Ongoing Actions, Ongoing Issues: Trying Again to Free Federal Dams From the ESA

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Summary

Federal dams have been the focus of major disputes involving application of the Endangered Species Act (ESA), especially its §7 prohibitions on federal actions causing jeopardy to protected species. Operating agencies and project beneficiaries have sought to keep the ESA from restricting dam operations, including by arguing that such operations are non-discretionary and thus exempt. In proposing new ESA implementing rules, the Trump Administration suggested, but did not formally propose, that ongoing federal actions should be considered part of the "environmental baseline" for §7 purposes. Redefining the environmental baseline could have dramatically changed over 25 years of practice in applying the ESA to federal dams, reducing or even eliminating crucial §7 protection. Although the Administration ultimately adopted a more modest change, it apparently did so due to legal rather than policy concerns. This Article examines the policy goals that the Administration apparently sought to pursue with the suggested rule, and identifies issues that will likely arise from ongoing efforts to pursue them at the project level. Although the Administration decided against a national rollback, there are sure to be ongoing battles over the application of the ESA to federal dams.

The application of the Endangered Species Act (ESA)[1] to federal dams has been controversial and contested since the 1970s, when the U.S. Supreme Court found in *Tennessee Valley Authority v. Hill* (*TVA*)[2] that because of the ESA, "the survival of a relatively small number of three-inch fish . . . would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million."[3] The 21st century has seen fierce legal and political disputes over the ESA and existing federal dams in multiple regions, effectively pitting the needs of imperiled fish and wildlife species against other interests—for example, irrigation water supply in the California Central Valley,[4] flood control and navigation in the Missouri River System,[5] and hydropower in the Columbia River Basin.[6]

The key ESA provision in all of these cases is §7(a)(2), which prohibits federal agencies from taking any action that would "jeopardize the continued existence" of a protected species.[7] Thus, the statute does not allow for agency action that would put a species at risk of extinction, even to serve important interests such as water supply or flood control.[8] ESA §7 does not allow for a balancing of these interests since the Court found in *TVA* that the U.S. Congress had enacted the ESA "to halt and reverse the trend toward species extinction, whatever the cost,"[9] making endangered species "the highest of priorities."[10]

When it comes to dams, however, the U.S. government has other priorities, and has repeatedly sought to limit application of the ESA to water projects operated by the U.S. Army Corps of Engineers (the Corps) or the U.S. Bureau of Reclamation (the Bureau). Because of a long-

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1. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18
2. 437 U.S. 153, 8 ELR 20513 (1978).
3. *Id.* at 172. The three-inch fish in that case was the endangered snail darter, and the dam was Tellico, being constructed by the federal Tennessee Valley Authority.
4. *See, e.g.*, San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 41 ELR 20124 (9th Cir. 2011).
5. *See, e.g.*, In re Operation of the Mo. River Sys. Litig., 421 F.3d 618 (8th Cir. 2005).
6. *See, e.g.*, Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 38 ELR 20099 (9th Cir. 2008).
7. 16 U.S.C. §1536(a)(2).
8. Jeopardy is allowed only under an exemption granted by the so-called God Squad. *See infra* note 63.
9. *TVA*, 437 U.S. 153, 184, 8 ELR 20513 (1978).
10. *Id.* at 172.

standing rule that §7 applies only to "discretionary" federal actions,[11] the government in several cases has argued that it has no discretion in how it operates the federal dams at issue; if those operations were non-discretionary, they would be exempt from §7's procedural mandate of "consultation," and could legally jeopardize a protected species.[12] These arguments have not always been persuasive, but the government's persistence in raising them—and disclaiming the discretion that agencies normally enjoy having—shows the ongoing interest in reducing the impact of the ESA on federal dam operations.

Another dispute over the ESA and federal water projects is the extent to which the impacts of existing dams and their ongoing operations should be considered part of the "environmental baseline," and not attributed to the agency's future dam operations. The effects of an agency's proposed action are separate from the baseline, which includes other factors affecting the protected species and its habitat. The distinction is important because the "jeopardy" determination applies to the effects of the agency's actions—so the more that negative impacts can be called part of the baseline, the less likely it is that the proposed action itself will be found to cause jeopardy.[13] Although courts have seen an existing dam's presence as part of the baseline, they have largely rejected arguments that the baseline should include ongoing operations.[14]

In 2018, the Donald Trump Administration suggested revising the ESA implementing rules to attribute all impacts of ongoing operations to the environmental baseline.[15] The suggested change[16] would have applied to all ongoing agency actions, but with especially major implications for federal dam operations. Shifting the impacts of ongoing operations to the baseline would have greatly reduced the chances that future operations would be found to cause jeopardy, and thus modified to reduce their impacts to listed species and their habitat. It may even have meant that ongoing dam operations no longer needed to go through the process of consultation to assess their impacts, resulting in greatly reduced protection for threatened and endangered species affected by federal dams.

In its final ESA implementing rules, however, the Administration stopped short of moving all ongoing operations into the environmental baseline. Under the new rules announced in August 2019,[17] the environmental baseline includes the impacts of ongoing activities and existing facilities that the consulting agency has no discretion to modify. The Administration apparently decided against the suggested rule because of well-founded concerns that it would not withstand judicial review. But by developing a specific alternative definition and pointedly requesting comment on that language, it also tipped its hand, showing its policy goal of greatly reducing the impact of §7 on ongoing activities. These and other statements in the §7 rulemaking notices point to issues that will surely arise in the Administration's case-by-case implementation of the ESA, especially in the context of federal dam operations.

A caveat regarding the scope of this Article: by focusing on the environmental baseline issue, and on the application of §7 to federal dam operations, it does not address most of the issues posed by the Trump Administration's new ESA implementing rules.[18] These rules have been widely seen as a rollback of important ESA provisions regarding species listing decisions, critical habitat designation, and protection for threatened species.[19] A number of environmental groups and 17 states have already filed suit to challenge these rules on both substantive and procedural grounds.[20] The new rules—which represent the most comprehensive regulatory overhaul of the ESA in decades[21]—raise many important legal and policy questions, most of which are beyond the scope of this Article because they do not have special significance in the context of federal water projects.

The Article begins by introducing federal dams and the agencies that operate them, the procedural and substantive requirements of ESA §7, and the significance of §7 for dam operations. Part II reviews the meaning of the environmental baseline in ESA consultations, then focuses on

11. 50 C.F.R. §402.03 (2018).
12. *See infra* notes 83-88 and accompanying text.
13. *See infra* Part II.
14. *See infra* Section II.C.
15. Endangered and Threatened Wildlife and Plants; Revisions of Regulations for Interagency Cooperation, 83 Fed. Reg. 35178 (proposed July 25, 2018) (to be codified at 50 C.F.R. Part 402) [hereinafter Proposed Section 7 Rule Notice].
16. As discussed below, the Administration did not actually propose this change, but its proposed rulemaking notice raised several problems associated with ESA compliance for ongoing agency actions, and requested comment on specific rule language that it suggested could address those problems. *See infra* Section III.B.
17. Endangered and Threatened Wildlife and Plants; Revisions of Regulations for Interagency Cooperation, 84 Fed. Reg. 44976 (Aug. 27, 2019) (to be codified at 50 C.F.R. Part 402) [hereinafter Final Section 7 Rule Notice].
18. Along with the new §7 implementing rules, *id.*, the Administration issued two other sets of revised ESA rules in August 2019. One set revised the rules regarding listing and delisting of species, along with critical habitat decisions. Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020 (Aug. 27, 2019) (to be codified at 50 C.F.R. Part 424). Another set revised the rule governing protection of threatened species, eliminating the "blanket 4(d)" rule that gave a threatened species listed by the U.S. Fish and Wildlife Service the same protection as if it were listed as endangered, so that all newly listed threatened species will require protection through a special §4(d) rule tailored to that species. Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44743 (Aug. 27, 2019) (to be codified at 50 C.F.R. Part 17).
19. *See*, *e.g.*, Adam Aton, *Endangered Species: Trump Admin Rolls Out Rule Changes to Limit Law's Reach*, Greenwire, Aug. 12, 2019 (describing reaction of environmental groups and congressional Democrats), https://www.eenews.net/greenwire/2019/08/12/stories/1060931003. Although critics have described the rule changes as gutting the ESA, the Trump Administration insists that it has done no such thing. Kellie Lunney, *Endangered Species: Top Interior Official: More Reg Rewrites Are on the Way*, Greenwire, Aug. 22, 2019 (dismissing critiques from "the press in the D.C. bubble"), https://www.eenews.net/greenwire/2019/08/22/stories/1061032889.
20. The initial lawsuit was filed by environmental groups within days of the new rules being announced. Complaint for Declaratory and Injunctive Relief, Ctr. for Biological Diversity v. Bernhardt, No. 3:19-cv-05206 (N.D. Cal. Aug. 21, 2019) [hereinafter ESA Rule Challenge Complaint]. A few weeks later, a geographically diverse group of states brought a similar challenge in the same court. Complaint for Declaratory and Injunctive Relief, California v. Bernhardt, No. 4:19-cv-06013 (N.D. Cal. Sept. 25, 2019).
21. As the Services noted in their proposed rule notice, the last "comprehensive" revision to the ESA implementing rules was in 1986. Proposed Section 7 Rule Notice, *supra* note 15, at 35178.

its significance in the context of ongoing dam operations, including a review of cases that have addressed the issue. Part III examines the Trump Administration's rulemaking to revise the regulations implementing §7 requirements, focusing on the suggested change to the environmental baseline definition in the proposed rule notice, and the new definition as adopted in the 2019 final rule. Part IV addresses the ongoing significance of the (unadopted) suggested rule, analyzing why the Administration decided against it, assessing the policy goals reflected in the suggested rule, and identifying ongoing issues that will arise as the Administration continues to pursue those goals case-by-case. Part V concludes.

I. Federal Dams and the ESA

Federal dams and their operations have enormous impacts on the health of aquatic and riparian ecosystems. The Corps operates more than 600 dams[22] on rivers across the nation, capable of storing almost 330 million acre-feet of water[23]; the Bureau operates 338 dams on rivers in 17 western states, creating reservoirs with a storage capacity of 140 million acre-feet.[24] Given the number and size of dams operated by these two agencies alone, and the serious impacts that large dams often have for rivers and native species,[25] it is hard to overstate the significance of Corps and Bureau operations for aquatic ecosystems—especially since so many of the nation's threatened and endangered species are aquatic creatures.[26]

A. *Federal Dams and Their Operations*

Federal dams unquestionably provide important benefits, largely in the form of water supply, flood control, hydropower, and reservoir recreation. The Corps claims that its dams can generate nearly one-quarter of the nation's hydropower,[27] that they helped prevent nearly one-half trillion dollars in flood damages over the course of a recent decade,[28] and that the Corps is "the nation's number one federal provider of outdoor recreation."[29] Many Corps projects also provide water supply,[30] although that purpose is not nearly as central to the Corps' mission as it is the Bureau's. The Bureau says its dams and reservoirs provide irrigation water for 10 million acres of farmland and drinking water for 31 million people, generate 15% of the nation's hydropower, and offer 289 recreation sites with a total of 90 million annual visitor-days.[31]

The purposes of any particular Corps or Bureau project are specified in its authorizing statute(s), whereby Congress called for its construction[32] and authorized it for one or more purposes: irrigation water supply, flood control, hydropower production, recreation, and so on.[33] Such statutes are often short on details, describing the project purposes and facilities to be constructed in general terms, and offering few if any specific requirements regarding project operations.[34]

Within the parameters of its authorizing statutes, each federal water project has more specific operating protocols established by the Corps or the Bureau, directing the timing and rate of reservoir storage and releases in accordance with the authorized purposes. The Corps develops "water control manuals" that govern the operation of its projects;

22. U.S. Army Corps of Engineers, *Mission Overview*, https://www.usace.army.mil/Missions/ (last visited Sept. 20, 2019).
23. *Id*. An acre-foot of water is the amount that will cover an acre of ground to a depth of 12 inches, or about 326,000 gallons.
24. U.S. Bureau of Reclamation, *About Us—Fact Sheet*, https://www.usbr.gov/main/about/fact.html (last updated Jan. 31, 2019). The 17 states are the six Great Plains states from North Dakota south to Texas, the eight Intermountain West states, and the three West Coast states in the lower 48.
25. *See generally* Michael Collier et al., Dams and Rivers: A Primer on the Downstream Effects of Dams 3, 7 (U.S. Geological Survey Circular No. 1126, 2d ed. 2000) (summarizing downstream impacts of dams). Most of the circular explains various impacts in much greater detail, through a series of case studies drawn from rivers across the United States.
26. A check of the government's "boxscore" of threatened and endangered species as of July 2019 shows that, of 719 listed animal species in the United States, the most common vertebrate taxon is fish (167 listed species), and the most common invertebrate taxon is clams (91 listed species). U.S. Fish and Wildlife Service, *Listed Species Summary (Boxscore)*, https://ecos.fws.gov/ecp0/reports/box-score-report (last updated Sept. 21, 2019).
27. Corps of Engineers, *supra* note 22.
28. "[Corps] dams contributed to $485 billion in damages prevented from 2004 to 2013, with $13.4 billion in damages prevented in 2013. [Corps] flood damage reduction projects avoid $8.00 in damages for every $1.00 invested." Corps of Engineers, *Dam Safety Facts and Figures*, https://www.usace.army.mil/Media/FactSheets/FactSheetArticleView/Article/590578/dam-safety-facts-and-figures/ (last update June 4, 2015).
29. Corps of Engineers, *supra* note 22.
30. The Corps' water supply mission involves more projects and more water than one might think. According to one report, "133 Corps multi-purpose reservoirs in 26 states have 11.1 million acre-feet of storage space" for municipal and industrial water supply. Cynthia Brougher & Nicole T. Carter, Congressional Research Service, Reallocation of Water Storage at Federal Water Projects for Municipal and Industrial Water Supply 3 (2012).
31. Bureau of Reclamation, *supra* note 24.
32. "[E]ach [Corps] project is authorized by Congress with a specific set of purposes, usually as part of a larger annual bill that encompasses multiple Corps' and other agency public works requests." Robert Haskell Abrams, *Water Federalism and the Army Corps of Engineers' Role in Eastern States Water Allocation*, 31 U. Ark. Little Rock L. Rev. 395, 407 (2009). As for the Bureau, while there are general statutes that broadly apply its program, "each project operates within its own legal framework, including project authorizing statutes and water supply contracts. The authorizing statutes specify (among other things) the purposes for which the projects are constructed and operated . . . ." Reed D. Benson, *Environmental Review of Western Water Project Operations: Where NEPA Has Not Applied, Will It Now Protect Farmers From Fish?*, 29 UCLA J. Envtl. L. & Pol'y 269, 275 (2011).
33. *See*, *e.g.*, Flood Control Act of 1950, §204, Pub. L. No. 81-516, 64 Stat. 163, 177 (approving "[t]he plan for flood control, water conservation, and related purposes, in the Russian River Basin, California, . . . substantially in accordance with the recommendations of the Board of Engineers"); Act of July 3, 1952, Pub. L. No. 82-445, 66 Stat. 325 (authorizing the U.S. Department of the Interior (DOI) to construct the Collbran Project in Colorado for purposes of "supplying water for the irrigation of approximately twenty-one thousand acres of land and for municipal, domestic, industrial, and stockwater uses and of producing and disposing of hydroelectric power and, as incidental to said purposes, for the further purpose of providing for the preservation and propagation of fish and wildlife").
34. More specific information is typically found in a planning report that the Corps or Bureau prepared and delivered to Congress, detailing the specifications of project features and the benefits the project could provide. Authorizing statutes sometimes refer specifically to the planning report for an approved project. *See*, *e.g.*, Flood Control Act of 1962, §203, Pub. L. No. 87-874, 76 Stat. 1173, 1193 (authorizing the project "for the Ririe Dam and Reservoir, Willow Creek, Idaho, . . . substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 562, Eighty-seventh Congress, at an estimated cost of $7,027,000").

the centerpiece of each manual is a reservoir regulation schedule that establishes operating criteria, including "rule curves" specifying reservoir levels to be maintained at certain times of the year.[35] The Bureau's operations are dictated more by the needs of those entities that receive water from a project; most Bureau projects supply water to one or more entities, such as an irrigation district or a municipal water utility, under the terms of a contract between the Bureau and the entity.[36] Hydropower generation is also a significant factor in the operations of many Corps and Bureau projects, although there is so much variation in the arrangements and operating practices for federal hydropower that it is hard to generalize about its effects on dam operations.[37]

Neither the Corps nor the Bureau makes a regular practice of comprehensively reviewing and revising its project operating plans,[38] even though the Corps has rules calling for its water control manuals to be reviewed and updated at least every 10 years.[39] Although the Corps and the Bureau have certainly updated the operating plans for some projects over the past several years,[40] many projects still function under relatively old operating plans, despite the strong policy arguments in favor of revising these plans to reflect a variety of changing circumstances.[41] Thus, for most projects, the Corps and the Bureau are simply carrying on the operational status quo, with no plans to consider any real alternatives to the regime for storing and releasing water.

Ironically, federal law does require periodic reviews for one type of water project: *nonfederal* hydropower installations regulated by the Federal Power Act.[42] A nonfederal hydropower facility requires a license[43] issued by the Federal Energy Regulatory Commission (FERC); such licenses impose operating restrictions and requirements such as minimum downstream flows.[44] Such licenses are limited to a maximum of 50 years,[45] and when a license expires, the project must go through "relicensing" by FERC. Today's Federal Power Act calls for FERC to issue licenses that reflect modern environmental standards, even if the new license requires operating changes that greatly impair an existing project's hydropower production.[46] Conditions imposed through relicensing have resulted in reduced environmental harm from project operations, sometimes dramatically so.[47]

In the absence of a periodic review process like FERC relicensing, the Corps and the Bureau have not been required—and have not chosen—to systematically assess and adopt changes to reduce environmental impacts of their dam operations. Where such operations adversely affect a threatened or endangered species, however, the ESA has effectively required an analysis of a project's effects on the protected species and its habitat. The remainder of this section summarizes the standards and processes of ESA §7 and the way they have applied to federal water project operations.

B. ESA §7 Requirements

Enacted in 1973, the ESA is one of the nation's most important and controversial environmental laws. The ESA's purpose is to conserve endangered and threatened species[48] and the ecosystems on which they depend.[49] As the Supreme Court famously stated in *TVA*, "[E]xamination of the language, history, and structure of the legislation . . . indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."[50]

All federal agencies have ESA duties, but the two with the greatest statutory responsibilities are the U.S. Fish and Wildlife Service (FWS) in the U.S. Department of the Interior (DOI), and for oceangoing species such as salmon, the National Marine Fisheries Service (NMFS) within the U.S. Department of Commerce (DOC) (together, the Services). ESA §4[51] requires the Services to decide which species are listed as threatened or endangered,[52] and to determine critical habitat for species upon listing.[53] Once listed, a species gains significant protection under the Act, which includes the general pro-

35. *See* Reed D. Benson, *Reviewing Reservoir Operations: Can Federal Water Projects Adapt to Change?*, 42 Colum. Envtl. L.J. 354, 384-87 (2017) (reviewing Corps rules and policies on developing and revising manuals).
36. *Id.* at 375-76 (explaining ways that water supply contracts and state-law water rights may affect Bureau project operations).
37. *Id.* at 376-77; *see also* U.S. Department of Energy (DOE), Effects of Climate Change on Federal Hydropower (2017) (providing an overview of hydropower generated at Corps and Bureau projects and marketed by power-marketing administrations within DOE).
38. Benson, *supra* note 35, at 389-94 (discussing reasons for Corps and Bureau reluctance to engage in such reviews).
39. *Id.* at 386-87. The Bureau has no parallel rule or policy on periodic review of its operating plans. *Id.* at 387-88.
40. *Id.* at 394-401 (identifying reasons for the agencies to revise operating plans, and examples of projects where the agencies have done so).
41. *Id.* at 356-59 (summarizing policy points).
42. 16 U.S.C. §§791a et seq.
43. *Id.* §797(e).
44. *See* Cal. v. Fed. Energy Regulatory Comm'n, 495 U.S. 490, 20 ELR 20913 (1990) (rejecting state's attempt to impose higher downstream flow requirements than those contained in FERC's license for a new hydropower project).
45. 16 U.S.C. §799.
46. City of Tacoma v. Fed. Energy Regulatory Comm'n, 460 F.3d 53, 71-74, 36 ELR 20173 (D.C. Cir. 2006) (upholding authority of FERC to impose operating requirements that could result in a project being uneconomic to operate).
47. *See* Dave Owen & Colin Apse, *Trading Dams*, 48 U.C. Davis L. Rev. 1043, 1064 (2015).
48. 16 U.S.C. §1532. The ESA defines an endangered species as one that is "in danger of extinction throughout all or a significant portion of its range," *id.* §1532(6), while a threatened species is one that is "likely to become an endangered species within the foreseeable future." *Id.* §1532(20). Through rules issued under §4(d) of the ESA, *id.* §1533(d), the law typically applies equally to both types of species.
49. *Id.* §1531(b).
50. *TVA*, 437 U.S. 153, 174, 8 ELR 20513 (1978).
51. 16 U.S.C. §1533.
52. *Id.* §1533(a)(1)-(2).
53. Section 4 generally calls for critical habitat to be determined at the time of listing. *Id.* §1533(a)(3). The statute defines critical habitat in some detail, but the key requirement is that the habitat be "essential for the conservation of the species." *Id.* §1532(5).

hibition[54] on any person causing "take"[55] of any member of a listed[56] fish or wildlife species.[57]

ESA §7[58] imposes both substantive and procedural mandates on all federal agencies. Every federal agency "shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence" of any protected species, or adversely modify its designated critical habitat.[59] To ensure compliance with this substantive standard of "no jeopardy," §7(a)(2) requires that federal agencies "consult" with the relevant Service before taking any action that might adversely affect a listed species.[60] The agency initiates consultation by providing the Service with a biological assessment that describes the proposed action and the agency's view of its potential impacts on listed species.[61] After consulting with the agency on its proposed action, the Service produces a biological opinion (BO) on the likely impacts on listed species and critical habitat.[62] Because the statute prohibits agency actions that would cause jeopardy[63]—generally by requiring identification of a "reasonable and prudent alternative" (RPA)[64]—an agency that wants to proceed with its proposal has an incentive to reduce the chances of a jeopardy finding.

Several key aspects of this framework are not fully spelled out in the statute,[65] and instead are found in the Services' §7 implementing rules.[66] For example, the ESA does not define "jeopardize the continued existence" of a listed species,[67] so that important standard is defined at 50 C.F.R. §402.02.[68] The statute specifies that §7 applies to "any action authorized, funded, or carried out by" a federal agency,[69] but does not define "action"; the rules say that the term means "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas."[70] The rules also create a notable exemption for non-discretionary agency actions by providing that the requirements of §7 apply "to all actions in which there is discretionary federal involvement or control."[71]

C. *Section 7 and Federal Dam Operations*

The Corps and the Bureau have been engaging in §7 consultations on their dam operations since at least the early 1990s, when new ESA listings of many West Coast salmon and steelhead populations forced the agencies to reckon with the ongoing impacts of their projects. Soon thereafter, the Corps and the Bureau found themselves in major litigation over their ESA compliance in the Columbia River Basin[72] and the California Central Valley,[73] respectively. The agencies have gone through §7 consultation over their operations in several basins over the past three decades, and litigation has often followed: against the Corps on the Missouri[74] and Kern Rivers,[75] and against the Bureau on the Lower Colorado[76] and Klamath Rivers,[77] to name just a few examples. Notably, however, there have also been long-standing collaborative efforts in some western basins that have allowed federal water projects to achieve §7 compliance without litigation.[78]

Because large federal dams and their operations have profoundly altered many aquatic ecosystems and seriously

54. The ESA allows for legalized "take" in certain circumstances. Nonfederal entities that meet certain requirements may receive permits allowing incidental take of listed species in connection with otherwise lawful activities. *Id*. §1539(a). Federal agencies that have completed the §7 consultation process (as explained below) are allowed a limited amount of "take" incidental to the actions on which they have consulted. *Id*. §1536(b)(4).
55. *Id*. §1538(a)(1). "'Take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id*. §1532(19).
56. Although ESA §9 prohibits take only for members of endangered fish or wildlife species, *id*. §1538(a)(1), FWS has a rule that generally extends the same protection against take to threatened fish or wildlife species. 50 C.F.R. §17.31 (2018). This rule had existed since 1978, but the Trump Administration recently eliminated it for species newly listed by FWS as threatened. Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44743 (Aug. 27, 2019) (to be codified at 50 C.F.R. Part 17).
57. For plant species, the "take" prohibition applies only on federal lands. 16 U.S.C. §1538(a)(2).
58. *Id*. §1536.
59. *Id*. §1536(a)(2).
60. *Id*.
61. *Id*. §1536(c).
62. *Id* §1536(b).
63. The only exception to this prohibition involves an exemption granted by the Endangered Species Committee, composed of high-level officials and sometimes called the "God Squad." *Id*. §1536(e). The committee must make its decision following trial-type administrative procedures, *id*. §1536(g)(6), and may only grant the exemption if it can make certain findings regarding the project, *id*. §1536(h)(1).
64. *Id*. §1536(b)(3).
65. ESA §3 as amended, *id*. §1532, defines 20 terms, but leaves out many of the key ones in §7.
66. *See* 50 C.F.R. §402; Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19926 (June 3, 1986).
67. 16 U.S.C. §1536(a)(2).
68. "Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. §402.02 (2018).
69. 16 U.S.C. §1536(a)(2).
70. 50 C.F.R. §402.02 (2018). This definition is followed by a nonexclusive list of certain types of actions that fall within it.
71. *Id*. §402.03. Although this definition arguably conflicts with the "any action" language of §7 itself, a divided Supreme Court upheld and applied the rule in a case involving the U.S. Environmental Protection Agency's (EPA's) approval of a state's request to assume responsibility for a Clean Water Act permitting program. Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 37 ELR 20153 (2007).
72. *See* Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv., 850 F. Supp. 866, 24 ELR 21384 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071, 26 ELR 20710 (9th Cir. 1995).
73. *See* Westlands Water Dist. v. U.S. Dep't of the Interior, 850 F. Supp. 1388 (E.D. Cal. 1994).
74. *See* Am. Rivers v. U.S. Army Corps of Eng'rs, 271 F. Supp. 2d 230 (D.D.C. 2003).
75. *See* Sw. Ctr. for Biological Diversity v. Klasse, No. CIV S-97-1969 GEB JF, 1999 WL 34689321 (E.D. Cal. 1999).
76. *See* Sw. Ctr. for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 28 ELR 21247 (9th Cir. 1998).
77. *See* Pac. Coast Fed'n of Fishermen's Ass'ns v. Bureau of Reclamation, 426 F.3d 1082, 35 ELR 20215 (9th Cir. 2005).
78. *See* Reed D. Benson, *Avoiding Jeopardy, Without the Questions: Recovery Implementation Programs for Endangered Species in Western River Basins*, 2 Mich. J. Envtl. & Admin. L. 473, 505-34 (2013) (describing and analyzing recovery implementation programs and similar collaborative efforts for ESA compliance).

affected many native species, it is not surprising that Corps or Bureau consultations have sometimes resulted in a BO finding that the proposed operation of a project would jeopardize a listed species. In some cases, the Services provided—and the courts upheld—an RPA that seemingly allowed the proposed operation to continue with relatively minor alteration or mitigation.[79] In other cases, like those involving the Columbia Basin[80] and Central Valley,[81] there has been a fierce and unending struggle over the application of §7 to project operations.

Given the high stakes involved in consultations over federal water projects, it is not surprising that the government and/or project beneficiaries have sought to limit the ESA's application in this context.[82] Several cases have involved arguments that Corps or Bureau operations are non-discretionary, and thus exempt from the requirements of §7.[83] This argument was a major focus of litigation in the early 2000s over Bureau operations in the Middle Rio Grande Basin in New Mexico,[84] and the Corps' operating discretion in that basin is still very much in dispute.[85] The argument succeeded in the unique context of Bureau operations on the Lower Colorado River,[86] but later failed in litigation over the Corps' operations on the Missouri[87] and Columbia Rivers.[88]

Section 7 is all the more significant for federal dams because the environmental review requirements of the National Environmental Policy Act (NEPA)[89] ordinarily do not apply to ongoing reservoir operations. The courts have effectively exempted routine water project operations from NEPA since 1990, when the U.S. Court of Appeals for the Ninth Circuit held that the Bureau did not need to prepare an environmental impact statement (EIS) before cutting releases from an Idaho reservoir during a drought.[90] The holding in that case, despite being an arguably incorrect interpretation of NEPA and its implementing rules,[91] has been extended and reinforced in later cases involving federal projects.[92] The most recent case on this point, where the Corps was excused from preparing an EIS even when it proposed a significant change in reservoir operations,[93] indicates that the courts are unwilling to require NEPA reviews for the operation of existing dams, unless perhaps the agency is proposing to do something it has never done before.

Experience has shown that the ESA has been far and away the most effective tool in making environmental concerns legally relevant in federal water project operations.[94] Any change that could reduce the effectiveness of the only tool that generally works in this context must be closely scrutinized. The Trump Administration appeared to signal its support for such a change, suggesting that all ongoing impacts of ongoing agency actions should be treated as part of the environmental baseline in §7 consultations. The next section explores the existing law and agency guidance on this issue.

II. The Environmental Baseline Issue in ESA Consultations on Dam Operations

Although defining ongoing dam operations as part of the environmental baseline for purposes of ESA compliance may seem like a subtle technicality, it would have huge practical impacts for federal dam operations and the ecosystems they affect. This section attempts to explain the reasons why that would be so, beginning with an explanation of the meaning of the environmental baseline in ESA consultations, and the way that both federal agencies and courts have understood and applied that term in the context of federal dam operating decisions. It also discusses how the determination of the

79. *Sw. Ctr. for Biological Diversity*, 143 F.3d at 523 (Bureau's operation of Lake Mead on the Colorado); In re Operation of the Mo. River Sys. Litig., 421 F.3d 618, 634-36 (8th Cir. 2005) (Corps' operation of Missouri River reservoirs).
80. *See* Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 886 F.3d 803 (9th Cir. 2018).
81. *See* San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 44 ELR 20056 (9th Cir. 2014).
82. One of the government's more ambitious arguments involved the 2002 consultation on operations of the Bureau's Klamath Project, which resulted in a jeopardy determination. The BO identified Klamath River flow levels needed to ensure the survival of listed coho salmon downstream of the project, but made the Bureau responsible for providing only 57% of those flows, because the project only supplied 57% of the irrigation water in the Klamath Basin. Thus, a key principle of the BO was that the federal project should bear only its proportional share of the water needed to avoid jeopardy. The district court overturned this aspect of the BO, however, and the government did not appeal that holding. *See Pac. Coast Fed'n of Fishermen's Ass'ns*, 426 F.3d at 1088-89.
83. *See* 50 C.F.R. §402.03 (2018).
84. *See* Reed D. Benson, *Dams, Duties, and Discretion: Bureau of Reclamation Water Project Operations and the Endangered Species Act*, 33 Colum. J. Envtl. L. 1, 33-40 (2008) (reviewing dispute over the Bureau's discretion to make water available for the endangered Rio Grande silvery minnow). A divided panel of the U.S. Court of Appeals for the Tenth Circuit would later vacate all the earlier opinions as moot. Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096 (10th Cir. 2010).
85. The Corps argues that nearly all of its activities in the Middle Rio Grande are non-discretionary because of the nature of its project authorizations. In the most recent decision in this ongoing litigation, the district court agreed almost entirely with the Corps. WildEarth Guardians v. U.S. Army Corps of Eng'rs, 314 F. Supp. 3d 1178 (D.N.M. 2018), *appeal docketed*, No. 18-2153 (10th Cir. Oct. 15, 2018).
86. Defs. of Wildlife v. Norton, 257 F. Supp. 2d 53 (D.D.C. 2003).
87. In re Operation of the Mo. River Sys. Litig., 421 F.3d 618, 630-31 (8th Cir. 2005).
88. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 928-29, 38 ELR 20099 (9th Cir. 2008).
89. 42 U.S.C. §§4321, 4331-4335, ELR Stat NEPA §§2, 101-105.
90. Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 21 ELR 20347 (9th Cir. 1990).
91. *See* Benson, *supra* note 32, at 298-300.
92. *Id.* at 294-95 (summarizing cases involving Bureau or Corps operations).
93. Idaho Conservation League v. Bonneville Power Admin., 826 F.3d 1173, 1176-77 (9th Cir. 2016). Although the Corps did not prepare an EIS on its proposed operating change at Albeni Falls Dam in Idaho, it did produce a substantial environmental assessment, so there was some consideration of environmental impacts.
94. In a 2011 report, the Bureau summarized 16 of its river restoration programs, every one of which was driven by the need for ESA compliance. U.S. Bureau of Reclamation, Bureau of Reclamation River Restoration Programs: A Summary of 16 Programs and Shared Institutional Challenges 72 (2011) (on file with author). While the Corps has general environmental authorities, it also has great discretion in operating many of its projects, so environmental concerns may carry little weight in the absence of ESA requirements. *See, e.g.*, Raymond Proffitt Found. v. U.S. Army Corps of Eng'rs, 343 F.3d 199 (3d Cir. 2003).

baseline is closely related to the question of agency discretion regarding dams.

A. What Is the Environmental Baseline Under ESA §7?

The term "environmental baseline" appears nowhere in the statute, but is instead a product of the Services' implementing rules that fill in many vital details of the §7 framework.[95] The bottom line in consultation is whether the proposed action would cause jeopardy, and the rules state that jeopardy results from an agency action that could be expected to "reduce appreciably the likelihood" of a species' survival and recovery.[96] But how should the jeopardy determination account for indirect or delayed impacts of the proposed actions, and for factors beyond the agency's control that affect the species?

To address such questions and clarify the approach to decisionmaking in consultation, the rules provide a definition of "effects of the action."[97] The Trump Administration recently altered the definition so that the term now means "all consequences to listed species or critical habitat that are caused by the proposed action," so long as the consequence "would not occur but for the proposed action and is reasonably certain to occur."[98] The prior definition was somewhat more complicated, because it included and defined subsidiary terms such as "indirect effects" and "interrelated" and "interdependent" actions.[99]

The effects of the proposed action under consultation "will be added to the environmental baseline,"[100] defined as follows:

> The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.[101]

Thus, the environmental baseline is about impacts to a listed species or critical habitat from activities *other than* the proposed action. These impacts include "past" and "present" impacts from all activities in the action area,[102] as well as "anticipated" impacts from other proposed federal actions. Although some of these impacts result from federal actions, none is attributed to the proposed action that is the subject of consultation; rather, the BO must determine whether the anticipated effects of the proposed action would be likely to jeopardize the species (or damage critical habitat) when "added" to the impacts that are part of the baseline.[103]

The Services' Consultation Handbook,[104] an important and detailed guidance document clarifying various aspects of the §7 consultation framework,[105] explains that the environmental baseline involves "the effects of past and ongoing human and natural factors leading to the current status of the species, its habitat (including designated critical habitat), and ecosystem, within the action area. . . . *It does not include the effects of the action under review in the consultation.*"[106]

Distinguishing the effects of the action from the environmental baseline is conceptually easy for entirely new actions or activities, such as the construction of a new dam.[107] Installing some new feature at an existing facility also seems fairly straightforward: the existing facility is part of the baseline, and the consultation will focus primarily on the effects caused by the new feature. The Consultation Handbook offers the example of adding a second hydropower turbine (requiring a federal permit) to an existing dam, and states, "Ongoing effects of the existing dam are already included in the Environmental Baseline, and would not be considered an effect of the proposed action under consultation."[108]

B. What Is the Environmental Baseline for Federal Dam Operations?

When the federal action is ongoing operation of an existing dam, there is room for argument about which impacts should be considered part of the baseline and which are effects of the action. Consider a hypothetical Corps dam that was completed in 1960, and ever since has been operated for flood

95. *See supra* notes 58-71 and accompanying text.
96. 50 C.F.R. §402.02 (2018). The other key issue in consultation is whether the proposed action will adversely modify critical habitat. 16 U.S.C. §1536(a)(2).
97. 50 C.F.R. §402.02 (2018).
98. Final Section 7 Rule Notice, *supra* note 17, at 45016 (redefining effects of the action, to be codified at 50 C.F.R. §402.02). The new definition also includes "consequences of other activities that are caused by the proposed action."
99. 50 C.F.R §402.02 (2018).
100. Although this language does not appear in the new "effects of the action" definition as it did in the prior one, *id.,* it remains true that the effects of the action must be added to the baseline conditions. Final Section 7 Rule Notice, *supra* note 17, at 44978-79.
101. *Id.* The new rules retained the quoted language verbatim, but also added two new sentences to the environmental baseline definition. *See infra* Section III.C.
102. The rules define "action area" to mean "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." *Id.*
103. When the Services adopted the prior definitions of effects of the action and environmental baseline in 1986, the preamble said this about the significance of the environmental baseline in §7 consultations:
> In determining the "effects of the action," the Director first will evaluate the status of the species or critical habitat at issue. This will involve consideration of the present environment in which the species or critical habitat exists, as well as the environment that will exist when the action is completed, in terms of the totality of factors affecting the species or critical habitat. The evaluation will serve as the baseline for determining the effects of the action on the species or critical habitat.

51 Fed. Reg. 19926, 19932 (June 3, 1986).
104. FWS & NMFS, Endangered Species Consultation Handbook (1998) [hereinafter Consultation Handbook], *available at* https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.
105. "The Handbook provides internal guidance and establishes national policy for conducting consultation and conferences pursuant to section 7 . . . . The purpose of the Handbook is to promote efficiency and nationwide consistency within and between the Services." *Id.* at Foreword.
106. *Id.* at 4-22 (emphasis added) (further describing the environmental baseline as "a 'snapshot' of a species' health at a specified point in time").
107. *Id.* at 4-27 (consultation on a new dam to be built by the Corps should also consider new irrigation canals to be served by the dam, and a new power turbine to be installed at the dam, because these actions are interrelated with the new dam).
108. *Id.* at 4-28.

control and reservoir recreation. The Corps is not proposing to change anything about the dam itself or about the operating regime, but only to continue the established operations. If a species of fish that lives downstream of the dam is newly listed as endangered, what impacts of the dam should be considered part of the baseline in a consultation on dam operations?

The Consultation Handbook addresses this question specifically, in a paragraph titled "Determining the effect of ongoing water projects."[109] It calls for using the standard §7 approach in consultations involving FERC hydropower licensing decisions,[110] Bureau contract renewals,[111] and "ongoing discretionary operations of Bureau and Corps of Engineers water facilities."[112] Thus, in a consultation on operations of an existing federal water project, "[t]he total effect of all past activities, *including effects of the past operation of the project* . . . form the environmental baseline[.]"[113] This baseline, plus the future impacts of project operations (both direct and indirect), make up the total effects on listed species and their habitat.[114] In other words, the Consultation Handbook calls for consultation on discretionary Corps and Bureau project operations, and the impacts of *past* operations fall within the environmental baseline, while *future* operations are addressed under the effects of the action.

The Corps produced its own internal "ESA Guidance" on this issue in 2013,[115] pushing back on ESA obligations that it clearly saw as unfair and inappropriate.[116] The guidance took the position that certain Corps project facilities and activities should be considered part of the environmental baseline for §7 purposes. It repeatedly stressed the importance of carefully defining the proposed action and the environmental baseline so as to be consistent with the Corps' mission and responsibilities,[117] and declared that the *existence* of a Corps structure such as a dam or levee is part of the environmental baseline.[118] The guidance also took the position that Corps *maintenance* of such a structure so that it continues to meets its authorized purposes is a non-discretionary activity that does not require consultation.[119] But it stopped short of saying that Corps *operations* were non-discretionary if they were carrying out a dam's authorized purposes, or that ongoing operations should be considered part of the environmental baseline.[120]

The Corps' guidance on its §7 duties was not written on a blank slate. The Corps had already been challenged over its ESA compliance in operating water projects, most notably in the Columbia and Missouri River Basins, and the courts had addressed the issue of the environmental baseline in this context. The next section examines some of the key points from these and other cases.

C. *Case Law Regarding Dam Operations and the Environmental Baseline*

1. *In re Operation of the Missouri River System Litigation*

The Corps has faced litigation on several fronts over its operation of a string of multipurpose dams in the Missouri River System.[121] The Flood Control Act of 1944 authorized these dams, not only for flood control, but also to support downstream navigation, hydropower generation, reservoir recreation, and other purposes.[122] With water supplies in the Missouri River Basin stressed by drought in the early 2000s, the Corps was sued by upstream states seeking to maintain reservoir levels and by downstream states advocating for flows to support navigation; these cases largely focused on whether the Corps' operations were violating the Flood Control Act.[123] Environmental groups also sued, arguing that the Corps was failing to meet its ESA duties regarding listed species found downstream of its reservoirs.[124] Amidst this flurry of litigation, the Corps produced a new Master Manual governing its operations of the Missouri River System reservoirs,[125] replacing the 1979 version of the Master Manual.

109. *Id.* at 4-30.
110. The paragraph begins by discussing hydropower relicensing by FERC (*see supra* notes 42-47 and accompanying text), which is required for existing projects when the old licenses expire. After noting that "FERC has determined that these new licenses represent a new commitment of resources," the Consultation Handbook states that the §7 analysis should treat a hydropower project relicensing just as it would a new license. *Id.*
111. Contracts govern the delivery of water supplies from Bureau projects to water users. The contract is typically between the Bureau and a "middleman" entity such as an irrigation district (or other form of water district), water users' association, or public water utility. Many such contracts have no expiration date and thus no need for renewal, but "water service contracts" do expire and thus require renewal. *See generally* Grant Cty. Black Sands Irrigation Dist. v. Bureau of Reclamation, 579 F.3d 1345, 1351-52 (Fed. Cir. 2009). The courts have generally viewed the renewal of these contracts as a discretionary federal action. *See* Nat. Res. Def. Council v. Jewell, 749 F.3d 776, 785, 44 ELR 20089 (9th Cir. 2014).
112. Consultation Handbook, *supra* note 104, at 4-30.
113. *Id.* (baseline also includes "current non-Federal activities, and Federal projects with completed section 7 consultations").
114. The additional impacts to be considered are those from "any reasonably certain non-Federal activities." *Id.*
115. Memorandum from Earl H. Stockdale, Chief Counsel, Corps, to "All Counsel" and Corps Offices (June 11, 2013) (on file with author).
116. The guidance concluded that its recommendations could help the Corps "ensure that the Civil Works budget is not inappropriately diverted to pay for large-scale environmental restoration projects that Congress has not authorized or funded, in the guise of alleged ESA responsibilities that are not legitimately the Corps' responsibilities under the ESA." *Id.* at 5.
117. *Id.* at 2, 3.
118. *Id.* at 2.
119. The Corps insisted that its duty to maintain these structures is non-discretionary, but acknowledged, "The how and when of the maintenance activities may be subject to Section 7 consultation if the process of maintenance (as opposed to the results of maintenance) could affect listed species or designated critical habitat." *Id.* at 3.
120. The Bureau's consultation guidance is much more general regarding the environmental baseline. The only definitive statement is that the Bureau is responsible for defining the environmental baseline at the biological assessment stage, but will coordinate with the Services in doing so. U.S. Bureau of Reclamation, Reclamation Manual: Policy ENV P04, at 3 (2003) (titled "Bureau of Reclamation Consultation Under the Endangered Species Act of 1973, as Amended").
121. In re Operation of the Mo. River Sys. Litig., 421 F.3d 618, 624-28 (8th Cir. 2005) (summarizing the relevant law governing the Corps' projects, the litigation history, and the Corps' administrative responses).
122. *Id.* at 624; *see* ch. 665, 58 Stat. 887 (1944).
123. South Dakota v. Ubbelohde, 330 F.3d 1014, 1027 (8th Cir. 2003).
124. Am. Rivers v. U.S. Army Corps of Eng'rs, 271 F. Supp. 2d 230 (D.D.C. 2003).
125. *See Operation of the Mo. River Sys. Litig.*, 421 F.3d at 627.

Interests in downstream Nebraska argued that because the Corps was required to operate the reservoirs for the congressionally authorized purpose of navigation, these operations were non-discretionary and thus not subject to §7 consultation.[126] The court rejected this argument, noting that ESA compliance did not prevent the Corps from supporting downstream navigation, in part because there was no statutory mandate for a particular flow or depth in the river channel. Because the Corps had enough discretion under the Flood Control Act to fulfill the authorized project purposes while addressing the needs of listed species, its operations were subject to the ESA.[127]

In the consultation over the Corps' Missouri River System operations, FWS included the existence of the dams within the environmental baseline, but assumed that the dams would be operated on a "run-of-the-river" basis that did not control or alter the flow of the river.[128] One party argued that the baseline should have included not just the dams, but also their ongoing operation under the prior 1979 Master Manual, which would have continued to govern the Corps' actions in the absence of the new version.[129] Because operations under the prior manual would impair the listed species' chances of recovery, the court observed that assuming such operations within the baseline "would tend to eliminate a finding of jeopardy for any proposed action."[130]

The court rejected this argument and upheld the run-of-the-river baseline for two main reasons. First, after referring back to the rule definition of environmental baseline as including "past and present impacts" of federal actions, the court concluded that "hypothetical continued operation under the previous version of the Master Manual in future years, as the alternative to the proposed action of updating the Master Manual, does not in any sense constitute a 'past impact' of federal action."[131] Second, the court saw the baseline argument as "essentially a different twist on the argument that the Corps has no discretion in operating the reservoir system."[132] Having already found that the statute leaves the Corps with discretion in balancing navigation with other authorized purposes, the court held that the baseline need not "include a specific operational profile."[133]

2. *National Wildlife Federation v. National Marine Fisheries Service*

The Federal Columbia River Power System (FCRPS) involves a set of multipurpose federal dams in the Columbia River Basin, operated primarily by the Corps.[134] In the early 1990s, several salmon stocks were listed as threatened or endangered in the Columbia River Basin,[135] resulting in consultation on FCRPS operations and an initial BO issued in 1993. Litigation over ESA compliance in the Columbia River Basin has been virtually continuous ever since then, as the courts have overturned a series of NMFS BOs for failing to meet the requirements of §7.[136]

Although its predecessors had concluded that FCRPS operations would jeopardize listed salmon species,[137] the 2004 BO found no jeopardy, largely because it took a very different view of the proposed action and the environmental baseline.[138] As for the action, NMFS regarded FCRPS dam operations for flood control, irrigation, and hydropower as non-discretionary, and therefore outside the scope of the consultation.[139] The environmental baseline included the existing FCRPS facilities, the "supposedly nondiscretionary dam operations, and all past and present impacts from discretionary operations." The BO also included a new "reference operation" of the FCRPS dams that it characterized as being the best possible operating regime for listed fish species, and said that this hypothetical operating regime was needed to account for impacts caused by the existence of the dams.[140]

In its 2008 decision,[141] the Ninth Circuit had little trouble rejecting the argument that federal dam operations were non-discretionary because of the dams' authorized purposes. After noting that the agencies had not previously taken such a narrow view of their FCRPS discretion, the court dismissed the view that "competing mandates for flood control, irrigation, and power production create any immutable obligations that fall outside of agency discretion."[142] Far from directing the agencies to perform specific non-discretionary acts, Congress had established broad mandates for achieving certain goals, leaving the agencies much discretion in how to implement those goals.[143] These dam operations were therefore subject to consultation, and the court ruled that the BO could not use "a reference operation to sweep so-called 'nondiscretionary' operations into the environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis."[144]

The court also faulted the BO for failing to account for the degraded baseline condition of Columbia River

126. *Id.* at 630. The court attributes this argument to the state of Nebraska and the Nebraska Public Power District, but not to the Corps.
127. *Id.* at 631.
128. *Id.* at 632. The case indicates that FWS chose this baseline—which was very different from the Corps' actual operating practices—based on its interpretation of its rules on §7 consultations.
129. *Id.* (argument of the Nebraska Public Power District).
130. *Id.*
131. The court agreed with FWS on this point, giving "due deference to the FWS' interpretation of its own regulations." *Id.* (citation omitted).
132. *Id.* at 633 (agreeing with the district court on this point).
133. *Id.*
134. The Bureau operates some of the dams, especially on the Snake River and other Columbia tributaries, and the Bonneville Power Administration markets the federal hydropower from the FCRPS. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 923, 38 ELR 20099 (9th Cir. 2008).
135. *See id.* at 923 n.2.
136. *Id.* at 925-27 (summarizing BOs and litigation from 1993 through 2008). The issues remain in litigation to this day. *See* Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 886 F.3d 803 (9th Cir. 2018) (addressing issues of injunctive relief following failure of 2014 BO on judicial review).
137. *See Nat'l Wildlife Fed'n*, 524 F.3d at 925 (explaining prior BOs).
138. *Id.* at 926.
139. "The [BO] offers little detail on the nature and extent of the purportedly nondiscretionary obligations or NMFS's basis for finding them to be non-discretionary." *Id.*
140. *Id.*
141. *Nat'l Wildlife Fed'n*, 524 F.3d 917.
142. *Id.* at 928.
143. *Id.* at 928-29.
144. *Id.* at 929.

Basin salmon stocks in analyzing whether they would be jeopardized by FCRPS operations. NMFS had based its no-jeopardy conclusion on the view that jeopardy could only result if the proposed action would make conditions for the species appreciably worse than the environmental baseline—no matter how bad the baseline conditions.[145] Because NMFS' approach treated the environmental baseline "only as a point of reference to determine the net effects of a narrowly-defined action," impacts assigned to the baseline were effectively left out of the jeopardy analysis.[146] The court insisted that it was not requiring NMFS to include the environmental baseline within the agency action—only to assess the effects of that action within the true context of a baseline that already imperils the species.[147]

After observing that the existing FCRPS dams were "already endangering" salmon populations, the court stated, "Although we acknowledge that the existence of the dams must be included in the environmental baseline, the operation of the dams is within the federal agencies' discretion."[148] And to determine whether those discretionary operations cause jeopardy, the BO must consider the problematic baseline conditions.

3. Other Cases

The Corps' ESA compliance regarding two dams on California's Yuba River has been repeatedly litigated,[149] and because the environmental baseline has been a recurring issue, the cases have applied the Ninth Circuit's decision in *National Wildlife Federation*. The Corps' dams on the Yuba pose significant passage barriers for salmon and other listed fish species,[150] but hydropower operations and water diversions at the dams are apparently nonfederal,[151] so the Corps' operating activities at these dams are somewhat limited.[152]

District court decisions from the Yuba offer some insights into the environmental baseline in the context of ESA consultations over federal dam operations. One problem associated with the dams was inadequate flow releases for downstream fish populations, but the Corps did not determine or control these flow levels, so their impacts were accepted as part of the environmental baseline.[153] Second, the Corps changed its position on which dam-related impacts should be included in the baseline and which should be considered effects of the action, initially regarding future impacts on fish passage as part of the action, and later moving those impacts to the baseline because they result from the dams' existence, not their operations.[154] Third, the most recent decision[155] agreed with the Corps that "past and present impacts flowing from the dams' existences" are properly part of the environmental baseline,[156] and that the Corps' dam inventory and safety inspections (but not its other activities at these dams) are non-discretionary and not subject to consultation.[157]

A recent U.S. Court of Appeals for the District of Columbia (D.C.) Circuit case, *American Rivers v. Federal Energy Regulatory Commission*,[158] involved a challenge to ESA compliance in FERC's decision to relicense a string of nonfederal hydropower dams on the Coosa River in Alabama. Here again, the existence and operation of these dams had inflicted both past and ongoing impacts on listed species and their habitat.[159] And here again, a key focus of the litigation was the proper approach to the environmental baseline in a consultation on the future operations of a set of existing dams. Thus, the case is relevant to Corps and Bureau operating decisions even though it involves a FERC licensing decision—especially since the Consultation Handbook calls for the same approach in all consultations involving the operation of "ongoing water projects."[160]

The court relied on the Consultation Handbook in determining that the relicensing BO had mishandled the environmental baseline.[161] The BO noted that the existing dams had caused both past harms and ongoing impacts on the Coosa River ecosystem, but stated that the relicensing decision could consider only current and future operations, not historic impacts.[162] Because the relicensing consultation had not considered "the degradation to the environment caused by the Coosa River Project's operation and its

145. *See id*. at 930.
146. *Id*. at 930 n.9.
147. *Id*. at 930-31. The court appeared to agree with NMFS that agency action can only "jeopardize" a species if that action "causes some deterioration in the species' pre-action condition." *Id*. at 930.
148. *Id*. at 930-31.
149. *See* Friends of the River v. Nat'l Marine Fisheries Serv., 293 F. Supp. 3d 1151, 1161-62 (E.D. Cal. 2018) (describing history of consultation and litigation regarding the Daguerre Point and Englebright Dams on the Yuba River in California).
150. *See* South Yuba River Citizens League v. Nat'l Marine Fisheries Serv., 723 F. Supp. 2d 1247, 1258-61 (E.D. Cal. 2010).
151. "Non-federal actions permitted or licensed by the Corps include operation of two hydroelectric generation facilities at Englebright and three diversions in the vicinity of Daguerre . . . ." *Id*. at 1253-54.
152. *See Friends of the River*, 293 F. Supp. 3d at 1167 (describing specific Corps activities at each dam).
153. *South Yuba River Citizens League*, 723 F. Supp. 2d at 1261.
154. *See id*. at 1260-61; *Friends of the River*, 293 F. Supp. 3d at 1162 (noting that the Corps officially changed its position in the 2012 consultation).
155. The Ninth Circuit, however, remanded the 2014 BO on Yuba dam operations to the National Marine Fisheries Service, requiring the agency to explain certain aspects of the BO. One issue was why the 2014 BO, unlike its predecessors, did not regard the continued existence of the dams as agency action. Friends of the River v. National Marine Fisheries Service, 2019 WL 4887136, __ Fed. Appx. __ (9th Cir. 2019).
156. *Id*. at 1166.
157. *Id*. at 1169.
158. 895 F.3d 32, 48 ELR 20113 (D.C. Cir. 2018).
159. *Id*. at 46-48, 50-53 (discussing problems caused by the dams and their operations, including impeding fish passage, impairing dissolved oxygen levels, and causing take of listed mussel species).
160. Consultation Handbook, *supra* note 104, at 4-30. A 2018 article notes that *American Rivers v. Federal Energy Regulatory Commission* appears contrary to earlier court of appeals cases on FERC relicensing, but recognizes that those earlier cases did not involve the ESA issues presented in the Coosa Project relicensing. Walker Stanovsky et al., *Hydropower Relicensing*, Water Rep., Dec. 15, 2018, at 7.
161. *Am. Rivers*, 895 F.3d at 45, 46 (quoting from the Consultation Handbook, *supra* note 104, at 4-33).
162. *Id*. at 46 (quoting BO as stating that activities dating as far back as the 1920s were "beyond the scope of the consultation").

continuing impacts,"[163] its jeopardy analysis had the same fatal flaw as the BO that was overturned in *National Wildlife Federation*.[164]

In defending that Columbia River BO, the government had argued that there could be no jeopardy unless the proposed action made things worse for the listed species.[165] In the Coosa case, the government offered a similar argument with arguably stronger facts, as the BO concluded that the relicensing would actually result in improved conditions for listed species compared to the prior operating regime.[166] The court would have none of it: "[A]ttributing ongoing project impacts to the 'baseline' and excluding those impacts from the jeopardy analysis does not provide an adequate jeopardy analysis. The [Coosa BO's] jeopardy analysis is arbitrary in failing to account for the impact of continued operations of the existing dams."[167]

What lessons emerge from the Consultation Handbook and the case law on the meaning of the environmental baseline in ESA consultations over dam operations? First, discretionary operation of a federal water project is an action subject to consultation, and the impacts of future operations on listed species and their habitat are effects of the action. Second, courts have been skeptical of arguments that the need to operate federal projects to meet their authorized purposes makes those operations nondiscretionary and outside the scope of §7. Third, courts recognize the existence of a federal dam as part of the environmental baseline, but it may be hard to distinguish impacts caused by a dam's existence from those resulting from operations. Fourth, past impacts on listed species and their habitat caused by dam construction and operation are part of the baseline, but a BO must account for those impacts and "incorporate degraded baseline conditions" in deciding whether future operations will cause jeopardy.

Thus, although there are continuing disputes over the proper treatment of the environmental baseline in the dam operations context, both the Consultation Handbook and the courts have addressed the issue in some detail. Against this backdrop of guidance and case law, the Trump Administration in 2018 suggested a change to the §7 implementing rules that would have greatly reduced the ESA's influence over dam operations.

III. The Environmental Baseline Issue in the §7 Rulemaking

On July 25, 2018, the Services published three proposed rule notices in the *Federal Register*, each dealing with a different aspect of the ESA. One of the notices proposed to eliminate the FWS' default rule giving threatened species the same protection as those listed as endangered.[168] Another notice proposed changes to the procedures and criteria for making determinations on listing and delisting species and designating critical habitat.[169] This section focuses on the notice that proposed revisions to the rules implementing §7.[170] The Services provided a modest 60-day comment period on their proposed §7 rule changes,[171] and received more than 65,000 public comments in response.[172]

A. *Overview of the §7 Proposed Rule Notice*

The Services introduced the proposed rule notice by stating that the revisions were intended to "improve and clarify interagency consultation, and make it more efficient and consistent, without compromising the conservation of listed species."[173] The notice then gave four examples of how the proposed rule changes might result in less time and money being spent on consultations, without mentioning how they would protect species as well as the current rules and practices.[174] In the preamble for several specific rules, however, the notice repeatedly stated that the proposed revisions were not intended to alter current agency practices under §7.[175]

The notice proposed several revisions to the §7 rules, and characterized most of these revisions as clarifications that were not intended to change meaning or practice. It repeatedly emphasized this point regarding the proposed revision of the effects of the action definition.[176] Similarly, the proposed

163. *Id.* The court noted that the BO had considered fish passage problems and inadequate flows to be part of the environmental baseline, but "hardly addressed" these problems in discussing the baseline, and failed to account for such degraded baseline conditions in deciding whether relicensing would cause jeopardy. *Id.* at 47.

164. *Id.* at 46 (noting that the Coosa BO had failed to "incorporate degraded baseline conditions into its jeopardy analysis," quoting from Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 929, 38 ELR 20099 (9th Cir. 2008).

165. In defending the FCRPS BO, the government argued that it could "satisfy the ESA by comparing the effects of proposed FCRPS operations on listed species to the risk posed by baseline conditions. Only if these effects are 'appreciably' worse than baseline conditions must a full jeopardy analysis be made." *Nat'l Wildlife Fed'n*, 524 F.3d at 930.

166. The government contended that the listed species affected by the Coosa Project had been "living under degraded baseline conditions since at least 1964, and this licensing action proposed to *improve* those conditions by, among other things, imposing a minimum-flow regime for the Weiss bypass for the first time." *Am. Rivers*, 895 F.3d at 47 (quoting from government brief).

167. *Id.*

168. Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35174 (July 25, 2018) (to be codified at 50 C.F.R. Part 17). This proposed rule change may have drawn the most public attention of the three, drawing more than 70,000 comments, see https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0007-0001 (last visited Sept. 18, 2019).

169. Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193 (July 25, 2018) (to be codified at 50 C.F.R. Part 424).

170. Proposed Section 7 Rule Notice, *supra* note 15.

171. *Id.* at 35178.

172. Regulations.gov, *Endangered and Threatened Species: Interagency Cooperation*, https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0009-0001 (last visited Sept. 18, 2019).

173. Proposed Section 7 Rule Notice, *supra* note 15, at 35179.

174. *Id.* (explaining cost and time savings that could result from the new definition of effects of the action as well as three other proposed rule changes).

175. *Id.* at 35181 (explaining proposed change to definition of "destruction or adverse modification" of critical habitat); *id.* at 35186 (explaining proposed change to rule on initiation of formal consultation); *id.* at 35189 (explaining that the new "reasonably certain to occur" standard was intended to be consistent with existing rules and agency practice).

176. As to this proposed change, the notice declared that the new language "does not change past practice on the evaluation of direct and indirect effects,"

change to the definition of "destruction or adverse modification" of critical habitat was intended "to further clarify the definition, removing language that is redundant and has caused confusion about the meaning of the regulation."[177] The proposed rule changes largely focused on definitions and processes, such as the time line for informal consultation,[178] the requirements for initiating formal consultation,[179] the trigger for reinitiating consultation,[180] and the practice of "programmatic consultation."[181]

In explaining some of the proposed rule changes, however, the Services pointedly responded to judicial rulings that the notice characterized as inconsistent with the ESA's text or the implementing rules.[182] Most significantly, the proposed rule notice took issue with some of the Ninth Circuit's determinations in *National Wildlife Federation*,[183] presenting a fairly detailed argument against the court's holding regarding jeopardy, the environmental baseline, and the effects of FCRPS operations.[184] This is especially notable because the Services did not propose, or specifically invite comment on, the key definition of "jeopardize the continued existence."[185]

The proposed rule notice did, however, invite comment generally on all aspects of the §7 implementing rules, and the Services declared that they were "comprehensively reconsidering the processes and interpretations of statutory language" set out in those rules.[186] The notice emphasized that the final rulemaking might adopt revisions that had not been proposed, and the Services declared that they could adopt any final rule that would be a "logical outgrowth" of the proposed rule.[187]

B. The Environmental Baseline Issue in the Proposed Rule Notice

On the environmental baseline issue, the Services signaled even more clearly the difference between what they *proposed* to do and what they *might* do in the final rule. The *proposed* rule would have retained the text of the environmental baseline definition,[188] merely moving that text from its former location—within the definition of effects of the action—into a stand-alone item within the list of defined terms in 50 C.F.R. §402.02.[189] Thus, the proposed rule would have left the environmental baseline definition substantively unchanged.

The notice then specifically invited comments on revising the definition as it relates to ongoing actions, without explaining what is meant by "ongoing action" or identifying any particular type of action.[190] With no further introduction, the notice then framed the problem:

> It has sometimes been challenging for the Services and Federal agencies to determine the appropriate baseline for those consultations involving ongoing agency actions. The complexities presented in these consultations include issues such as: What constitutes an "ongoing" action; if an ongoing action is changed, is the incremental change in the ongoing action the only focus of the consultation or is the entire action or some other subset reviewed; is the effects analysis different if the ongoing action has never been the subject of consultation as compared to if there is a current biological opinion for the ongoing action; if a change is made to an ongoing action that lessens, but does not eliminate, the harmful impact to listed species or critical habitat, is that by definition a "beneficial action"; and can a "beneficial action" ever jeopardize listed species or destroy or adversely modify critical habitat.[191]

The proposed rule notice posed these questions without providing any example of a consultation where the issue has arisen, let alone citing any case where the issues have been addressed. Instead of clarifying the problem to be solved, however, the notice simply invited comments on a possible solution, asking "whether the following language would address these issues"[192]:

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and that the Services "do not anticipate the revised language will change what types of effects or activities will be considered within our consultations; rather, we expect it to simplify and improve consistency in our effects analysis," *id*. at 35183. The notice later repeated the Services' intent "to simplify and clarify the definition of effects of the action, without altering the scope of what constitutes an effect." *Id*. at 35184.

177. *Id*. at 35180. (explaining proposal to eliminate the second sentence of the definition adopted by the Services in 2016, and add "as a whole" to the first sentence).
178. *Id*. at 35185.
179. *Id*. at 35186.
180. *Id*. at 35188.
181. *Id*. at 35184 (explaining the proposal to add a new definition in the rules "to codify an optional consultation technique that is being used with increasing frequency").
182. For example, the notice took issue with the Ninth Circuit's decision in *National Wildlife Federation*, 524 F.3d at 935-36 (9th Cir. 2008) (*see supra* notes 134-48 and accompanying text), regarding the ability of the Services to rely on a federal agency's commitment to implement measures that will mitigate adverse effects on a listed species. Proposed Section 7 Rule Notice, *supra* note 15, at 35187. It likewise disagreed with the Ninth Circuit regarding the need to reinitiate consultation on federal land management plans when critical habitat is newly designated for a listed species, taking issue with *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1084-85, 45 ELR 20114 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 293 (2016).
183. *See supra* notes 134-48 and accompanying text.
184. Proposed Section 7 Rule Notice, *supra* note 15, at 35182-83. The notice also took issue with statements in *Turtle Island Restoration Network v. U.S. Department of Commerce*, 878 F.3d 725, 735 (9th Cir. 2017). On a closely related issue, the notice argued against statements by the Ninth Circuit in *Oceana, Inc. v. National Marine Fisheries Service*, 705 F. App'x 577, 580 (9th Cir. 2017), and *Wild Fish Conservancy v. Salazar*, 628 F.2d 513, 527, 40 ELR 20037 (9th Cir. 2010).
185. *See supra* notes 68-69 and accompanying text. The discussion of the jeopardy holding was included in the proposed change to the definition of "destruction or adverse modification," which, as the notice pointed out, includes the word "appreciably" just as the jeopardy definition does. Proposed Section 7 Rule Notice, *supra* note 15, at 35182. Thus, the arguments on this point are somewhat relevant to the rule change actually proposed in the notice, even though they relate much more directly to the jeopardy standard.
186. "Thus, this rulemaking should be considered as applying to all of part 402, and as a part of the rulemaking initiated today, the Services will consider whether additional modifications" to the §7 rules "would improve, clarify, or streamline the administration of the Act." Proposed Section 7 Rule Notice, *supra* note 15, at 35179.
187. *Id*.
188. *See supra* note 101 and accompanying text.
189. Proposed Section 7 Rule Notice, *supra* note 15, at 35184 (explanation of proposed revision), 35191 (text of proposed rule).
190. *Id*. at 35184.
191. *Id*.
192. *Id*.

> *Environmental baseline* **is the state of the world absent the action under review and** includes the past, present **and ongoing** impacts of all **past and ongoing** Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action areas that have already undergone formal or early section 7 consultation, and the impact of State or private actions in the action areas which are contemporaneous with the consultation in process. **Ongoing means impacts or actions that would continue in the absence of the action under review.**[193]

The words in bold type would have been new language within the definition. The proposed rule notice did not explain how this version of the rule would "address" any of the identified questions regarding ongoing actions, how it might change existing consultation practice, or how it would relate to the outcome of any cases dealing with the baseline issue. Nor did the notice explain the Services' views on the potential pros and cons of defining the environmental baseline in this way. Because this version was not actually proposed, one might call it a "suggested" rule.[194] It did not become law, apparently because it may have been contrary to the ESA and cases interpreting it, but the final rule did include new language on ongoing operations and existing facilities in redefining the environmental baseline.

C. *The Final Rule and the Redefined Environmental Baseline*

In their final §7 rules, the Services adopted a new definition of environmental baseline[195] based on the version they actually proposed—that is, retaining the existing language but making environmental baseline a stand-alone item within the list of terms defined in 50 C.F.R. §402.02. The revised definition, however, now begins with a new sentence that was not mentioned in the proposed rule notice: "Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or its habitat caused by the proposed action."[196] It then states the preexisting language,[197] which the Services retained as proposed. Finally, the revised definition ends with this new sentence: "The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline."[198]

The preamble of the final rule notice offered some explanation of the intended purpose and meaning of this new final sentence, stating that it was added to "clarify" environmental baseline issues regarding ongoing agency activities and existing facilities. According to the notice, the ongoing consequences of such activities or facilities belong in the environmental baseline when the agency that is consulting on an action "has no discretion to modify either those activities or facilities."[199] Thus, "not within the agency's discretion to modify" applies to both agency activities and facilities—so unlike the suggested rule, the new definition of environmental baseline includes the impacts of ongoing actions only if such actions are non-discretionary.

The preamble continued its explanation of the new sentence, not surprisingly using the example of a federal dam. It stated that courts have regarded the existence of a federal dam as a proper part of the environmental baseline in a consultation regarding its operations, especially when there is no agency discretion to modify the dam.[200] On the matter of existing facilities, the notice concluded that "when a Federal agency has authority for managing or operating a dam, but lacks discretion to remove or modify the physical structure of the dam, the consequences from the physical presence of the dam in the river are appropriately placed in the environmental baseline . . . ."[201]

As for the impacts of ongoing dam operations, the preamble made it clear that they must be considered effects of the action unless those operations are non-discretionary:

> We distinguish here between activities and facilities where the Federal agency has no discretion to modify and those discretionary activities, operations, or facilities that are part of the proposed action but for which no change is proposed. For example, a federal agency may modify some of their ongoing, discretionary operations of a water project and keep other ongoing, discretionary operations the same. The resulting consultation on future operations analyzes the effects of all the discretionary operations of the water project on species and designated critical habitat as part of the effects of the action, even those operations that the federal agency proposes to keep the same.[202]

The preamble also noted that attributing certain ongoing impacts to the environmental baseline does not mean that those impacts will be ignored in the consultation process, consistent with the admonition of the D.C. and Ninth Circuit

193. *Id.*

194. The final rule notice, in fact, referred to this preamble language as "the suggested revised definition" of the environmental baseline. Final Section 7 Rule Notice, *supra* note 17, at 44995.

195. *Id.* at 45016.

196. *Id.* at 45016 (new rule text), 44978 (explaining new first sentence). Although the language is new, it appears generally consistent with the description of the environmental baseline in the Consultation Handbook: "The environmental baseline is a 'snapshot' of a species' health at a specified point in time. It does not include the effects of the action under review in the consultation." Consultation Handbook, *supra* note 104, at 4-22.

197. The Final Section 7 Rule Notice stated:

> The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

Final Section 7 Rule Notice, *supra* note 17, at 45016.

198. *Id.*

199. *Id.* at 44978.

200. *Id.* (citing Friends of the River v. Nat'l Marine Fisheries Serv., 293 F. Supp. 3d 1151, 1166 (E.D. Cal. 2018)). The litigation over two Corps dams on the Yuba River, the latest round of which is now on appeal to the Ninth Circuit, is discussed *supra* notes 149-57.

201. Final Section 7 Rule Notice, *supra* note 17, at 44978.

202. *Id.*

Courts of Appeals in cases involving dam operations.[203] "[T]he environmental baseline evaluations of the species or designated critical habitat will reflect the impact of those consequences and the effects of the action must be added to those impacts in the Services' jeopardy and adverse modification analysis."[204]

Thus, although the Services did revise the environmental baseline definition to address the issue of ongoing actions, the final version is much more consistent with the relevant case law and the Conservation Handbook than the suggested version in the proposed rule notice. And in the end, they provided a few paragraphs of explanation about the rule they adopted in 2019, while never saying much of anything about the rule they suggested in 2018. The next section examines why the suggested rule was not adopted, considers the policy goals reflected in the suggested rule, and identifies issues that are likely to arise regarding the application of §7 to dam operations under the new definition.

IV. The §7 Rulemaking and the Ongoing Push to Free Federal Dams From the ESA

It would be easy to believe that rule language that was not finally adopted (or even officially proposed) has no practical significance. But the suggested rule reflects Administration policy goals that have not gone away, and that have special significance for federal dam operations. This section examines the ongoing importance of these policy goals for ESA implementation in the context of federal water projects.

A. *Why Did the Administration Balk at Adopting the Suggested Rule?*

The final rule notice did not fully explain why the Services chose not to adopt the suggested rule language on ongoing operations, but it gave some good indications in responding to comments on the environmental baseline issue. After stating that there was support for the suggested rule by commenters who "agreed with different treatment for ongoing . . . actions or effects,"[205] the notice mentioned the new sentence addressing ongoing actions or existing facilities, and said that these revisions "address the comments received and are consistent with the existing case law and the Services' current approach to this issue."[206]

It also summarized the reasons why other commenters opposed the suggested rule, including arguments that it would have illegally "grandfathered" harmful effects or activities contrary to ESA case law, including *TVA*.[207] In response to these comments, the notice explained that the baseline would include impacts from ongoing activities or existing facilities "that are not within the agency's discretion to modify," and said that this new definition was consistent with *TVA* because that case involved an ongoing activity that the agency did have discretion to modify.[208]

This last statement shows that the Services were concerned—quite rightly—that the suggested rule might conflict with *TVA*[209] and its sweeping statements about the plain meaning of ESA §7. In that challenge to the completion and closing of the federal Tellico Dam, the Supreme Court declared:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result" in the destruction or modification of habitat of such species . . . .[210]

The quoted statutory text remains at the heart of §7(a)(2) today,[211] and as the Court stated in its 1978 decision, "This language admits of no exception."[212]

TVA would have posed a serious problem for the suggested rule even under the agency-friendly *Chevron* test, whereby courts defer to an implementing agency's interpretation of an ambiguous statute so long as that interpretation is reasonable.[213] *Chevron* deference gained through notice-and-comment rulemaking[214] can sometimes turn an agency's losing litigation positions into winners, perhaps most notably in the case of the U.S. Environmental Protection Agency's (EPA's) "water transfers rule" under the Clean Water Act.[215] And under the *Brand X* principle,[216] an agency is free to interpret a statute differently than a federal court did, so long as the statute is ambiguous

203. American Rivers v. Federal Energy Regulatory Commission, 895 F.3d 32, 46, 48 ELR 20113 (D.C. Cir. 2018); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 930, 38 ELR 20099 (9th Cir. 2008).
204. Final Section 7 Rule Notice, *supra* note 17, at 44979.
205. *Id.* at 44995.
206. *Id.*
207. *Id.*
208. *Id.*
209. *TVA*, 437 U.S. 153, 8 ELR 20513 (1978).
210. *Id.* at 173.
211. 16 U.S.C. §1536(a)(2).
212. *TVA*, 437 U.S. at 173. The Court had just finished stating:
> It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a nearly completed dam for which Congress has expended more than $100 million. . . . We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.

Id. at 172-73.
213. The principle of judicial deference to an agency's statutory interpretations is named for *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 14 ELR 20507 (1984). The Court stated a two-step test for evaluating such interpretations, asking first if Congress had expressed clear intent on the issue before the agency, and, if not, was the agency's interpretation of that ambiguous point a reasonable (or permissible) one. *Id.* at 842-43. While the *Chevron* doctrine gets mixed reviews, it is a very important principle of judicial review of agency action, and might well be the most-cited decision in the administrative law field. *See* Peter L. Strauss et al., Gellhorn and Byse's Administrative Law 1021, 1033-38 (11th ed. 2011).
214. The Supreme Court does not extend *Chevron* deference to every agency interpretation of statute, but does so when an agency follows a formal process and issues the interpretation in a form that carries the force of law—including making rules using the process of notice and comment. United States v. Mead Corp., 533 U.S. 218, 226-27, 231 (2001).
215. *See* Catskill Mountains Chapter of Trout Unlimited v. Environmental Prot. Agency, 846 F.3d 492, 47 ELR 20011 (2d Cir. 2017) (upholding the water transfers rule after earlier rejecting the same position taken by EPA in litigation).
216. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

on the issue: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[217] In order to gain the benefit of *Chevron,* however, an agency must show some ambiguity in the statute.

In defending the suggested rule, the government could have argued that the ESA cannot possibly be unambiguous on the specific issue involved in the environmental baseline definition, because the statute does not even use that term. By redefining the environmental baseline, however, the suggested rule would have effectively shielded all ongoing impacts of ongoing actions from the jeopardy test of §7(a)(2), so that ongoing actions could never be found to cause jeopardy even if they brought about the extinction of a species. On the surface, it would only have redefined a technical term found only in the implementing rules, but the suggested rule's practical effect would have meant a new exception from §7 for ongoing agency actions—an exception that *TVA* said the statutory text did not allow.

In a later case, a divided Supreme Court did uphold the rule that exempts non-discretionary agency actions from §7.[218] In *National Association of Home Builders v. Defenders of Wildlife* (*Home Builders*), the majority saw an otherwise irreconcilable conflict between seemingly mandatory statutory provisions, and felt the need to interpret §7 to avoid "implied repeal" of the commands of other laws.[219] But it was that need to avoid a head-on collision between the ESA and other seemingly absolute statutes that caused the Court to find contextual ambiguity in §7.[220] *Home Builders* distinguished *TVA* based on the absence of statutory conflict: although the dam at issue in *TVA* was authorized and funded by Congress, there was no statute that mandated its completion, so the *Home Builders* majority said it was a discretionary activity.[221] Far from overruling its earlier decision, the *Home Builders* Court declared, "*TVA v. Hill* thus supports the position . . . that the ESA's no-jeopardy mandate applies to every *discretionary* agency action—regardless of the expense or burden its application might impose."[222]

Thus, although the Services did not directly explain why they did not adopt the suggested rule, the final rule notice indicates they doubted that it would hold up in court.[223] But nothing in either the proposed or final rule notice suggests that the Administration did not like the *policy* of moving ongoing impacts of all ongoing actions into the environmental baseline. The next section examines the policy goals that the suggested rule appears to reflect.

B. What Does the Suggested Rule Indicate About the Administration's Policy Goals?

Given that the proposed rule notice devoted only one cryptic paragraph to the suggested rule, saying nothing about its potential outcomes or the Services' view of it, there is no clear official signal of the intention behind it.[224] The notice clearly indicated that the Administration saw a problem with consultations in the context of ongoing actions, however, and it is hard to believe that the Services would develop and present a specific option that they were not prepared to support as a policy matter. And by pointedly requesting comment on a specific draft definition, with new language presented in bold type, the proposed rule notice seemed designed to provide legally adequate notice for final adoption of the suggested rule.[225] It is therefore worth evaluat-

217. *Id.* at 982. This principle applies even to judicial decisions predating the Court's 1984 *Chevron* decision. United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 483-89 (2012) (holding that 1958 decision interpreting a statutory provision precluded a much later agency rule that interpreted the same provision differently).

218. Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 37 ELR 20153 (2007) (upholding 50 C.F.R. §402.03).

219. "The Ninth Circuit's reading of §7(a)(2) would not only abrogate [Clean Water Act] §402(b)'s statutory mandate, but also result in the implicit repeal of many additional otherwise categorical statutory commands." *Id.* at 664.

220. The Court stated:

> We must therefore read §7(a)(2) of the ESA against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal if it were construed as broadly as the Ninth Circuit did below. When §7(a)(2) is read this way, we are left with a fundamental ambiguity . . . .

Id. at 666.

221. *Id.* at 670.

222. *Id.* at 671.

223. Had the suggested rule been adopted without any environmental review, inadequate NEPA compliance may have been a further problem for the government in the courts. The final rule was adopted with no environmental review, as the Services claimed that the rule qualified for a categorical exclusion: "The amendments are of a legal, technical, or procedural nature. The rule serves only to clarify and streamline existing interagency consultation procedures." Final Section 7 Rule Notice, *supra* note 17, at 45015 (citing NEPA rules and guidance for both DOI and DOC). The suggested rule, however, would clearly have been no mere technical or procedural tweak; as discussed below, it would have fundamentally changed the application of the ESA to ongoing actions, and could have been interpreted as exempting nearly all ongoing dam operations from §7. Such a rule would have unavoidably had environmental impacts, and the Services would have been on thin ice in claiming a categorical exclusion for such a major policy change. *See* Citizens for Better Forestry v. U.S. Dep't of Agric., 481 F. Supp. 2d 1059, 1089 (N.D. Cal. 2007) (holding that U.S. Forest Service violated NEPA by issuing rules revising the requirements for land management "forest plans" under a categorical exclusion), 1100 (enjoining rules pending adequate NEPA compliance). Although the suggested rule was not adopted, the Administration's revision of various ESA implementing rules will arguably cause significant environmental impacts, and the plaintiffs challenging those rules alleged a NEPA violation as their first claim for relief. ESA Rule Challenge Complaint, *supra* note 20, at 29-33.

224. The final rule notice gave some hints as to why the suggested rule was not adopted, *see supra* notes 205-08 and accompanying text, but shed no new light on the reasons why the proposed rule notice included a specific draft version of the definition and requested comments on that version.

225. As noted above, the Services declared that they might adopt any rule that was a "logical outgrowth" of the proposed rule notice. *See supra* note 188 and accompanying text. In determining whether an agency has violated the Administrative Procedure Act by adopting a final rule without providing adequate notice, courts have applied the logical outgrowth test to determine whether the proposed rule notice gave the public sufficient indication that the agency was considering adopting the kind of rule that it ultimately did. *See, e.g.*, Fertilizer Inst. v. Environmental Prot. Agency, 935 F.2d 1303, 1311, 21 ELR 21122 (D.C. Cir. 1991); Am. Med. Ass'n v. United States, 887 F.2d 760, 767 (7th Cir. 1989).

Had the Services adopted the suggested rule, notice would have been arguably inadequate, not simply because the proposed rule language was very different from the suggested rule, but because the notice said so little on the underlying problem and the Services' preferred solution. But a key issue in these cases is whether a proposed rule notice adequately alerted

ing the potential implications of the suggested rule because it presumably reflects the Administration's policy goals for ongoing actions under §7.

Had the Services adopted the suggested definition, all ongoing impacts of ongoing federal dam operations would have become part of the environmental baseline for §7 purposes, under the new language stating that the environmental baseline includes "ongoing impacts of all past and ongoing" federal actions. The harm caused to listed species by existing operating practices would no longer have been analyzed as effects of the action of future dam operations, because as stated in the proposed rule notice and the Consultation Handbook, the environmental baseline excludes the effects of the action that is the subject of consultation.[226] The impacts of status quo dam operations would instead have been considered background conditions affecting the species and its habitat.

This shift would have had major practical significance even though both the D.C. Circuit and the Ninth Circuit have insisted that in determining whether future dam operations will jeopardize a listed species, the Services must factor in degraded baseline conditions. In their proposed §7 rule notice, however, the Services insisted that a federal action could cause jeopardy only if the effects of that action would be serious enough to "appreciably reduce" the chances of survival and recovery of a listed species,[227] no matter how bad the baseline condition might be. Although the notice did "acknowledge that for a species with a particularly dire status, a smaller impact could cause an alteration that . . . appreciably reduces the likelihood of survival and recovery of the species,"[228] it argued that the law did not support the courts' test for jeopardy under such conditions.[229]

This argument echoed the government's litigating position in *National Wildlife Federation*, in which NMFS claimed that a full jeopardy analysis was necessary only if the effects of proposed FCRPS operations would be appreciably worse for species than baseline conditions.[230] The Ninth Circuit saw this jeopardy test as fundamentally inconsistent with the ESA: "Under this approach, a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide to oblivion is one of the very ills the ESA seeks to prevent."[231] The court also noted that under the government's approach, "the environmental baseline serves only as a point of reference to determine the net effects of a narrowly-defined action. Thus, *whether an action is included in the baseline determines whether its impacts are considered at all* in the agency's basic jeopardy analysis."[232]

The government in *National Wildlife Federation* also took the position that ongoing dam operations on the Columbia River were part of the environmental baseline. It contended that congressional mandates to operate the FCRPS for flood control, hydropower, navigation, and irrigation were non-discretionary, and that non-discretionary ongoing operations were part of the baseline.[233] As noted above, the Ninth Circuit found that the government had discretion in operating the dams,[234] and ruled that NMFS could not "sweep so-called 'non-discretionary' operations into the environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis."[235]

The failed argument in *National Wildlife Federation* was that ongoing dam operations were part of the baseline because they were non-discretionary; the suggested rule would have gone a big step further by defining the baseline to include all ongoing impacts of ongoing operations, discretionary or not. The government also argued unsuccessfully in *National Wildlife Federation* that jeopardy could result only if the effects of an action make the species appreciably worse off than the baseline, no matter how bad it is—a position repeated in the proposed §7 rule notice. Thus, the rulemaking shows the government returning to positions rejected by the Ninth Circuit in 2008, at a time when current Secretary David Bernhardt was DOI solicitor, the agency's top lawyer.[236]

Adoption of the suggested rule might have meant that established federal dam operations became almost entirely exempt from ESA §7. Had all ongoing impacts of ongoing operations become part of the baseline, such impacts would have effec-

stakeholders of the issues on which they should comment. *See*, *e.g.*, Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 626 F.3d 84, 94-95 (D.C. Cir. 2010). By pointedly requesting comment on a specific version of the definition, the proposed rule notice seemed to be written in a way that would allow the government to prevail against an inadequate-notice claim had it adopted the suggested rule.

226. Proposed Section 7 Rule Notice, *supra* note 15, at 35184 (citing Consultation Handbook, *supra* note 104, at 4-22).

227. *Id.* at 35182. The Services made this point in explaining their proposed revision to the definition of "destruction or adverse modification" of critical habitat. The existing definition of that term turned on whether an action would "appreciably diminish" the value of critical habitat for a listed species, and the Services noted that the jeopardy definition likewise asks if an action would "appreciably reduce" a species' likelihood of survival and recovery. According to the Services, in determining if a federal action would adversely modify critical habitat *or* jeopardize a listed species, the question is whether the effects of the action "are consequential enough to rise to the level of 'appreciably diminish' or 'appreciably reduce.'" *Id.*

228. *Id.* at 35182-83.

229. The notice criticized as "inconsistent with the statute and our regulations" the Ninth Circuit's statement that "where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm" (citing Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 930, 38 ELR 20099 (9th Cir. 2008)). *Id.* at 35182. The notice did not mention that this Ninth Circuit language was quoted by the D.C. Circuit in *American Rivers v. Federal Energy Regulatory Commission*, 895 F.3d 32, 47, 48 ELR 20113 (D.C. Cir. 2018), probably because the latter case was decided on July 6, 2018, only a few days before the proposed rule document was signed by the Secretaries of DOI and DOC. Proposed Section 7 Rule Notice, *supra* note 15, at 35193 (signed on July 16 and 18, 2018).

230. *Nat'l Wildlife Fed'n*, 524 F.3d at 930.

231. *Id.* The court insisted that it was not lumping all baseline harms into the effects of the action, but only requiring NMFS to consider existing degraded conditions in deciding whether future operations would jeopardize the species. The court also noted that an agency can only jeopardize a species if it causes some new harm. *Id.*

232. *Id.* at 930 n.9 (emphasis added).

233. Federal Defendant's Memorandum in Support of Motion for Summary Judgment at 9, Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. 01-00640-RE (D. Or.), *aff'd*, 524 F.3d 917 (9th Cir. 2008). The government contended that agencies were "not required to consult on operations mandated by Congress, in particular, operations necessary to meet the multiple purposes of flood control, irrigation, navigation, power generation, and fish and wildlife." *Id.* at 18.

234. *See supra* notes 141-44 and accompanying text.

235. *Nat'l Wildlife Fed'n*, 524 F.3d at 929.

236. Wikipedia, *David Bernhardt*, https://en.wikipedia.org/wiki/David_Bernhardt (last edited Sept. 18, 2019).

tively been considered background conditions, rather than being effects of a proposed action—that is, future operations. Under that definition, if the Corps or the Bureau were to propose a change in their operating practices, that would be a proposed action subject to consultation, but by maintaining the status quo, the agencies could attribute all their impacts to the baseline.[237] Never mind that the agency would have discretion to revise its operations; the proposed rule notice took the position (as the government did in *National Wildlife Federation*[238]) that consultation is required only if the agency affirmatively proposes an action.[239] The Corps and the Bureau already have reasons why they rarely review and revise dam operating plans,[240] and giving all ongoing operations baseline status would have made it even less likely that these agencies would propose to alter their practices.

By deciding against the suggested rule, the Administration chose not to make a dramatic—and probably unsupportable—change in the ESA legal framework regarding ongoing actions.[241] But by developing that version of the definition and featuring it in the proposed rule notice, the Administration tipped its hand regarding its policy goals. There is no reason to believe those goals have changed, and the §7 final rule notice indicates how federal agencies might pursue them case-by-case, especially in the context of ongoing dam operations.

C. *Ongoing Issues for Ongoing Dam Operations and §7 Compliance*

For federal dams, the key portion of the revised definition is the new sentence declaring, "The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline." This language, other statements in the rulemaking notices, and the government's litigating positions in federal dam cases point to at least three issues that are likely to arise in ongoing and future disputes over the application of §7 to dam operations.

First, and most obviously, we can expect to see a new round of disputes over the existence and extent of agency discretion to revise federal dam operations. These are certainly not new issues, as both federal operators and nonfederal beneficiaries have argued that agencies lack discretion to change dam operations due to congressionally authorized project purposes.[242] These arguments were raised in litigation arising from several different river basins in the first decade of the 2000s, and generally had limited success in those cases.[243]

As noted above, an ESA implementing rule makes the requirements of §7 applicable only to discretionary agency actions, so non-discretionary actions would not require consultation at all. The new rule allows for an argument that the impacts of non-discretionary operations will still be considered in any consultation on dam operations, only as part of the environmental baseline, as the final rule notice insists that baseline conditions will not be ignored.[244] The courts have recognized, however, that moving impacts of project operations to the environmental baseline changes the analysis significantly, making it much less likely that those operations will be found to jeopardize a listed species.[245] Reviewing courts must continue to scrutinize closely any argument that an agency has no discretion to change dam operations.

Second, there may be more efforts to attribute impacts on listed species and their habitat to the *existence* of a federal dam, rather than to its ongoing operations. Here again, these are not new arguments, as the court in *National Wildlife Federation* recognized that the environmental baseline must include the existence of the Columbia River dams, but not discretionary operations.[246] Questions about the existence of federal dams and the environmental baseline are also a point of contention in the ongoing litigation over Corps dams on the Yuba River.[247] As Judge Lawrence Karlton observed in an earlier case challenging the Corps' §7 compliance on the Yuba, the distinction between impacts caused by a dam's existence and those caused by its operations "is easy to state but hard to apply."[248] In deciding such cases, courts must recognize that the government has a strong incentive to blame impacts on the (presumably non-discretionary) existence of a dam, and not on the Bureau's or the Corps' ongoing discretionary operations of that dam.

237. The suggested rule states, "Ongoing means impacts or actions that would continue in the absence of the action under review." Proposed Section 7 Rule Notice, *supra* note 15, at 35184. Thus, if status quo operations continue and the agency proposes no change, those operations and their impacts would fall entirely within the baseline.

238. "[T]he 'action' upon which the Action Agencies must consult are those aspects of dam operations and configuration over which they have discretion to act *and which they propose to exercise*." Federal Defendant's Memorandum in Support of Motion for Summary Judgment at 18, Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. 01-00640-RE (D. Or.), *aff'd*, 524 F.3d 917 (9th Cir. 2008) (emphasis added).

239. Proposed Section 7 Rule Notice, *supra* note 15, at 35189. The Services took this position in the context of existing programmatic land management plans adopted by the Forest Service or Bureau of Land Management. The notice took issue with the holding in *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 45 ELR 20114 (9th Cir. 2015), which required reinitiation of consultation on a forest plan following the designation of critical habitat within the plan area. The Services declared that "only affirmative discretionary actions are subject to reinitiation under our regulations, and the mere existence of a programmatic land management plan is not affirmative discretionary action." Proposed Section 7 Rule Notice, *supra* note 15, at 35189. The Services proposed a rule that would eliminate that requirement for such federal land management plans, and they also invited comment "on whether to exempt other types of programmatic land *or water management plans* . . . from the requirement to reinitiate consultation when a new species is listed or critical habitat is designated." *Id.* (emphasis added).

240. *See* Benson, *supra* note 35, at 389-94 (identifying cost, controversy, and litigation risk as key reasons why the agencies are reluctant to review and revise operating plans).

241. It remains to be seen whether the revised environmental baseline definition will withstand judicial review, see ESA Rule Challenge Complaint, *supra* note 20, at 26, although it seems far more likely to do so than the suggested rule would have, had it been adopted.

242. *See supra* Section I.A.

243. *See supra* notes 82-88 and accompanying text; *see also* Section II.C. (discussing courts' finding that water project operations on the Missouri and Columbia Rivers were discretionary).

244. Final Section 7 Rule Notice, *supra* note 17, at 44978, 44995-96.

245. *See supra* note 130 and accompanying text (Missouri River litigation), note 144 and accompanying text (Columbia River litigation), note 167 and accompanying text (Coosa River litigation).

246. *See supra* Section II.C.2. and accompanying text.

247. *See supra* notes 149-57 and accompanying text.

248. *South Yuba River Citizens League*, 723 F. Supp. 2d 1247, 1261 (E.D. Cal. 2010).

Third, the Bureau and the Corps may attempt to avoid consulting by maintaining the operational status quo at a dam, and taking the position that there is no agency action that triggers §7. Moving all ongoing operations to the environmental baseline (as the suggested rule would have done) would have allowed these agencies to contend that they needed to consult only on some new operating practice or regime. It appears, however, that they may still offer that argument as to ongoing discretionary operations that they do not propose to change. In the context of changes to the rule regarding reinitiating consultation, the final rule notice declares that "only affirmative discretionary actions are subject to reinitiation."[249] The potential trouble for listed species, then, is if the Bureau or the Corps proposes no change in operations that would clearly qualify as an action requiring consultation.

The final rule notice addressed this issue specifically in the dam operations context. It noted that a federal agency may propose to change some aspects of discretionary operations while keeping other aspects the same; the consultation would have to consider the effects of all discretionary dam operations, not just those that the agency was proposing to change.[250] But the notice also indicated that an agency has discretion to choose which of its possible discretionary operations to propose for consultation:

> [T]he obligation is on the Federal action agency to propose actions for consultation and while they should not improperly piecemeal or segment portions of related actions, a request for consultation on one aspect of a Federal agency's exercise of discretion does not de facto pull in all of the possible discretionary actions or authorities of the Federal agency.[251]

This statement could be read equally as an admonition to agencies not to evade consultation requirements, and an indication of how they might attempt to do so.[252] Especially given the Bureau's and the Corps' usual inertia in reviewing and revising their operating plans, they may face litigation over whether they have failed to consult or improperly defined the scope of their proposed actions, forcing the courts to make difficult case-by-case decisions on these issues.

By declining to adopt the suggested rule, the Administration stepped back from a battle of nationwide significance over the legality of moving all impacts of ongoing actions to the environmental baseline. Thus, the battle over the ESA and federal dams will continue to be fought at the level of individual Corps and Bureau projects. Courts evaluating these agencies' §7 compliance can expect arguments over the existence and extent of operating discretion, the attribution of impacts, and the necessity and scope of consultation on status quo operations.

V. Conclusion

For federal agencies that must "ensure" that their ongoing actions do not jeopardize listed species, the ESA compliance problem has always been a difficult one, and that is true in spades for existing Corps and Bureau water projects. At federal dams, the toughest part of the problem is their inherent trade offs, pitting important water supply, flood control, and hydropower benefits against serious harm to aquatic ecosystems and other environmental values.

Another part of the problem is conceptual and technical: in a §7 consultation on dam operations, which impacts to the species are properly attributed to the proposed operating plan under review, and which are part of the environmental baseline? This is a complex question that has been litigated repeatedly, and the courts have recognized that an expansive environmental baseline means more freedom for dam operators and less protection for listed species. After suggesting that all ongoing agency actions should be shifted to the environmental baseline, the Administration did not adopt that change in its final ESA rules, opting for a more modest redefinition of the term.

It may seem hypervigilant to focus on a rule change that was never finalized or even officially proposed, especially one that would only have altered a regulatory definition. The suggested rule, however, could have resulted in a major change to the way §7 applies to federal dams, significantly reducing its protection for listed species and their habitat. That all-important protection could still be eroded one dam at a time, however, so wildlife advocates and the federal courts have work to do in upholding §7 requirements at the project level. Federal dam operations are ongoing, and so is the challenge of ensuring that they are consistent with the letter and spirit of the ESA.

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249. Final Section 7 Rule Notice, *supra* note 17, at 45010. The final rule exempted certain federal agencies from having to reinitiate consultation on their land management plans in the event of a new species listing or critical habitat designation. *Id.* at 45017-18. The proposed rule had invited comment on whether this exemption from reinitiation should also extend to certain "water management plans." Proposed Section 7 Rule Notice, *supra* note 15, at 35189. The final rule notice noted that some commenters had favored expanding this exemption for "all programmatic plans" including water management plans, but said only that it would not adopt that approach "[a]t this time." Final Section 7 Rule Notice, *supra* note 17, at 45010.

250. Final Section 7 Rule Notice, *supra* note 17, at 44978.

251. *Id.*

252. The final rule notice also made it clear that decisions about reinitiating consultation, at least, are up to action agencies like the Bureau and the Corps, and not the Services. *Id.* at 45010.