No. 14-48

In the Supreme Court of the United States

GLENN-COLUSA IRRIGATION DISTRICT, ET AL.,
PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Bureau of Reclamation had sufficient discretion in renewing or renegotiating certain long-term water contracts so as to require it to consult with the United States Fish and Wildlife Service under Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536(a)(2), to determine whether renewal of the settlement contracts would jeopardize the existence of or adversely modify the critical habitat of species listed as threatened or endangered under the ESA.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-21) is reported at 749 F.3d 776. The court of appeals' order withdrawing the panel decision and granting rehearing en banc (Pet. App. 22-24) is reported at 710 F.3d 874. The panel decision of the court of appeals (Pet. App. 25-56) is reported at 686 F.3d 1092. The district court's final judgment (Pet. App. 57-58) is unreported. A second decision by the district court further modifying its summary judgment decision (Pet. App. 81-85) is not published in the *Federal Supplement* but is available at 2009 WL 1575208. The district court's first decision clarifying its decision granting petitioners summary judgment (Pet. App. 86-93) is reported at 627 F. Supp. 2d 1212. The district court's supplemental decision granting

petitioners' cross-motions for summary judgment (Pet. App. 94-202) is reported at 621 F. Supp. 2d 954. The district court's first decision on the parties' cross-motions for summary judgment (Pet. App. 203-312) is not published in the *Federal Supplement* but is available at 2008 WL 5054115.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2014. The petition for a writ of certiorari was filed on July 14, 2014. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in an appendix to this brief: 16 U.S.C. 1536; 33 U.S.C. 1342(b); 50 C.F.R. 402.02, 402.03, 402.14. App., *infra*, 1a-41a.

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 United States Departments of the Interior (Interior) and Commerce to list threatened and endangered species and to designate their critical habitats.[1] 16 U.S.C. 1533.

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[1] The Fish and Wildlife Service implements the ESA with respect to species under the jurisdiction of the Secretary of the

Section 7 of the ESA requires federal agencies to ensure their actions are not likely to jeopardize the continued existence of endangered or threatened species or to modify their critical habitat, and to carry out programs for their conservation. 16 U.S.C. 1536(a)(1) and (2). If any action by a federal agency action may adversely affect a listed species, Section 7(a)(2) requires the agency to consult with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) before taking such action. 16 U.S.C. 1536(a)(2); Pet. App. 6. Execution of contracts is within the regulatory definition of federal actions that can require consultation under Section 7 of the ESA. 50 C.F.R. 402.02; see *NRDC* v. *Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998) (holding that renewal of water service contracts was "agency action" under the ESA and stating that "[t]he term 'agency action' has been defined broadly"), cert. denied, 526 U.S. 1111 (1999).

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, which culminates in the issuance of a biological opinion, 50 C.F.R. 402.14(h). That consultation process 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 jeop-

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Interior. 50 C.F.R. 402.01(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. See 50 C.F.R. 222.101(a), 223.102.

ardy to listed species and whether the proposed action will result in destruction or adverse modification of designated 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 "[r]easonable and prudent alternative[]" as defined in the regulations, an alternative course of action must be capable of implementation in a manner "consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. 402.02 (emphasis omitted). The regulations further provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary [f]ederal involvement or control." 50 C.F.R. 402.03; see *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666-668 (2007) (*Home Builders*) (holding that Section 7 of the ESA does not apply to those actions of an agency where the agency lacks discretion to consider the ESA in its decision-making process).

2. a. This case arises out of the renewal of long-term water contracts by the Bureau of Reclamation (Reclamation) in connection with its operation of a system of dams and reservoirs in California known as the Central Valley Project (CVP). Pet. App. 8, 29-30. Reclamation originally entered into those contracts, known as Settlement Contracts, in the 1960s to resolve a dispute with parties who had asserted water rights under California state law that antedated the CVP. *Id.* at 9.

Located in the Central Valley Basin in California, the CVP includes the major watersheds of the Sacramento and San Joaquin River systems and constitutes "the largest federal water management project in the United States." *Central Delta Water Agency* v. *United States*, 306 F.3d 938, 943 (2002), aff'd, 452 F.3d 1021 (9th Cir. 2006); see Pet. App. 30. The CVP includes major water-storage facilities on the Sacramento River, including the Shasta Dam and Lake in the northern part of California. *Firebaugh Canal Co.* v. *United States*, 203 F.3d 568, 570 (9th Cir. 2000); *Pacific Coast Fed'n of Fishermen's Ass'ns* v. *Gutierrez*, 606 F. Supp. 2d 1122, 1158 (E.D. Cal. 2008).

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.[2] Pet. App. 30. The CVP and SWP work together 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); Pet. App. 30.

Reclamation, on behalf of the United States, took over construction and operation of the CVP from California in the 1930s. Pet. App. 108. To operate the CVP, Section 8 of the Reclamation Act, Pub. L. No. 57-161, 32 Stat. 390, required the United States to

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[2] The Ninth Circuit has described the SWP as "the state analogue to the [CVP]. It also consists of dams, canals, pumping plants, and other facilities designed to generate power, provide flood control, and transfer water from the Delta to the more arid regions of central, coastal, and southern California." *Sierra Club* v. *Andrus*, 610 F.2d 581, 586 (1979), rev'd on other grounds *sub nom. California* v. *Sierra Club*, 451 U.S. 287, 290-291 (1981).

acquire water rights under California state law by obtaining permits from the State Water Rights Board, later renamed the State Water Resources Control Board (SWRCB).[3] See Pet. App. 108. A number of parties challenged the United States' permit applications by claiming that they hold water rights with priority dates senior to the dates of the United States' permit applications, which would entitle them, under California law, "to fulfill [their] needs before a junior appropriator is entitled to use any water." *United States* v. *State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 168 (Cal. Ct. App. 1986); see Pet. App. 115-117. Those challenges raised the possibility of the need for a general stream adjudication, which would have been a lengthy and costly process.[4] *Id.* at 118-119.

The SWRCB held lengthy hearings on the United States' application for water permits, which culminated in its issuance of Decision 990 (D-990) in February 1961. Pet. App. 115, 120. D-990 recognized that some parties held water rights senior to the United States, but the SWRCB found "these rights have never been comprehensively defined." *Id.* at 118 (quoting SWRCB D-990 at 75 (Feb. 9, 1961), http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d0950_d0999/

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[3] This brief uses the acronym SWRCB to refer to the Board as both formerly and currently named.

[4] The Interior and Insular Affairs Committee of the House of Representatives urged Reclamation to reach an agreement with senior water rights claimants, stating that a general stream adjudication would create "[a] monstrous lawsuit . . . that would embroil the [CVP] in litigation for decades." Pet. App. 121-122 (brackets in original) (quoting H.R. Doc. No. 416, 84th Cong. 2d Sess. 681 (1956)).

wrd990.pdf (D-990). Rather than define the rights, the SWRCB urged the parties to "reach agreement concerning these rights and the supplemental water required to provide the holders with a firm and adequate water supply."[5] *Id.* at 118-119 (emphasis omitted).

In 1964, the United States entered into the Settlement Contracts, which each had a term of 40 years but were subject to renewal. Pet. App. 123. The Settlement Contracts resolved senior water rights holders' claims by establishing two categories of water: a "base supply" of water; and "project water" for water in excess of the base supply, for which settlement contractors would be assessed charges for CVP capital and operation-and-maintenance expenses. *Id.* at 31, 87, 252-253. In dry years, the United States could reduce the base supply, but only by 25 percent. *Id.* at 31, 254.

b. As the original Settlement Contracts were expiring, FWS had completed a consultation with Reclamation and DWR concerning the impacts of the operations of the CVP and SWP on species listed as threatened and endangered under the ESA. Pet. App. 10, 213. In a biological opinion issued in 2004 and revised 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. *Id.* at 10, 33. Although FWS considered impacts to various listed species, the primary species of concern was the delta smelt (*Hypo-*

[5] While encouraging settlement, D-990 did impose certain conditions limiting Reclamation's right to export stored water outside the watershed, including prohibiting export if "reasonable beneficial use" of the water was made locally. Pet. App. 120-121.

mesus transpacificus), a small fish, two to three inches long, with a short life span of one year, that was listed in 1993 as a threatened species pursuant to the ESA, 16 U.S.C. 1533. 58 Fed. Reg. 12,854, 12,858 (Mar. 5, 1993); Pet. App. 9, 29.

FWS issued letters, relying on its 2005 Biological Opinion concerning operation of the CVP and SWP generally, that concurred with Reclamation's conclusion that renewal of the Settlement Contracts would not jeopardize the continued existence of the delta smelt. Pet. App. 10, 215-217. With some changes, Reclamation renewed the Settlement Contracts for the same amount of base supply and project water, and with the same shortage provision for base supply as found in the original contracts. See *id.* at 11.

c. Shortly after FWS issued its 2005 Biological Opinion, the delta smelt population sharply declined for reasons unknown. See Pet. App. 29-30. The Natural Resources Defense Council and several other organizations, referred to collectively here as NRDC, filed suit to challenge the 2005 Biological Opinion. Petitioners intervened, joined by other water-contract holders that received deliveries of water from the CVP. *NRDC* v. *Kempthorne*, 506 F. Supp. 2d 322, 328-329 (E.D. Cal. 2007).[6] 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.

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[6] As a result of the unexpected smelt decline, FWS and Reclamation had voluntarily reinitiated consultation under Section 7 of the ESA regarding the operations of the CVP and SWP. The district court denied the agencies' request to voluntarily remand the matter to the agencies so that they could complete the consultation process. *Kempthorne*, 506 F. Supp. 2d at 341-342.

That ruling was not appealed. After holding evidentiary hearings, the district court imposed interim remedial measures to be followed until a new biological opinion could be completed. See Pet. App. 205.

FWS issued a new Biological Opinion on December 15, 2008 (2008 Biological Opinion). Unlike the 2005 Biological Opinion, the 2008 Biological Opinion found that the CVP/SWP operations would jeopardize the delta smelt. Pet. App. 11. As required by the ESA, 16 U.S.C. 1536(b)(3)(A), the 2008 Biological Opinion provided a reasonable and prudent alternative (RPA) to prevent CVP/SWP operations from jeopardizing the delta smelt, which included limitations on the rates at which water could be pumped south of the Delta during certain times of the year, Pet. App. 34-35. Neither the RPA nor the 2008 Biological Opinion required Reclamation to make any changes in the Settlement Contracts to avoid jeopardy to the delta smelt or other species listed under the ESA.[7] Gov't Supp. C.A. E.R. 1548-1554.

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[7] A number of water users, not including petitioners here, challenged the 2008 Biological Opinion in the district court, and NRDC intervened on the side of the federal defendants to defend the biological opinion. The district court found the 2008 Biological Opinion arbitrary and capricious for a number of reasons. *San Luis & Delta-Mendota Water Auth.* v. *Salazar*, 760 F. Supp. 2d 855, 863 (E.D. Cal. 2010). The federal respondents and NRDC appealed, and the Ninth Circuit held that the district court had failed to follow principles of administrative law through unwarranted supplementation of the administrative record and failed to give deference to the agency's technical decisions. *San Luis & Delta-Mendota Water Auth.* v. *Jewell*, 747 F.3d 581, 592-593, (2014). The Ninth Circuit denied the petitions for rehearing en banc, *Jewell*, 11-15871 Docket entry No. 177 (July 23, 2014), and petitions for writs of certiorari have been filed seeking review of that decision. *Stewart & Jasper Orchards* v. *Jewell*, No. 14-377

3. In 2008, NRDC filed a Third Amended Complaint, challenging the validity of 41 of the renewed Settlement Contracts. NRDC argued that Reclamation failed adequately to consult with FWS prior to renewing the contracts, in violation of Section 7(a)(2) of the ESA. Pet. App. 203-204, 206-207.

Both the federal respondents and petitioners argued that Reclamation lacked discretion to decline to renew the Settlement Contracts, and that under this Court's decision in *Home Builders*, 551 U.S. at 666-667, Reclamation therefore had no consultation obligation under Section 7 of the ESA. Pet. App. 208-209. Specifically, petitioners contended that Article 9(a) of the original Settlement Contracts required renewal of the contracts on the same terms for base supply and project water. Article 9(a) stated:

> During the term of this contract and any renewal thereof it shall constitute full agreement as between the United States and the Contractor as to the quantities of water * * * which said diversion, use, and allocation shall not be disturbed so long as the Contractor shall fulfill all of its obligations hereunder, and the Contractor shall not claim any right against the United States in conflict with the provisions hereof.

Id. at 148 (emphasis omitted). Petitioners also asserted that, in D-990, SWRCB made entering into the Settlement Contracts a condition of the permits for the United States' operation of the CVP. *Id.* at 180, 194-199.

(filed Sept. 30, 2014); *State Water Contractors* v. *Jewell*, No. 14-402 (filed Oct. 6, 2014).

The federal respondents made the additional argument, not joined by petitioners, that D-990 further constrained the United States' discretion by making the United States' water rights to operate the CVP "subject to" the Settlement Contract holders' reasonable beneficial use of water within the Sacramento River basin. Gov't C.A. Resp. Br. 54-57, see Pet. App. 121. The federal respondents also argued that renewal of the Settlement Contracts was required by the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, 106 Stat. 4706, which provided that "the Secretary shall, upon request, renew any existing long-term repayment or water service contract for the delivery of water from the [CVP]." § 3404(c), 106 Stat 4708-4709. Gov't C.A. Resp. Br. 57.

The district court granted summary judgment to petitioners and the federal respondents. The court relied on the language of Article 9(a) of the original Settlement Contracts quoted above, Pet. App 148-149, 202, concluding that the reference to "any renewals thereof" meant that Article 9(a) required renewal of the Settlement Contracts for the same amount of base supply and project water. *Id.* at 148-149, 160, 170. The court, however, rejected the petitioners' and the federal respondents' arguments that D-990 "[s]ubstantially [c]onstrain[ed]" Reclamation's discretion, *id.* at 199, see 188-199, and rejected the federal respondents' claim that the CVPIA required renewal, *id.* at 172-174. But because the court concluded that the contracts did constrain that discretion, it held that Section 7(a)(2) did not apply to the contract renewal process. *Id.* at 199, 201.

4. A divided panel of the Ninth Circuit affirmed the judgment of the district court. Pet. App. 25-42.

The majority agreed with the district court that Article 9(a) of the contracts required Reclamation to renew the Settlement Contracts on the same terms for the amount of water and division of the water between base supply and project water. *Id.* at 41-42. In addition, the majority ruled that the CVPIA required Reclamation "to renew these contracts upon request." *Id.* at 40-41 (emphasis omitted) (citing CVPIA, § 3404(c), 106 Stat. 4708).

Judge Paez dissented. Pet. App. 42-58. The dissent maintained that D-990 did not condition approval of the operation of the CVP on a requirement that the Settlement Contracts be renewed after 40 years, which, the dissent believed, would effectively render the contracts permanent.[8] *Id.* at 51. With respect to the Settlement Contracts, the dissent did not interpret Article 9(a) as requiring contract renewal, *id.* at 52-54, in light of the language in Article 2 of the contracts stating that "renewals may be made" under "terms and conditions mutually agreeable to the parties," *id.* at 54 (emphasis omitted). The dissent also stated that even if Article 9(a) did require the Settlement Contracts to be renewed on terms that provide for the same amount of water as under the original contracts, it did not prevent renegotiation of other contract provisions such as the pricing and timing of water deliveries in ways that could benefit listed species. *Id.* at 55. Accordingly, the dissent concluded

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[8] The dissent concluded that the majority had held that D-990 also required renewal of the Settlement Contracts. Pet. App. 50-52. While the majority's opinion was not completely clear on this point, its holding appeared to rely only on the constraints imposed by Article 9(a) of the Settlement Contracts and the CVPIA, but not on any obligation imposed by D-990. See *id.* at 38-42.

that Reclamation had some discretion to modify the Settlement Contracts, and therefore had to engage in consultation under Section 7 of the ESA. *Id.* at 51-52.

5. On March 5, 2013, the Ninth Circuit granted rehearing en banc and vacated the panel's decision. Pet. App. 22-24. Then, in a unanimous decision, the en banc court of appeals reversed the district court's decision. *Id.* at 1-21.

The court of appeals first rejected the federal respondents' argument that the case was rendered moot by the 2008 Biological Opinion. The court explained that the 2008 Biological Opinion "merely assesses the general effects of [Reclamation's] Plan," but did not constitute the remedy sought by NRDC, mainly "a consultation with the FWS" concerning the Settlement Contracts' renewal or renegotiation of contract terms based on FWS's assessment. Pet. App. 13.

Turning to the merits, the en banc court of appeals concluded that the district court had applied an "erroneous standard" when it found that Article 9(a) of the Settlement Contracts "substantially constrained" Reclamation's discretion and thus that no consultation was required with FWS under Section 7(a)(2) of the ESA. Pet. App. 19. Rather, the court of appeals reasoned, "Section 7(a)(2)'s consultation requirement applies with full force so long as a federal agency retains 'some discretion' to take action to benefit a protected species." *Ibid.* (quoting *Karuk Tribe* v. *United States Forest Serv.*, 681 F.3d 1006, 1024 (9th Cir. 2012) (en banc), cert. denied, 133 S. Ct. 1579 (2013), and *Houston*, 146 F.3d at 1126).

The en banc court of appeals then found that, at minimum, Article 9(a) "does not strip [Reclamation] of all discretion to benefit the delta smelt and its critical

habitat." Pet. App. 19-20. The court first concluded that the text of the contracts themselves did not mandate renewal, in light of the "permissive" language in Article 2 of the Settlement Contracts providing that "renewals *may* be made for successive periods not to exceed forty (40) years." *Ibid.* But the court found that even if Reclamation was required to renew the contracts and that Article 9(a) constrained its discretion in doing so, Article 9(a) at most "constrain[ed] future negotiations with regard to 'the quantities of water and the allocation thereof,'"; it did not, the court continued, prevent Reclamation from negotiating other contract terms that could potentially benefit the delta smelt, such as altering "their pricing scheme or the timing of water distribution." *Id.* at 20-21.

The en banc court of appeals did not reach the arguments by petitioners and the federal respondents that, beyond the terms of the Settlement Contracts themselves, state and federal law did limit Reclamation's discretion with respect to renewing the Settlement Contracts. The court stated: "[This court] recognize[s] that the [CVP] is governed by a complicated set of federal and state laws, and [this court] express[es] no view as to whether other legal obligations may compel [Reclamation] to execute renewal contracts with holders of senior water rights." Pet. App. 20 n.1.

Because the court of appeals found Reclamation did have "some discretion" in connection with renewing the Settlement Contracts to take action beneficial to the delta smelt, the court held that Reclamation was required to engage in Section 7(a)(2) consultation with FWS prior to renewing the contracts. Pet. App. 21. The court therefore remanded the case to the district

court for further proceedings consistent with its opinion. *Ibid.*

ARGUMENT

Petitioners ask this Court to grant review to resolve complicated questions of federal and state law that were not addressed by the court of appeals, and that may never need to be addressed by any court following Reclamation's further consideration of the issues. The en banc court of appeals simply concluded that Reclamation had at least "some discretion" under the Settlement Contracts to act in a manner that might benefit the delta smelt and that Reclamation therefore must consult with FWS, pursuant to Section 7 of the ESA, prior to contract renewal. Pet. App. 19-21. Until that consultation is complete, it is speculative to conclude that the consultation will lead Reclamation to demand changed terms in the renewed Settlement Contracts that are unacceptable to petitioners.

This fact-specific holding does not conflict with any decision of this Court, including *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644 (2007), or with any decision of another court of appeals, including the D.C. Circuit's decision in *Platte River Whooping Crane Critical Habitat Maintenance Trust* v. *FERC*, 962 F.2d 27 (1992) (*Platte River*). The unanimous en banc decision of the court of appeals in this case therefore does not warrant review by this Court at this time.

1. At this stage, there is no reason for this Court to address the issues petitioners attempt to raise, when it is uncertain whether, on remand, Reclamation might seek to alter the terms of the Settlement Contracts to petitioners' detriment. The Ninth Circuit's en banc decision requires only that Reclamation en-

gage in a Section 7 consultation with FWS concerning renewal of the Settlement Contracts. Pet. App. 21. That reconsultation process has not yet begun.[9] Neither the en banc court's decision nor the 2008 Biological Opinion requires any amendment of the Settlement Contracts. See p. 9, *supra*. The decision below thus imposes no conditions on the results of that consultation, and the court declined to reach petitioners' arguments that Reclamation must renew the Settlement Contracts in order to operate the CVP by virtue of other, non-contractual legal obligations. Pet. App. 20 n.1. Those arguments are preserved for further proceedings, including any subsequent appeal to the Ninth Circuit or a subsequent petition for a writ of certiorari to this Court. The court of appeals also has not ordered that the renewed Settlement Contracts be rescinded, leaving any question of immediate relief to the district court. It is therefore speculative whether the remand ordered by the court of appeals will have any adverse effect on petitioners.

As noted earlier, FWS issued a new biological opinion in 2008. Although the 2008 Biological Opinion contained an RPA proposing that Reclamation and DWR modify CVP and SWP operations to avoid jeopardy to the delta smelt, the RPA likewise did not conclude that Reclamation must make any changes to the Settlement Contracts. See p. 9, *supra*.

Even if the consultation process ordered by the court of appeals resulted in a conclusion that addition-

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[9] Petitioners filed a motion asking the Ninth Circuit to stay the issuance of the mandate in this case pending disposition of their petition for a writ of certiorari. 09-17661 Docket entry No. 235 (May 30, 2014). On October 14, 2014, the court of appeals denied petitioners' motion for a stay of the mandate. *Id.* No. 241.

al water is needed to protect the delta smelt in any given water year, Reclamation could reduce annual allocations of water to other water users. As discussed in the en banc court of appeals' decision, Reclamation has contracts with other water users that do not have senior water rights. Pet. App. 9. Those other contracts contain provisions giving Reclamation discretion to reduce water deliveries to comply with federal statutes, including the ESA. *Id.* at 242-247. Accordingly, even if additional water is found to be needed, Reclamation could potentially renew the Settlement Contracts for the same quantities and allocations of water as contained in the 2004-2005 renewed contracts and still avoid jeopardy to the delta smelt.

This Court has in the past expressed reluctance to review decisions in which the court of appeals has remanded the case to a district court for further action. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curium) ("Petitioners seek certiorari to review the adverse rulings made by the [c]ourt of [a]ppeals. However, because the [c]ourt of [a]ppeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("And, except in extraordinary cases, the writ [of certiorari] is not issued until final decree.") (citations omitted); see also *Mount Soledad Mem'l. Ass'n* v. *Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., respecting denial of petitions for writs of certiorari) (agreeing with denial of certiorari "[b]ecause no final judgment has been rendered and it remains unclear precisely what action the Federal [g]overnment will be required to take").

Here, the ultimate scope of Reclamation's discretion in connection with contract renewal, and whether any different terms in the Settlement Contracts are needed to avoid jeopardy to the delta smelt, are matters that should be addressed on remand to Reclamation in the first instance during the consultation process, and then, if necessary, in a challenge in the district court to Reclamation's subsequent action. Should the case reach this Court again, it would have the benefit of Reclamation's and the lower courts' analyses of the various legal constraints that petitioners have asserted but that the en banc court of appeals did not address. This Court does not have that benefit now, and resolution of those arguments by this Court now would not be tied to any present harm to petitioners. Further review therefore is not warranted.

2. Petitioners argue (Pet. 15-21) that review is necessary because the en banc court of appeals' decision is in conflict with this Court's decision in *Home Builders* and the D.C. Circuit's decision in *Platte River*. There is no conflict, however, and review by this Court therefore is not warranted.

In *Home Builders*, this Court determined that the Environmental Protection Agency (EPA) lacked any discretion to consider the impact on listed species in deciding whether to authorize Arizona to issue National Pollution Discharge Elimination System permits under the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and therefore held that EPA was not required to engage in consultation under Section 7 of the ESA. 551 U.S. at 671-673. In holding that no consultation was required, this Court noted that EPA's authorization decision turned on whether the state pro-

gram met nine specific statutory criteria set out in the CWA. If those criteria were met, then EPA was required to authorize the state program. *Id.* at 650-651, 661-662. None of the nine statutory criteria allowed EPA "to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application." *Id.* at 671. The Court therefore held that EPA's lack of discretion to consider the needs of threatened or endangered species in authorizing Arizona to carry out the CWA program meant that EPA had no obligation to engage in consultation under Section 7 of the ESA before doing so. *Id.* at 673.

The court of appeals' en banc decision in this case correctly stated the legal standard articulated in *Home Builders*: Section 7(a)(2)'s consultation requirement applies only where an agency retains "some discretion" to take action beneficial to a protected species. Pet. App. 19; see 50 C.F.R. 402.03 (limiting Section 7(a)(2)'s application to "actions in which there is discretionary [f]ederal involvement or control"). While the en banc court concluded that the particular contract language here afforded Reclamation at least some discretion to benefit the delta smelt in its contract renewal negotiations, Pet. App. 20-21, its decision did not address the complex questions of whether *other* state or federal legal obligations constrain Reclamation, and thereby bring this case within the rationale of *Home Builders*. *Id.* at 20 n.1. The court of appeals' application of the *Home Builders*' legal standard to contract language specific to this case does not warrant this Court's review. Nor is review warranted of the court of appeals' decision *not* to resolve other issues, instead leaving them for consid-

eration in further proceedings on remand. *Home Builders* does not require that this Court now issue what could well be an advisory opinion on petitioners' arguments regarding the degree and scope of Reclamation's discretion on remand.

There is also no conflict between the decision below and *Platte River*. In that case, the D.C. Circuit held that the Federal Energy Regulatory Commission (Commission) had no obligation to engage in consultation over renewal of an annual operating license for a power plant where the governing statute placed clear limitations on the Commission's discretion by providing that an annual license "can only be altered 'upon mutual agreement between the licensee and the Commission.'" 962 F.2d at 32 (quoting 16 U.S.C. 799); see *id.* at 37. Here, by contrast, the court of appeals concluded that the relevant contracts did accord Reclamation at least some discretion in connection with contract renewal, and it did not resolve whether applicable federal or state laws constrained the agency's discretion in the way the Commission's discretion was limited in *Platte River*. Petitioners will have an opportunity to raise any arguments concerning the complicated set of federal and state laws governing the CVP and the renewal of the Settlement Contracts in the lower courts. Pet. App. 20 n.1. There is no reason for this Court to undertake such a review before Reclamation and the lower courts have done so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

1. 16 U.S.C. 1536 provides:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") 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 which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a) (2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Sec-

retary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this

section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be al-

lowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5.

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a non-reimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2) of this section, the

Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any

irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) of this section or was not identified in

any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that

such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(*l*) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(*o*) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species

or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

2. 33 U.S.C. 1342(b) provides:

National pollutant discharge elimination system

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the

Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants,

(B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

3. 50 C.F.R. 402.02 provides:

Definitions

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq*.

Action 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. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical

habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Director refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his

authorized representative, for the region where the action would be carried out.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. 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. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the

Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

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.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Proposed critical habitat means habitat proposed in the FEDERAL REGISTER to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the FEDERAL REGISTER to be listed under section 4 of the Act.

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 economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

4. 50 C.F.R. 402.03 provides:

Applicability

Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.

5. 50 C.F.R. 402.14 provides:

Formal consultation.

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions*. (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a

result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment

has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is

agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make

available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give

appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions*. The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take*. (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act

of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be es-

tablished in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(j) *Conservation recommendations*. The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps*. When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.