No. 14-377

IN THE

Supreme Court of the United States

STEWART & JASPER ORCHARDS, ET AL.,

Petitioners,

v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL AND THE BAY INSTITUTE

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the United States Fish and Wildlife Service ("FWS") adequately explained the basis for the reasonable and prudent alternative ("RPA") in its 2008 biological opinion, where there was no dispute that it was feasible for the U.S. Bureau of Reclamation and California's Department of Water Resources to implement that alternative in jointly operating water diversion projects to avoid jeopardy to the delta smelt.

2. Whether the court of appeals correctly ruled that FWS had no obligation to consider the economic impact to the public at large from implementation of the RPA.

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

4. Whether the court of appeals properly found that FWS had used the best scientific data available in formulating measures in its RPA to minimize the loss of individual delta smelt and to improve the quality of their habitat in the fall.

CORPORATE DISCLOSURE

Respondents submitting this Brief in Opposition are the Natural Resources Defense Council and The Bay Institute. Respondents have no parent corporations, and no publicly held company owns any stock in these respondents.

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BRIEF IN OPPOSITION

In these cases, the United States Court of Appeals for the Ninth Circuit upheld a biological opinion of the United States Fish and Wildlife Service ("FWS") about the impacts of two water diversion and delivery projects on the threatened delta smelt ("BiOp").

Two sets of petitioners now seek review based on assertions that the "decision exacerbates the harmful effects of California's drought, creates multiple circuit splits, and contravenes this Court's precedents." State Water Contractors ("SWC") Pet. 5; *see also* Stewart & Jasper Orchards ("S&J") Pet. 3-4. None of these claims is accurate.

The effects of California's drought cannot be blamed on the threatened delta smelt or on protections designed to prevent the smelt's extinction. The delta smelt reasonable and prudent alternative ("RPA") provides ample flexibility for the operators of the two water projects to export water when water is available. Indeed, in 2011, while operating in compliance with the BiOp, the federal Central Valley Project ("CVP") and California's State Water Project ("SWP") (collectively, the "Projects") exported more water than ever before in the history of the Projects.[1] In critically dry years such as 2014, as several Petitioners recently acknowledged, the RPA "minimally affect[s] water deliveries" because "precipitation levels have been so

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[1] "The CVP and SWP export facilities pumped record amounts of water (6.6 [million acre-feet])" in the 2010-2011 water year. Delta Operations for Salmonids and Sturgeon, Technical Working Group, Annual Report of Activities October 1, 2010, to September 30, 2011, at 20 (available at http://www.deltacouncil.ca.gov/sites/default/files/documents/files/DOSS_Annual_Report_10_18-11_final.pdf (last visited Dec. 5, 2014)).

low that there likely would be very little water to distribute to water project users even absent the BiOp restrictions in this particular year." *San Luis & Delta-Mendota Water Auth. v. Salazar*, Nos. 11-15871 *et al.*, Dkt. 170-1 (9th Cir., filed June 24, 2014) at internal pps. 1-2. In fact, the FWS did not issue any determinations in 2014 that affected water operations.[2] Petitioners' attempt to attribute the impacts of the drought to the delta smelt lacks basis in fact.

Nor does the court of appeals's decision conflict with decisions of other circuits. Petitioners assert that one case from the Fourth Circuit is at odds with the Ninth Circuit's decision here, but the cases do not conflict. Both decisions assess the lawfulness of challenged RPAs by focusing on the statutory language that an RPA propose an alternative that "can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A). The Fourth Circuit case construed a regulation interpreting this statutory language to require consideration of the feasibility of implementing an RPA for the federal agency and any applicant seeking a federal license or permit. Here, Petitioners seek to greatly expand the reach of this language and the Fourth Circuit's holding to require FWS to estimate the costs of any RPA on an undefined but vast set of non-agency and non-applicant third parties and weigh those costs against the value of preserving a species. No court has ever construed the statute to call for analysis of economic effects of an RPA on the public at large.

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[2] *See* http://mavensnotebook.com/2014/12/05/2014-water-year-in-review-part-3-groundwater-delta-smelt-and-sacramentos-response-to-the-drought/ (last visited Dec. 5, 2014) (quoting Michael Chotkowski, Field Supervisor, FWS Bay-Delta Office).

The court of appeals's decision faithfully adheres to this Court's precedents, and nothing warrants modifying those precedents. Petitioners' attempt to create a congressional override of this Court's decision in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) ("*TVA*"), based on amendments to the Endangered Species Act ("ESA") enacted over 35 years ago, fails. In those amendments, Congress expressly required consideration of economic impacts in two new ESA provisions but not in the provisions at issue here.

The Court should also decline S&J Petitioners' invitation to address *Auer* versus *Skidmore* deference here, where the court of appeals applied the less deferential *Skidmore* standard to uphold FWS's action, and applying *Auer* would not change the outcome in Petitioners' favor.

Finally, SWC Petitioners raise numerous factbound criticisms of the correctness of the court of appeals's decision addressing the unique circumstances of the particular BiOp and the water projects at issue here. This highly factual inquiry does not merit this Court's review, and Petitioners have not identified any misapplication of law.

The court of appeals's decision closely adheres to existing law, affirms a set of biologically-based recommendations that have allowed the federal and state water projects in California to continue operating along lines they suggested, and allows those projects to continue exporting the same average amount of water from the San Francisco Bay-Delta estuary ("Delta") as the projects exported in the 1980s and 1990s. Review by this Court is not warranted.

STATEMENT OF THE CASE

1. Facts

The delta smelt is a small fish that lives only in the Delta. Pet. App. 34.[3] As recently as the early 1970s, the "delta smelt was one of the most common and abundant pelagic fish" caught in trawl surveys conducted in the Delta by the California Department of Fish and Wildlife. 58 Fed. Reg. 12,854, 12,858 (Mar. 5, 1993). Delta smelt were historically harvested by Native Americans for food, *id.* at 12,860, and "were harvested commercially with other smelt (Osmeridae) and silverside (Atherinidae) species during the 19th and early 20th centuries in a prosperous 'smelt' fishery (Skinner 1962; Sweetnam and others 2001)." 6ER:1248[4] (W. A. Bennett, *Critical Assessment of the Delta Smelt Population in the San Francisco Estuary*, SAN FRANCISCO ESTUARY & WATERSHED SCIENCE (2005)).

As a result of dramatic declines in smelt abundance, FWS listed the smelt as a threatened species under the ESA in 1993, 58 Fed. Reg. 12,854, and critical habitat for the species was designated in 1994. 59 Fed. Reg. 65,256 (Dec. 19, 1994). Despite the ESA's protections, 2009 population estimates were the lowest on record, three orders of magnitude below previous historic lows, prompting FWS to determine that reclassifying the delta smelt from threatened to endangered status was warranted but precluded by higher priority listing actions. Pet. App. 34-35; 75 Fed.

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[3] Citations to Petitioners' Appendix ("Pet. App.") refer to SWC Petitioners' Appendix.

[4] Excerpts of Record ("ER"), lodged with the Ninth Circuit Court of Appeals on December 5, 2011.

Reg. 17,667 (Apr. 7, 2010).[5] The smelt's perilous situation improved in 2011, when abundance indices showed a ten-fold increase, but it has declined since.[6]

The CVP is the largest federal water management project in the United States. Pet. App. 30. Congress enacted the Central Valley Project Improvement Act in 1992 to elevate "mitigation, protection, and restoration of fish and wildlife" as CVP purposes on par with irrigation. *San Luis & Delta-Mendota Water Auth. v. U.S.*, 672 F.3d 676, 683-84 (9th Cir. 2012) (citing CVPIA, Pub. L. No. 102-575, § 3406(a)(1)–(2), 106 Stat. 4706, 4714). The United States Bureau of Reclamation ("Reclamation") operates the CVP in coordination with California's SWP, the "state analogue" to the CVP, overseen by the California Department of Water Resources ("DWR"). Pet. App. 31.

The CVP and SWP are major contributors to the delta smelt's decline. Both operate massive pumping plants in the Delta. *Id*. The plants reverse natural flows in the south Delta, particularly in two channels of the San Joaquin River, the Old and Middle Rivers. *Id*. As a result of these reverse flows, many smelt are killed by "entrainment" by CVP-SWP pumping when pulled into the pumps or into nearby areas harboring predators or possessing other conditions lethal for smelt. 3ER:626-27.

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[5] As a result of "immediate and high magnitude threats" confronting the species, the delta smelt was assigned a listing priority of 2. 75 Fed. Reg. at 17,675. "Warranted but precluded" species are assigned listing priority numbers from 1 to 12, with 1 being the highest priority. *Id*. at 17,674.

[6] https://www.dfg.ca.gov/delta/data/fmwt/Indices/sld002.asp (last visited Dec. 8, 2014).

2. Proceedings Below

This case follows from an earlier challenge to a biop issued by FWS in 2005 concerning the impacts of proposed coordinated CVP-SWP operations on the delta smelt for the next 25 to 30 years, which concluded that these operations, which contemplated significant increases in pumping capacity, would not put the smelt in jeopardy of extinction. Pet. App. 37. Natural Resources Defense Council ("NRDC"), The Bay Institute, and other organizations challenged the 2005 BiOp, and the district court held that it was arbitrary and capricious and that CVP-SWP operations posed jeopardy for the delta smelt. *NRDC v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007). That decision was not appealed.

Following that 2007 decision, the district court directed FWS to complete a new biop within a year and imposed interim remedies to protect the smelt from CVP-SWP operations following an extensive evidentiary hearing with expert testimony. Pet. App. 37-38; *NRDC v. Kempthorne*, 2007 WL 4462391 (E.D. Cal., Dec. 14, 2007) (Interim Remedial Order); *see also* 2007 WL 4462395 (E.D. Cal., Dec. 14, 2007) (Findings of Fact and Conclusions of Law). In its interim remedial orders, the district court imposed limits during certain times of the year on the rate at which the Old and Middle Rivers, the Delta channels that feed the CVP-SWP pumping facilities, could flow backward (denoted as negative cubic feet per second ("cfs")) to minimize the number of delta smelt entrained at the pumping facilities, where smelt perish. 2007 WL 4462395 at *4, *7-*9. These included a flow limit no more negative than -2,000 cfs for ten days during certain "winter pulse flow" events that trigger adult migration before spawning, and a limit

no more negative than -5,000 cfs between January and June when adult and juvenile smelt are at risk of entrainment. 2007 WL 4462391 at *2-*4. The court also adopted a "health and safety exception" to allow the agencies to take "any action in operating the Projects that is reasonably necessary to protect human health or safety of the public." *Id.* at *4. The district court found these actions feasible for the operating agencies to take, based upon the best scientific data available, and narrowly tailored to achieve ESA compliance. 2007 WL 4462395 at *8-9, *15, *21.

When FWS concluded in the 2008 BiOp that proposed future CVP-SWP operations would jeopardize the continued existence of the delta smelt and adversely modify its critical habitat, the agency proposed a reasonable and prudent alternative that closely resembled the district court's interim remedial measures. The RPA includes four seasonal actions requiring CVP-SWP operations to maintain certain flow levels in the Delta to avoid jeopardy to the delta smelt.[7] Actions 1 through 3, like the district court's order, impose reverse Old and Middle River flow limits of -2,000 cfs during winter pulse flow events and -5,000 cfs when delta smelt are vulnerable to entrainment in late winter and spring, and incorporate a "public health and safety exception." 4ER:762. FWS gathered and analyzed a wealth of information in establishing these limits, well beyond the evidence reviewed and

[7] Subsection 7(a)(2) of the ESA prohibits federal agency actions that would jeopardize the continued existence of listed species or result in the adverse modification of such species' designated critical habitat. 16 U.S.C. § 1536(a)(2). For the sake of brevity, "avoid jeopardy" and "jeopardize" will be used herein also to encompass the prohibition on adverse modification of critical habitat.

relied upon by the district court in its interim remedial order. Pet. App. 59-82. Among other things, FWS carefully considered the input of DWR provided before the 2008 BiOp issued, urging FWS to set a cap on reverse Old and Middle River flows at -5,000 cfs. Pet. App. 74-75. DWR explained that "the -5000 cfs the FWS, [Reclamation], and DWR proposed to the District Court last summer should be more clearly explained" and that information provided by DWR and incorporated into the BiOp "clearly shows that when the monthly OMR flows are more negative than about -5,000 cfs, the risk of salvage increases dramatically." *Id.*[8]

RPA Action 4 requires CVP-SWP operations to allow sufficient flows into the Delta in September and October to keep a salinity marker called "X2" no more than 74 kilometers from the Golden Gate in hydrologically "wet" years and no more than 81 kilometers in "above normal" (but lower precipitation than "wet") years, to move juvenile smelt's rearing habitat into broad, shallow waters that foster their survival and growth. Pet. App. 82. "X2" is the zone in which Delta salinity is two parts per thousand, and, at various points in their life cycle, delta smelt congregate around X2, which shifts up- or downstream depending on the amount of fresh water flowing into the Delta. Pet. App. 82-83. Action 4 has only been triggered once, in 2011, the only wet year since the BiOp became effective in December, 2008. The requirements of the action were met in 2011 despite the district court enjoining its implementation, *see In*

[8] "Salvage" is the process at the Projects' pumping facilities where entrained fish are collected in an effort to divert them from entering the pumps, where they are killed. Delta smelt do not survive the salvage process. Pet. App. 257, n.3.

re Cons. Delta Smelt Cases, 812 F. Supp. 2d 1133 (E.D. Cal. 2011) (judgment vacated), *San Luis & Delta-Mendota Water Auth. v. Salazar*, 2012 WL 6929161, (9th Cir., Aug. 23, 2012), because favorable hydrology and requirements that the CVP-SWP release water from upstream reservoirs for other purposes kept X2 in the area prescribed by Action 4.[9]

The RPA offers Reclamation and DWR a manner of complying with the ESA while still providing millions of acre-feet per year of water deliveries to CVP and SWP contractors. Indeed, the CVP-SWP exported more water out of the Delta in 2011 while operating in compliance with the BiOp than the Projects had ever exported previously in the history of the CVP and SWP. *See* n.1, above. On average, compliance with the delta smelt BiOp and the related biop issued by the National Marine Fisheries Service on the impact of CVP-SWP operations on salmon and other listed fish "bring [SWP and CVP Delta exports] back to levels more commonly experienced prior to the year 2000," when Delta exports reached previously historically high levels. *In re Cons. Delta Smelt Cases*, Nos. 1:09-cv-00407, *et al.*, Dkt. 535-4 at internal 14 (filed Feb. 1, 2010) (Congressional Research Service, California Drought: Hydrological and Regulatory Water Supply Issues (Dec. 7, 2009)). The RPA actions did not

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[9] *See* California Department of Fish & Game Consistency Determination (Oct. 14, 2011) (available at http://www.dfg.ca.gov/water/water_operations.html) (last visited Dec. 4, 2014) at 6 of 7 (finding that Action 4 was essentially implemented in 2011 in spite of injunction because "favorable hydrology will result in an X2 location which is the same or nearly the same as what is required in the RPA without the injunction").

exacerbate the impacts of the drought in the 2014 water year.[10]

Once the remanded BiOp issued, Petitioners and other parties filed six lawsuits challenging the 2008 BiOp and its RPA on a variety of grounds, which were consolidated. Pet. App. 42, 46. NRDC and The Bay Institute participated as defendant-intervenors. Pet. App. 37. After extensive proceedings, the district court upheld the BiOp's jeopardy finding but invalidated portions of the RPA in a lengthy summary judgment ruling. Pet. App. 246-506. The district court found that FWS's analyses failed to justify a number of specific requirements of the RPA in various respects. Pet. App. 500-04. In reaching its summary judgment ruling, the district court relied extensively on extra-record evidence admitted over the defendants' objections. Pet. App. 40-41.

On appeal, the court of appeals upheld the BiOp in its entirety. Pet. App. 47. Judge Bybee's opinion for the court rejected Petitioners' argument that "FWS is . . . responsible for balancing the life of the delta smelt against the impact of restrictions on CVP/SWP operations" because "[t]hat balance has already been struck by Congress in the ESA and the Central Valley

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[10] *See* n.2, above (FWS did not issue any determinations in 2014 that affected water operations). RPA Actions 1, 2, and 4 were not implemented in water year 2014. *See* Summary Report on the Transactions of the Smelt Working Group in Water Year 2014, prepared by the Bay-Delta Fish and Wildlife Office, U.S. Fish and Wildlife Service, Sacramento, California (Aug. 2014) at 5 (available at http://deltacouncil.ca.gov/sites/default/files/2014/10/SWG-Final-Report-Water-Year-2014.pdf) (last visited Dec. 5, 2014). RPA Action 3 is automatically triggered when delta smelt larvae are detected in the Delta in spring but did not impose water supply restrictions in excess of other applicable requirements in 2014. *Id.* at 6-7.

Project Improvement Act." Pet. App. 130. However, the court also held that Reclamation was obligated to analyze the impacts of that agency's decision to adopt and implement the RPA under the National Environmental Policy Act ("NEPA"). Pet. App. 148. The court concluded that Reclamation's NEPA analysis is the appropriate place to address the impacts on the human environment of reductions in exports from the Delta, among other potential impacts, and that "the EIS may well inform Reclamation of the overall costs—including the human costs—of furthering the ESA. So informed, Reclamation has the option of seeking an exemption from the ESA from the Endangered Species Committee." Pet. App. 151, 167. NRDC, the only party below to contest Reclamation's NEPA obligation in this context, has not sought further review of that holding, and Reclamation's NEPA analysis of its decision to adopt and implement the RPA and alternatives to that action is underway. Pet. App. 160; *In re Cons. Delta Smelt Cases*, Nos. 1:09-cv-00407, *et al.*, Dkt. 1135, Am. J. at 2 (filed Oct. 1, 2014).

The court of appeals made several other decisions of relevance here, including holding that FWS was well within the bounds of its discretion and rationally supported its proposed -5,000 cfs reverse flow limit. Pet. App. 59-82. The court of appeals also found that FWS amply justified its choice of methodology to identify the impacts of future water project operations on the location of the X2 salinity zone compared to its historical location. Pet. App. 82-101.

Three groups of plaintiff parties, including all parties to the State Water Contractors, *et al.* petition for certiorari, No. 14-402, sought en banc review of the

decision; the petitions were summarily denied, with no judge requesting a vote. Pet. App. 507-12.

REASONS THE PETITION SHOULD BE DENIED

1. There Is No Conflict with the Fourth Circuit.

The court of appeals's decision rests in part on its holding that, under the ESA and its implementing regulations, an RPA must be feasible for the agencies and applicants requesting ESA consultation to implement, but that the consulting fish and wildlife agency need not provide an exhaustive analysis of the economic impacts of the RPA on third parties. Petitioners argue that the court of appeals's decision in this respect is at odds with the Fourth Circuit's decision in *Dow AgroSciences LLC v. Nat'l Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013) ("*Dow*"). SWC Pet. 21-26; S&J Pet. 19-21. But the decisions are not in conflict. *Dow* did not require such an analysis of the economic effects of an RPA, and Petitioners overstate *Dow* in an attempt to create the impression of a conflict.

Petitioners incorrectly claim that *Dow* stands for the proposition that the consulting fish and wildlife agency must conduct an in-depth economic analysis of a proposed RPA on the world at large (what the Ninth Circuit here termed the "downstream economic impacts" of implementing an RPA, Pet. App. 130-31). But that is neither what *Dow* nor the provision of the ESA cited by *Dow* in its discussion of this issue requires. Subsection 7(b)(3)(A) expressly provides that:

> If jeopardy or adverse modification [of critical habitat] 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.

16 U.S.C. § 1536(b)(3)(A) (emphasis added). In other words, Congress has specified that a valid RPA is one that "can be taken by the Federal agency or the applicant," where there is an applicant involved in the ESA section 7 consultation process. Thus, the regulation implementing this statutory requirement is limited to the economic and technological feasibility of the RPA for the federal agency and any applicant seeking the agency action.

As the court of appeals here discussed, FWS's regulations concerning the feasibility of an RPA need to be understood in this statutory context, and the statute's focus on the feasibility of the RPA for the entities who will implement it:

> The whole point of the "reasonable and prudent alternative" is for the FWS to suggest what Reclamation can do to avoid [terminating CVP operations because of subsection 7(a)(2) obligations]. The regulation identifies "economic and technological feasibility" as factors because these go to whether the RPA "*can* be taken by the Federal agency . . . in implementing the agency action," 16 U.S.C. 1536(b)(3)(A) (emphasis added), not to whether restricting CVP activities will affect its consumers.

Pet. App. 129-30.

Dow reflects an entirely consistent application of the same provision in a case where action by private

applicants was at issue. In *Dow*, the pesticide manufacturers seeking reregistration were standing in the shoes of DWR in this case—both were applicants in the context of an ESA consultation,[11] which distinguishes them from the public at large in terms of Congress's directive that "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." 16 U.S.C. § 1536(b)(3)(A) (emphasis added).

Specifically, in *Dow*, the Fourth Circuit found that the National Marine Fisheries Service ("NMFS") completely failed to consider the "feasibility" factor in formulating an RPA on the Environmental Protection Agency's ("EPA") reregistration of three pesticides where plaintiffs were manufacturers of these pesticides seeking reregistration and applicants in the ESA consultation. *Dow*, 707 F.3d at 465-66 (noting that plaintiffs were involved in setting terms of reregistration of pesticides with EPA before consultation on reregistration with NMFS). The *Dow* court pointed to the absence of *any* information in the record on the feasibility of the RPA's buffer requirement, explicitly noting that every RPA "must be a measure that 'can be taken by the Federal agency or applicant in implementing the agency's action.' 16 U.S.C. § 1536(b)(3)(A)." *Id.* at 474. In the face of both NMFS's

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[11] All three plaintiffs in *Dow* were identified as the applicants in the ESA consultation on pesticide reregistration in the biop. NMFS Biological Opinion on Environmental Protection Agency Registration of Pesticides Containing Chlorpyrifos, Diazinon, and Malathion at 18, available at http://www.nmfs.noaa.gov/pr/pdfs/pesticide_biop.pdf (last visited Dec. 2, 2014). DWR was identified as the applicant in the 2008 BiOp at issue here. 3ER:453.

admission that it did not consider the RPA's economic feasibility and of many uncertainties about the buffers and their feasibility for the agency and the applicants, the court found that this aspect of the RPA was not "the product of reasoned decisionmaking" and, thus, arbitrary and capricious. *Id.* at 474-75.

Here, the court of appeals explicitly addressed *Dow* and, in stark contrast to that case, found sufficient evidence in the record supporting FWS's consideration of the RPA's technological and economic feasibility for Reclamation and DWR, the two agencies that sought consultation, to implement. Pet. App. 130-32.

> We note that the Fourth Circuit recently remanded a BiOp to the FWS for failure to evaluate an RPA for its economic and technological feasibility. *Dow AgroSciences*, 707 F.3d at 474-75. We do not read *Dow* to require the FWS to address economic and technological feasibility as a procedural matter. As we read *Dow*, the court was concerned that the FWS had imposed an especially onerous requirement *without any thought for whether it was feasible*.

Pet. App. 127 n.42 (emphasis added). The court of appeals correctly found that the record demonstrates that the RPA is economically and technologically feasible for DWR, the state agency that shares responsibility for implementing the provisions of the RPA that keep its operations from jeopardizing the delta smelt, as well as for the federal agency, Reclamation. Pet. App. 131. The court of appeals noted that the RPA "closely resembles measures in the [district court's] interim remedial order, the feasibility of which was proven in its mid-December 2007 through December 2008 implementation" by DWR

and Reclamation. *Id.* Further, the court of appeals observed that DWR, as applicant, advocated adoption of the RPA's -5,000 cfs OMR flow limit before the BiOp issued, and acknowledged that both DWR and Reclamation had proposed the -5,000 cfs OMR limit to the district court in the 2007 remedy proceedings. Pet. App. 74-75. Clearly, DWR would not advocate a measure that was infeasible for it to adopt.

The Fourth Circuit's decision in *Dow* neither conflicts with the court of appeals decision in this case nor stands for the proposition that Petitioners contend: that FWS has an obligation to estimate and analyze the economic impacts of any suggested RPA on any and all who might potentially be affected by the implementation of an RPA. Petitioners' claim of conflict thus provides no reason for review by this Court.

2. The Law Is Well Settled That FWS Cannot Take Third Party Impacts into Account in Formulating an RPA to Avoid Jeopardy to a Listed Species.

Despite the lack of statutory or case support for their argument that the ESA obligates FWS to assess the economic impacts of the RPA on the public at large, Petitioners urge this Court to overturn its prior decision in *TVA* to allow this result, asserting that "[t]he case thus presents the Court an opportunity to correct the widely held misimpression—based in significant part on language in *TVA v. Hill*, 437 U.S. 153 (1978), that requires this Court's clarification—that the Endangered Species Act requires the Government to protect species at all costs, without regard for the impact on the public." SWC Pet. 20-21. Petitioners offer little rationale for this radical result, other than a misplaced argument that "subsequent

amendments to the Endangered Species Act [were] specifically designed to limit that decision's impact." S&J Pet. 4; *see also* SWC Pet. 29-30. But those 1978 amendments identified two specific arenas where agencies could consider economic impacts, neither of which is at issue here.

The ESA requires that any federal agency proposing an action that may affect a listed species or its designated critical habitat must, in consultation with FWS, ensure that such agency action "is not likely to jeopardize the continued existence of [the species], or result in the destruction or adverse modification" of its critical habitat. 16 U.S.C. § 1536(a)(2). This duty to protect listed species and their critical habitat has long been held to apply regardless of the cost of such protection. This Court has stated time and again that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost," *TVA*, 437 U.S. at 184, concluding that "'the ordinary meaning' of § 7 of the ESA contained 'no exemptions' and reflected 'a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies,'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 670 (2007) (quoting *TVA*, 437 U.S. at 173, 185, 188), and recognizing that the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 698 (1995) (quoting *TVA*, 437 U.S. at 180).

Congress enacted subsection 7(b)(3)(A) of the ESA directing FWS to propose an RPA when jeopardy was found as part of the 1978 amendments to the Act. It provides that, if FWS finds that a proposed agency

action poses jeopardy to a listed species or adverse modification to its critical habitat, FWS must suggest reasonable and prudent alternatives "that would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A). Thus, the statutory requirements for an RPA are (1) that it identify a course of action that will neither jeopardize a listed species nor adversely modify its critical habitat and (2) that the course of action identified is one that can be taken by the agency or the applicant (when an applicant for federal authorization is involved). Subsection 7(b)(3)(A) contains no requirement that FWS investigate the potential economic effects of implementing an RPA on the world at large. This stands in stark contrast to two other sets of provisions in the ESA, which, like subsection 7(b)(3)(A), were enacted as part of the 1978 amendments to the ESA that followed this Court's *TVA* ruling.

The first of these created the exemption process, set forth at subsections 7(e)-(p). 16 U.S.C. § 1536(e)-(p). In these provisions, Congress created a process by which federal agencies, federal license or permit applicants, or state governors can seek an exemption for an action that would otherwise violate subsection 7(a)(2)'s prohibition of federal actions that jeopardize a species. 16 U.S.C. § 1536(g)(1). If an application for an exemption is filed, the Secretary of Interior or Commerce (depending on the species involved) must prepare a report for the exemption committee of high-level officials—established in § 1536(e)—discussing "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 actions consistent with conserving the

species or the critical habitat" and "a summary of the evidence concerning *whether or not the agency action is in the public interest and is of national or regional significance*." 16 U.S.C. § 1536(g)(5)(A), (B) (emphases added). The committee will grant an exemption if at least five of its members determine, among other things, that the benefits of the 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" and that "the action is of regional or national significance." 16 U.S.C. § 1536(h)(1)(A)(ii), (iii).

With the exemption process, Congress created a means by which the ESA's mandate that federal agencies must protect listed species, whatever the cost, can be disregarded for a federal action that would provide significant national or regional benefits, economic or otherwise, to the public. This—not the RPA process, which is specifically designed to carry out the requirements of subsection 7(a)(2)—is the means by which economic impacts can be weighed against the subsection 7(a)(2) mandate, which otherwise "admits of no exception." *TVA*, 437 U.S. at 173.

The ESA's provisions governing the designation of critical habitat for a listed species, as amended in the 1978 ESA amendments, also explicitly require that the economic impacts of such designation be weighed in determining the area to be designated. 16 U.S.C. § 1533. The relevant cabinet secretary must take "into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The secretary may "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits" of

including the area, unless excluding the area would result in the species's extinction. *Id.*

The exemption provisions and the critical habitat provisions plainly demonstrate Congress's conscious decision to require the consideration of broad economic and other impacts in specific provisions of the ESA. The absence of any such requirement in the provisions of subsections 7(a) and 7(b) indicates that Congress did not intend the mandated protection of listed species from federal agency actions to be subject to balancing against general economic harms. "[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." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations, quotation marks omitted).

The conclusion that FWS has no duty to consider the economic impacts of the implementation of an RPA it formulates (beyond the impacts on the federal agency or applicant) is also consistent with the role it is assigned by subsection 7(a)(2), that of providing expert biological advice to other federal agencies in fulfilling their duty to insure that their actions are not likely to jeopardize listed species. The ability to evaluate economic aspects of a proposed activity lies primarily with the action agency. When presented with an RPA, the action agency need not accept it if it thinks the economic consequences of implementing the RPA outweigh the benefits of going forward subject to the RPA's restrictions. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990) (action agency has discretion "whether to implement conservation recommendations put forth by the FWS"). In such a case, the action agency has

other options. In the context of this case, if Reclamation, the action agency, believed that it had another way to operate the CVP that would not jeopardize listed species and that would be better for the agency, for third parties, or otherwise more desirable, it could have asked FWS to reinitiate section 7 consultation on that operations plan as a new agency action. If FWS found the new proposal consistent with section 7, Reclamation could proceed with the operations as modified.[12] If the agency did not have an alternative means of proceeding with its proposed action without violating subsection 7(a)(2), it could seek an exemption under subsection 7(g).

Here, Reclamation will thoroughly consider the impacts of the RPA, as well as alternatives to the RPA, through its evaluation under the National Environmental Policy Act, 42 U.S.C. § 4332 ("NEPA"), of its decision to adopt and implement the RPA, as required by the court of appeals. Judge Bybee noted that this analysis will include an assessment of economic impacts and may well inform Reclamation's future course of action, stating that the NEPA-required "[Environmental Impact Statement] may well inform Reclamation of the overall costs—including the human costs—of furthering the ESA. So informed, Reclamation has the option of seeking an exemption from the ESA from the Endangered Species

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[12] Federal agencies can disregard FWS's advice and adopt a different course of action so long as the alternative action complies with the subsection 7(a)(2) mandate not to jeopardize listed species. *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988) (agency could disregard biop recommendations if it "took alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species").

Committee." Pet. App. 166-67. Reclamation could also use the information generated by the NEPA process to reformulate its operations plan in some other manner than required by the RPA that would avoid jeopardy. The impacts of the RPA on third parties will be publicly explored through NEPA, further undermining the need to distort the ESA in the manner urged by Petitioners in attempting to read a similar requirement into the ESA's consultation provisions.

Petitioners' claimed problems with *TVA* are, at base, expressions of disagreement with what Congress provided in enacting and amending the ESA, any alteration of which lies with Congress, not the judiciary. The federal courts, including this Court, have reaffirmed the applicability of *TVA* numerous times since Congress passed the 1978 amendments to the ESA, and there is no basis for this Court to review the issue. *See, e.g., Nat'l Ass'n of Home Builders*, 551 U.S. at 670; *Babbitt*, 515 U.S. at 698.

3. There Is No Procedural Requirement for FWS to Explain How an RPA Meets the Non-jeopardy Factors.

Petitioners argue that the Administrative Procedure Act creates a procedural requirement for FWS explicitly to address how an RPA meets the three "non-jeopardy" factors identified in FWS's definition of "reasonable and prudent alternatives," even in light of record evidence, as is the case here, that the RPA meets those factors. SWC Pet. 26-28; S&J Pet. 12-16. There is no division of authority on this technical issue of statutory and regulatory construction and no need for the Court to address this issue.

FWS regulations provide:

> *Reasonable and prudent alternatives* refer to alternative actions identified during formal consultation [1] that 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 [sic] 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 (numbering added). The factors numbered 1 through 3 are the "non-jeopardy" factors. Pet. App. 123. The Ninth Circuit correctly determined that this definition does not create a stand-alone requirement, and, even if it did, record evidence supported FWS's decision here. Pet. App. 122-32.

The court of appeals overturned the district court's imposition of a procedural requirement upon FWS, that it document in the record how the RPA satisfied the non-jeopardy factors, holding that section 402.02 is "definitional" and does not create any such procedural requirement.[13] Pet. App. 125. The court of appeals relied on well-established law to reach this ruling, holding that it cannot "impose procedural

[13] The cases that S&J Petitioners cite at 15 of their petition without discussion, regarding disputes "concerning agency interpretations" of terms defined in the Clean Water Act, the Clean Air Act, and the ESA, have no bearing here. "Reasonable and prudent alternative" is not defined in section 3 of the ESA, 16 U.S.C. § 1532 ("Definitions"), so there is no issue here regarding agency interpretations of statutory definitions.

requirements [not] explicitly enumerated in the pertinent statutes." Pet. App. 127 (citing *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008)); *see also Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978) (court must not "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good"). Emphasizing that the jeopardy factor is a statutory requirement of ESA subsection 7(a)(2) that an RPA is expressly prohibited from violating, 16 U.S.C. § 1536(b)(3)(A), the court of appeals properly concluded that, since the ESA does not similarly require the non-jeopardy factors to be addressed, the APA cannot be read to create such a requirement. Pet. App. 127-28.

In further support of its ruling, the court of appeals noted that, under FWS's Section 7 Consultation Handbook, a potential RPA that fails to meet one or more of the non-jeopardy factors must be documented in the biop to show that it was considered. Pet. App. 126; U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook (Mar. 1998), available at http://www.fws.gov/endangered/esa-library/index.html#consultations (last visited Dec. 5, 2014). The court of appeals concluded that, while a biop must always document an RPA's capacity to avoid jeopardy to the species at issue, as avoiding jeopardy is a mandatory requirement of ESA subsection 7(a)(2), "documentation of the non jeopardy factors is only required when the RPA fails to meet a non jeopardy factor." Pet. App. 126.

The court of appeals also recognized that the record evidence demonstrated that the proposed RPA met the non-jeopardy factors. The court pointed to information in the record showing that the RPA is consistent

with the underlying purpose of CVP-SWP operations, consistent with Reclamation's legal authority, and economically and technologically feasible for Reclamation and DWR to implement. Pet. App. 131-32. The court of appeals observed that the RPA's economic and technological feasibility is "nearly self-evident," given that it "closely resembles measures in the [district court's] interim remedial order, the feasibility of which was proven in its mid-December 2007 through December 2008 implementation." Pet. App. 131.

Because the court of appeals' ruling fully comports with the law, the petition for review should be denied.

4. This Case Is Not an Appropriate Vehicle for Determining the Extent to Which an Agency's Interpretation of Its Regulations Is Entitled to Deference.

S&J Petitioners present this case as an occasion to address an alleged circuit split on the issue of whether *Skidmore* or *Auer* deference is owed to an agency's interpretation of its own regulations. S&J Pet. 22-26. The Court should decline this invitation. S&J Petitioners' arguments are all directed at their dissatisfaction with the decision in *Auer v. Robbins*, 519 U.S. 452 (1997), but the court of appeals never mentioned *Auer*, let alone apply *Auer* deference. Instead, the court of appeals applied *Skidmore* deference to FWS's interpretation of its regulations in the Section 7 Consultation Handbook, choosing the standard less deferential to the agency, and still ruled against Petitioners. Resolving any claimed theoretical conflict over these standards here would not change the outcome of this case in a way favorable to Petitioners, and Petitioners have failed to offer any reason to address *Auer* in this case.

FWS's Consultation Handbook provides that if a draft RPA *fails* to meet one of the non-jeopardy elements of the RPA definition, FWS should provide documentation to show that it was considered during the consultation process. Pet. App. 123. The court of appeals found that FWS's interpretation of its regulatory definition of "reasonable and prudent alternatives" in its Consultation Handbook was entitled to *Skidmore* deference to the extent it was "persuasive." Pet. App. 124. The court determined that the Handbook "implies" that no explicit discussion is needed of how non-jeopardy factors are met, and cited the Handbook as further support for its determination that FWS was not required to discuss how the RPA met the three non-jeopardy factors in its regulatory definition of "reasonable and prudent alternatives." Pet. App. 126. The court of appeals looked directly to the language of subsections 7(a)(2) and 7(b)(3)(A) of the ESA and of 50 C.F.R. § 402.02 in reaching its ruling. Pet. App. 122-23, 128. *See* Part 3, above. Nowhere did the court hold that the Handbook controlled its decision.

If the court of appeals applied *Auer* here, S&J Petitioners would be even less likely to prevail in their arguments since FWS's Handbook does not support their position. *Skidmore* holds that "interpretations and opinions" of an agency, "while not controlling upon the courts, do constitute a body of experience and informed judgment" to which a court may look for "guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Auer* deference treats an agency's interpretation of its own regulation as "controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (citations, internal quotations omitted).

The Court should also decline Petitioners' invitation to review this issue because of alleged "serious constitutional concerns" about deference. The cases that S&J Petitioners cite all relate to concerns about *Auer* deference, raised either in dissent or dicta, but *Auer* was not applied here. S&J Pet. 24-25. The "separation of powers" arguments offered about *Auer* deference are irrelevant. *Id.* The court of appeals's use of *Skidmore* deference, looking to FWS's interpretation of its own regulation for guidance, not as controlling law, presents no "separation of powers" problem. The court, not the agency, decides whether the interpretation is persuasive.

5. FWS Observed the ESA's Requirement to Use the Best Scientific Data Available in Formulating the BiOp and Its RPA.

SWC Petitioners ask this Court to review several highly factbound issues involving application of well-settled law to the massive record in this case. SWC Petitioners' arguments do not implicate legal issues that have divided lower courts and the issues raised do not meet the standards justifying a grant of certiorari. The court of appeals properly observed subsection 7(a)(2)'s requirement that FWS must use the best scientific data available, and SWC Petitioners arguments to the contrary do not raise any issues requiring the Court's review.

While SWC Petitioners couch their claims in the ESA's requirement that FWS use the best scientific data available, their actual concern is not about a failure to use the best scientific data available, but rather a disagreement about how FWS chose to utilize that data. Subsection 7(a)(2) requires FWS and any federal agency with which it consults to ensure that the agency's action will not jeopardize any listed

species "to use the best scientific . . . data available." SWC Petitioners, arguing that FWS violated this requirement in creating the delta smelt RPA, ignore the plain language requiring the agencies to use the "best scientific data available," substituting "best available science," and fault FWS for failing to employ the methodology that SWC Petitioners would prefer to apply to that data. SWC Pet. 32-36. As the court of appeals recognized, Petitioners object to FWS's analytical approach, not to a failure to use the best scientific data available. There is no misinterpretation of the "best scientific data available" standard to review.

SWC Petitioners first argue that FWS's use of "raw salvage data"—the actual numbers of delta smelt caught at fish screens at CVP-SWP pumps—as opposed to "normalized" salvage data, which calculates the portion of the estimated total smelt population that raw salvage numbers represent, to establish flow limits to prevent smelt loss violated the "best scientific data available" requirement. SWC Pet. 33-36. The court of appeals reviewed the record evidence supporting the FWS's approach and found that it was appropriate to use this data in order to achieve FWS's goal of reducing "the *absolute* number of smelt entrained at the pumps, not the *relative* number." Pet. App. 66 (emphasis in original). "The current population cannot tolerate direct mortality through adult entrainment at levels approaching even 'moderate' take as observed through the historic record of recent decades." *Id.* (quoting BiOp at 287). The court of appeals observed that, while "the *analytical approach* preferred by [Petitioners]" might more accurately reflect the relative impact of flows on the smelt population, "it is not tailored to protect the maximum absolute number of individual smelt, as

the BiOp's approach is." Pet. App. 66-67 (emphasis added). It correctly found that FWS had discretion to take this conservative approach in the face of "great measurement uncertainty and a smelt population whose existence is threatened." Pet. App. 68. (citing *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983)).

The same is true of SWC Petitioners' arguments about FWS's use of data from two different computer models, DAYFLOW and CALSIM II. Their concerns are not about whether the best scientific data available was used but rather with FWS's methodology in using that data. The court of appeals expressly found that the two models were "the best scientific and commercial data [currently] available," agreeing with the district court. Pet. App. 86-87. The court of appeals thoroughly examined the question of whether FWS's method of using data from the two programs was arbitrary and capricious. Pet. App. 83-94. It concluded that FWS had provided a "reasoned analysis" why it used the data from the two models and that such use of the data was not arbitrary and capricious. Pet. App. 94. Petitioners do not seek review of that ruling in seeking the Court's review of whether FWS relied on an erroneous interpretation of section 7(a)(2)'s "best scientific data available" requirement, nor does it present any important issue warranting the Court's attention.

Finally, SWC Petitioner's cursory argument that review is needed to reverse the court of appeals's decision that the extensive extra-record "expert" testimony offered in the district court was not properly admitted provides no reason to review this case. SWC Pet. 37-38. Although it had appointed four experts to advise the court under Federal Rule of Evidence 706,

the district court admitted over 40 declarations and extensive testimony from experts hired by petitioners and relied heavily on that extra-record evidence in its ruling. Pet. App. 51-54. The court of appeals followed long-standing and well-established principles of administrative law to find the district court's approach improper, turning the case into "a battle of the experts" that gave "the appearance that the administrative record was open and that the proceedings were a forum for debating the merits of the BiOp." Pet. App. 52.

SWC Petitioners simply assert, without citation to particular evidence they think was improperly excluded nor to any law, that extra-record testimony is "often essential" to show that best available science was not considered. Pet. 37-38. Moreover, they fail to explain why the court-appointed experts could not have satisfied any need to determine if FWS used the best scientific data available. Pet. App. 52.

Petitioners' arguments offer no basis for this Court's review, nor do they present any issue of national significance.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

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