



The Endangered Species Act Baseline & Waterway Projects

Steven Burns

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Legislative Summit

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- ESA 101
- The environmental baseline
- Legal questions about the NMFS-USACE memorandum
- Potential precedential effect

- Section 4: Listing and critical habitat designations
- **Section 7: Consultation on *federal* actions**
 - Federal agencies cannot “jeopardize the continued existence” of a listed species or adversely modify “critical habitat”
 - **NMFS: Marine and anadromous species (+/-)**
 - **FWS: Terrestrial and freshwater species (+/-)**
- Section 9: “Take” prohibition – applies to everybody
- Section 10: Exceptions – incidental take permits and habitat conservation plans
- Section 11(g): Citizen suits

- If the “**action agency**” proposal “may affect” ESA resources, two possible responses:
 - **Service** may find “not likely to adversely affect,” or
 - Agencies initiate formal **consultation**
- “Biological Opinion” (BiOp) can include—
 - A “reasonable and prudent alternative” (**RPA**) (**the action**)
 - An “incidental take statement” (**ITS**) with “reasonable and prudent measures” (**RPM**) (**conditions**)
- Affects *both* direct Corps operations *and* issuance of a Corps permit

What *IS* the baseline?

Current conditions, from which impacts of the proposed actions are measured.

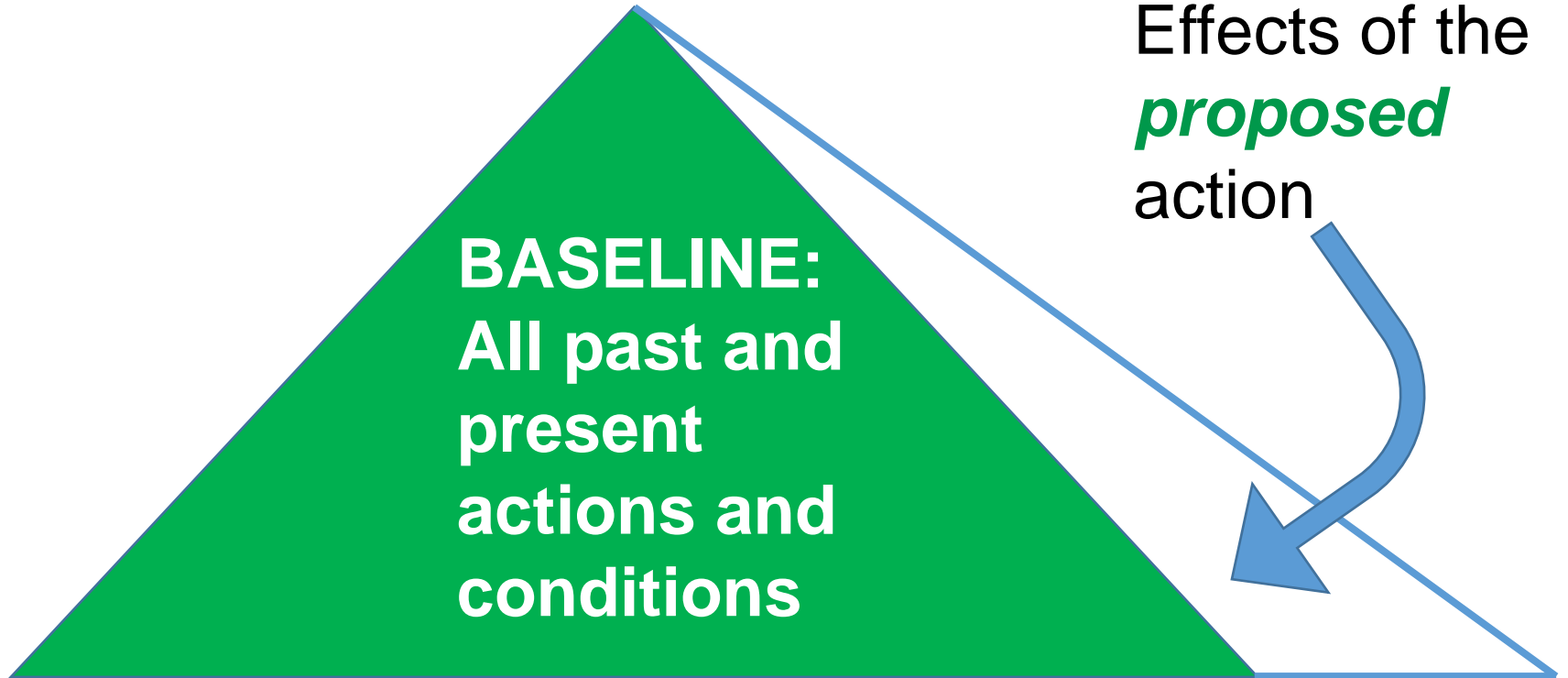
- “[I]ncludes the *past and present impacts of all Federal, State, or private actions* and other human activities in the action area” (50 C.F.R. § 402.02)
- “The consequences to listed species or . . . critical habitat from ongoing agency activities or *existing agency facilities* that are not within the agency's discretion to modify *are* part of the environmental baseline.” (50 C.F.R. § 402.02)

What is *IN* the baseline?

According to NMFS' Consultation Handbook:

- “The baseline includes State, tribal, local, and private actions ***already affecting the species*** or that will occur contemporaneously with the consultation in progress.”
- A federal action ***can be removed from the baseline***—
 - if it will not be implemented
 - if consultation is reinitiated, or
 - an alternative will “remove all adverse effects”

What is *IN* the baseline?



Re the environmental baseline in a consultation:

- As to **Corps** activity at Corps projects:
 - “[T]he effects stemming from the existence of that structure into the future **would be considered part of the environmental baseline.**”
- As to **non-Corps permittees**:
 - “[T]he agencies will consider various factors, including the current condition of the structure, how long it would likely exist irrespective of the action, and how much of it is being replaced, repaired, or strengthened”
 - In other words: **Structures can be removed from the baseline** under some circumstances

The Corps says maintenance of its facilities is required by statute and **non**discretionary.

- **Is it though?**

- “May” = authorized = discretionary = subject to \$\$\$
- “Shall” = required = non-discretionary / mandatory
- Maintenance necessary as a **practical** matter —that’s not the same as a **legal** mandate
 - AND there is usually discretion in **time and manner**

What's the problem?

Consequences of removing an existing structure from the baseline:

1. Compensatory mitigation obligations for impacts not caused by the permittee's action
2. Increases complexity of the analysis
 - Additional time and cost for permittee
 - Agency resources already too constrained—additional complexity adds delay for necessary maintenance

Whose permit is it?

Agency memorandum:

- Provisions of an RPA or RPM “**that address activities that are completely outside the Corps’ authority**” should be assigned solely to applicants”
- “The Corps will include as a condition of the Corps permit the ITS or RPA when required under a Section 7 consultation” with NMFS

Translation:

- The Corps permit can include conditions the Corps itself lacks the authority to require.

Supreme Court (NAHB v. DOW 2007): ESA does not override a **mandatory** statute

- CWA provides **specific** criteria to approve state program
- ESA not an independent basis to disapprove

If the action agency statute is discretionary:

- **1st, 8th, and 9th Circuit Courts of Appeal:**
 - ESA is an **independent** source of agency authority
- **5th and D.C. Circuits:** No additional authority
 - Agencies “utilize their authorities” (§ 7(a)(1)), but ESA does not expand their powers (*Platte River*)

Is the memo reviewable?

- Agencies: Not legally binding or enforceable.
 - *If a court agrees*, there is no judicial review.
- **Principles to determine reviewability:**
 - **Interpretive** rule or general statement of **policy**:
Generally *is not* reviewable
 - **“Legislative rule”** *is* reviewable
 - Regardless of what the agency says it’s doing
 - An action carrying the force and effect of law
 - Also: Must be a **“final”** agency action

NOW: Governs NMFS & USACE everywhere

- Does not govern other agencies directly

FUTURE: May be cited as a source in other cases challenging actions of other agencies

- On what principled basis should FWS differ their ESA analysis?
- If this is the baseline for purposes of ESA, why not the National Environmental Policy Act?
- ***Not authoritative*** but may be ***persuasive***

Area of potential applicability:

- NGO challenges a federal action or permit.
 - ESA consultations if **species** are present
 - NEPA analysis for any **federal** action involving existing structures or operations
 - **Hydropower relicensing**
 - Terrestrial 404 permits
 - *Any federal action or permit involving an existing structure or prior environmental impact*

Side note: Agency deference

- Courts have developed doctrines that defer to agency interpretations of ambiguous sources:
 - Ambiguous statutes (*Chevron*)
 - Ambiguous regulations (*Aeur*)
- The Supreme Court now hinting at a more hands-on approach
 - Current case to watch: *AHA v. Becerra*
 - Criteria to calculate Medicare drug reimbursements

Thank you!

BALCH
& BINGHAM LLP

Steven Burns
(205) 226-8736
sburns@balch.com