No. 14-402

In the Supreme Court of the United States

STATE WATER CONTRACTORS, ET AL., PETITIONERS

v.

SALLY JEWELL,
SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

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

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

2. Whether the court of appeals correctly applied the statutory requirement that agency decisions under the ESA use "the best scientific and commercial data available." 16 U.S.C. 1533(b)(1)(A).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-187a) is reported at 747 F.3d 581. The opinion of the district court (Pet. App. 246a-506a) is reported at 760 F. Supp. 2d 855.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2014. Petitions for rehearing were denied on July 23, 2014 (Pet. App. 507a-512a). The petition for a writ of certiorari was filed on October 6, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

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

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

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

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

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

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

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

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[3] The regulatory definition of an RPA provides:

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

2. This case arises out of the operation by the Bureau of Reclamation (Reclamation) of a system of dams and reservoirs in California known as the Central Valley Project (CVP). Pet. App. 25a, 30a-31a. Located in the Central Valley Basin in California, the CVP constitutes "the largest federal water management project in the United States." *Central Delta Water Agency* v. *United States*, 306 F.3d 938, 943 (9th Cir. 2002), aff'd, 452 F.3d 1021 (9th Cir. 2006).

Reclamation must coordinate its CVP operations with the California Department of Water Resources (DWR), which operates its State Water Project (SWP) in the same watershed, to export water from Northern California through the Sacramento-San Joaquin Delta (Delta) for delivery to southern parts of the State. *California* v. *Sierra Club*, 451 U.S. 287, 290-291 (1981); see Pet. App. 30a-31a.

In 2005, FWS completed a consultation with Reclamation and DWR concerning the impacts of CVP and SWP operations on species listed as threatened or endangered under the ESA. Pet. App. 37a. In a biological opinion issued in 2005 (2005 Biological Opinion), FWS concluded that those operations would not place the existence of any listed species in jeopardy or adversely modify critical habitat. *Ibid.* Although FWS considered impacts to various listed species, the primary species of concern was the delta smelt (Hypomesus transpacificus), a small fish, two to three inches long, with a short life span of approximately one year, which was listed in 1993 as a threatened

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

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

species under the ESA, 16 U.S.C. 1533. 58 Fed. Reg. 12,854, 12,858 (Mar. 5, 1993); Pet. App. 34a-37a.

Shortly after FWS issued its 2005 Biological Opinion, the delta smelt population sharply declined, for reasons unknown. Pet. App. 34a-35a & n.4. The Natural Resources Defense Council (NRDC) and several other organizations, referred to collectively here as NRDC, filed suit to challenge the 2005 Biological Opinion. *Id.* at 37a. A number of parties that held water contracts with Reclamation for delivery of water from the CVP intervened in the suit. *NRDC* v. *Kempthorne*, 506 F. Supp. 2d 322, 328-329 (E.D. Cal. 2007). The district court granted in part and denied in part NRDC's motion for summary judgment and held that the 2005 Biological Opinion was arbitrary and capricious. *Id.* at 387-388; see Pet. App. 37a-38a. That ruling was not appealed. The court imposed interim remedies intended to protect the delta smelt until a new court-ordered biological opinion was completed. *Id.* at 37a-38a. The FWS issued its new biological opinion on the court-ordered deadline, December 15, 2008 (2008 Biological Opinion). *Id.* at 38a.

3. Unlike the 2005 Biological Opinion, the 2008 Biological Opinion concluded that the CVP/SWP operations were likely to jeopardize the continued existence of the delta smelt and that the operations are major contributors to (although not the exclusive causes of) the delta smelt's decline. Pet. App. 38a-40a.

The CVP and SWP operate massive pumping plants that reverse the natural flow of the southern part of the Delta, particularly two distributary channels of the San Joaquin River known as the Old and Middle Rivers (referred to as OMR). Pet. App. 31a.

The pumping plants can kill delta smelt by entrainment, *i.e.*, by the negative flows pulling the delta smelt into the pumps.[4] *Id.* at 31a-32a, 39a. Screening devices, called "louvers," catch fish larger than 30 millimeters before they are pulled into the pumps. *Id.* at 32a. In a process of "salvage," the delta smelt, along with other fish caught in these devices, are then counted and trucked to a location where they are released. *Ibid.* Few delta smelt survive the salvage process, but the salvage data provide an indicator of the total number of smelt entrained by the pumping plants. *Ibid.*

As required by the ESA, 16 U.S.C. 1536(b)(3)(A), the 2008 Biological Opinion provided an RPA to prevent CVP/SWP operations from jeopardizing the delta smelt. The RPA consisted of several actions, each of which, if triggered, would require limits on CVP/SWR pumping rates or the release of fresh water from upstream reservoirs. Pet. App. 40a-42a.

Actions 1, 2, and 3 of the RPA provide protection to the delta smelt at various points in its life cycle during the winter and spring by imposing limitations (expressed as negative OMR flows) on the pumping plants operated by Reclamation and DWR. Pet. App. 40a-41a. Action 1, which is triggered if the "daily salvage index" reaches a "critical point," restricts OMR flows to specified average rates. *Id.* at 40a. Action 2 follows "immediately after Action 1," or oc-

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[4] A key metric of the flow rate in the OMR is net upstream flow, which is usually measured in negative cubic feet per second. Pet. App. 38a & n.8. A higher negative number shows that the pumps are being run at a higher rate, and that the delta smelt are subject to stronger currents pulling them to the pumps. *Id.* at 285a.

curs if recommended by the Smelt Working Group,[5] and also imposes limits on the OMR flow rate "depending on a complex set of biological and environmental parameters." *Id.* at 256a. Action 3 similarly regulates OMR flow rate and seeks to protect juvenile and larval smelt when signs of smelt spawning are detected annually. *Id.* at 40a-41a.

Action 4 of the RPA applies only in years classified as "wet" or "above normal" by DWR,[6] and regulates the location of "X2," the point (measured in kilometers above the Golden Gate Bridge) in the Delta where the salinity levels are two parts per thousand. Pet. App. 41a, 82a; see *id.* at 33a-34a. Because the delta smelt spends most of its lifecycle in a low salinity zone, the location of X2 is a "primary driver of delta smelt habitat suitability," such that as X2 moves further downstream, toward the Golden Gate Bridge, the habitat available to the delta smelt improves and increases. *Id.* at 83a; see *id.* at 34a, 82a-83a; see also 812 F. Supp. 2d at 1148.

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

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

Moving the location of X2 downstream requires the release of fresh water from upstream reservoirs or a decrease in project pumping, or both. Pet. App. 82a-83a. The location of X2 was therefore "critical to the parties" in this case because it "directly affects how much water can be exported to southern California for agricultural and domestic purposes." *Id.* at 83a. Action 4 requires that CVP/SWP operations be managed so that X2's monthly average location is no more than 74 kilometers upstream of the Golden Gate Bridge in "wet" years (which allows the delta smelt access to the favorable feeding and living conditions in the Suisun Bay) and no more than 81 kilometers upstream of the Bridge in "above normal" years. *Ibid.*; see *id.* at 425a-428a.

4. Following issuance of the 2008 Biological Opinion, six complaints were filed by parties (including petitioners) challenging its conclusions under the ESA and the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq*. See Pet. App. 26a-27a & n.2, 42a. In substance, the complaints asserted that the technical determinations made by FWS supporting the RPA were arbitrary and capricious. See *id.* at 263a-264a, 282a-283a. In particular, plaintiffs challenged the data and methods used by FWS to recommend limitations on pumping operations and the release of fresh water under Actions 1, 2, 3, and 4. See *id.* at 282a-284a. NRDC intervened on the side of the federal respondents to defend the 2008 Biological Opinion; DWR intervened on the side of the plaintiffs. See *id.* at 1a-15a, 253a. Plaintiffs filed several motions for injunctive relief, and ultimately the parties cross-moved for summary judgment. See *id.* at 258a-259a.

In reviewing the 2008 Biological Opinion, the district court appointed four of its own experts, and also permitted plaintiffs to introduce extensive extra-record evidence, including more than 40 expert declarations in support of the motions for injunctive relief and summary judgment.[7] Pet. App. 51a-52a.

In a lengthy opinion, the district court granted summary judgment to plaintiffs, concluding, based on its own interpretation of the extra-record declarations, that certain technical determinations in support of the 2008 Biological Opinion were arbitrary and capricious. Pet. App. 43a-44a, 53a; *id.* at 282a-365a (discussing whether FWS used the "best available science" to justify the RPA actions); see also, *e.g.*, *id.* at 306a-333a (discussing whether FWS should have adjusted numbers of delta smelt taken by pumping stations); *id.* at 333a-365a (discussing whether FWS's choice of models to calculate the location of X2 was reasonable).

The district court also held that FWS failed to explain how the RPA satisfied "non-jeopardy factors," including whether the RPA was "economically and technologically feasible." Pet. App. 455a, 470a; see *id.* at 455a-473a; see also 50 C.F.R. 402.02 (defining RPA). In the court's view, the APA and FWS regulations require "some exposition in the record of why the agency concluded (if it did so at all) that all four regulatory requirements for a valid RPA were satisfied." Pet. App. 473a; No. 1:09-cv-00407, 2011 WL 1740308, at *4 (May 4, 2011) (explaining the court's

[7] After the district court denied motions by the federal respondents and NRDC seeking to strike plaintiffs' declarations, the federal respondents and NRDC submitted declarations in response to the plaintiffs' filings. Pet. App. 51a-52a.

summary judgment decision). The court added that FWS did not explain "[h]ow the appropriation of water for the RPA Actions, to the exclusion of implementing less harmful alternatives, is required for species survival," although the court did not delineate the degree to which FWS had to consider the economic impacts to the public at large.[8] Pet. App. 473a.

5. The federal respondents and NRDC appealed the district court's decision. Pet. App. 46a. Petitioners filed response briefs, dividing up the issues between them. See State Water Contractors C.A. Principal & Resp. Br. 1-2. DWR filed a separate brief. See DWR C.A. Answering Br.

a. The court of appeals reversed the district court's ruling that the 2008 Biological Opinion was arbitrary and capricious. Pet. App. 58a-101a. The court of appeals concluded that the district court had erred in relying on the many post-decisional expert declarations submitted by the plaintiffs, stating "we cannot see what the parties' experts added that the court-appointed experts could not have reasonably provided to the district court." *Id.* at 52a. As the court of appeals saw it, "the district court opened the

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

[2008 Biological Opinion] to a post-hoc notice-and-comment proceeding involving the parties' experts, and then judged the [2008 Biological Opinion] against the comments received." *Id.* at 53a.

The court of appeals also held that the district court had failed to give appropriate deference to FWS's technical determinations concerning the need for the protective measures contained in the RPA. Pet. App. 101a-122a. The court of appeals noted that this Court has stated that "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Id.* at 48a (quoting *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983)).

Applying these principles, the court of appeals reversed each of the district court's rulings and found that FWS's 2008 Biological Opinion and RPA were not arbitrary and capricious. In particular, the court of appeals held that the OMR flow-rate restrictions applied in Actions 1, 2, and 3 were supported by substantial evidence and were reasonably designed to work "as one part in a dynamic monitoring system that accounts for the smelt population as a whole." Pet. App. 79a; see *id.* at 58a-82a (analyzing FWS's flow limits). The court similarly held that FWS's recommendations regarding the location of X2 were supported by the record and by valid methods and data.[9] *Id.* at 82a-101a.

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[9] While the court of appeals found parts of the 2008 Biological Opinion "a bit of a mess," it found that those problems were "not the fault of the agency," but rather were attributable to the "substantive constraint on what an agency can reasonably do" within the "tight" 12-month deadline set by the district court. Pet. App. 55a-56a, 58a. Notwithstanding these challenges, the court of

Examining the regulatory definition of an RPA in 50 C.F.R. 402.02, the court of appeals further held that FWS was not obligated to address non-jeopardy factors. Pet. App. 122a-132a. The court observed that Section 402.02 "is a definitional section" that "defin[es] what constitutes an RPA" rather than "setting out hoops that the FWS must jump through." *Id.* at 125a. The court similarly found no statutory obligation under the ESA itself to consider non-jeopardy factors, noting that the ESA's sole requirement is that the RPA "will prevent jeopardy or adverse modification of critical habitat." *Id.* at 127a. At any rate, the court of appeals held that, even if FWS were required to consider non-jeopardy factors, "the record shows that the FWS has sufficiently considered them," particularly since "[t]he RPA closely resembles measures in the interim remedial order, the feasibility of which was proven in its [nearly one-year] implementation." *Id.* at 130a-131a.

The court further noted that 50 C.F.R. 402.02 addresses the economic and technological feasibility of an RPA to ensure that the RPA proposes actions that "can be taken by the [f]ederal agency * * * in implementing the agency action," 16 U.S.C. 1536(b)(3)(A), not to consider an RPA's impact on the public at large. Pet. App. 129a-130a (citing *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 185 (1978) (*TVA*) (holding that the ESA reflects "a conscious decision by Congress to give endangered species priority over the primary missions of federal agencies") (internal

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appeals found it could "discern the agency's reasoning" and determine that the 2008 Biological Opinion "is adequately supported by the record and not arbitrary and capricious." *Id.* at 58a.

quotation marks omitted).[10] The court therefore found that the district court erred to the extent it required FWS to "address the downstream economic impacts" of restrictions on CVP's operations. *Id.* at 129a; see *id.* at 129a-130a.

b. Judge Arnold, sitting by designation, concurred in part and dissented in part. Pet. App. 173a-179a. His dissent would have upheld the district court's finding that FWS's use of raw salvage data to determine OMR flow limits was not an "accepted scientific methodology," and was therefore arbitrary and capricious. *Id.* at 174a; see *id.* at 173a-175a. Judge Arnold also would have found insufficient support for FWS's determination of X2, because, in his view, the 2008 Biological Opinion did not adequately consider sources of bias in the models used to determine and predict X2's position or "sufficiently explain why 74 km and 81 km were selected as critical points for X2 to preserve smelt habitat." *Id.* at 177a; see *id.* at 176a-177a. And the dissent would have found no abuse of discretion in the district court's admission of extrinsic expert evidence on these subjects. *Id.* at 173a-176a, 179a.

As to non-jeopardy factors, the dissent agreed with the majority that there was "no authority requiring FWS to address specifically and analyze * * * the question of whether the RPA meets the non-jeopardy elements," but the dissent would have nonetheless affirmed the district court on this point because "[t]he record shows that concerns were raised relating to

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[10] The court of appeals noted that "[n]either the parties nor the district court argue that the RPAs themselves (and their proposed Actions) are not economically and technologically feasible." Pet. App. 129a n.43.

RPA feasibility" and to the agencies' "authority to implement the RPA."[11] Pet. App. 177a-178a.

c. Petitioners and DWR filed petitions for rehearing en banc, which were denied. Pet. App. 512a.

ARGUMENT

Petitioners argue (Pet. 21-32) that the court of appeals erred by failing to require FWS to consider the RPA's potential economic impact on third parties and the general public. The court properly rejected that claim as inconsistent with the ESA's plain language, FWS's regulations, and this Court's decision in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), which collectively require FWS to propose actions that will prevent jeopardy to the delta smelt without requiring an analysis of a recommended action's downstream economic consequences. Petitioners err in contending (Pet. 21-23) that the court of appeals' decision conflicts in this respect with the Fourth Circuit's decision in *Dow AgroSciences LLC* v. *National Marine Fisheries Service*, 707 F.3d 462 (2013) (*Dow AgroSciences*), which, contrary to petitioners' contention, did not require a consulting agency to weigh the economic impact of an RPA on the broader public. *Id.* at 474-475.

Petitioners also argue (Pet. 32-38) that the court of appeals erroneously excused FWS from complying with the requirement to use "the best scientific and commercial data available," 16 U.S.C. 1533(b)(1)(A), in

[11] Judge Rawlinson concurred in part and dissented in part, disagreeing with the majority on an issue not raised in this certiorari petition—whether Reclamation's adoption and implementation of the 2008 Biological Opinion triggered obligations under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* Pet. App. 180a-187a.

determining the RPA's OMR flow restrictions and estimating the location of X2, and that the court should have considered extra-record expert testimony in evaluating FWS's technical and scientific conclusions. The court, however, did not excuse FWS from using the best scientific data available, and it properly confined its review to the administrative record. The court carefully reviewed FWS's analyses and concluded that its OMR flow limits and X2 location estimates were adequately supported by the record. Petitioners' claims amount to a fact-specific disagreement over certain of FWS's technical conclusions, which do warrant this Court's review. The petition for a writ of certiorari should be denied.

1. a. Petitioners maintain (Pet. 28-29) that the words "reasonable and prudent" necessarily require consideration of the economic consequences of an RPA, and thus that the court of appeals erred when it found FWS was not required by the ESA to evaluate possible economic impact of implementation of the RPA on the public.

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

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

The Endangered Species Committee and critical-habitat provisions demonstrate that Congress knew how to provide for consideration of broader economic impacts in administering the ESA, and Congress's omission of any mention of economic factors in defining an RPA shows it did not intend the RPA to include such considerations. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original) (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) (per curiam). To the extent there is some value in estimating the economic impacts of an RPA, such information will be provided in an Environmental Impact Statement

(EIS) prepared by Reclamation under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq*. Pet. App. 138a. The court of appeals ruled that Reclamation had to prepare an EIS addressing the impacts of its acceptance of the RPA, *id.* at 148a-171a, and no party has sought further review of that ruling.

Petitioners rely on the *House Report* on the 1978 Amendments to argue that public economic impact should be considered in the RPA process because the amendments were "intended to introduce some flexibility into the Act." Pet. 29 (quoting H.R. Rep. No. 1625, 95th Cong., 2d Sess. 3 (1978) (*House Report*)) (internal quotation marks omitted). But petitioners fail to quote the very next sentence of the *House Report*, which states that it was the exemption procedure through the Endangered Species Committee—not the RPA process—which was "[t]o accomplish this purpose." *House Report* 3. Far from representing a "legislative backlash" to *TVA*, Pet. App. 29, moreover, the 1978 Amendments left *TVA*'s holding intact and largely preserved the existing structure of the ESA, see *House Report* 11 (favorably describing *TVA* as affirming the principle that "the determination of whether a particular activity violates [S]ection 7 is made irrespective of the economic importance of the activity"); see also H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978) ("The basic premise of [the 1978 Amendments] is that the integrity of the interagency consultation process designated under [S]ection 7 of the act be preserved."). The legislative history of the ESA's 1978 Amendments thus shows that Congress did *not* overturn *TVA* or inject broad economic policy consideration into the RPA process.

b. To support their position that broad economic considerations should nonetheless be read into the ESA's consultation process, petitioners posit (Pet. 30-31) two hypothetical RPAs, one of which (RPA 2) could avoid "massive economic dislocation" while foregoing only "marginally greater protection" of an alternative RPA (RPA 1). Petitioners assert (*ibid.*) that, if FWS chose the expensive, but marginally-more-protective RPA 1, then the agency's only recourse would be to seek an exemption from the Endangered Species Committee.

That stark hypothetical mischaracterizes the ESA's RPA process, which is intended to be a good faith consultation that will generally resolve any conflict between the consulting and acting agencies. See *House Report* 12 (describing the RPA process as a "valuable tool for resolving conflicts"). Petitioners' hypothetical also fails to recognize the inherent difficulty in predicting what measures will prevent extinction of a species, not to mention the challenge of predicting the downstream economic impact of an RPA. Because mistakes that result in extinction cannot be undone, RPAs typically include some margin of safety, which allows the consulting agency to "choose to 'counteract the uncertainties' inherent in its scientific analyses by 'overestimat[ing]' known parameters without being unreasonable." Pet. App. 68a (brackets in original) (quoting *Baltimore Gas & Elec. Co.*, 462 U.S. at 103).

This case illustrates the difficulties in assessing the economic impact of an RPA to the general public. For example, petitioners assert, without citation to any reliable scientific source, that the "cumulative effect of the [2008 Biological Opinion's] RPAs is to reduce the amount of water the Projects can deliver by hundreds

of thousands of acre feet per year." Pet. 10. But RPA Actions 1, 2, and 4 have been implemented or triggered only on a few discrete occasions between 2010 and the present. Only one action, Action 3, has applied each year, and it applies only seasonally for a several-month period.[12] Petitioners present no convincing evidence demonstrating that the RPA has significantly increased water shortages caused by the drought, nor have they proposed a means of calculating the resulting economic impact to the general public.

Congress has not imposed on consulting agencies the burden of weighing a proposed margin of safety against the purported public costs. For these reasons, FWS was not required to explain why less intrusive means would not suffice to avoid jeopardy. See *Southwest Ctr. for Biological Diversity* v. *United States Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998) ("[U]nder the ESA, the Secretary was not required to explain why he chose one RPA over another.") (footnote omitted); see also Pet. App. 132a n.44. Indeed, this Court in *TVA* anticipated this issue, observing that it might be said that "the burden on

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[12] The Smelt Working Group produced annual summaries on the implementation of the 2008 Biological Opinion, which document when the RPA Actions were triggered and implemented. See, *e.g.*, FWS, *Summary Report on the Transactions of the Smelt Working Group in Water Year 2014*, at 5 (Aug. 2014), http://deltacouncil.ca.gov/sites/default/files/2014/10/SWG-Final-Report-Water-Year-2014.pdf (Actions 1 and 2 not implemented in water year 2013-2014); FWS, *Smelt Working Group Annual Report on the Implementation of the Delta Smelt Biological Opinion on the Coordinated Operations of the Central Valley Project and State Water Project Water Year 2013*, at 5-8 (Sept. 2013), http://deltacouncil.ca.gov/sites/default/files/documents/files/SWG_Report_WY2013.pdf.

the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. But neither the Endangered Species Act nor [Article] III of the Constitution provides federal courts with authority to make such fine utilitarian calculations." 437 U.S. at 187 (footnote omitted).

The ESA therefore provides no support for petitioners' effort to impose on consulting agencies a duty to consider economic impacts to the public at large in preparing an RPA.

c. Petitioners further maintain (Pet. 26-28) that administrative law principles obligate FWS to explain how the RPA satisfied the non-jeopardy factors listed in 50 C.F.R. 402.02, and in particular, to address the RPA's economic and technical feasibility. But the court of appeals did not exempt FWS from the usual requirement that an agency explain the bases for its decisions. As a threshold matter, the court recounted how the 2008 Biological Opinion did adequately explain each of its conclusions, see Pet. App. 130a-131a, observing that "the record shows that the FWS has sufficiently considered [non-jeopardy factors]," *id.* at 130a.

Similarly, the court of appeals did not excuse FWS from compliance with its own regulations. Rather, the court simply interpreted the particular regulation at issue here, 50 C.F.R. 402.02, and held that it does not "obligate[] the FWS to address the non-jeopardy factors when it proposes RPAs," given that such considerations are neither required by statute nor referred to elsewhere in the regulations. Pet. App. 125a; see *id.* at 125a-126a. That narrow holding was correct and does not merit this Court's review.

d. Petitioners further assert (Pet. 21-26) that the Ninth Circuit's decision in this case conflicts with the Fourth Circuit's decision in *Dow AgroSciences* on whether FWS is obligated expressly to address the economic impact or feasibility of an RPA. There is no conflict.

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

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

that NMFS had to address specifically the uniform buffers' economic feasibility, *id.* at 475.

Petitioners are wrong in broadly contending (Pet. 25) that *Dow AgroSciences* "holds that the impact on third parties *must* be considered expressly" in a biological opinion. Their contention ignores the critical distinction between this case and *Dow AgroSciences*: the pesticide manufactures in *Dow AgroSciences* were applicants under the ESA, rather than downstream consumers (like petitioners). See 707 F.3d at 464-465; see also 16 U.S.C. 1532(12) (definition of applicant). *Dow AgroSciences* thus cited the ESA's requirement that an RPA must be a measure that "can be taken by the Federal agency or *applicant* in implementing the agency action," 16 U.S.C. 1536(b)(3)(A) (emphasis added), but the decision imposes no similar statutory feasibility requirement for the general public. See *Dow AgroSciences*, 707 F.3d at 474-475.[13]

In this case, the court of appeals also distinguished *Dow AgroSciences* because, here, economic feasibility for the agency or for an applicant to the agency was not disputed. Pet. App. 129a n.43 ("Neither the parties nor the district court argue that the RPAs themselves (and their proposed Actions) are not economically and technologically feasible."). In *Dow AgroSciences*, by contrast, the Fourth Circuit remanded for further consideration of economic feasibility because the RPA "imposed an especially onerous requirement

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

without any thought for whether it was feasible." *Id.* at 127a n.42.

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

2. Petitioners contend (Pet. 32-37) that the court of appeals allowed FWS to ignore the ESA's requirement that decisions be based on the "best scientific and commercial data available," 16 U.S.C. 1533(b)(1)(A), when FWS established the OMR flow limits and determined the location of X2 for purposes of the RPA. Petitioners mischaracterize the Ninth Circuit's decision in this case.

The court of appeals did not relax the best-available-science requirement. Instead, the court extensively reviewed the complex record to evaluate the competing scientific claims, and it concluded, in light of the deferential and narrow arbitrary-and-capricious standard of review, that FWS applied the best available scientific data in developing the RPA. Pet. App. 58a-101a. The court correctly found, moreover, that the determination of what constitutes the best available science "belongs to the agency's 'special expertise,'" such that the court "must be at [its] most deferential in reviewing this provision of the [2008 Biological Opinion]." *Id.* at 48a (quoting *Baltimore Gas & Elec. Co.*, 462 U.S. at 103).[14] Applying these

[14] This Court has described "arbitrary [and] capricious" review as "narrow" in scope and limited to "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres.*

principles, the court upheld the RPA's OMR flow restrictions and FWS's estimate of X2's location. Its application of these legal standards to affirm FWS's technical findings does not warrant this Court's review.

a. Petitioners assert (Pet. 33) that, in determining the OMR flow limits, FWS "failed to use the best scientific evidence available" when FWS relied on raw salvage data, rather than using normalized data that would adjust the salvage rates based on the relative size of the smelt population.

But the court of appeals correctly answered such criticism, finding that the use of raw, rather than normalized, salvage data better aligned with FWS's priority "to protect the maximum absolute number of individual smelt." Pet. App. 67a. The *absolute*, rather than the *relative* number of delta smelt entrained was FWS's prime concern, because the 2008 Biological Opinion found that the delta smelt population could not tolerate even "moderate" levels of entrainment of adult smelt in the pumps. *Id.* at 66a; see *ibid.* (observing that the "population numbers of the delta smelt are perilously low," and yet the "lack of real-time information and variations inherent to the environmental systems" render "precision virtually impossible" in setting an OMR flow limit that will avoid jeopardy). In such circumstances, the use of raw salvage

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Overton Park, Inc. v. *Volpe*, 401 U.S. 402, 416 (1971). The agency must articulate a "rational connection between the facts found and the choice made," *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962), but even an agency decision of "less than ideal clarity" will stand "if the agency's path may reasonably be discerned, *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

data to set OMR flow restrictions was not scientifically unreasonable. *Id.* at 66a-68a; see *id.* at 67a n.23 ("[T]he quality of the statistical method is not the only relevant factor * * * : the [2008 Biological Opinion's] choice of one model over the other implicates significantly differing management policies.").[15]

The court of appeals also discussed at length how the use of salvage data was only one of many factors relied upon by FWS to establish the OMR flow restrictions. See Pet. App. 71a-78a (describing the studies, models, and experience utilized by FWS in setting the flow limits). In addition, the court observed that the OMR flow-rate restrictions "exist as but one part of a complicated dynamic system" that imposes real-time operational limits on flow rates to prevent incidental take at certain critical time periods. *Id.* at 79a; see *id.* at 79a-82a.

Similarly, the court of appeals did not err when it upheld FWS's methods of estimating the location of X2. Petitioners challenge (Pet. 36-37) the models used by FWS to locate X2, arguing that when one model appeared flawed, the court gave FWS a "carte blanche to adopt whatever methodology it wanted, with no further explanation." That was far from the court's approach.

After careful discussion of available models, the court of appeals found that "FWS explained why it chose to use 'a combination of available tools and da-

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[15] Normalization of the salvage data would further be troubled by the lack of reliable population data for the delta smelt. See Pet. App. 64a n.21 ("[W]e know the smelt population is continuing to decline and is imperiled, but still no one knows how many there are. It must tell us something about the difficulties that inhere in trying to count migrating, two-inch fish.").

ta'" to calculate X2's location, Pet. App. 87a (citation and footnote omitted), and further "explained its assumptions" and the reasons for its choice of model, *id.* at 92a. In addition there was "no indication" that the model calibration sought by petitioners would assist the analysis. *Id.* at 93a. Given that "no superior set of models [has] been identified," *id.* at 85a (quoting *id.* 358a), the court reasonably upheld FWS's analytic decisions.

Thus, contrary to petitioners' argument (Pet. 32-37), the court of appeals did not allow FWS to ignore the best available science; it rather determined that FWS reasonably could "'counteract the uncertainties' inherent in its scientific analyses by 'overestimat[ing]' known parameters" to avoid jeopardy to the delta smelt by setting a reasonable limitation on OMR flow and estimating the location of X2. Pet. App. 68a (brackets in original) (quoting *Baltimore Gas & Elec. Co.*, 462 U.S. at 103).

For these reasons, there is no conflict with the cases cited by petitioners (Pet. 35-36), all of which describe and apply the best-available-science standard. If anything, the cases petitioners cite support the substantial deference owed to the consulting agency's scientific determinations. See *Miccosukee Tribe of Indians* v. *United States*, 566 F.3d 1257, 1265 (11th Cir. 2009) ("[T]he agency decides which data and studies are the 'best available' because that decision is itself a scientific determination deserving deference."); *Southwest Ctr. for Biological Diversity*, 215 F.3d at 61 (holding that where species' population count was inconclusive, the agency was not "obligated to find better data" by conducting a new population study).

At bottom, petitioners' arguments amount to a dispute over the application of the correct legal standard to highly complex and technical facts. The court of appeals accorded appropriate deference to FWS's technical determinations, finding they were not arbitrary and capricious. Accordingly, this Court's review of petitioners' claims is unwarranted.

b. Petitioners argue (Pet. 37-38) that the court of appeals erred by "ignoring" the "[e]xtra-record expert testimony" admitted by the district court. The court of appeals correctly limited its review to "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam); see Pet. App. 49a-50a. The district court's consideration of over 40 new expert declarations and days of live testimony runs directly counter to that principle. See Pet. App. 52a (finding that the district court effectively reopened the administrative record and turned judicial review into "a battle of the experts" and a "forum for debating the merits of the [2008 Biological Opinion])." Petitioners offer no support for their contention that such extra-record evidence was properly taken by the district court or that the court of appeals erred by declining to rely on it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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