Nos. 11-15871, 11-16617, 11-16621, 11-16623, 11-16624

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*

Plaintiffs-Appellees,
and
CALIFORNIA DEPARTMENT OF WATER RESOURCES,
Plaintiff-Intervenor-Appellee,

v.

KENNETH LEE SALAZAR, *et al.* ,
Defendants-Appellants,
and
NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Intervenors-Defendants-Appellants.

Appeal from the U.S. District Court for the
Eastern District of California, No. 09-407, et al.
(Lead Case)

PLAINTIFF-INTERVENOR-APPELLEE DEPARTMENT OF WATER RESOURCES' PETITION FOR REHEARING EN BANC AND JOINDER WITH PLAINTIFFS-APPELLEES STATE WATER CONTRACTORS' ET AL'S PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Ninth Circuit Rules 35-1 through Rule 35-3, the Plaintiff-Intervenor-Appellee California Department of Water Resources (DWR) respectfully petitions the circuit judges of the U.S. Court of Appeals for the Ninth Circuit and requests that the appeal in Case No. 11-15871 be reheard by the Court en banc. As the following will show, rehearing en banc is proper because the majority opinion issued on March 13, 2014 conflicts with decisions of this Court and the U.S. Supreme Court. Rehearing is therefore necessary to secure and maintain uniformity of the Court's decisions and to address questions of exceptional importance.

This appeal involves a multi-party challenge to a biological opinion issued by the U.S. Fish and Wildlife Service (USFWS) under Section 7 of the federal Endangered Species Act (ESA). Section 7 requires that federal agencies engaging in actions likely to jeopardize an ESA-listed species or destroy or adversely modify the species' critical habitat to consult with the appropriate federal fish and wildlife agencies. 16 U.S.C. § 1536(a)(2). That agency must then prepare a regulatory document known as a biological opinion. 16 U.S.C. § 1536(b)(3).

In December of 2008, the USFWS released a biological opinion on the effects of the coordinated operations of the federal Central Valley Project (CVP) and the California State Water Project (SWP) on the threatened Delta smelt (*Hypomesus*

transpacificus) and its critical habitat (BiOp). 3 ER 453. DWR operates the SWP and provides water to approximately 23 million people in California, about 60 percent of the State's population, under contracts with twenty-nine public water entities. 7 ER 1428, 1433. The BiOp's implementation will have "dramatic water supply effects" on the CVP and the SWP. 3 SER 817. DWR has opposed the BiOp and intervened in the six consolidated actions brought against the USFWS and the U.S. Bureau of Reclamation (Bureau) challenging the BiOp. 1 SER 69.

After briefing and hearing, the district court issued a 224 page summary judgment ruling. 1 ER 26. Based upon that ruling, the district court entered judgment that invalidated the BiOp as arbitrary and capricious under the federal Administrative Procedure Act (APA) and the ESA, and remanded the BiOp without vacatur back to the USFWS. 1 ER 1-4. On appeal, this Court issued a three-opinion ruling in which the majority opinion reversed the district court's affirmation of the plaintiffs' ESA challenges to the BiOp, but sustained the National Environmental Policy Act challenge to the Bureau's implementation of the BiOp. *San Luis & Delta-Mendota Water Authority, et al. v. Jewell, et al.*, No 11-1587, slip op. (9th Cir. March 13, 2014) (Slip Op.).

The majority opinion changes the Ninth Circuit and U.S. Supreme Court's standard of review under the APA from a requirement that an agency articulate an explanation for its actions including a rational connection between the facts found

and the choice made to a standard of granting conclusive effect to an agency's finding of fact if the findings are supported by substantial evidence. Further, here, besides the absence of showing a rational connection to facts and choice made, there was a lack of substantial evidence in some of the findings.

DWR is currently working with all Federal, State, and local agencies and interested stakeholders in a collaborative process with a goal towards producing a new biological opinion that is supported by strong science. While DWR strongly supports the success of this process, it is important that the Ninth Circuit resolve these critical questions regarding the proper standard of review under the APA.

SUMMARY OF ARGUMENT

DWR respectfully requests rehearing en banc because the majority opinion issued on March 13, 2014 conflicts with decisions of this Court and of the U.S. Supreme Court in at least two respects.

First, the majority opinion erred by not applying the longstanding APA standard of review and reversing the district court and affirming the BiOp's requirement that the CVP and the SWP restrict project operations to maintain a salinity requirement known as Fall X2 at certain locations in the Sacramento-San Joaquin Delta in the absence of evidence that maintenance of this requirement at those locations would benefit the Delta smelt. Slip Op. at 85-92. The USFWS's failure to explain the reasons for the Fall X2 locations contravenes the

longstanding APA standard for judicial review of agency actions set forth in the U.S. Supreme Court decision in *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual* that "the agency must examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 43 (1983), citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Northwest Resource Information Center v. Northwest Power and Conservation Council,* 730 F.3d 1008, 1020-1021 (9th Cir. 2013); *Ctr. For Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101, 1124-1125 (9th Cir. 2012).[1]

Second, the majority opinion compounded this error by justifying its Fall X2 decision based upon appellate counsel's *post hoc* arguments raised for the first time in briefs filed after the agency decision. It is settled that "courts may not rely on counsel's *post hoc* rationalizations" and that "an agency's action must be upheld, if at all, on the same basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50; *Oregon Natural Desert Ass'n v. Bureau of Land*

[1] The majority's standard of review discussion does not cite to *State Farm Mutual* for this core APA principle. Slip Op. at 43-44. Instead, the majority relies, at least in part, on a non-APA decision arising under the Federal Power Act (FPA). *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003). However, under the FPA, unlike the APA, courts must grant "conclusive effect" to FERC findings of fact if such findings are supported by substantial evidence. *Id.* at 1073, 1076.

Management, 625 F.3d 1092, 1120 (9th Cir. 2010); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1073, n. 9 (9th Cir. 2004).

In addition, DWR joins with the following two arguments raised by the Plaintiffs-Appellees State Water Contractors et al. in their petition for rehearing en banc: 1) the majority opinion erred in failing to apply the abuse of discretion standard to assess the district court's decision to consider extra-record evidence, and 2) the majority erred in holding that the USFWS may specify alternatives to the federal agency action without regard to their economic and technological feasibility as required by the USFWS's regulations.

For these reasons, DWR respectfully requests that this Court grant its petition for rehearing en banc of the panel opinion in the above-entitled appeal.

I. THE MAJORITY OPINION ERRED BY AFFIRMING THE FALL X2 REQUIREMENT NOTWITHSTANDING THE USFWS'S FAILURE TO JUSTIFY THE FALL X2 LOCATIONS AS REQUIRED BY THE APA.

As authorized by Section 7 of the ESA, the BiOp contains reasonable and prudent alternatives (RPAs) which the USFWS contends are necessary to avoid jeopardy to the Delta smelt or adverse modification of its critical habitat. 16 U.S.C. § 1536(b)(3)(A). The BiOp's RPA Action 4 requires the projects to "provide sufficient Delta outflow to maintain average X2 for September and October no greater (more eastward) than 74 km in the fall following wet years and 81 km in the fall following above normal years." 4 ER 835. X2 is a salinity metric of two

parts per thousand and its location is measured by the distance from the Golden Gate Bridge. 3 ER 615. Depending upon water year conditions, implementation of this RPA may cost the CVP and the SWP hundreds of thousands of acre-feet of deliverable water. 3 SER 817-818. The district court considered the Fall X2 RPA and found that the "BiOp has failed to sufficiently explain why maintaining X2 at 74 km (following wet years) and 81 km (following above normal years), respectively, as opposed to any other specific locations, is essential to avoid jeopardy and/or adverse modification." 1 ER 246.

The majority opinion rejected the district court's judgment that the USFWS must explain its reasons for mandating the X2 locations as asking the "wrong question" and "not the district court's responsibility." Slip Op. at 85, 89.[2] The majority erred here for at least two reasons. First, the majority wrongly accused the district court of applying a "least restrictive alternative" test to the district court's analysis of the RPA, a test foreclosed by this Court's decision in *Southwest Center for Biological Diversity v. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998). However, the district court's Fall X2 RPA analysis never used the term "least restrictive alternative," nor did it adopt any equivalent concept in invalidating the RPA. 1 ER 150-151. Instead, the district court explicitly applied

[2] Circuit Judge Arnold declined to join the majority and concluded that "FWS did not sufficiently explain why 74 km and 81 km were selected as critical points for X2 to preserve smelt habitat." Slip Op. at 159.

the *State Farm Mutual* standard that the agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm Mutual,* 463 U.S. at 43; 1 ER 150. The majority opinion therefore has ignored the district court's application of settled U.S. Supreme Court authority, authority that, as will be explained, this Court has fully embraced in other decisions.

Second, the majority opinion wrongly contends that the ESA's "flexible standard" allows the USFWS to adopt numeric requirements, such as the Fall X2 locations, without explaining how the specific requirements are needed to avoid jeopardy to the Delta smelt or adverse modification to the species' habitat. Slip Op. at 90. This reading of the ESA conflicts with at least three Ninth Circuit APA and/or ESA decisions applying *State Farm Mutual* that have required federal agencies to explain how their quantitative mandates are necessary to comply with their statutory obligations.

In *Northwest Coalition for Alternatives v. E.P.A.*, 544 F.3d 1043, 1046 (9th Cir. 2008), this Court applied the *State Farm Mutual* standard and invalidated an Environmental Protection Agency (EPA) determination that reduced the child safety tolerance levels for certain pesticides from a "ten-fold" factor when compared to adult tolerance level to a "three-fold" factor. EPA reached this determination after reviewing the "toxicology data" that "showed no evidence of

greater sensitivity to the young and there was no evidence of abnormalities in the development of the fetal nervous system." *Id.* at 1052. This Court nonetheless overturned the EPA decision because the decision "does not explain the connection between the toxicology data and the 3x margin of safety elected by EPA." *Id.* According to the Court, "it appears that the EPA chose these lower safety levels arbitrarily" because "it is entirely unclear why the EPA chose safety factors of 3x for pymetrozine and acetamiprid and 1x for mepiquat, *as opposed to 4x or 5x or 8x or 9x*." *Id.*, emphasis added. As a result, the EPA decision failed to "provide enough information to demonstrate a rational connection between the factors that EPA examined and the conclusions it reached" as required by the U.S. Supreme Court decision in *State Farm Mutual. Id.*

In *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093-1094 (9th Cir. 2005), this Court again relied upon *State Farm Mutual* and overturned an ESA biological opinion intended to protect the Klamath River fisheries because the National Marine Fisheries Service (NMFS) did not explain how the specific Phases I and II flows, which ranged from 542 to 749 cubic feet per second, "would be protective" of the fisheries. The Court rejected the federal defendants' argument that "the agency is not required to provide quantitative analysis [of the flows], and that the analysis for Phases I and II reflects NMFS's qualitative determination that the RPA would not jeopardize" the

fishery. *Id.* at 1094. Applying the *State Farm Mutual* standard, the Court concluded that "[i]t is not sufficient for the agency to impose these flows without explaining how the flows will protect critical habitat and ensure that sufficient water is in the main stem for coho to survive." *Id.*

Finally in *Humane Society v. Locke,* 626 F.3d 1040, 1048 (9th Cir. 2010), this Court invoked *State Farm Mutual* and overturned a NMFS decision under the Marine Mammal Protection Act, in part, because NMFS had failed to explain its quantitative finding that "California sea lion predation greater than 1 percent would have a significant negative impact on the decline or recovery of the salmonid population." *Id.* at 1048, 1052. Directly applying the *State Farm Mutual* "rational connection" principle, the Court declared that:

> NMFS said only that the 1 percent target "is intended to balance the policy value of protecting all pinnipeds, as expressed in the MMPA, against the policy value of recovering threatened and endangered species, as expressed in the ESA." *Pinniped Removal Authority, 73 Fed. Reg. at 15,486*. This may be a worthy public policy goal, but the agency's explanation does not help us to understand why this level of predation amounts to a "significant negative impact" or how this level of removal is related to the decline or recovery of listed salmonids. Without that explanation, we cannot ascertain whether NMFS has complied with its statutory mandate under the MMPA.

Id. Again, this Court applied the "rational connection" principle to overturn a federal agency's quantitative finding on the grounds that the proffered numeric value had not been "adequately explained." *Id.* at 1053.

In the present appeal, the majority opinion points to no evidence of any "quantitative analysis" that would explain how the numeric Fall X2 values of 74 km during wet seasons, and 81 km during above normal seasons are essential to avoid jeopardy to the Delta smelt or adverse modification of the smelt's critical habitat. *Pacific Coast Federation*, 426 F.3d at 1094. The only "quantitative analysis" discussed by the majority opinion and referenced in the BiOp that discusses the biological benefits to the Delta smelt of a specific X2 location is inapplicable because the study discusses X2 from January through March instead of during the fall, when the BiOp imposes its X2 requirement. Slip Op. at 87; 4 ER 685 (see the portion referencing the "Grimaldo et al (accepted manuscript)"). Moreover, the BiOp notes that the study only "found that prior to spawning entrainment vulnerability of adult delta smelt increased at the SWP and CVP when X2 was upstream of 80 km." Slip Op. at 87; 4 ER 685. Neither the majority nor the USFWS can point to any "quantitative analysis" that explains why either Fall X2 specifically at 74 km during wet years or specifically 81 km during above normal years is essential to avoiding jeopardy or adverse modification of habitat.[3]

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[3] The majority also points to Dayflow historical data showing that "[m]edian historic fall X2 was 79 km." and USFWS graphs that showing that the "range of X2 location was 60-95 km, with most data points between 65-85 km." Slip Op. at 86-87. Accepting the accuracy of this historical data, nothing in these data demonstrate that the 74 km or the 81 km locations are essential for avoiding (continued...)

In *Northwest Coalition,* this Court rejected EPA's numeric toxicology determination as "arbitrary" because EPA could "not explain the connection between the toxicological data and the 3x margin of safety." *Northwest Coalition*, 544 F.3d at 1052. According to the Court, "it is entirely unclear why EPA chose safety factors of 3x for pymetrozine and acetamiprid and 1x for mepiquat, *as opposed to 4x or 5x or 8x or 9x*." *Id.*, emphasis added. In the present appeal it is equally unclear why the USFWS chose as Fall X2 values 74 km during wet years and 81 km during above normal years, *as opposed to 75 km, 76 km, 77 km, 78 km, 79 km, or 80 km*.

As this Court has observed, "[i]t is a basic principle of administrative law that the agency must articulate the reason or reasons for its decision" and as a result an agency's decision stands only "if the agency's path may reasonably be discerned." *Pacific Coast Federation*, 426 F.3d at 1091. The "absence of a cogent explanation by the agency" is fatal under the "rational connection" principle. *Ctr. For Biological Diversity*, 698 F.3d at 1124; *Humane Society,* 626 F.3d at 1049. The majority states that the BiOp is "without the kinds of signposts and roadmaps that even trained, intelligent readers need in order to follow the agency's reasoning." Slip Op. at 52. The USFWS did not explain the reasoning for its choice made in

(...continued)
jeopardy or adverse modification of the species' habitat. 16 U.S.C. § 1536(b)(3)(A).

adopting the 74 km and 81 km locations, which is part of the duty to provide a "reasoned basis" for its decision as required by *State Farm Mutual,* 463 U.S. at 43. DWR therefore respectfully submits that rehearing en banc is appropriate because the majority opinion conflicts with decisions of this Court and the U.S. Supreme Court identified above.

II. THE MAJORITY OPINION ERRED BY RELYING ON *POST HOC* RATIONALIZATIONS CONTAINED IN THE FEDERAL APPELLANTS' BRIEF TO SUPPORT THE FALL X2 RPA

In reviewing the evidence to support the Fall X2 RPA, the majority opinion points to evidence in the administrative record provided by DWR which suggests that locating Fall X2 at 74 km and 81 km is defensible because salinity monitoring stations are adjacent to those locations. Slip Op. at 90-91.[4] However, this argument cannot be used to support the BiOp because the USFWS never advanced this contention in the BiOp or in the BiOp administrative record. The BiOp's "justification" discussion of the Fall X2 RPA does not mention this point. 4 ER

[4] DWR's comments did not conclude that measurements at other locations would be infeasible, only that such measurements would pose "difficulties." 3 SER 896.

839-842. The Federal Appellants only raised the point in their post-decision briefing of this case. Appellants' Opening Br. at 35-36.[5]

Citing to its earlier decision in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), the U.S. Supreme Court in *Burlington Truck Lines v. United States,* 371 U.S. 156, 168-169 (1962), has held that "[t]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *See also State Farm Mutual*, 463 U.S. at 50. This Court has repeatedly confirmed that agencies cannot rely on post-decision arguments in their counsel's briefs to support their decisions. *Humane Society,* 626 F.3d at 1049; *Oregon Natural Desert Assoc.,* 625 F.3d at 1120; *Gifford Pinchot*, 378 F.3d at 1072, n. 9. The majority's reliance on the monitoring station argument is therefore contrary to the decisions of this Court and the U.S. Supreme Court.

CONCLUSION

DWR respectfully requests that the Court grant its petition for rehearing en banc. In addition to the above reasons, resolution of the above described conflict between the majority opinion and the decisions of this Court would serve the

[5] In rejecting the majority's monitoring station argument, Circuit Judge Arnold concluded that "it is undisputed that it was offered for the first time in post-judgment proceedings." (Slip Op. at 159.)

broader public interest purpose of resolving what appear to be systemic conflicts among the Court's decisions regarding the level of judicial deference to be awarded to agency expertise. See Laura Anzie Nelson, *2009 Ninth Circuit Environmental Review: Delineating Deference to Agency Science: Doctrine or Political Ideology*, 40 Envtl. L. 1057, 1097 (2010) ("Based upon voting records and the recorded disagreements within recent opinions, Ninth Circuit judges have demonstrated that the extent of deference to 'agency expertise' is anything but resolved.") For the above reasons, DWR respectfully requests that rehearing en banc be granted.

Dated: May 12, 2014

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