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.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL HYDROPOWER ASSOCIATION, THE NORTHWEST HYDROELECTRIC ASSOCIATION, NORTHWEST RIVERPARTNERS AND THE UTILITY WATER ACT GROUP AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

INTERESTS OF AMICI CURIAE

The National Hydropower Association ("NHA"), Northwest Hydroelectric Association ("NWHA"), Northwest RiverPartners ("RiverPartners"), and Utility Water Act Group ("UWAG") hereby submit this *amicus curiae* brief in support of the petition for certiorari filed by the State Water Contractors, et al.[1] In the decision below, *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 659 (9th Cir. 2014), the Ninth Circuit held that the U.S. Fish and Wildlife Service (the "Service") has no obligation to explain in the record how its specification of a "reasonable and prudent alternative," as required by Section 7 of the Endangered Species Act ("ESA"), is in fact "reasonable and prudent" as that term is defined by federal regulation. As detailed below, the Ninth Circuit's opinion is contrary to the language, history, and intent of the ESA, creates an inter-circuit conflict, fundamentally alters the ESA Section 7 consultation process, and renders the Service's regulatory definition of "reasonable and prudent" superfluous.

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[1] Pursuant to Supreme Court Rule 37(2)(a), all parties received notice of the intent to file this amicus curiae brief 10 days prior to the due date for such brief and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37(6), undersigned counsel certifies that (A) no party's counsel authored this brief, in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (C) no person, other than the *amicus curiae* or their members, contributed money that was intended to fund preparing or submitting this brief.

NHA is a nonprofit national association dedicated to promoting the growth of clean, affordable U.S. hydropower. It seeks to secure hydropower's place as a climate friendly, renewable, reliable energy source that serves national environmental, energy, and economic policy objectives. NHA represents nearly 200 member companies in the North American hydropower industry, from Fortune 500 corporations to small family-owned businesses. NHA's members include both public and investor-owned utilities, independent power producers, developers, manufacturers, environmental and engineering consultants, attorneys, and public policy, outreach, and education professionals.

NWHA is a nonprofit trade association dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region. Incorporated in 1981, NWHA represents 121 members in Alaska, Idaho, Montana, Oregon, Washington, Northern California, and British Columbia. Members include utilities, both investor-owned and public; independent power producers, including water and irrigation districts and municipalities; manufacturers; consultants; associations; and trade unions in those states.

RiverPartners is an alliance of public and private utilities, ports, businesses, and farming organizations working for a balanced approach to managing the federal hydropower system on the Columbia and Snake rivers. RiverPartners' member organizations include more than 40,000

farmers, four million electric utility customers, thousands of port employees, 7,000 small businesses, and hundreds of large businesses that rely on the economic and environmental resources provided by the Columbia and Snake rivers. RiverPartners promotes all the benefits of these rivers – fish and wildlife, renewable hydropower, agriculture, flood control, commerce, and recreation.

UWAG is a voluntary, *ad hoc*, non-profit, unincorporated group of 191 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. The Edison Electric Institute is the association of U.S. shareholder owned energy companies, international affiliates, and industry associates. The National Rural Electric Cooperative Association is the association of non-profit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. The American Public Power Association is the national trade association that represents publicly-owned (units of state and local government) energy utilities in 49 states, representing 16 percent of the market. UWAG's purpose is to participate on behalf of its members in federal agency proceedings under the Clean

Water Act and related statutes, such as the Endangered Species Act, and in litigation arising from those proceedings.

NHA, NWHA, RiverPartners and UWAG agree with the reasoning put forth in the Petition for a Writ of Certiorari filed by the State Water Contractors, et al., explaining that the Ninth Circuit's decision warrants Supreme Court review because it squarely conflicts with basic requirements of administrative law (requiring a reviewable record) and with the Fourth Circuit's decision in *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462, 475 (4th Cir. 2013) (holding that "[b]y not addressing the economic feasibility of its proposed 'reasonable and prudent' alternative . . . the . . . Service has made it impossible for us to review whether the recommendation satisfied the regulation and therefore was the product of reasoned decision-making"). Without repeating those arguments, NHA, NWHA, RiverPartners, and UWAG are compelled to write separately because the ramifications of the Ninth Circuit's holding extend far beyond the parties in this case, and could seriously and adversely impact numerous hydropower and other power projects nationwide.

SUMMARY OF ARGUMENT

Congress added the "reasonable and prudent alternative" requirement to the ESA in 1978 out of growing concerns that the implementation of the ESA Section 7 consultation process by the Service and the National Marine Fisheries Service (jointly, the "Services") was halting too many important

infrastructure projects, including, specifically, hydropower projects. To alleviate these concerns, Congress amended the ESA to provide additional flexibility and added the requirement that the Services must develop a "reasonable and prudent alternative" before they could force an action agency or applicant to give up on a project altogether. Congress explicitly instructed that, in addition to avoiding jeopardy or the adverse modification or destruction of a species' critical habitat, the reasonable and prudent alternative must be an action that "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A). Accordingly, the Services amended their implementing regulations in 1986 to identify those factors that make an alternative "[r]easonable and prudent," including whether the alternative is "economically and technologically feasible." 50 C.F.R. § 402.02.

The Ninth Circuit's decision largely renders these statutory and regulatory provisions meaningless. Under the Ninth Circuit's holding, the Services may impose "reasonable and prudent" alternatives on important infrastructure projects that could have crippling economic impacts without any obligation to demonstrate in the record that the alternative is economically or technologically feasible. This result is contrary to the language of the ESA and its regulations, contrary to the clear purpose for amending the ESA in 1978, and fundamentally inconsistent with the basic tenants governing judicial review of agency actions.

ARGUMENT

I. The ESA's Reasonable And Prudent Alternative Requirement Was Added To The ESA In 1978 To Provide An Important Protection For Federal Action Agencies And Applicants Against Unnecessary Economic Harm.

Congress originally enacted the ESA in 1973, in response to a rise in the number and severity of threats to the world's wildlife, with the intent of preserving threatened and endangered species. *See Tenn. Valley Auth. v. Hill (TVA)*, 437 U.S. 153, 177 (1978). As originally enacted, Section 7 of the ESA categorically instructed all federal agencies that they must "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species." Pub. L. No. 93-205, § 7, 87 Stat. 884 (1973). This original mandate (now encompassed in ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2)) left no room for alternatives or the consideration of economic concerns.

The ESA's mandate quickly became a matter of controversy, however, when a concerned citizen filed suit against the Tennessee Valley Authority alleging that the construction of the Tellico Dam on the Little Tennessee River would eradicate the endangered "snail darter," a small fish living in the vicinity of the dam. *See TVA*, 437 U.S. at 156. Although construction was "virtually complete[]," with nearly $100 million already expended on the major infrastructure project, the Supreme Court

enjoined work on the dam. *Id.* at 172. As the Court explained in its June 15, 1978 opinion, the original language of Section 7 and its legislative history appeared to indicate a "plain intent . . . to halt and reverse the trend toward species extinction, *whatever the cost*." *Id*. at 184 (emphasis added).

Congress immediately responded to this pronouncement by amending the ESA in November 1978. Pub. L. No. 95-632, 92 Stat. 3751 (1978). As one member of Congress explained, "[t]he Supreme Court decision may be good law, but it is very bad public policy." Staff of S. Comm. on Environment and Public Works, 97th Cong., a Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979 and 1980 (Comm. Print 1982) ("Legislative History") at 822 (reprinting House Consideration and Passage of H.R. 14104, with Amendments). Simply put, the situation facing Tellico Dam was not unique, and many members of Congress faced similar problems in their own districts. *Id*. at 805.

As a result, legislators expressed serious concerns that the ESA would "serve[] to delay and, in many instances, completely halt important public works projects with impeachable cost/benefit ratios." *Id*. at 796 (reprinting House Consideration and Adoption of House Resolution 1423). In short, Congress quickly recognized that the Supreme Court's decision left the ESA "totally inflexible" (*id*. at 799) and that changes were needed to inject "commonsense" into the statute (*id*. at 837). Accordingly, and as Congressman Bowen explained, "we have rewritten that legislation this

year, and we have made a diligent effort to take into consideration more accurately the development needs of this Nation." *Id.* at 801.

The 1978 changes to the ESA reflect Congress' pragmatic concerns for federal agencies and applicants. For example, Congress amended Section 7, expanding it from a single paragraph to 16 subsections. Pub. L. No. 95-632. Relevant here, subsection (b) was amended to require the Services to produce a written biological opinion explaining the basis for their conclusion that a federal action will jeopardize the continued existence of a listed species. *Id.* Moreover, if the action as proposed was deemed to violate the prohibition on jeopardy or destruction of critical habitat, the amendment further directed the Service to propose alternatives:

> The Secretary shall suggest those reasonable and prudent alternatives which he believes would avoid jeopardizing the continued existence of any endangered or threatened species or adversely modifying the critical habitat of such species, and which can be taken by the Federal agency or the permit or license applicant in implementing the agency action.

Id. (emphases added) (the current version of this requirement is now at ESA Section 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A)).[2] Indeed, Congress

[2] A subsequent amendment in 1979 made technical changes to this provision, substituting a cross-reference to Section 7(a)(2) for the narrative description: avoid jeopardizing "the

specifically revised the consultation process to "assist in the development of alternatives to the proposed action," particularly "those that are 'reasonable and prudent'" and not "inconsistent with the project's objectives and outside of the Federal agency's jurisdiction." Legislative History at 744 (reprinting H.R. Rep. No. 95-1625 (1978)). The addition of the reasonable and prudent alternative requirement to the statute therefore provided critical flexibility to the ESA, by allowing agencies and applicants to proceed with projects that would otherwise be prohibited by making reasonable modifications to proposed actions.

In addition, in 1978 Congress also provided a last resort for agencies and applicants where no reasonable and prudent alternative can be identified. Specifically, subsection (g) allows a federal agency or applicant to seek exemption from the Endangered Species Committee, where it has worked "in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives." Pub. L. No. 95-632. In sum, and as the legislative history shows, the broad range of amendments made to the ESA in 1978, "for the first time, recognize[d] that there are human considerations to be dealt with and people are an

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continued existence of any endangered species" or adversely modifying or destroying the critical habitat of such species. Pub. L. No. 96-159, 93 Stat. 1225 (1979). In 1982, this subsection was renumbered as Section 7(b)(3)(A) and shortened "permit or license applicant" to "applicant." Pub. L. No. 97-304, 96 Stat. 1411 (1982).

important factor in [the ESA] equation." Legislative History at 837.

Consistent with the language of the ESA and its legislative history, the Services in 1986 adopted regulations to implement the reasonable and prudent alternative requirement added to the statute in 1978. As Congress intended, these rules recognize the importance of identifying alternatives that are economically and technically feasible; that is, alternatives that are "reasonable and prudent" and that "can be taken by the Federal agency or applicant." *See* 16 U.S.C. § 1536(b)(3)(A); 51 Fed. Reg. 19,926, 19,952 (June 3, 1986). In their rules, the Services define the "reasonable and prudent alternative" as

> alternative actions identified during formal consultation that [1] can be implemented in a manner consistent with the intended purpose of the action, [2] that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, [3] that is economically and technologically feasible, and [4] 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.

50 C.F.R. § 402.02. The first three factors (sometimes called the nonjeopardy factors) ensure that any identified alternative is both "reasonable and prudent" as required by the plain language of the statute. 16 U.S.C. § 1536(b)(3)(A). The fourth factor (sometimes called the jeopardy factor), on the

other hand, relates to the statutory mandate that the reasonable and prudent alternative may not violate the prohibition on jeopardizing a species or adversely modifying or destroying critical habitat. *Id*.

In addition to defining the term "reasonable and prudent alternative," the Services' 1986 regulations address their obligation to "[d]iscuss with the Federal agency and any applicant . . . 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)." 50 C.F.R. § 402.14(g)(5). In so doing, the rules provide that "[t]he Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives" (*id.*), and "will use the best scientific and commercial data available" in the formulation of alternatives (50 C.F.R. § 402.14(g)(8)). Finally, the Services' preamble recognizes that, while they often rely on the expertise of the agency or applicant as to the "feasibility of an alternative," the Services can disagree with that assessment and "must reserve the right to include . . . alternatives in the biological opinion if it determines that they are 'reasonable and prudent' according to the standards set out in the definition in § 402.02." 51 Fed. Reg. at 19,952.

Following the 1978 amendments to the ESA and the Services' promulgation of implementing regulations in 1986, federal agencies and applicants are no longer faced with the inflexible situation where a project proceeds or fails based on

an initial jeopardy opinion. The Services are now required to be flexible and work with federal agencies and applicants to develop reasonable and prudent alternatives that are economically and technologically feasible, and thus "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A); *see* 50 C.F.R. § 402.02. Moreover, in those circumstances where disputes arise as to whether an alternative is actually feasible, the regulations provide certainty that the selection of a reasonable and prudent alternative will be based on the best scientific and commercial data available. 50 C.F.R. § 402.14(g)(8). As a result, in accordance with the post-*TVA* revisions to the ESA, few formal consultations should result in a jeopardy opinion where there is no available reasonable and prudent alternative.[3]

II. The Ninth Circuit's Decision Renders Meaningless The Protections Provided By The Reasonable And Prudent Alternative Requirement.

The Ninth Circuit's decision seriously undermines the protections provided by Congress in the 1978 amendments to the ESA. The Ninth Circuit recognized that 50 C.F.R. § 402.02 is "a definitional section; it is defining what constitutes [a reasonable and prudent alternative]." *San Luis*, 747 F.3d at 635. The Ninth Circuit further

[3] See Oliver A. Houck, The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce, 64 U. Colo. L. Rev. 277, 318 (1993).

concluded that the Service must always address the fourth prong of that definition (the jeopardy prong) because Section 7(b)(3)(A) directs (as does 50 C.F.R. § 402.02) that a reasonable and prudent alternative cannot result in jeopardy or adversely modify or destroy critical habitat. *Id*. at 636. However, since the Ninth Circuit could find "no similar requirement in the ESA that the FWS address the remaining three nonjeopardy factors," it concluded that the Service has no obligation to do so. *Id*.

This conclusion cannot be reconciled with the plain language of the ESA, its history, or the Services' regulations. First, when Congress required the Service to offer a "reasonable and prudent alternative," it instructed *both* that the alternative avoid jeopardy (as the Ninth Circuit held) *and* that the alternative "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A). Instead of being superfluous, as the Ninth Circuit's decision concludes, the three nonjeopardy factors set out in 50 C.F.R. § 402.02 determine whether an alternative is, in fact, reasonable and prudent. Accordingly, the Service cannot offer an alternative unless it provides some basis in the record for its determination that the alternative is both "reasonable and prudent" and that it "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A). Not only is this necessary to give meaning to every word in the statute, but it is a bedrock principle of agency action. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (agency must "cogently explain

why it has exercised its discretion in a given manner").

Second, the Ninth Circuit's holding is flatly contrary to the history of Section 7. As discussed *supra*, the reasonable and prudent alternative requirement was added to the consultation process to provide flexibility for action agencies and applicants, and to infuse "commonsense" into the ESA. *See* Legislative History at 799, 837. If the Service can simply impose a reasonable and prudent alternative that would (in the applicant's or agency's opinion) be technologically or economically infeasible, without any obligation on the part of the Service to justify how that alternative "can be taken by the Federal agency or applicant," 16 U.S.C. § 1536(b)(3)(A), then that flexibility and the statutory requirement is meaningless. Simply put, there is nothing "commonsense" about a provision that would allow the Service to offer a reasonable and prudent alternative without requiring any explanation as to how or why that alternative is, in fact, reasonable or prudent. *See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (there is a "simple but fundamental rule of administrative law, that the agency must set forth clearly the grounds on which it acted" (internal citation and quotation marks omitted)).

Third, the Panel's conclusion that the Service has no obligation to document the nonjeopardy factors is directly contrary to the Services' implementing regulations. In its rules, the Service makes clear that "[i]n formulating its . . . reasonable and prudent alternatives, . . . the

Service will use the best scientific and commercial data available." 50 C.F.R. § 402.14(g)(8). This obligation to use the best information available in formulating a reasonable and prudent alternative is in no way limited to *only* determining whether that alternative would avoid jeopardy. Instead, the regulations plainly require that the Service use the best available information in formulating the alternative itself, which, by definition, includes consideration of the nonjeopardy factors. 50 C.F.R. § 402.02. Indeed, the only way for an action agency or applicant (or a reviewing court) to know whether the Service's obligations have been satisfied is for the agency to "set forth clearly the grounds on which it acted." *See Atchison, Topeka & Santa Fe Ry. Co.*, 412 U.S. at 807.

Finally, the Ninth Circuit's holding is especially troubling in light of the Services' discussion in the preamble to its implementing rules, where they explain that they "must reserve the right to include those alternatives in the biological opinion if it determines that they are 'reasonable and prudent' according to the standards set out in the definition in § 402.02." 51 Fed. Reg. at 19,952. If there is no requirement that the Service make a record on that finding (and the Ninth Circuit has held that there is not) an agency or applicant that is presented with a reasonable and prudent alternative that is not actually feasible or achievable has no judicial recourse and must either forgo a project or face the difficult burden of

seeking an exemption from the ESA.[4] Notably, even the Service's arguments before the Ninth Circuit stopped short of that holding, conceding that it would have to produce a reviewable record "where an action agency does assert that the RPA cannot meet one of the non-jeopardy factors."[5]

There are, no doubt, situations where the feasibility of a reasonable and prudent alternative is self-evident, goes unquestioned by the agency, applicant, or other interested party, or is otherwise not subject to reasonable dispute. Under such circumstances, the obligation of the Service to document in the record that the alternative meets all the factors that comprise the definition of reasonable and prudent may be attenuated. *See, e.g., Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978) (parties must "structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions"). But the Ninth Circuit's holding is categorical. It concludes that there is no obligation in the Service regulations, the ESA, or the Administrative Procedures Act that requires the Service to address the nonjeopardy factors that define a reasonable and prudent alternative. Thus, even where "an

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[4] Indeed, that is precisely the Ninth Circuit's conclusion in this instance: "the FWS is not responsible for balancing the life of the delta smelt against the impact of restrictions on CVP/SWP operations." *San Luis*, 747 F.3d at 637.

[5] *See* Brief for the Federal Defendants-Appellants, Ninth Circuit No. 11-15871, Dkt. 30 at 67 n.13.

action agency does assert that the RPA cannot meet one of the non-jeopardy factors," as the Service describes,[6] the Ninth Circuit's opinion excuses the Service from justifying its position in the record.

The Ninth Circuit's holding in this case is inconsistent with the letter and intent of the ESA because it renders the important protection for agencies and applicants established by the reasonable and prudent alternative largely meaningless. Now (at least in those states represented by the Ninth Circuit) the Services are not required to have any evidence in the record that a proposed reasonable and prudent alternative is within the authority of the agency to carry out, is technologically or economically feasible, or otherwise "can be taken by the Federal agency or applicant." 16 U.S.C. § 1536(b)(3)(A). As a result, a conclusion by the Services that an alternative is "reasonable and prudent" is essentially unreviewable.

III. The Ninth Circuit's Decision Has Serious Ramifications For Future Consultations.

The concerns raised by the Ninth Circuit's decision are not hypothetical. As intended by Congress, the reasonable and prudent alternative requirement has proven exceptionally important for NHA, NWHA, RiverPartners, and UWAG members that own and operate hydropower projects or other

[6] *See id.*

power projects, or rely on the power generated by those projects. Because of the nature of these projects, ESA Section 7 consultations for hydropower projects can result in the Services concluding that the project will jeopardize a species or adversely modify critical habitat.

When that occurs, the applicants and federal agencies must work cooperatively with the Services to develop a reasonable and prudent alternative that avoids jeopardy but still "can be taken by the Federal agency or applicant," as required by the ESA. 16 U.S.C. § 1536(b)(3)(A). This often involves complex negotiations between the Services, action agencies, applicants as to whether all the factors provided in the Services' regulations are satisfied. This includes considering whether the agency or applicant can implement the alternative consistent with the factors specified in the regulations, such as whether the agency or applicant has authority to carry out the alternative and whether the alternative is feasible or would render the project uneconomic. 50 C.F.R. § 402.02

The Services' practice in consultations with the hydropower industry (as elsewhere) has demonstrated that the statutory obligation to produce a reasonable and prudent alternative based on a defensible record can be an important bulwark against the imposition of unreasonable alternatives on agencies or applicants. The Services occasionally suggest that the denial of a hydropower license is a "reasonable and prudent alternative" or that some excessively expensive alternative is reasonable and feasible. The federal agencies, applicants and affected members of the

public can respond, when appropriate, with "the best scientific and commercial data available" to show that an alternative is neither practicable nor feasible, nor consistent with the proposed action. This process affords agencies and applicants the opportunity "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

Perhaps the most visible and contentious such hydropower consultation is for the Federal Columbia River Hydropower System ("FCRPS"). The negotiated reasonable and prudent alternative developed for the FCRPS was produced in collaboration with states, tribes, federal agencies, and stakeholders.[7] The reasonable and prudent alternative for the FCRPS includes 73 different actions, any one of which may impose costs on the agencies (and ultimately the ratepayers) of millions (or even hundreds of millions) of dollars. Although the reasonable and prudent alternative for the FCRPS represents a substantial investment by the region, the feasibility factors outlined in 50 C.F.R. § 402.02 have been an important part of eliminating some measures that are not cost-effective or otherwise not economically feasible, such as

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[7] *See* NOAA Fisheries, 2014 FCRPS Supplemental Biological Opinion, at 32 (Jan. 17, 2014), *available at* http://www.westcoast.fisheries.noaa.gov/publications/hydropower/fcrps/2014_supplemental_fcrps_biop_final.pdf (discussing history of reasonable and prudent alternative for the FCRPS).

proposals to eliminate dams within the hydropower system.[8]

The Ninth Circuit's holding renders this important protection meaningless by excusing the agency from producing any factual basis in the record as to why an alternative is economically or technologically feasible. This result is directly contrary to the reason why Congress added the reasonable and prudent alternative in the first place, is directly contrary to the language of the ESA, and would seriously alter the scope of ESA consultations moving forward. Accordingly, NHA, NWHA, RiverPartners, and UWAG urge the Court to accept review.

CONCLUSION

For all these reasons, NHA, NWHA, RiverPartners, and UWAG respectfully urge the Court to grant the petition for writ of certiorari. The Ninth Circuit's holding directly conflicts with the Fourth Circuit's decision on this precise issue; fundamentally changes the nature of the Section 7 consultation process in a manner that is contrary to the ESA, its history, and the Services' regulations; and will have serious ramifications for future ESA

[8] *See, e.g.,* U.S. Army Corps of Engineers, Lower Snake River Fish Passage Improvement Study: Dam Breaching Update (Mar. 2010), *available at* http://www.nww.usace.army.mil/Portals/28/docs/environmental/dambreaching/plan_of_study_final_03_30_10.pdf.

consultations. Accordingly, this issue presents an exceptional issue warranting Supreme Court review.

Respectfully submitted,

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