No. 05-631

In the Supreme Court of the United States

ENVIRONMENTAL DEFENSE AND NATIONAL WILDLIFE FEDERATION, PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

JAMES C. KILBOURNE
ROBERT H. OAKLEY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, in conducting judicial review of agency action under the Administrative Procedure Act, a court may uphold an agency's decision on the basis of a rationale offered in the document containing the decision and on the basis of facts contained either in that document or in documents from the administrative record to which the document containing the decision expressly refers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 421 F.3d 618. The memorandum and order of the district court (Pet. App. 29a-77a) is reported at 363 F. Supp. 2d 1145.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2005. The petition for a writ of certiorari was filed on November 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a series of lawsuits filed by various States and other entities concerning the operation of dams and reservoirs along the Missouri River by the United States Army Corps of Engineers (the Corps). The Judicial Panel on Multidistrict Litigation consolidated those lawsuits for pretrial proceedings. In the consolidated action, Nebraska, Missouri, and other downstream parties alleged that a new plan adopted by the Corps in 2004 to govern its management of the Missouri River Basin violated various statutes. In addition, several environmental groups alleged that the actions of the Corps and the Fish and Wildlife Service (FWS) in the Department of the Interior violated the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* The district court granted summary judgment to the federal defendants on all of those claims. Pet. App. 29a-77a. The court of appeals affirmed in relevant part. *Id.* at 1a-28a. Petitioners are two of the environmental groups that brought ESA and NEPA claims.[1]

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[1] North Dakota and South Dakota have filed their own petition for a writ of certiorari, challenging the court of appeals' disposition of the downstream parties' claims under the Flood Control Act of 1944, ch. 665, 58 Stat. 887. See *North Dakota* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-611 (filed Nov. 14, 2005). In addition, North Dakota, together with various state agencies and officials, has filed another petition for a writ of certiorari, seeking review of a separate decision in which the court of appeals rejected its claim that the Corps' operations violated state-law water-quality standards. See *North Dakota* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-628 (filed Nov. 14, 2005). The federal

1. Congress enacted the Flood Control Act of 1944 (the Act), ch. 665, 58 Stat. 887, to provide for the comprehensive management of the waters of the Missouri River Basin. Along with other legislation, the Act authorized the Corps to build and operate a series of six dams and associated reservoirs, known as the Main Stem System, along the upstream portion of the river in Montana, North Dakota, South Dakota, and Nebraska.[2] The Act authorizes the Corps to contract for the use of surplus water available at the reservoirs, 33 U.S.C. 708, and to "prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs," provided that "the operation of any such project shall be in accordance with such regulations," 33 U.S.C. 709. The Act and its legislative history identify various purposes that the Corps is to serve in operating the Main Stem System, including flood control, provision of hydroelectric power, irrigation, recreation, navigation, protection of the water supply and water quality, and preservation of fish and wildlife. See, *e.g.*, *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 499-502 (1988).

The Corps has developed a water-control plan for operation of the Main Stem System, which is embodied

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respondents are filing separate briefs in opposition to those petitions for writs of certiorari.

[2] The six Main Stem System dams are as follows (with the associated reservoirs identified in parentheses): Garrison Dam (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case), Gavins Point Dam (Lewis and Clark Lake), and Fort Peck Dam (Fort Peck Lake). Congress authorized construction of the Fort Peck Dam in Montana in the earlier River and Harbor Act of 1935, ch. 831, 49 Stat. 1028, for the purpose of flood control and navigation; in 1938, Congress amended that statute to add the purpose of providing hydroelectric power, see Act of May 18, 1938, ch. 250, 52 Stat. 403.

in the Missouri River Main Stem Reservoir System Master Water Control Manual (commonly known as the Master Manual). The Master Manual was first published in 1960 and was revised in 1973, 1975, and 1979. The Master Manual sets forth general guidelines for operation of the Main Stem System; in addition, each year, the Corps promulgates an Annual Operating Plan, which details its plans for the coming year. Pet. App. 4a, 29a.

2. The Endangered Species Act provides that a federal agency, in consultation with the Fish and Wildlife Service, must ensure that any action it takes is not "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. 1536(a)(2). At the conclusion of its consultation with the agency, FWS must produce a biological opinion in which it determines whether the agency action is likely to result in "jeopardy" or "adverse modification," and, if so, whether there are "reasonable and prudent alternatives" (RPAs) that the agency could undertake to reduce the impact of its action on the affected species. 16 U.S.C. 1536(b)(3)(A); 50 C.F.R. 402.14. The National Environmental Policy Act of 1969 provides that a federal agency must prepare an environmental impact statement (EIS) when undertaking a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). An EIS is "a detailed statement by the responsible official on," *inter alia*, "the environmental impact of the proposed action" and "alternatives to the proposed action." *Ibid.*

The Corps' management of the Missouri River Basin affects several endangered or threatened species, three

of which are at issue here: the pallid sturgeon, an endangered fish; the least tern, an endangered migratory bird; and the piping plover, a threatened migratory bird. The pallid sturgeon lives in the Missouri River and its tributaries; the least tern and piping plover nest on sparsely vegetated sandbars along the river. In 2000, pursuant to the ESA, the Corps consulted with FWS concerning the effects of its Missouri River operations on the three species at issue. In 2000, FWS issued a biological opinion in which it concluded that the Corps' management plan was likely to jeopardize the continued existence of the three species. FWS therefore identified a reasonable and prudent alternative that the Corps could undertake to reduce the impact of its action on the species. In that RPA, FWS proposed that the Corps increase river flows in the spring, in order to scour the sandbars for the bird species and provide a spawning cue for the pallid sturgeon, and decrease river flows in the summer, in order to expose the sandbars for the bird species and increase the amount of shallow-water habitat for the pallid sturgeon. Although FWS described altered flows as an "integral component" of the RPA, FWS also proposed a variety of other changes to the Corps' management plan, including the construction of significant amounts of new habitat for the three species. Pet. App. 5a-8a; C.A. App. 10111-10115, 10117-10128.

3. In 2003, because of the ongoing drought in the Missouri River Basin, the Corps concluded that it was unable to implement the flow changes mandated by the 2000 biological opinion. The Corps therefore reinitiated consultation with FWS pursuant to the ESA. As a result of that consultation, FWS issued a supplemental biological opinion in which it ratified the Corps' proposal to

suspend the flow changes for the period from May 1 to August 15, 2003. Pet. App. 7a.

In June 2003, various environmental groups, including petitioners, filed suit against the federal respondents in the United States District Court for the District of Columbia, challenging FWS's promulgation of the supplemental biological opinion. The district court granted a preliminary injunction, reasoning that the plaintiffs were likely to succeed on their claim, *inter alia*, that FWS had failed sufficiently to explain why it had abandoned its earlier conclusion that flow changes were necessary to protect the species at issue. *American Rivers* v. *United States Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 255-257, 262 (D.D.C. 2003). In the meantime, the United States Court of Appeals for the Eighth Circuit had affirmed an injunction requiring the Corps to provide enough flow to support navigation. *South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1033 (2003), cert. denied, 541 U.S. 987 (2004). In light of the apparent conflict between the two injunctions, the Corps initially did not implement the flow reduction mandated by the 2000 biological opinion, and the District of Columbia district court held the Corps in conditional contempt. *American Rivers* v. *United States Army Corps of Eng'rs*, 274 F. Supp. 2d 62, 71 (2003). Two days later, the Judicial Panel on Multidistrict Litigation consolidated all of the lawsuits involving the management of the Missouri River Basin for pretrial proceedings before a single court in the District of Minnesota. *In re Operation of the Missouri River Sys. Litig.*, 277 F. Supp. 2d 1378, 1379 (2003). The Corps subsequently implemented the flow changes for the remainder of the summer of 2003. Pet. App. 8a.

4. In November 2003, the Corps again reinitiated consultation with FWS pursuant to the ESA. The Corps had developed substantial new information on tern and plover mortality since the 2000 biological opinion, and had concluded that the changes proposed by FWS in the 2000 opinion would not be as effective in protecting those species as had originally been thought. Accordingly, the Corps proposed a new set of changes that did not include the flow changes specified in the 2000 opinion. The changes did include the acceleration of habitat creation, implementation of a monitoring program, flow testing, and expanded support for propagation efforts for the pallid sturgeon. Pet. App. 8a; C.A. App. 6108-6134, 9764-9800; C.A. Supp. App. 1.

Later in 2003, in light of the new information, FWS issued an amended biological opinion with a revised RPA. In the amended opinion, FWS again proposed that the Corps decrease river flows in the summer, but by a smaller amount than was proposed in the 2000 opinion. FWS stated, however, that it would reconsider that requirement if the Corps built 1200 acres of new shallow-water habitat for the pallid sturgeon. In addition, FWS again proposed that the Corps increase river flows in the spring, but by a smaller amount than was proposed in the 2000 opinion. Before imposing the spring flow increase, however, FWS gave the Corps two years to develop a long-term alternative to that increase. The RPA incorporated other proposals by the Corps, including a proposal to construct new sandbar habitat for the bird species. Pet. App. 8a; C.A. App. 6626-6922; C.A. Supp. App. 49-51.

In the meantime, the Corps was finishing a revised version of its Master Manual, which it had been preparing for many years. In order to comply with NEPA, the

Corps prepared an EIS, which considered the environmental impact of various alternatives to existing operations. In 1993, the Corps circulated a preliminary draft version of the EIS to interested federal and state agencies. After producing numerous revisions of the EIS and conducting a lengthy public-comment process (in which it received over 50,000 comments), the Corps selected a preferred alternative. On March 5, 2004, the Corps issued the final EIS, and on March 19, 2004, the Corps issued the revised Master Manual. Pet. App. 29a; C.A. App. 7241-7246.

5. After FWS issued its amended biological opinion and the Corps issued its EIS and revised Master Manual, the plaintiffs in the Minnesota district court filed amended complaints, and the parties filed cross-motions for summary judgment. As is relevant here, plaintiff environmental groups, including petitioners, amended their complaints to add claims (1) that FWS acted arbitrarily and capriciously under the Administrative Procedure Act (APA), 5 U.S.C. 706(2), in preparing the amended biological opinion required by the ESA, and (2) that the Corps acted arbitrarily and capriciously in preparing the EIS required by NEPA.

The district court granted the federal defendants' motion for summary judgment on all of the pending claims. Pet. App. 29a-77a. As is relevant here, the district court rejected the environmental groups' ESA claim, *id.* at 41a-49a, 52a, and NEPA claim, *id.* at 60a-63a. With regard to the ESA claim, the district court concluded that FWS did not act arbitrarily and capriciously by concluding that not all of the flow changes specified in the 2000 biological opinion were necessary to protect the endangered and threatened species. *Id.* at 52a. As to the bird species, the court noted that the

2003 amended biological opinion "relie[d] on updated information": most notably, information suggesting that the tern and plover populations had "experienced some improvement" since the 2000 opinion, and that the flow changes specified in the 2000 opinion had "actually impeded the development of sandbar habitat essential to plover and tern survival." *Id.* at 43a. The court reasoned that the environmental groups "d[id] not point to any evidence that indicates that the only possible way to avoid jeopardy to the plover and the tern is to implement flow changes and habitat construction." *Id.* at 44a. The court therefore concluded that FWS had "articulated a rational basis" for its changes to the 2000 opinion. *Ibid.* As to the pallid sturgeon, the court rejected the groups' argument that the change in summer flows was arbitrary and capricious, noting that the change was "minimal" and that the modifications in the flow changes were "complemented by the implementation of other elements" in the amended opinion. *Id.* at 45a. The court likewise upheld the change in spring flows and concluded that the construction of shallow-water habitat was an "appropriate measure" to help protect the species. *Id.* at 46a.

With regard to the NEPA claim, the district court concluded that the Corps did not act arbitrarily and capriciously by selecting the preferred alternative over the other alternatives. Pet. App. 63a. The court reasoned that "NEPA only requires that the Final EIS demonstrate that the agency in good faith objectively has taken a 'hard look' at the environmental consequences of a proposed action and alternatives." *Id.* at 60a-61a. The court added that "[t]he Final EIS must provide sufficient detail to permit those who did not participate in its preparation to understand and consider the relevant

environmental influences involved" and that "an agency's consideration of alternatives need only be reasonable." *Id.* at 61a. The court determined that, in selecting its preferred alternative, "the Corps conducted a detailed analysis of all five alternatives" and "present[ed] an analysis pertaining to each criteria in comparative form." *Id.* at 62a. Although the Corps did not directly compare the preferred alternative with the alternative proposed in the 2000 FWS opinion, the court noted that the environmental groups had "fail[ed] to cite any legal authority to support the assertion that such a comparison is required." *Ibid.* The court concluded that "the Corps' decision to implement the [preferred alternative] was made in good faith after proper consideration of the alternatives." *Id.* at 63a.

6. The court of appeals affirmed in relevant part. Pet. App. 1a-28a.

As is pertinent here, the court of appeals first rejected the environmental groups' ESA claim. Pet. App. 20a-25a. With regard to the pallid sturgeon, the court rejected the environmental groups' contention that statements in the amended opinion to the effect that restoration of natural river flows was necessary indicated that FWS had acted irrationally by permitting the Corps not to make certain changes in summer flows once it had constructed a specified amount of shallow-water habitat. *Id.* at 21a. The court reasoned that "evidence in the record adequately explains the decision made by the FWS." *Ibid.* In particular, the court noted that the Corps had presented new modeling results demonstrating that the changes in summer flows proposed in the 2000 opinion would increase shallow-water habitat by 1189 acres—essentially the same acreage that the Corps proposed to create artificially. *Ibid.* The court also

noted that the 2003 opinion retained a change in spring flows and imposed monitoring and other requirements on the Corps. *Ibid.*

The court of appeals also rejected the environmental groups' contention that the 2003 opinion was invalid because it did not expressly state that the additional acreage of habitat that would be constructed was designed to replace the acreage that would have resulted from the changes in summer flows. Pet. App. 21a-22a. While acknowledging that it could not accept a *post hoc* rationalization for agency conduct, the court reasoned that "there is no requirement that every detail of the agency's decision be stated expressly in the 2003 [opinion]." *Id.* at 22a. "The rationale is present in the administrative record underlying the document," the court explained, "and this is all that is required." *Ibid.*

With regard to the bird species, the court of appeals agreed with the district court that the elimination of flow requirements was not arbitrary and capricious. Pet. App. 24a-25a. The court noted that those flow requirements were premised on findings that flow changes were necessary to scour and expose sandbars for nesting. *Id.* at 22a. The court reasoned that new models developed by the Corps indicated that "those flows were more likely to reduce the quality of previously available habitat" than to enhance it. *Id.* at 23a. In addition, the court noted that the 2003 amended opinion included new information about the tern and plover populations, including information suggesting that the tern population exceeded targets. *Ibid.* "Based on this new information," the court concluded, "it was rational for the FWS to conclude that the * * * spring rise and summer low flow elements were not necessary to avoid jeopardy to the tern and plover, and to instruct the Corps to focus

its resources on the mechanical construction of habitat, monitoring and adaptive management." *Ibid.*

The court of appeals rejected the environmental groups' contentions that there was insufficient evidence that mechanically constructed sandbars would develop into functional habitat for the bird species and that the changes in flows proposed in the 2000 opinion would be more beneficial than the changes proposed in the 2003 amended opinion. Pet. App. 23a-24a. As to the first argument, the court reasoned that FWS need only have "a rational reason to expect [the proposed measures] to work as intended," and added that the amended opinion required the Corps to monitor the performance of the mechanically constructed habitat. *Id.* at 24a. As to the second argument, the court reasoned that FWS was not required to pick the most effective alternative, as long as the RPA that was selected sufficiently protected the species in question and could feasibly be implemented by the agency. *Ibid.*

Finally, the court of appeals rejected the environmental groups' NEPA claim. Pet. App. 25a-26a. The court concluded that the Corps did not act arbitrarily and capriciously by failing to explain in greater detail why it selected the preferred alternative over the alternative proposed in the 2000 FWS opinion. *Id.* at 26a. The court noted that "the EIS included a detailed comparative analysis of the effects of all five alternatives on a wide range of interests." *Id.* at 25a. The court added that "[t]his analysis, presented in a series of tables, enables the reader to compare the relative effectiveness of each of the alternatives, as required by NEPA." *Id.* at 26a. The court specifically observed that the preferred alternative was "strong[ly] superior[]" to the alternative proposed in the 2000 FWS opinion with regard to gener-

ating hydroelectric power, navigation, and reduction of damage to crops and groundwater. *Ibid.* The court concluded that "there is no further NEPA or Administrative Procedure Act requirement to repackage the information in the summary tables into prose one-to-one comparisons of the [preferred alternative] with each of the other alternatives." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 17-29) that the court of appeals misapplied the "arbitrary and capricious" standard of review applicable under the Administrative Procedure Act in upholding the actions of FWS and the Corps. The court of appeals' decision, however, is entirely consistent with well-established principles governing judicial review under the APA. Further review is therefore unwarranted.

1. In *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*), this Court articulated the familiar principle that a reviewing court, in applying the "arbitrary and capricious" standard of review, "must judge the propriety of [agency] action solely by the grounds invoked by the agency." *Id.* at 196. The Court reasoned that it would be inappropriate to uphold an agency action "by substituting what [a court] considers to be a more adequate or proper basis." *Ibid.* Critically for present purposes, the Court also noted that, "[i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *Ibid.*

Although an agency must set out the basis for its action with *some* level of clarity, this Court has never required that an agency specifically set out *every* factual detail or logical step that supports its action in a single

document (or, indeed, in any particular form). See, *e.g.*, *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943) (*Chenery I*) (noting, in setting aside agency action, that "[w]e are not enforcing formal requirements" or "suggesting that the [agency] must justify its exercise of administrative discretion in any particular manner or with artistic refinement"). Instead, the Court has emphasized that a reviewing court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974); accord *Motor Vehicle Manufacturers Association* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). All that is required is that the agency articulate some "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962); accord *Motor Vehicles Manufacturers Association*, 463 U.S. at 43. Thus, in *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581 (1945), the Court upheld an agency action despite recognizing that "[t]he findings of the [agency] * * * leave much to be desired since they are quite summary and incorporate by reference the [agency's] staff's exhibits." *Id.* at 595. The Court concluded that the findings were not "so vague and obscure as to make * * * judicial review * * * a perfunctory process." *Ibid.* Similarly, in *Camp* v. *Pitts*, 411 U.S. 138 (1973), the Court upheld an agency action where the agency's explanation for its action was "curt," on the ground that the explanation "surely indicated the determinative reason for the final action taken." *Id.* at 143.

2. The court of appeals correctly applied those settled principles in holding that FWS's and the Corps' actions were not arbitrary and capricious.

a. With regard to petitioners' ESA claim against FWS, the court of appeals focused on evidence in the administrative record indicating that the changes in summer flows specified in the 2000 opinion were no longer necessary to protect the pallid sturgeon. Pet. App. 21a. The court then rejected petitioner's contention that FWS was specifically required to state in its opinion that the additional acreage of habitat that would be constructed was designed to replace the acreage that would have resulted from the changes in summer flows. *Id.* at 21a-22a. In doing so, the court recognized that it could not accept counsel's *post hoc* rationalization for the agency's action. *Id.* at 22a. The court proceeded to state, however, that "there is no requirement that every detail of the agency's decision be stated expressly in the [document containing the decision]." *Ibid.* Because the fact that the flow changes specified in the 2000 opinion would produce essentially the same acreage that the Corps proposed to create artificially was contained in the administrative record, *id.* at 21a, the court ultimately concluded that the government had demonstrated "a rational connection between the facts in the record and the decision" to permit habitat construction in lieu of flow changes, *id.* at 22a.

Petitioners contend (Pet. 19-20) that the court of appeals effectively held that a reviewing court may uphold an agency action on *any* rationale consistent with the factual record, even if that rationale differs from the rationale offered by the agency. The court of appeals, however, did not adopt such a rule. To the contrary, it expressly recognized that it could not accept counsel's *post hoc* rationalization for the agency's action. Pet. App. 22a.

In any event, FWS *did* state in its 2003 opinion that one reason for its action was that the additional acreage of habitat that would be constructed would replace the acreage that would have resulted from the flow changes. See C.A. App. 6848 (noting that the additional acreage of habitat constituted "approximately the amount that would be developed through flow management"); *id.* at 6633 (noting that "the Corps proposed to meet the habitat goals specified in the [2000 opinion] through alternate means" and that "[FWS] accepted the Corps' results regarding the efficacy of the * * * flow modifications to create habitat"). To the extent that petitioners are contending merely that FWS should have articulated that reason *with greater specificity* in its 2003 opinion, that argument fails because this Court has never required that an agency elaborate fully on every reason for its action in the document containing its decision. See, *e.g.*, *Bowman Transportation*, 419 U.S. at 286; *Chenery I*, 318 U.S. at 95. Even if FWS had not stated that reason in so many words in its opinion, moreover, FWS's action would be valid because, as the court of appeals noted (Pet. App. 22a), it is clear that there was a "rational connection" between the facts in the record—specifically, the fact that habitat construction would produce essentially the same acreage—and the agency's decision. See, *e.g.*, *Burlington Truck Lines*, 371 U.S. at 168.

To the extent that petitioners are instead contending that FWS should have expressly included, in its 2003 opinion, the data supporting the *factual* proposition that habitat construction would produce essentially the same acreage, that argument similarly lacks merit. This Court has never required that an agency include every supporting fact in the document containing its decision,

rather than permitting the agency to rely on facts in the administrative record—which, after all, is the "focal point for judicial review." *Camp*, 411 U.S. at 142. Consideration of the administrative record is particularly appropriate where, as here, the document containing the agency's decision expressly refers to the document in the record containing the relevant data: namely, the detailed biological assessment prepared by the Corps when it reinitiated consultation with FWS. See, *e.g.*, C.A. App. 6627, 6629. The court of appeals therefore did not contravene any of this Court's decisions in rejecting petitioners' APA challenge to FWS's preparation of the amended biological opinion required by the ESA.[3]

b. With regard to petitioners' NEPA claim against the Corps, the court of appeals recognized at the outset that the Corps was required to explain why it had selected the preferred alternative over the other alternatives. Pet. App. 25a (quoting *Motor Vehicle Manufacturers Association*, 463 U.S. at 48). The court reasoned, however, that the Corps had met this requirement by "includ[ing] a detailed comparative analysis of the effects of all five alternatives on a wide range of interests" in its EIS. *Ibid*. The court explained that "[t]his analysis, presented in a series of tables, enables the reader to compare the relative effectiveness of each of the alternatives, as required by NEPA." *Id*. at 26a. The court con-

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[3] Petitioners note (Pet. 11, 23-24) that other evidence in the record indicated that the creation of habitat would be insufficient to protect the pallid sturgeon absent flow changes. Even putting aside the fact that the amended biological opinion required *some* flow changes, however, petitioners' contention fails because the mere existence of contrary evidence in the record does not render an agency's action arbitrary and capricious. See, *e.g.*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989).

cluded that "there is no further NEPA or Administrative Procedure Act requirement to repackage the information in the summary tables into prose one-to-one comparisons of the [preferred alternative] with each of the other alternatives." *Ibid.*

Petitioners contend (Pet. 25) that the court of appeals erred insofar as it "burrowed into the EIS itself and found [a rationale] in a few out of hundreds of tables, which showed the Corps' alternative superior to the [alternative proposed in the 2000 FWS opinion] for a few economic factors." That contention lacks merit. The tables at issue were contained in Chapter 7 of the EIS, which compared the impacts of the various alternatives being considered by the Corps. See C.A. App. 7660-7918. That chapter was the key section of the EIS explaining the benefits and detriments of each alternative. Given the wide range of considerations that the Corps was required to take into account in operating the Main Stem System, and given the technical complexity of those considerations, the Corps did not act arbitrarily and capriciously by placing the relevant data in tables, rather than in text, and by comparing the preferred alternative to the other alternatives simultaneously, rather than individually. Because the Corps adequately set out the reasons for its decision to choose the preferred alternative, the court of appeals did not contravene any of this Court's decisions in rejecting petitioners' APA challenge to the Corps' preparation of the EIS required by NEPA.[4]

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[4] Contrary to petitioners' suggestion (Pet. 25-26), the data in the EIS demonstrate that the Corps rationally chose the preferred alternative (described in the EIS, in slightly altered form, as "MCP") over the alternative preferred by petitioners (described in the EIS as "GP2021"). Although petitioners' alternative was not without its own

3. Petitioners contend (Pet. 20-22) that the decision of the court of appeals conflicts with decisions of other courts of appeals invalidating agency actions on APA review. In all of those cases, however, the court held that the agency had entirely failed to supply a rationale or factual basis for its action. See, *e.g.*, *National Ass'n of Home Builders* v. *Norton*, 340 F.3d 835, 849 (9th Cir. 2003) (invalidating agency's listing of a species as "endangered" where the agency failed to indicate whether an area was a "major geographic area" in which the species was no longer viable); *W.R. Grace & Co.* v. *EPA*, 261 F.3d 330, 340-344 (3d Cir. 2001) (vacating agency order requiring remediation where one study did not support the need for remediation and another study supporting the selected remediation standard was not actually performed); *Chemical Mfrs. Ass'n* v. *EPA*, 899 F.2d 344, 359-360 (5th Cir. 1990) (reversing agency decision allowing manufacturers to conduct toxological testing where statute allowed testing only upon satisfaction of specified criteria and agency failed to provide basis for determining that criteria had been met); *American Mun.*

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advantages, the preferred alternative maximizes revenues from hydroelectric power, provides greater benefits for navigation, and reduces damage to crops and groundwater. See, *e.g.*, C.A. App. 7759-7812, 7825-7831, 7853-7858. As this Court has explained, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Although petitioners contend (Pet. 26 n.15) that their alternative would provide *greater* overall benefits for navigation because it would have a positive effect on navigation on the *Mississippi* River, they simply misread the relevant table, which estimates that petitioners' alternative would have a *negative* effect of $7.29 million on Mississippi River navigation. See C.A. App. 7877.

Power-Ohio, Inc. v. *FERC*, 863 F.2d 70, 72-73 (D.C. Cir. 1988) (invalidating agency decision approving rate increase where basis for action could not be discerned). None of those cases involved agency actions that were supported both by rationales offered in the documents containing the decisions and by facts contained either in those documents or in documents from the administrative record to which those documents expressly refer. Petitioners therefore identify no conflict among the courts of appeals that warrants this Court's review.

4. Finally, further review is unwarranted because the agency actions challenged by petitioners are of limited prospective importance. Pursuant to the terms of FWS's 2003 amended opinion, the Corps was required to decide by this year whether to adopt the default increase in spring flows specified by FWS or to develop a long-term alternative to that increase. In accordance with that requirement, the Corps recently announced its 2006 Annual Operating Plan, which includes changes to spring flows that will be incorporated into the Master Manual. Even if petitioners were to prevail on the merits before this Court, moreover, the result would be simply to remand to the relevant agencies, which could, in turn, reach the same substantive result, albeit with more detailed reasoning or factual evidence. Because any such proceedings on remand would very likely be at least partially overtaken by events, the Court's intervention at this stage would be unwarranted even if (contrary to our submission above) this case otherwise presented a legal issue appropriate for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
JAMES C. KILBOURNE
ROBERT H. OAKLEY
Attorneys

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