Id.* (emphasis added).

<sup>207</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 964 (E.D.Cal.2010).

<sup>208</sup> *See Ramsey*, 96 F.3d at 444. This could be due to the fact that the relevant inquiry for the appellate court was whether an EIS needed to be prepared, rather than who needed to prepare it. *See id.*

<sup>209</sup> *See San Luis*, 760 F. Supp. 2d at 964.

other federal agency could potentially be required to prepare an EIS, it does not speak to whether the National Marine Fisheries Service would then fall outside of NEPA under those circumstances. The appellate court's express ruling, that "if a federal permit is a prerequisite for a project . . . issuance of that permit does constitute major federal action," required the wildlife agency to prepare an EIS for its issuance of that permit.<sup>210</sup> In *Ramsey*, the permit of which the appellate court spoke was the ITS found in the wildlife agency's BiOp.<sup>211</sup>

In *Ramsey*, the issuance of the BiOp<sup>212</sup> was an action that satisfied NEPA's environmental review requirement *wholly independent* of any other actions involved.<sup>213</sup> Had some other federal agency been involved in the implementation of the fishing regulations, the court should have determined whether that potential federal action required preparation of an EIS regardless of whether the National Marine Fisheries Service had to prepare one. NEPA requires federal agencies to evaluate *every* potential major federal action that significantly affects the quality of the human environment.<sup>214</sup> The court should look at each potential action by every agency involved, regardless of the interrelation between the agencies' conduct.

If it is determined that multiple agencies are required to conduct NEPA environmental review and prepare an EIS, then a decision could be made regarding which agency will assume the role of lead agency to conduct the environmental review.<sup>215</sup> Assigning one federal agency as the lead agency because of its role in the implementation of the ITS could potentially excuse the other agency from actually having to prepare its own EIS,<sup>216</sup> but it should not impact whether or not NEPA attaches to the underlying action.<sup>217</sup> In *San Luis*, the district court was confusing the question of *whether* an EIS must be prepared with *who* should be required to prepare it, leading to the incorrect conclusion that *Ramsey* did not apply.<sup>218</sup>

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<sup>210</sup> *Ramsey*, 96 F.3d at 444.

<sup>211</sup> *Id.*

<sup>212</sup> Or, more precisely, the ITS. *See id.*

<sup>213</sup> *See id.*

<sup>214</sup> 42 U.S.C. § 4332(2)(C) (2012).

<sup>215</sup> *See* 40 C.F.R. § 1501.5 (2012) (describing lead agencies in multi-agency actions).

<sup>216</sup> *See* 40 C.F.R. § 1501.6(c) (2012).

<sup>217</sup> *See* 42 U.S.C. § 4332(2)(C) (requiring an EIS for "every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment . . .") (emphasis added).

<sup>218</sup> *See* *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1036, 1041-1044 (E.D.Cal.2009) (focusing on the federal nature of CVP and Reclamation and determining that Reclamation is the appropriate lead agency for NEPA); *see* *San Luis &*

The district court did correctly note that “*Ramsey* stands for two important principles: First, under certain circumstances, a biological opinion may qualify as a major federal action for NEPA purposes; second, not every biological opinion is a major federal action.”<sup>219</sup> The circumstances contemplated by *Ramsey* where a BiOp may qualify as major federal action are those situations where the ITS that accompanies the BiOp is indispensable to the proposed activity, making it the functional equivalent of a permit.<sup>220</sup> In those circumstances, there will be a federal action as defined by the regulation.<sup>221</sup>

### C. Applying the Functional Equivalency Analysis to San Luis

In *Ramsey*, the ITS was deemed a permit because it provided the states with an exemption from the ESA’s take prohibition and allowed the salmon fishing to commence.<sup>222</sup> This is where the functional equivalency analysis originates. The court did not find the ITS to be a permit per se; it stated that the ITS was “*functionally equivalent* to a permit because the activity in question would, for all practical purposes, be prohibited *but for* the incidental take statement.”<sup>223</sup> This suggests that an ITS will be considered a permit only when the proposed activity cannot proceed without the ITS.<sup>224</sup> In essence, the ITS, which allows (permits) the taking of protected species, also allows (permits) an activity to be undertaken that would otherwise be prohibited by the ESA.

In declaring that the functional equivalency analysis was irrelevant for *San Luis*, the district court seems to rely on the fact that the project in question—the CVP—is a federal project operated by a federal agency—

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Delta-Mendota Water Auth. v. Salazar, 760 F. Supp. 2d 855, 964 (E.D.Cal.2010) (distinguishing *Ramsey* because of the lack of a federal action agency). NEPA requires “all agencies of the federal government” to comply with the EIS requirement “to the fullest extent possible.” 42 U.S.C. § 4332(2)(C). Even if Reclamation is ultimately found to be the appropriate lead agency, it is still possible that Fish and Wildlife’s conduct triggers NEPA’s environmental review requirement. *See* 42 U.S.C. § 4332(2)(C). Therefore, the court should look at each possible action to determine *whether* environmental review is required at all before considering *who* is better suited to prepare an EIS—Reclamation or Fish and Wildlife.

<sup>219</sup> San Luis & Delta-Mendota Water Auth. v. Salazar, 686 F. Supp. 2d 1026, 1036 (E.D.Cal.2009).

<sup>220</sup> *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996).

<sup>221</sup> *See* 40 C.F.R. § 1508.18(b)(4) (2012).

<sup>222</sup> *Ramsey*, 96 F.3d at 444.

<sup>223</sup> *Id.* (emphasis added).

<sup>224</sup> *Cf.* *Marbled Murrelet v. Babbitt*, 111 F.3d 1447, 1450 n.4 (9th Cir. 1997) (finding that a Fish and Wildlife concurrence is not a prerequisite to gaining state approval of a timber harvesting plan).

Reclamation.<sup>225</sup> The fact that CVP and Reclamation are both federal in nature established a nexus for determining the activity is *federal*, but it has nothing to do with whether there is an *action* involved.<sup>226</sup>

*Ramsey* clearly states that if a project requires a federal permit, issuance of the permit is a major federal action, and the federal agency that grants the permit must undertake NEPA environmental review before granting it if there will be adverse impacts to the environment.<sup>227</sup> The appropriate question, then, is whether the proposed activity can proceed without an ITS or some other federal authorization exempting the activity from the ESA's take prohibition. If the activity can proceed without an ITS, then the ITS is not the functional equivalent of a permit.<sup>228</sup> On the other hand, if it is practically impossible to conduct the operation without an ITS—because listed species will be taken in violation of the ESA—then the ITS becomes the functional equivalent of a permit<sup>229</sup> and the project approved by the ITS fits squarely into the fourth category of federal actions as defined by the regulations.<sup>230</sup>

In *San Luis*, Fish and Wildlife included an ITS with the BiOp.<sup>231</sup> The ITS indicates that the RPA as well as the other conditions stated in the ITS must be followed in order for Reclamation to receive the benefit of a takings exemption.<sup>232</sup> The question, then, is whether it would be practically impossible to operate the CVP and SWP without the ITS's protection.

It has been noted that the action agency is not required to adopt the RPA suggested by the consulting agency.<sup>233</sup> However, failure to

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<sup>225</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1036 (E.D. Cal. 2009).

<sup>226</sup> Plaintiffs argued that *Ramsey* should be applied because there is also a state project (SWP) at issue here. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 965 (E.D. Cal. 2010). The fact that SWP is *not* federal should have just as little bearing on the issue as the fact that CPV *is* federal. The focus of the functional equivalency analysis should be on whether the ITS acts as a permit, in which case the agency's activity could not proceed but for the ITS. *See Ramsey*, 96 F.3d at 444.

<sup>227</sup> *Ramsey*, 96 F.3d at 444.

<sup>228</sup> *See id.*

<sup>229</sup> *See id.*

<sup>230</sup> *See* 40 C.F.R. § 1508.18(b)(4) (2012).

<sup>231</sup> *See generally* BIOLOGICAL OPINION, *supra* note 79, at 285.

<sup>232</sup> *Id.* at 285-286.

<sup>233</sup> *See Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988) ("The agency is not required to adopt the alternatives suggested in the biological opinion . . ."); *but see Bennett v. Spear*, 520 U.S. 154, 170 (1996) ("[Fish and Wildlife] itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions."). The district court dismisses this point made in *Bennett* when it was raised by Plaintiffs because, the court noted, *Bennett* concerned final agency actions for purposes of the

implement an RPA runs the risk of an ESA violation.<sup>234</sup> The courts have noted that there will be no ESA violation where “‘alternative, reasonably adequate steps’” have been taken “‘to insure the continued existence’” of the species.<sup>235</sup>

While those cases suggest that Reclamation has the option of ignoring the RPA and operating the projects in an alternative, reasonably adequate manner, that notion is a farce. The Supreme Court has noted the substantial risk to federal agencies and their employees if their non-expert opinion on what is a reasonably adequate, alternative species protection measure turns out to be wrong.<sup>236</sup> The Supreme Court makes it very clear that an ITS is a permit to take a listed species, and that such conduct will not violate the ESA.<sup>237</sup> In the absence of ITS protection, all parties involved in the taking of a protected species may be in violation of federal law.<sup>238</sup>

For all practical purposes, it is impossible to operate the CVP and SWP without violating the ESA unless there is an ITS permitting the taking of listed species. Focusing exclusively on the south Delta pumps, there is a risk of killing the fish by entrainment whenever the pumping stations are operating.<sup>239</sup> The negative flows in the Delta also disrupt spawning and feeding, and otherwise impact the critical habitat.<sup>240</sup> Significant discussion in the BiOp concerning impacts from the projects

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Administrative Procedures Act rather than major federal actions for purposes of NEPA. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1041 n.8 (E.D. Cal. 2009). This overlooks the fact that the Supreme Court was speaking about the nature of the ITS generally, which should apply to any matter where the character of an ITS is in question. *See Bennett*, 520 U.S. at 170.

<sup>234</sup> *Tribal Village*, 869 F.2d at 1193 (“[H]owever, if the Secretary deviates from them, he does so subject to the risk that he has not satisfied the standards of [ESA].”).

<sup>235</sup> *San Luis*, 686 F. Supp. 2d at 1038 (“A Secretary can depart from the suggestions in a biological opinion, and so long as he or she takes ‘alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species,’ no ESA violation occurs.”).

<sup>236</sup> *Bennett*, 520 U.S. at 170 (“The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for ‘any person’ who knowingly ‘takes’ an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.”).

<sup>237</sup> *Id.* (“Thus, the Biological Opinion’s Incidental Take Statement constitutes a permit authorizing the action agency to ‘take’ the endangered or threatened species so long as it respects the Service’s ‘terms and conditions.’”).

<sup>238</sup> 16 U.S.C. § 1532(19) (2012); 16 U.S.C. § 1540(a)-(b) (2012) (authorizing civil fines of up to \$25,000 per violation and criminal penalties of up to \$50,000 and imprisonment for one year); *see supra* note 236.

<sup>239</sup> *See* BIOLOGICAL OPINION, *supra* note 79, at 160.

<sup>240</sup> *Id.* at 276.

relates to pumping activities and effects on water flow.<sup>241</sup> Three of the five components in the RPA were specifically designed to limit negative flows.<sup>242</sup> It is undeniable that these flows are caused by the pumping stations; it is equally undeniable that in order to facilitate the protective measures desired by Fish and Wildlife pumping capacity must be significantly diminished.<sup>243</sup>

Even with the RPA in effect, there is still a risk of killing delta smelt at the pumps.<sup>244</sup> The ITS itself permits the killing of potentially thousands of delta smelt per year, meaning that number could be taken even after the protective measures are put in place.<sup>245</sup> In the absence of an ITS permitting the activity, a single taking of a delta smelt is prohibited.<sup>246</sup> This includes taking by entrainment (kill),<sup>247</sup> habitat modification (harm),<sup>248</sup> and spawning disruption (harass).<sup>249</sup> It would be practically impossible to attempt to operate the pumping facilities without a delta smelt taking.

This is the same as the situation present in *Ramsey*. If the activity cannot be conducted without a federal permit, the issuance of the federal permit is a federal action for NEPA.<sup>250</sup> The ITS is the functional equivalent of a permit because it would allow the pumps to be operated without violating the ESA. Without the ESA exemption, the projects cannot be operated because it is practically impossible to pump water out of the Delta without entraining delta smelt or affecting its habitat through negative flows. Therefore, the appellate court should find that the ITS is the functional equivalent of a permit based on its prior decision in *Ramsey*.

#### *D. Major Federal Action by the Approval of a Specific Project*

The appellate court should determine that the functional equivalency analysis from *Ramsey* does apply to the *San Luis* case, and that the ITS is the functional equivalent of a permit because the project operations would be prohibited without protection from the ESA's take prohibition.

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<sup>241</sup> *Id.* at 276-278.

<sup>242</sup> *Id.* at 280-285.

<sup>243</sup> *San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1049 (E.D. Cal. 2009).

<sup>244</sup> See BIOLOGICAL OPINION, *supra* note 79, at 285-293.

<sup>245</sup> *Id.*

<sup>246</sup> See 16 U.S.C. § 1538(a)(1)(B) (2012); see 16 U.S.C. § 1536(o)(2) (2012).

<sup>247</sup> 16 U.S.C. § 1532(19) (2012).

<sup>248</sup> 50 C.F.R. § 17.3 (2012).

<sup>249</sup> *Id.*

<sup>250</sup> See *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996).

Additionally, by putting forward a set of practices that could be followed by Reclamation to proceed with CVP and SWP operations, Fish and Wildlife approved of the project. The court should find that Fish and Wildlife engaged in a major federal action as it is described in the fourth category of the NEPA regulation.

## VI. CONCLUSION

Fish and Wildlife's issuance of the 2008 BiOp and the accompanying RPA and ITS recommended a proposal for major federal action significantly affecting the quality of the human environment under NEPA.<sup>251</sup> NEPA environmental review should be required for this action. Accordingly, the appellate court should reverse the district court's ruling and order Fish and Wildlife to prepare an EIS before issuing a new delta smelt BiOp.

The benefit to requiring Fish and Wildlife to independently prepare an EIS prior to issuing the BiOp is that Fish and Wildlife must then consider the potential impacts from any protective measures outlined in the RPA as they are being developed. As Fish and Wildlife assesses the various options for protecting the delta smelt, impacts to farmers and rural communities caused by water delivery deductions must be considered and addressed in the EIS. This will ensure that any proposal for project modifications provided to Reclamation, in the form of a BiOp and RPA, has given appropriate attention to the human environment. The underlying goal of NEPA—informed agency decision making—would be completely frustrated if Reclamation's analysis of environmental impacts determined that there would be significant negative impacts caused by implementation of any RPA, but its justification for moving forward with implementation would be to state that Fish and Wildlife has determined the RPA modifications to be an acceptable method of species protection.<sup>252</sup> In essence, a decision by Fish and Wildlife would have been made without the assistance of an EIS, and Reclamation would be very likely to act upon that decision.<sup>253</sup>

To faithfully advance the goals of NEPA, the court must ensure that

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<sup>251</sup> See discussion *supra* Parts III, IV, V.

<sup>252</sup> See *Bennett v. Spear*, 520 U.S. 154, 170 (1996) (“The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for ‘any person’ who knowingly ‘takes’ an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment . . . . [Fish and Wildlife] itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions.”).

<sup>253</sup> See *id.*

Fish and Wildlife considers the potential impacts of any RPA during the development process.<sup>254</sup> The best way to ensure this end result will be to require Fish and Wildlife to prepare an EIS. While this will not guarantee that the adverse impacts experienced by farmers and rural communities will be remedied, it will provide the assurance that impacts to the human environment were considered before the agency made a decision to act. NEPA requires nothing less.

WESLEY LAWRENCE CARLSON

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<sup>254</sup> See 42 U.S.C. § 4321 (2012) (“The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.”); see also 40 C.F.R. § 1500.1(a) (2012) (“The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains ‘action-forcing’ provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.”).