No. 14-377

In the Supreme Court of the United States

STEWART & JASPER ORCHARDS, ET AL., PETITIONERS

v.

SALLY JEWELL,
SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case arises out of a biological opinion issued by the United States Fish and Wildlife Service (FWS) that the operations of two large water management projects, the Central Valley Project (operated by the United States Bureau of Reclamation) and the State Water Project (operated by the California Department of Water Resources) jeopardized the existence of the delta smelt, a species listed as "threatened" under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq*. As required by the ESA, FWS's biological opinion contained a reasonable and prudent alternative (RPA) identifying operational changes to avoid jeopardizing the continued existence of the delta smelt. The court of appeals' decision held that the biological opinion and its RPA were not arbitrary and capricious. The questions presented are:

1. Whether the court of appeals erred in ruling that FWS had no obligation to consider the economic impacts to the public at large from implementation of an RPA.

2. Whether the court of appeals erred in giving deference under this Court's decision in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), to the FWS's interpretation of its own regulation as expressed in the *Consultation Handbook*, a guidance document it prepared with the National Marine Fisheries Service.

3. Whether this Court should reverse its decision in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A162) is reported at 747 F.3d 581. The opinion of the district court (Pet. App. B1-B250) is reported at 760 F. Supp. 2d 855.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2014. Petitions for rehearing en banc were denied on July 23, 2014 (Pet. App. C1-C7). The petition for a writ of certiorari was filed on September 30, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Endangered Species Act of 1973 (ESA or the Act), 16 U.S.C. 1531 *et seq.*, to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). Section 2(c)(1) of the ESA states that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. 1531(c)(1). Section 4 of the ESA directs the Secretaries of the Departments of the Interior (Interior) and Commerce (Commerce) to list threatened and endangered species and to designate their critical habitats.[1] 16 U.S.C. 1533.

Section 7 of the ESA requires federal agencies to ensure that their actions do not jeopardize the continued existence of endangered or threatened species, or destroy or adversely modify their critical habitat, and to carry out programs for their conservation. 16 U.S.C. 1536(a)(1) and (2).[2] If any action by a federal agency may affect a listed species or its critical habitat, Section 7(a)(2) requires the agency to consult with the United States Fish and Wildlife Service (FWS) or the National Marine Fisheries Service

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[1] The United States Fish and Wildlife Service implements the ESA with respect to species under the jurisdiction of the Secretary of the Interior. 50 C.F.R. 402.01(a) and (b); see 50 C.F.R. 17.11. The National Marine Fisheries Service administers the Act with respect to species under the jurisdiction of the Secretary of Commerce. 50 C.F.R. 222.101(a); see 50 C.F.R. 223.102.

[2] We use the term "jeopardy" to refer both to the prohibitions against jeopardizing the continued existence of an endangered or threatened species and against destroying or adversely modifying critical habitat.

(NMFS) (collectively the consulting agencies). 16 U.S.C. 1536(a)(2); see 50 C.F.R. 402.01(a) and (b).

Regulations promulgated jointly by the Secretaries of the Interior and Commerce furnish a structure for consultation concerning the likely effects on listed species of proposed federal actions. See 50 C.F.R. Pt. 402. The regulations establish a process of "formal consultation," 50 C.F.R. 402.14, between the consulting agency (FWS or NMFS) and the federal agency seeking to take the action (the action agency), which culminates in the issuance of a biological opinion, 50 C.F.R. 402.14(h). That biological opinion includes a "detailed discussion of the effects of the action on listed species or critical habitat." 50 C.F.R. 402.14(h)(2). The biological opinion assesses the likelihood of jeopardy to the listed species and its critical habitat. 50 C.F.R. 402.14(g)(4).

If FWS or NMFS determines that the action as proposed is likely to jeopardize a listed species, it is required to identify "reasonable and prudent alternatives, if any," that will avoid jeopardy. 50 C.F.R. 402.14(h)(3); see 16 U.S.C. 1536(b)(3)(A). In order to qualify as a "reasonable and prudent alternative[]" (RPA), an alternative course of action must prevent jeopardy and be an action that "can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. 1536(b)(3)(A); see 50 C.F.R. 402.02 (regulatory definition).[3]

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[3] The regulatory definition of an RPA provides:

> Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is

2. This case arises out of the operation by the Bureau of Reclamation (Reclamation) of a system of dams and reservoirs in California known as the Central Valley Project (CVP). Pet. App. A13-A18. Located in the Central Valley Basin in California, the CVP constitutes "the largest federal water management project in the United States." *Central Delta Water Agency* v. *United States*, 306 F.3d 938, 943 (9th Cir. 2002), aff'd, 452 F.3d 1021 (9th Cir. 2006).

Reclamation must coordinate its CVP operations with the California Department of Water Resources (DWR), which operates its State Water Project (SWP) in the same watershed, to export water from Northern California through the Sacramento-San Joaquin Delta (Delta) for delivery to southern parts of the State. *California* v. *Sierra Club*, 451 U.S. 287, 290-291 (1981); see Pet. App. A18-A19.

In 2005, FWS completed a consultation with Reclamation and DWR concerning the impacts of CVP and SWP operations on species listed as threatened or endangered under the ESA. Pet. App. A24. In a biological opinion issued in 2005 (2005 Biological Opinion), FWS concluded that those operations would not place the existence of any listed species in jeopardy or adversely modify critical habitat. *Ibid.* Although FWS considered impacts to various listed species, the primary species of concern was the delta smelt (Hypomesus transpacificus), a small fish, two to three inches long, with a short life span of approximately one year, which was listed in 1993 as a threatened

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> economically and technologically feasible, and that the Director believes would avoid the likelihood of [jeopardy to the listed species].

50 C.F.R. 402.02 (emphasis omitted).

species under the ESA, 16 U.S.C. 1533. 58 Fed. Reg. 12,854, 12,858 (Mar. 5, 1993); Pet. App. A21-22, A24.

Shortly after FWS issued its 2005 Biological Opinion, the delta smelt population sharply declined, for reasons unknown. Pet. App. A22 & n.4. The Natural Resources Defense Council (NRDC) and several other organizations, referred to collectively here as NRDC, filed suit to challenge the 2005 Biological Opinion. *Id.* at A24. A number of parties that held water contracts with Reclamation for delivery of water from the CVP intervened in the suit. *NRDC* v. *Kempthorne*, 506 F. Supp. 2d 322, 328-329 (E.D. Cal. 2007). The district court granted in part and denied in part NRDC's motion for summary judgment and held that the 2005 Biological Opinion was arbitrary and capricious. *Id.* at 387-388; see Pet. App. A24. That ruling was not appealed. The court imposed interim remedies intended to protect the delta smelt until a new court-ordered biological opinion was completed. *Id.* at A25. The FWS issued its new biological opinion on the court-ordered deadline, December 15, 2008 (2008 Biological Opinion). *Id.* at A25.

3. Unlike the 2005 Biological Opinion, the 2008 Biological Opinion concluded that the CVP/SWP operations were likely to jeopardize the continued existence of the delta smelt and that the operations are major contributors to (although not the exclusive causes of) the delta smelt's decline. Pet. App. A25-A26.

The CVP and SWP operate massive pumping plants that reverse the natural flow of the southern part of the Delta, particularly two distributary channels of the San Joaquin River known as the Old and Middle Rivers (referred to as OMR). Pet. App. A19.

The pumping plants can kill delta smelt by entrainment, *i.e.*, by the negative flows pulling the delta smelt into the pumps.[4] *Id.* at A19, A26. Screening devices, called "louvers," catch fish larger than 30 millimeters before they are pulled into the pumps. *Id.* at A19. In a process of "salvage," the delta smelt, along with other fish caught in these devices, are then counted and trucked to a location where they are released. *Ibid.* Few delta smelt survive the salvage process, but the salvage data provide an indicator of the total number of smelt entrained by the pumping plants. *Id.* at A19-A20.

As required by the ESA, 16 U.S.C. 1536(b)(3)(A), the 2008 Biological Opinion provided an RPA to prevent CVP/SWP operations from jeopardizing the delta smelt. The RPA consisted of several actions, each of which, if triggered, would require limits on CVP/SWR pumping rates or the release of fresh water from upstream reservoirs. Pet. App. A27-A28.

Actions 1, 2, and 3 of the RPA provide protection to the delta smelt at various points in its life cycle during the winter and spring by imposing limitations (expressed as negative OMR flows) on the pumping plants operated by Reclamation and DWR. Pet. App. A27-A28. Action 1, which is triggered if the "daily salvage index" reaches a "critical point," restricts OMR flows to specified average rates. *Id.* at A27. Action 2 follows "immediately after Action 1," or oc-

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[4] A key metric of the flow rate in the OMR is net upstream flow, which is usually measured in negative cubic feet per second. Pet. App. A25 & n.8. A higher negative number shows that the pumps are being run at a higher rate, and that the delta smelt are subject to stronger currents pulling them to the pumps. *Id.* at B39.

curs if recommended by the Smelt Working Group,[5] and also imposes limits on the OMR flow rate "depending on a complex set of biological and environmental parameters." *Id.* at B12. Action 3 similarly regulates OMR flow rate and seeks to protect juvenile and larval smelt when signs of smelt spawning are detected annually. *Id.* at A27-A28.

Action 4 of the RPA applies only in years classified as "wet" or "above normal" by DWR,[6] and regulates the location of "X2," the point (measured in kilometers above the Golden Gate Bridge) in the Delta where the salinity levels are two parts per thousand. Pet. App. A28, A66; see *id.* at A21. Because the delta smelt spends most of its lifecycle in a low salinity zone, the location of X2 is a "primary driver of delta smelt habitat suitability," such that as X2 moves further downstream, toward the Golden Gate Bridge, the habitat available to the delta smelt improves and increases. *Id.* at A66; see *id.* at A21-A22; see also 812 F. Supp. 2d at 1148.

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[5] The Smelt Working Group consists of experts from FWS, DWR, and other agencies. It provides recommendations to FWS, and assists FWS with monitoring and protecting the delta smelt. See FWS *Smelt Working Group*, http://www.fws.gov/sfbaydelta/cvp-swp/smelt_working_group.cfm (last updated June 11, 2014).

[6] As shown in a decision by the State of Cal. Water Res. Control Bd., *Revised Water Right Decision 1641*, at 20 (Mar. 15, 2000), which is available at http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf (Tbl. 4), water years are classified based on the amount of precipitation. Going from the years with the most precipitation to the least, the classification is "Wet," "Above Normal," "Below Normal," "Dry," and "Critical." *Ibid.* DWR's water years are fiscal years, not calendar years, and begin on October 1 and end on September 30.

Moving the location of X2 downstream requires the release of fresh water from upstream reservoirs or a decrease in project pumping, or both. Pet. App. A66. The location of X2 was therefore "critical to the parties" in this case because it "directly affects how much water can be exported to southern California for agricultural and domestic purposes." *Ibid.* Action 4 requires that CVP/SWP operations be managed so that X2's monthly average location is no more than 74 kilometers upstream of the Golden Gate Bridge in "wet" years (which allows the delta smelt access to the favorable feeding and living conditions in the Suisun Bay) and no more than 81 kilometers upstream of the Bridge in "above normal" years. *Ibid.*; see *id.* at B174-B177.

4. Following issuance of the 2008 Biological Opinion, six complaints were filed by parties (including petitioners) challenging its conclusions under the ESA and the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq*. See Pet. App. A14-A15 & n.2, A29. In substance, the complaints asserted that the technical determinations made by FWS supporting the RPA were arbitrary and capricious. See *id.* at B18-B19, B37-B38. In particular, plaintiffs challenged the data and methods used by FWS to recommend limitations on pumping operations and the release of fresh water under Actions 1, 2, 3, and 4. See *id.* at B37-B38. NRDC intervened on the side of the federal respondents to defend the 2008 Biological Opinion; DWR intervened on the side of the plaintiffs. See *id.* at A1-A4, B9. Plaintiffs filed several motions for injunctive relief, and ultimately the parties cross-moved for summary judgment. See *id.* at B13-B14.

In reviewing the 2008 Biological Opinion, the district court appointed four of its own experts, and also permitted plaintiffs to introduce extensive extra-record evidence, including more than 40 expert declarations in support of the motions for injunctive relief and summary judgment.[7] Pet. App. A37-A38.

In a lengthy opinion, the district court granted summary judgment to plaintiffs, concluding, based on its own interpretation of the extra-record declarations, that certain technical determinations in support of the 2008 Biological Opinion were arbitrary and capricious. Pet. App. A30, A39; see *id.* at B37-B118 (discussing whether FWS used the "best available science" to justify the RPA actions); see also, *e.g.*, *id.* at B59-B86 (discussing whether FWS should have adjusted numbers of delta smelt taken by pumping stations); *id.* at B86-B118 (discussing whether FWS's choice of models to calculate the location of X2 was reasonable).

The district court also held that FWS failed to explain how the RPA satisfied "non-jeopardy factors," including whether the RPA was "economically and technologically feasible." Pet. App. B202-B217; see *id.* at B202-B219; see also 50 C.F.R. 402.02 (defining RPA). In the court's view, the APA and FWS regulations require "some exposition in the record of why the agency concluded (if it did so at all) that all four regulatory requirements for a valid RPA were satisfied." Pet. App. B219; No. 1:09-cv-00407, 2011 WL 1740308, at *4 (May 4, 2011) (explaining the court's

[7] After the district court denied motions by the federal respondents and NRDC seeking to strike plaintiffs' declarations, the federal respondents and NRDC submitted declarations in response to the plaintiffs' filings. Pet. App. A37-A38.

summary judgment decision). The court added that FWS did not explain "[h]ow the appropriation of water for the RPA Actions, to the exclusion of implementing less harmful alternatives, is required for species survival," Pet. App. B219, although the court did not delineate the degree to which FWS had to consider the economic impacts to the public at large.[8]

5. The federal respondents and NRDC appealed the district court's decision. Pet. App. A32. Two groups of plaintiffs, which included the State Water Contractors and the Metropolitan Water District, filed response briefs, dividing up the issues between them. See Metro. Water Dist. C.A. Principal & Resp. Br. 1-2; State Water Contractors C.A. Principal & Resp. Br. 1-2. DWR filed a separate brief. See DWR C.A. Answering Br. Petitioners did not file a brief, but instead filed a statement under Federal Rule of Appellate Procedure 28(i) incorporating arguments made in the briefs made by the State Water Contractors and the Metropolitan Water District.[9]

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[8] Subsequently, the same district court judge ruled in *In re Consolidated Salmonid Cases*, 791 F. Supp. 2d 802 (E.D. Cal. 2011), appeal pending, No. 12-15144 (9th Cir. argued Sept. 15, 2014) (*Salmonid Cases*), that NMFS had no obligation to consider economic impacts to the public at large, stating that such consideration would violate this Court's ruling in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978). *Salmonid Cases*, 791 F. Supp. 2d at 921. The *Salmonid Cases* concern a challenge by many of the same plaintiffs in this case to a biological opinion issued by NMFS concerning the impacts of CVP and SWP operations on species for which NMFS has responsibility under the ESA. See *id.* at 812-813.

[9] Pls-Appellees Stewart & Jasper Orchards, Arroyo Farms, LLC, & King Pistachio Grove's Joinder in Appellees Principal & Resp. Brs. 1.

a. The court of appeals reversed the district court's ruling that the 2008 Biological Opinion was arbitrary and capricious. Pet. App. A44-A83. The court concluded that the district court had erred in relying on the many post-decisional expert declarations submitted by the plaintiffs, stating "we cannot see what the parties' experts added that the court-appointed experts could not have reasonably provided to the district court." *Id.* at A38. As the court of appeals saw it, "the district court opened the [2008 Biological Opinion] to a post-hoc notice-and-comment proceeding involving the parties' experts, and then judged the [2008 Biological Opinion] against the comments received." *Id.* at A39.

The court of appeals also held that the district court had failed to give appropriate deference to FWS's technical determinations concerning the need for the protective measures contained in the RPA. Pet. App. A83-A102. The court of appeals noted that this Court has stated that "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Id.* at A34 (quoting *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983)).

Applying these principles, the court of appeals reversed each of the district court's rulings and found that FWS's 2008 Biological Opinion and RPA were not arbitrary and capricious. In particular, the court of appeals held that the OMR-flow rate restrictions applied in Actions 1, 2, and 3 were supported by substantial evidence and were reasonably designed to work "as one part in a dynamic monitoring system that accounts for the smelt population as a whole." Pet. App. A62; see *id.* at A44-A65 (analyzing FWS's flow

limits). The court similarly held that FWS's recommendations regarding the location of X2 were supported by the record and by valid methods and data.[10] *Id.* at A65-A83.

Examining the regulatory definition of an RPA in 50 C.F.R. 402.02, the court of appeals further held that FWS was not obligated to address non-jeopardy factors. Pet. App. A101-A111. The court observed that Section 402.02 "is a definitional section" that "defin[es] what constitutes an RPA" rather than "setting out hoops that the FWS must jump through." *Id.* at A105. The court similarly found no statutory obligation under the ESA itself to consider non-jeopardy factors, noting that the ESA's sole requirement is that the RPA "will prevent jeopardy or adverse modification of critical habitat." *Id.* at A107. At any rate, the court held that, even if FWS were required to consider non-jeopardy factors, "the record shows that the FWS has sufficiently considered them," particularly since "[t]he RPA closely resembles measures in the interim remedial order, the feasibility of which was proven in its [nearly one-year] implementation." *Id.* at A110-A111.

The court further noted that 50 C.F.R. 402.02 addresses the economic and technological feasibility of an RPA to ensure that the RPA proposes actions

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[10] While the court of appeals found parts of the 2008 Biological Opinion "a bit of a mess," it found that those problems were "not the fault of the agency," but rather were attributable to the "substantive constraint on what an agency can reasonably do" within the "tight" 12-month deadline set by the district court. Pet. App. A40, A42-A43. Notwithstanding these challenges, the court of appeals found it could "discern the agency's reasoning" and determine that the 2008 Biological Opinion "is adequately supported by the record and not arbitrary and capricious." *Id.* at A44.

that "can be taken by the Federal agency * * * in implementing the agency action," 16 U.S.C. 1536(b)(3)(A), not to consider an RPA's impact on the public at large. Pet. App. A109 (citing *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 185 (1978) (*TVA*) (holding that the ESA reflects "a conscious decision by Congress to give endangered species priority over the primary missions of federal agencies")) (internal quotation marks omitted).[11] The court therefore found that the district court erred to the extent it required FWS to "address the downstream economic impacts" of restrictions on CVP's operations. *Id.* at A109.

b. Judge Arnold, sitting by designation, concurred in part and dissented in pertinent part. Pet. App. A148-A154. His dissent would have upheld the district court's finding that FWS's use of raw salvage data to determine OMR flow limits was not an "accepted scientific methodology," and was therefore arbitrary and capricious. *Id.* at A150; see *id.* at A148-A150. Judge Arnold also would have found insufficient support for FWS's determination of X2, see *id.* at A151-A152, because, in his view, the 2008 Biological Opinion did not adequately consider sources of bias in the models used to determine and predict X2's position or "sufficiently explain why 74 km and 81 km were selected as critical points for X2 to preserve smelt habitat," *id.* at A152. The dissent also would have found no abuse of discretion in the district court's admission of extrinsic expert evidence on these subjects. *Id.* at A148-A151, A154.

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[11] The court of appeals noted that "[n]either the parties nor the district court argue that the RPAs themselves (and their proposed Actions) are not economically and technologically feasible." Pet. App. A109 n.43.

As to non-jeopardy factors, the dissent agreed with the majority that there was "no authority requiring FWS to address specifically and analyze * * * the question of whether the RPA meets the non-jeopardy elements," but the dissent would have nonetheless affirmed the district court on this point because "[t]he record shows that concerns were raised relating to RPA feasibility" and to the agencies' "authority to implement the RPA."[12] Pet. App. A152-A153.

c. Two other groups of plaintiffs[13] and DWR filed petitions for rehearing en banc, which were denied. Pet. App. C7. Petitioners did not file their own petition or file a statement joining in the petitions filed by the other parties. See 11-15871 C.A. docket.

ARGUMENT

Petitioners argue (Pet. 12-21) that the court of appeals erred by failing to require FWS to consider the RPA's potential economic impact on third parties and the general public. The court properly rejected that claim as inconsistent with the ESA's plain language, FWS's regulations, and this Court's decision in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), which collectively require FWS to propose actions

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[12] Judge Rawlinson concurred in part and dissented in part, disagreeing with the majority on an issue not raised in this certiorari petition—whether Reclamation's adoption and implementation of the 2008 Biological Opinion triggered obligations under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq*. Pet. App. A155-A162.

[13] These plaintiffs included the State Water Contractors, the Metropolitan Water District and other water contractors that have filed a separate certiorari petition in this Court. See *State Water Contractors*, petition for cert. pending, No. 14-402 (filed Oct. 6, 2014).

that will prevent jeopardy to the delta smelt without requiring an analysis of a recommended action's downstream economic consequences. Petitioners err in contending (Pet. 19-21) that the court of appeals' decision conflicts in this respect with the Fourth Circuit's decision in *Dow AgroSciences LLC* v. *National Marine Fisheries Service*, 707 F.3d 462 (2013) (*Dow AgroSciences*), which, contrary to petitioners' contention, did not require a consulting agency to weigh the economic impact of an RPA on the broader public. *Id.* at 474-475.

Petitioners assert (Pet. 22-26) that the Court should grant review to determine the appropriate level of deference accorded to an agency's interpretation of its own regulations. Even if this issue could merit this Court's review, this case would not be an appropriate vehicle in which to do so. Petitioners forfeited this argument by failing to raise it below, and the court of appeals found FWS's regulations to be clear, making only a passing reference to deference levels.

Finally, petitioners argue (Pet. 26-34) that this Court should overrule *TVA*'s holding that the ESA requires agencies to protect endangered species and their critical habitat without balancing the economic costs of such protections. Petitioners do not point to any subsequent event that calls this Court's decision into question other than their own policy disagreement with the ESA.

Further review of the court of appeals' decision therefore is not warranted by this Court.

1. a. Petitioners maintain (Pet. 17-18) that the words "reasonable and prudent" necessarily require consideration of the economic consequences of an

RPA, and thus that the court of appeals erred when it found FWS was not required to evaluate possible public economic impact of implementation of the RPA.

Petitioners' argument ignores the plain language of the ESA, which limits feasibility considerations to the agency's or applicant's ability to implement the RPA. In 1978, in the Endangered Species Act Amendments of 1978 (1978 Amendments), Pub. L. No. 95-632, 92 Stat. 3751, Congress defined a "reasonable and prudent alternative[]" as one that "can be taken *by the Federal agency or applicant.*" 16 U.S.C. 1536(b)(3)(A) (emphasis added); see § 7(b), 92 Stat. 3753. The Act makes made no mention of a requirement to consider economic impacts to the public at large in preparing an RPA.

The 1978 Amendments to the ESA provided for broader public economic considerations in *other* aspects of the ESA, but not in the RPA process. For example, the 1978 Amendments created the Endangered Species Committee, which is authorized to grant exemptions from Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), but only after following detailed procedures and in consideration of enumerated factors that expressly include economic costs, 16 U.S.C. 1536(h)(1)(A). The 1978 Amendments also allowed consulting agencies to exclude areas from a critical habitat designation if, "after taking into consideration the economic impact, * * * [the consulting agency] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"—but only if extinction of the species will not result. 16 U.S.C. 1533(b)(2).

The Endangered Species Committee and critical habitat provisions demonstrate that Congress knew

how to provide for consideration of economic impacts in administering the ESA, and Congress's omission of any mention of economic factors in defining an RPA shows it did not intend the RPA to include such considerations. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original) (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) (per curiam).[14]

The legislative history of the ESA's 1978 Amendments further shows that the 1978 Amendments were intended to leave *TVA*'s holding intact. H.R. Rep. No. 1625, 95th Cong., 2d Sess. 11 (1978) (favorably describing *TVA* as affirming the principle that "the determination of whether a particular activity violates [S]ection 7 is made irrespective of the economic importance of the activity"); see also H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978) (*House Conference Report*) ("The basic premise of [the 1978 Amendments] is that the integrity of the interagency consultation process designated under [S]ection 7 of the act be preserved.").

The ESA therefore provides no support for petitioners' effort to impose on consulting agencies a duty

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[14] To the extent there is some informational value in estimating the economic impacts of an RPA, such information will be provided in an Environmental Impact Statement (EIS) prepared by the Reclamation under NEPA. Pet. App. A117. The court of appeals ruled that Reclamation had to prepare an EIS addressing the impacts of its acceptance of the RPA, *id.* at A126-A147, and no party has sought further review of that ruling.

to consider economic impacts to the public-at-large in preparing an RPA.

b. Petitioners maintain (Pet. 12-16) that the court of appeals erred in failing to require that FWS adequately explain its decision, and in particular, by not requiring FWS to address how the RPA was "economically feasible." But the court of appeals did not establish any broad exemption from the usual requirement that an agency explain the bases for its decisions. Rather the court recounted how the 2008 Biological Opinion did adequately explain each of its conclusions, observing that "the record shows that the FWS has sufficiently considered [non-jeopardy factors]." Pet. App. A110; see, *e.g.*, *id.* at A77-A83 (holding that the 2008 Biological Opinion "sufficiently explained the fall X2 locations"); *id.* at A86-A88 (record adequately explains methodology used to calculate incidental take limits).

Moreover, contrary to petitioners' contentions (Pet. 15-16), the court of appeals did not excuse FWS from compliance with its own regulations. Rather, the court simply interpreted the particular regulation at issue here, 50 C.F.R. 402.02, and held that this section does not "obligate[] the FWS to address the non-jeopardy factors when it proposes RPAs," given that such considerations are neither required by statute nor referred to elsewhere in the regulations. Pet. App. A105; see *id.* at A105-A106. This narrow holding was correct and does not merit this Court's review.

c. Petitioners assert (Pet. 19-21) that the Ninth Circuit's decision in this case conflicts with the Fourth Circuit's decision in *Dow AgroSciences* on whether FWS is obligated expressly to address the economic

impact or feasibility of an RPA as concerns third parties. There is no such conflict.

Dow AgroSciences considered an application by pesticide manufacturers to reregister their products with the Environmental Protection Agency (EPA), which required EPA, *inter alia*, to ensure that the pesticides perform without "unreasonable adverse effects" on the environment. 707 F.3d at 465; see *id.* at 464-466. Pursuant to the ESA, NMFS prepared a biological opinion finding that reregistration of the pesticides would jeopardize certain Pacific salmonids and their critical habitats. *Id.* at 465-466. NMFS proposed an RPA that imposed significant restrictions on pesticide use, *id.* at 466, including establishing uniform buffers surrounding any waterway "connected, directly or indirectly," to a water body in which "salmonids might be found at some point," *id.* at 475 (emphasis omitted).

In *Dow AgroSciences*, the Fourth Circuit ruled in favor of the pesticide manufacturers, which had challenged the RPA on several grounds, including that NMFS failed to provide an adequate explanation of the economic feasibility of imposing uniform, one-size-fits-all buffers that did not adjust depending on the body of water and the proximity to sensitive salmonid habitat. 707 F.3d at 473-475. Although the district court had found that NMFS sufficiently explained that "uniform buffers were the industry standard," *id.* at 474, the Fourth Circuit disagreed and held, in light of the RPA's "broad prohibition" on pesticide application, that NMFS had to address specifically the uniform buffers' economic feasibility, *id.* at 475.

In this case, the court of appeals distinguished *Dow AgroSciences* because here, economic feasibility for

the agency or for an applicant to the agency was not disputed. Pet. App. A109 n.43 ("Neither the parties nor the district court argue that the RPAs themselves (and their proposed Actions) are not economically and technologically feasible."). In *Dow AgroSciences*, by contrast, the Fourth Circuit remanded for further consideration of economic feasibility because the RPA "imposed an especially onerous requirement without any thought for whether it was feasible." *Id.* at A107 n.42.

There is also another critical distinction between this case and *Dow AgroSciences*: the pesticide manufactures in *Dow AgroSciences* were themselves applicants under the ESA, rather than downstream consumers (like petitioners), who are members of the general public. See 707 F.3d at 464-465; see also 16 U.S.C. 1532(12) (definition of applicant). The ESA requires that an RPA must be a measure that "can be taken by the Federal agency or *applicant* in implementing the agency action," 16 U.S.C. 1536(b)(3)(A) (emphasis added), but imposes no similar statutory feasibility requirement for the general public. See *Dow AgroSciences*, 707 F.3d at 474-475.[15] Petitioners' argument, however, wrongly equates the consulting agency's obligation to ensure an RPA's economic feasibility for an applicant (if that issue is raised in the consultation process) with a need to consider the economic impact on the public at large. See Pet. 21 (ar-

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[15] Applicants also have special rights under the ESA not held by the general public, such as the right to participate in the consultation process and to seek to have the Endangered Species Committee grant an exemption to the prohibition in 16 U.S.C. 1536(a)(2) against federal actions that could cause extinction of species. 16 U.S.C. 1536(g)(1).

guing that the impact on pesticide manufacturers of "*refraining* from otherwise productive activity" is "*exactly* what [the RPA] has done to the San Joaquin Valley").

Dow AgroSciences imposed no duty to consider economic impacts beyond the action agency or the applicant. See 707 F.3d at 474-475. There is accordingly no conflict between *Dow AgroSciences* and the court of appeals' decision in this case warranting this Court's review.

2. Petitioners assert (Pet. 22-26) that the Court should grant review of this case to determine "[t]he degree of deference owing [FWS's] interpretation of Section 402.02, and agency interpretations of regulations generally." The court of appeals made only passing reference to deference, noting that the Ninth Circuit had "previously afforded Skidmore deference" to the *Consultation Handbook*, a guidance document prepared by FWS and NMFS, which requires documentation of non-jeopardy factors only where an RPA fails to meet one or more elements of the definition of RPA in Section 402.02. Pet. App. A104 (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)); see *id.* at A103-A106.[16]

Petitioners seek to link (Pet. 22-25) the court of appeals' reference to *Skidmore* deference to more general issues concerning the degree of deference owed to an agency's interpretation of its own regulations. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulations is

[16] Under *Skidmore* deference, this Court "follow[s] an agency's rule only to the extent it is persuasive." *Gonzales* v. *Oregon*, 546 U.S. 243, 269 (2006) (citing *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000))

"controlling unless plainly erroneous or inconsistent with the regulation.") (citations and internal quotation marks omitted); see also *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring and dissenting in part) (questioning whether *Auer* was correctly decided).

First, petitioners have waived those arguments by endorsing contrary views below. As noted earlier, petitioners filed no brief of their own in the court of appeals, and incorporated by reference briefs filed by other appellants, including the State Water Contractors, which argued that the court *should* give deference to the *Consultation Handbook*. State Water Contractors Principal & Resp. C.A. Br. 38-39. The State Water Contractors raised no question concerning the level of deference due to an agency's interpretation of its own regulations. See, *e.g.*, *Department of Treasury, IRS* v. *Federal Labor Relations Auth.*, 494 U.S. 922, 934 (1990) ("As this argument was not raised or considered in the [c]ourt of [a]ppeals, [this Court] do[es] not reach it.").

Even if this Court were to overlook petitioners' waiver, review of this issue is not warranted. Deference to the *Consultation Handbook* was only one of many reasons that the court of appeals rejected petitioners' economic-impact claim. And in any event, the court of appeals accorded FWS's interpretation only *Skidmore* deference, so this case presents no question concerning the application of the more deferential standard under *Auer*. The court's limited citation to deference principles does not warrant this Court's review.

3. Finally, petitioners urge (Pet. 26-34) this Court to overrule its decision in *TVA*. In particular, peti-

tioners ask this Court to repudiate its statement that the plain intent of Congress in enacting the ESA was "to halt and reverse the trend towards species extinction, whatever the cost." Pet. 27 (quoting *TVA*, 437 U.S. at 184).

Petitioners identify no error in this Court's analysis in *TVA*. While petitioners assert that this Court, in *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 669-671 (2007) (*Home Builders*) and *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997), backed away from what they characterize as *TVA*'s "pro-species radicalism," they point to nothing in either decision questioning the holding of *TVA*. Pet. 30. *Home Builders* held that an agency had no consultation obligations under the ESA where it lacked discretion to consider the needs of wildlife or species in carrying out the action. 551 U.S. at 673. *Home Builders* mentioned *TVA* only to distinguish it on the ground that the federal action in *TVA* (the construction and operation of a dam) was discretionary and thus the consultation obligation applied, whereas the federal action in *Home Builders* was nondiscretionary. *Id.* at 670-671. *Bennett* made no mention of *TVA*, and nowhere suggested a consulting agency is obligated to balance costs against harm to listed species. And in a third decision not cited by petitioners, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), this Court restated *TVA*'s holding without qualification. *Id.* at 698.

Rather than rely on the ESA's statutory text or legislative history, petitioners base their argument for *TVA*'s reversal on various articles and statements of individual members of Congress suggesting that the

ESA imposes excessive costs or may not be successful in saving all listed species from extinction. See Pet. 30-32. In *TVA* itself, however, it might have been said, as the Court observed, that "the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. But neither the [ESA] nor [Article] III of the Constitution provides federal courts with authority to make such fine utilitarian calculations." 437 U.S. at 187 (footnote omitted).

Petitioners raise a similar argument in asserting (Pet. 2-3), without citation to any reliable scientific source, that implementation of the RPA has "greatly exacerbated" water shortages during the drought experienced by California over the last several years. See Pet. 32 (arguing that in this case "*TVA's* costs" include "millions of prime farmland made a wasteland, thousands of laborers out of work, millions of dollars of income foregone"). But RPA Actions 1, 2, and 4 have been implemented or triggered only on a few discrete occasions between 2010 and the present. Only one action, Action 3, has applied each year, and it applies only seasonally for a several-month period.[17]

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[17] The Smelt Working Group produced annual summaries on the implementation of the 2008 Biological Opinion, which document when the RPA Actions were triggered and implemented. See, *e.g.*, FWS, *Summary Report on the Transactions of the Smelt Working Group in Water Year 2014*, at 5 (Aug. 2014), http://deltacouncil.ca.gov/sites/default/files/2014/10/SWG-Final-Report-Water-Year-2014.pdf (Actions 1 and 2 not implemented in water year 2013-2014); FWS, *Smelt Working Group Annual Report on the Implementation of the Delta Smelt Biological Opinion on the Coordinated Operations of the Central Valley Project and State Water Project Water Year 2013*, at 5-8 (Sept. 2013), http://deltacouncil.

Petitioners present no convincing evidence showing that the RPA has significantly increased water shortages caused by the drought.

In arguing for the overruling of *TVA*, petitioners also dismiss (Pet. 33 n.20) considerations of stare decisis in a footnote, asserting that the only party concerned with stare decisis would be the delta smelt. But petitioners ignore the many holdings of this Court that emphasize that "[t]he principle of *stare decisis* has special force in respect to statutory interpretation because Congress remains free to alter what [this Court] ha[s] done." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014) (citations and internal quotation marks omitted). Stare decisis has significant weight here where Congress effectively ratified *TVA* when it amended the ESA in 1978 without disturbing *TVA*'s core holding. See *House Conference Report* 18 ("The basic premise of [the 1978 Amendments to the ESA] is that the integrity of the interagency consultation process designated under [S]ection 7 of the act be preserved.").

Petitioners have given this Court no reason to reconsider its decision in *TVA*.

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ca.gov/sites/default/files/documents/files/SWG_Report_WY2013.pdf.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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