

Case No. 18-15623

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FRIENDS OF THE RIVER,
Plaintiff - Appellant,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,
Defendants - Appellees, and

YUBA COUNTY WATER AGENCY,
Defendant - Intervenor - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

**BRIEF OF *AMICUS CURIAE* WESTERN WATER PROVIDERS IN
SUPPORT OF THE DEFENDANTS AND DEFENDANT-INTERVENOR**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a)(4)(A), *Amicus Curiae*, the Association of California Water Agencies, the Metropolitan Water District of Southern California, the National Water Resources Association, the State Water Contractors, Western Coalition of Arid States, and Western Urban Water Coalition (collectively “Western Water Providers”) hereby files its Corporate Disclosure Statement as follows. None of the amici has a parent corporation or has issued stock.

Dated: October 22, 2018

Respectfully submitted,

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RULE 29 STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amici Curiae, the Association of California Water Agencies, the Metropolitan Water District, the National Water Resources Association, the State Water Contractors, the Western Coalition of Arid States, and the Western Urban Water Coalition (collectively “Western Water Providers”), has consulted with Appellant Friends of the River, the Federal Appellees and the Yuba County Water Agency concerning the filing of this brief. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

Amici represent the vast majority of water agencies in California and throughout the western United States.

1. Association of California Water Agencies (“ACWA”)

ACWA is a non-profit corporation that represents the interests of its over 440 California public water agency members, which range in size from small irrigation districts to some of the largest urban water wholesalers in the nation. ACWA’s members develop, manage, treat, and distribute water to rural communities, farms, industries, and major cities in California, and develop and operate vital flood projects. ACWA coordinates, develops, and implements innovative statewide water policies and initiatives, and routinely represents the collective interests of its member agencies before the California Legislature, and numerous California and Federal

regulatory bodies, as well as supporting these agencies as amicus curiae in judicial matters.

2. The Metropolitan Water District of Southern California (“Metropolitan”)

Metropolitan is a special district organized and existing under the provisions of an Act of the California Legislature, the Metropolitan Water District Act.¹ Its mission is to provide those within its service area adequate and reliable supply of high-quality water to meet present and future needs in an environmentally and economically responsible way. Operating as a consortium of 26 cities and water districts, Metropolitan currently provides an average of 1.7 billion gallons per day of supplemental water supplies to approximately 19 million people who live and work in its 5,200 square-mile service area in Los Angeles, Orange, Ventura, Riverside, San Bernardino, and San Diego counties.

3. National Water Resources Association (“NWRA”)

National Water Resources Association (NWRA) is a nonprofit federation of state water resources associations and special interest caucuses, whose members include irrigation districts, water conservation and conservancy districts, municipal water districts, farmers, ranchers, and others with an interest in water issues in the

¹ Metropolitan is a member of the National Water Resource Association, the Association of California Water Agencies, the State Water Contractors, and the Western Urban Water Coalition.

western United States. The NWRA has member entities in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. With roots that date back to the 1890s, it is the oldest national association concerned with water resources policy and development. One of the primary objectives of the NWRA is to advocate on behalf of western water users for federal government compliance with all applicable state laws and regulations and interstate compacts governing the appropriation, distribution, control, or use of water. It is the position of the NWRA that the Endangered Species Act should not be used as a device to erode states' rights under the law to allocate water resources or to support decisions regarding the reallocation of vested water rights, including stored water.

4. State Water Contractors (“SWC”)

SWC is a non-profit mutual benefit corporation formed under California law to represent the common interests of 27 public agencies throughout California that have vested contractual rights to receive water from the California State Water Project. Collectively, these agencies deliver water to more than 750,000 acres of agricultural lands and 25 million people who live and work within their service areas.

The California State Water Project is the largest state-operated water supply project in the United States and includes 32 storage facilities, reservoirs, and lakes; 17 pumping plants; 3 open canals that collectively stretch from Oroville Reservoir,

a 3.5-million-acre foot reservoir located on the Feather River in the north, to Perris Reservoir, located in Riverside County to the south.

5. Western Coalition of Arid States (“WESTCAS”)

WESTCAS is a coalition including more than one hundred municipal entities in Arizona, California, Colorado, Nevada, New Mexico, and Texas. WESTCAS is dedicated to encouraging the development of water programs and requirements that assure adequate supplies of high quality water for those living in arid regions, while protecting the environment.

6. Western Urban Water Coalition (“WUWC”)

WUWC consists of the largest urban municipal water utilities in the West, serving more than 40 million western water consumers in major metropolitan areas in six western states—Arizona, California, Colorado, Nevada, New Mexico and Washington. WUWC members are charged with providing a reliable, high quality urban water supply for present and future generations in the Western cities. WUWC members own and/or operate a variety of water resource infrastructure that includes reservoirs, dams, canals, diversions, and power facilities. Operating, maintaining, and improving this infrastructure often requires approval from federal agencies and Section 7 consultation on affected species. In addition to Section 7 consultation, WUWC members also participate in regional conservation plans that are designed to mitigate and alleviate the impacts of water use on endangered species. WUWC

advocates for effective and practicable approaches to the implementation of environmental protection programs in a time when water is becoming more scarce and critical to the West's sustainability.

Members of all amici hold water rights and operate water infrastructure that would be affected by the Ninth Circuit's decision. The outcome of this appeal could substantially impact their ability to exercise these rights, to operate and maintain such infrastructure, and as a result, it could impact both the availability and cost of water in the western United States.

Accordingly, pursuant to Fed. R. App. P. 29(a), Western Water Providers offers this brief to emphasize the extent and magnitude of what is at stake in this case: the Ninth Circuit's decision could significantly alter how water projects are planned for, operated, maintained, and constructed in the western United States.

This brief was drafted solely by counsel for the Western Water Providers regarding the underlying facts of the case offered by counsel for Federal Appellees and Defendant-Intervenor. Neither Federal Appellees, Defendant-Intervenor, their counsel, or any other third parties contributed funding for the preparation of this brief. Preparation of this brief was solely funded by the Western Water Providers. No person other than amici or its counsel has made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION

The Western Water Providers submit this brief in support of the Federal Appellees and Yuba County Water Agency.

Collectively, Western Water Providers and their members are charged with managing and providing for the water supply, water resource, and flood control needs of most California residents and a significant portion of its agricultural industry, as well as other water users across the West. To meet these needs, they depend upon, and in many cases, maintain, operate, and own extensive and costly infrastructure projects designed to capture, store, and distribute water supplies. Many of these water projects serve multiple purposes and were authorized under federal and state law, following a careful balancing of multiple interests. In some cases, the realization of certain benefits of these projects may require additional federal action and authorization, subjecting them to the requirements of Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*

Where a proposed federal action is narrow in scope and the agency is not proposing to alter ongoing operations or maintenance of an existing water project, or the statutory authority of the action agency is significantly limited, it is essential that the parameters of the Section 7(a)(2) consultation properly reflect the agency focus. Expanding a consultation to include activities that are not the subject of the federal action or are not subject to federal discretionary involvement or control is

contrary to the ESA's federal implementing regulations, as well as established Supreme Court precedent. Where the relevant authorizing laws and regulations have already considered the need for careful balancing, an overly broad definition of the proposed federal action improperly subjects existing facilities and activities to uncertainty and potentially onerous compliance costs. Where the consultation would require modifications to already established and approved projects, such modifications have the potential to significantly impact the environment through reductions in water supply, increased groundwater pumping and related energy use, increased flood risk, and changes in land use patterns.

This controversy surrounds the Army Corps of Engineers' ("Corps") proposal to undertake a narrowly defined set of activities at two dams in California. Both dams at issue were authorized and developed by a mandate of Congress. The Congressional authorizations provided the Corps with a limited scope of duties and jurisdiction over these dams, which includes maintenance and inspection pursuant to set objective standards. Notably absent is any authorization to remove or significantly modify the dams. Any modifications to alter the scope of the project or change the function or areas or purposes served by the project would require Congressional action.

This case centers on whether a federal agency, in consulting under Section 7(a)(2), must not only analyze the impacts on listed species resulting from the

proposed action, but also analyze and consult on every conceivable action that could be taken with respect to an existing facility, even when those actions have not been proposed and could not be taken in the absence of additional Congressional authorization or additional actions by states and non-federal entities.

This case also concerns the proper scope of the Section 7 “effects of the action” analysis where the proposed action involves existing infrastructure, specifically, a dam. Appellant has alleged that the “effects of the action” analysis must include not only the effects of the proposed federal action itself, but also the effects of the presence of the dam, despite the fact that the dams at issue have been in place for decades. This assertion is at odds with Ninth Circuit precedent establishing that the existing infrastructure is properly included in the “environmental baseline,” to which the effects of the proposed federal action must be added.

Appellant advocates for an impermissibly broad interpretation of Section 7 that would require federal agencies to consult on whether to continue operating and maintaining a previously developed project—here two dams—even when the agency is only proposing to undertake limited actions at the facilities, and even when Congress has clearly delineated the narrow parameters of the agency’s responsibility. Appellant asserts that proposed action must include the realm of possible actions the federal agency theoretically *could* take to protect listed species.

Appellant’s Opening Brief (“Op. Br.”) at 47-48. As part of this strategy, Appellant would also in effect have the federal action agency and reviewing courts disregard the legal mandate to include existing facilities in the environmental baseline. If accepted, Appellant’s position would result in a radical departure from statutory and regulatory mandates, as well as existing case law, that would transform the Section 7 consultation process from assessing the future effects of a specific, proposed action, to an exploratory exercise examining everything a federal agency might do.

The interpretation of Section 7 sought by Appellant is inconsistent with the purpose of the ESA, its regulations, and case law. Pursuant to Section 7, a federal agency’s consultation process is limited to the action *proposed to be taken* by the federal action agency. Specific to this case, Appellant asks this Court to require the Corps to take actions which the Corps has no authority to take, including the complete removal or significant modification of the Daguerre and Englebright dams on the Yuba River. Put simply, this is not the intent and purpose of Section 7.

Briefs filed by Federal Appellants and Intervenor Yuba County Water Agency (“YCWA”) fully analyze and describe why the 2013 Biological Assessment (“BA”) and 2014 Biological Opinion (“BiOp”) and Letter of Concurrence (“LOC”) do not violate the ESA or the Administrative Procedure Act. Western Water Providers adopt the arguments in those briefs and aim to provide additional insight on the

potentially devastating implications for Western Water Providers if the Court adopts the Appellant's position and reverses the District Court.

ARGUMENT

I. Adopting Appellant's Position Regarding The Scope Of A Consultation Could Severely Impact The Ability Of Western Water Providers To Exercise Their Water Rights And Manage And Maintain Water Infrastructure

Collectively, members of amici hold or manage most of the water rights and manage, operate and/or fund and benefit from much of the water resource facilities throughout the Western U.S. These facilities not only provide water for municipal, industrial and agricultural beneficial uses, they also serve flood control, conservation, environmental protection, and energy generation purposes. For many years, and in some instances decades, these facilities have been operated consistent with a variety of state and federal legal requirements. It is important to recognize that this network of reservoirs, dams, conduits, canals, energy facilities, and other infrastructure was not built in a day. Members of amici have, step-by-step, individually and collectively, developed the water infrastructure of the West as it is known today. Because of the significant role of the federal government in the development, maintenance, and operation of water infrastructure in the West, some of the projects and activities undertaken by members of amici may require prior federal approval or authorization.

To illustrate the scope of amici's projects and concerns, water project facilities in each of the fourteen western states represented by amici serving water to more than 100 million people and businesses could be significantly affected by the outcome of this litigation. One example is the 242-mile long Colorado River Aqueduct, which is owned and operated by the Metropolitan Water District and which includes several water storage reservoirs, multiple treatment plants, and an extensive distribution system built over many years and funded by Metropolitan.



Another example, representing the scope of the issues in this case on a regional basis throughout the western states, is in New Mexico, where amici operate numerous dams including: American Diversion Dam, Avalon Dam, Brantley Dam, Caballo Dam, El Vado Dam, Elephant Butte Dam, Heron Dam, Isleta Diversion Dam,

Navajo Dam, San Acacia Diversion Dam and Sumner Dam. For many of these important facilities, there is a limited and clearly defined federal role.



The nature and scope of these projects often spans multiple facilities and regulatory authorities (not all of which are the subjects of federal action). If the scope of the Section 7 consultation over a federal action agency's proposal to approve or undertake activities is interpreted in the broad manner advocated by the Appellant, such expansive consultations would substantially delay the approval of routine maintenance activities and impede the safe and cost-effective operation of critical water infrastructure projects throughout the western states. Such an outcome has the

potential to affect every water resource facility operated by members of amici where federal agency approvals are required.

The operation of these complex water resource facilities involves a balancing of multiple considerations, and for decades, members of amici worked with federal agencies to carefully design their projects and activities and, where needed, seek consultation under Section 7. When the consultation involves activities related to an existing project or facility, Appellant's position would require the Secretary to consider the effects of a wide-ranging scope of activities that the federal agency has not proposed and may lack authority to carry out. The Section 7 consultation process would become meaningless: instead of focusing on how a defined proposed federal action might impact a listed species and habitat, the federal agency would be required to engage in an exercise of exploring with the Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") (collectively "Services") the possible actions that they theoretically *could* take, not the specific actions that the federal agency has actually proposed. This is inconsistent with the plain language and intent of Section 7.

II. Appellant's Position Is Contrary To The Endangered Species Act, Regulations, Guidance, And Case Law

At the core, this case is about a federal agency's ability to define a proposed action subject to Section 7 consultation in the context of actions that involve existing infrastructure. Under Section 7, a federal action agency must consult with the FWS

and/or NMFS regarding impacts of a proposed action to species listed under the ESA. 16 U.S.C. § 1536. To ascertain the scope of these impacts, the agencies compare the proposed action to the environmental baseline, which is defined as “the past and present impacts of all Federal, State, or private actions and other human activities in the action area” 40 C.F.R. § 402.02. Notably, the Section 7(a)(2) consultation duty applies to actions that a federal agency is proposing to authorize, fund or carry out. *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1091 (9th Cir. 2017) (citations omitted). The agency’s proposed actions dictate the scope of the consultation. 50 C.F.R. § 402.14(c); *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1208 (10th Cir. 2014) (“The duty to consult is bounded by the agency action. Consultation is called for to ensure that the *action* does not jeopardize endangered or threatened species”). The consultation duty, in other words, does not apply to the full suite of actions that a federal agency could conceivably undertake, relying, for example, on a federal action agency’s legal authority unrelated to the project at issue.

Appellant’s position hinges upon a misguided interpretation of both the facts of this case and the law. Section 7 is limited to a proposed action by a federal agency and does not include other actions that could have been taken. *Ctr. for Biological Diversity*, 847 F.3d at 1091. The environmental baseline from which to assess a proposed action encompasses any past and present impacts, including the impacts of the previous construction and continued presence of the *Daguerre and Englebright*

dams. See 50 C.F.R. § 402.02; *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 930 (9th Cir. 2008).

A. Section 7 Applies To A Federal Agency’s Proposed Action And Does Not Include Actions That The Agency Has Not Proposed And Is Not Authorized To Undertake

Section 7 applies to “all actions where there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. The inquiry of whether an agency’s action triggers consultation is two-fold, “First, we ask whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. Second, we determine whether the agency had some discretion to influence or change the activity for the benefit of a protected species.” *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1021 (9th Cir. 2012).

Section 7 consultations are limited to the federal agency’s proposed action. 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.14(c)(1). “The dispositive issue is whether there was any ‘action authorized, funded, or carried out’ by a federal agency, that would have triggered the ESA’s consultation requirement” *California Sportfishing Protection Alliance v. F.E.R.C.*, 472 F.3d 593, 594 (9th Cir. 2006) (quoting 16 U.S.C. § 1536(a)(2)). A proposed action does not include actions that an agency could have or even did consider, but it does not propose to take. See *id.* at 595. The proposed action is established by the acting federal agency; NMFS and

FWS do not have the authority to define the boundaries of the proposed action because they do not have unilateral authority. *See* 50 C.F.R. §§ 402.13(b), 402.14(c).

In instances where there are ongoing activities related to a project, Section 7 is triggered only by an affirmative action of the federal agency: “[T]he retention of discretionary control is necessary but insufficient to trigger an agency’s duty to initiate consultation.” *Ctr. for Biological Diversity*, 847 F.3d at 1091 (internal quotation marks and citations omitted). Equally important, even where an agency is involved in operation or maintenance activities at an existing facility, consultation need not include those activities if the agency has no discretion over and is required by statute to undertake such operations. Consultation under Section 7 is not required on non-discretionary actions. *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007).

As an example, in *Grand Canyon Trust v. U.S. Bureau of Reclamation*, this Court held that the Bureau of Reclamation had no discretion regarding the preparation of an annual operating plan for the Glen Canyon Dam. 691 F.3d 1008, 1018-19 (9th Cir. 2012). The statute in question, the Colorado River Basin Project Act, required the Bureau of Reclamation to annually submit a report “describing the actual operation [of the Dam] under the adopted criteria for the preceding compact water year and the projected operation for the current year.” *Id.* at 1018 (citing 43 U.S.C. § 1552(b)). Because the operating criteria had been previously adopted for

this ongoing project, the report served as a routine description of past and planned operations. *Id.* In essence, “the statute requires Reclamation to perform a specific non-discretionary act rather than achieve broad goals.” *Id.* at 1018-19 (quoting *Karuk Tribe*, 681 F.2d at 1024). As such, no Section 7 consultation was required.

Similarly, in *WildEarth Guardians v. U.S. Army Corps of Engineers*, the court held that the Corps had no discretion with respect to the operation of dam facilities for the Middle Rio Grande Project. 314 F. Supp. 3d 1178, 1194-95 (D.N.M. 2018). There, the 1960 Flood Control Act set out clear operational requirements, limiting operation of the dams solely to flood and sediment control, with storage and flows dictated by prescribed standards that detailed, among other things, when the Army Corps could release water, the maximum rate of flow, and how to address fish and wildlife concerns. *Id.* The court concurred with the Corps that these explicit directives left the Corps with no discretion over how to operate the dams. *Id.* at 1196. Consequently, the court concluded that the Corps was not required to consult on its actions under Section 7, because the Corps lacked the authority to implement any mitigation or enhancement measures recommended in the consultation process. *Id.* at 1196-97.

Here, the Corps’ proposed action for the Englebright and Daguerre dams comprises the maintenance of the recreational facilities, administration of outgrants and service contracts, and a variety of conservation measures within the Corps’

prescribed authorities. The Corps is proposing certain activities that are discretionary and is consulting on the impacts of those actions. The Corps has proposed no other discretionary activities related to the dams.

Appellant argues, however, that the proposed action also includes the Corps' regular ongoing maintenance and inspection of the dams. The Corps does perform this regular maintenance and inspection of the dams. As in *Ctr. For Biological Diversity*, however, Appellant is unable to identify where the statute requiring the Corps to inspect and maintain the dams grants the Corps any discretion related to the ongoing maintenance and inspection. *Ctr. For Biological Diversity*, 847 F.3d at 1091.

To avoid the fatal flaw in its argument, Appellant points to a variety of other statutes that are unrelated to the Corps' mandatory duty to maintain and inspect the dams. Op. Br. at 44-47. But Appellant has failed to demonstrate that these statutes give the Corps any discretionary authority to remove or significantly modify the dams; nor can Appellant point to any statutory provisions that would expand the scope of the Corps' proposed action. Fed. Gov't Answering Brief at 35-36. Rather, the Corps' routine maintenance and inspection of the dams are analogous to the non-discretionary duties identified in *Grand Canyon Trust* and *WildEarth Guardians*. Like the statutes in those cases, which obligate the federal agency to perform non-discretionary actions, the Corps is required to perform routine maintenance and

inspection of the dams pursuant to the National Dam Safety Program and established standards. 33 U.S.C. § 467 *et seq.* See Engineer Regulation 110-2-1156 (available at https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/er_1110-2-1156.pdf); Fed. Gov't Answering Brief at 7-8.

The Corps has no discretion over whether to perform routine maintenance and inspection of the dams. Although the required maintenance and inspections that the Corps performs are affirmative actions, the Corps lacks the “discretion to influence or change the activity for the benefit of a protected species.” *Karuk Tribe*, 681 F.3d at 1021.

The District Court correctly recognized that an agency must consult under Section 7 only when it undertakes an affirmative act or authorization. This is particularly important for many amici because they depend on facilities where there is very limited federal discretionary involvement, which, in many cases, does not extend to the ongoing operation or maintenance of project facilities. At many of these facilities, the water rights are held by non-federal entities, and non-federal entities have, with state and in some cases federal authorization, funded and built integrated delivery facilities and infrastructure that are used to serve multiple purposes, including providing municipal water supplies, for flood control, and to provide power.

There are projects throughout the West where the federal facility involved is just one part of a complex network of infrastructure of reservoirs, diversions, canals, pumps, and dams that are operated by state and local agencies. Requiring or even allowing a Section 7 consultation on a discrete aspect of a federal facility to expand into a consideration as to whether that facility should be maintained to continue to perform its functions or significantly altered could have catastrophic water supply consequences, as well as far-reaching financial and environmental consequences, and would inevitably delay implantation of the specific agency action at issue.

B. Section 7 Does Not Require Federal Agencies To Consult On Discretionary Activities That They May—But Do Not Propose—To Take

The federal agency proposing the action defines the scope of the proposed action. *See* 50 C.F.R. §§ 402.13(b), 402.14(c)(1). When initiating consultation, the federal agency shall include “a description of the action to be considered.” 50 C.F.R. § 402.14(c)(1). In formulating a Biological Opinion, the Services analyze the action proposed by the federal agency. 50 C.F.R. § 402.14(g)(4). Nothing in the ESA or its implementing regulations suggests that the Services may define the scope of an agency action. During an informal consultation, the Services may suggest modifications to any action to avoid adverse effects on listed species or critical habitat, but that is the extent of their role in defining the action. 50 C.F.R. § 402.13(b).

Appellant argues that because the Corps purportedly has some discretion to operate and modify the dams under certain statutes, the future effects of the dams' continued existence should be considered part of the proposed action. Op. Br. at 36-36, 44-48. In essence, Appellant seeks to expand the nature and scope of Section 7 consultations to include discretionary activities that an agency *could* or *might* take. This is incorrect.

Section 7 applies to *proposed federal actions*. The availability of discretion, by itself, does not trigger Section 7; instead, the crucial question is whether that regulatory authority is exercised. *Ctr. for Biological Diversity*, 847 F.3d at 1091; *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1108 (9th Cir. 2006) (existing discretion to regulate is insufficient without an action to exercise that discretion).

Adopting Appellant's position would lead to an absurd result. A federal agency should not be required to consult on all the possible actions that it might take. This "would hamstring government regulation in general and would likely impede rather than advance environmental protection." *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1209 (10th Cir. 2014). In the context of water infrastructure in the West, like the dams and associated facilities at issue here, projects often interact and are physically connected, although they are managed by multiple agencies, often with independent purposes. Adopting Appellant's position would create a regulatory

quagmire: An activity requiring federal agency action would require the federal agency to explore all possible actions that it could take, including actions far beyond what is proposed. This position is plainly inconsistent with the scope and intent of the ESA.

And when there is discretion to act, the federal agency may decide whether to exercise that discretion without triggering Section 7. *WildEarth Guardians*, 759 F.3d at 1209 (“[An ESA consultation] cannot be invoked by trying to piggyback nonaction on an agency action by claiming that the nonaction is really part of some broader action.”); *California Sportfishing Protection Alliance*, 472 F.3d at 599 (noting that consultation occurs when agency undertakes discretionary action).

C. The District Court Properly Determined That The Dams Are Included In The Baseline

The environmental baseline includes “the past and present impacts of all Federal, State, or private actions and other human activities in the action area” 50 C.F.R. § 402.02. As stated in the agencies’ Section 7 Handbook: The environmental baseline is the “effects of past and ongoing human and natural factors leading to the current status of the species, its habitat (including designated critical habitat), and ecosystem, within the action area. . . . It does not include the effects of the action under review in the consultation.” *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* (March 1998) at 4-27, available at

https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf

(“Handbook”) at 4-22.

Indeed, this Court has confirmed that existing dams are included in the environmental baseline and should not be analyzed as part of the proposed action. *National Wildlife Federation*, 524 F.3d at 930. *See also Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054-55 (9th Cir. 2013) (The “baseline already appears to account for the aggregate effects of past activities, while future federal and private actions must withstand independent regulatory scrutiny.”); Handbook at 4-27. “[This Court’s] approach does not require NMFS to include the entire environmental baseline in the agency action subject to review.” *National Wildlife Federation*, 524 F.3d at 930 (citations omitted). Instead, the assessment of the proposed action must be “within the context of other existing human activities that impact the listed species.” *Id.*

When an agency is involved in discretionary decisions regarding the operations of a dam, such operational actions should be included as part of the proposed action, while the dam’s development and continued existence are part of the environmental baseline. *Id.* at 930-31. As discussed above, where the ongoing operation, maintenance, and inspection of a dam is non-discretionary, as it the case here, such activities are not included as part of the proposed action. Thus, this Court’s statement in *National Wildlife Federation* that agencies should not be able

to “sweep so-called ‘nondiscretionary’ operations into the environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis,” should be limited to situations where the action agency retains discretion in the operation of the facility at issue and the agency actually proposes to undertake operational activities. *Id.* at 929.

National Wildlife Federation specifically stopped short of concluding that as part of a Section 7 consultation, an agency must mitigate for effects that are not directly or indirectly caused by the discretionary actions that it is proposing. *Id.* at 930-31. This Court carefully explained that NMFS was not required to expand the agency action under review to include independent harms to listed species. *Id.* at 930 (noting that “expose to loss or injury” and “imperil” – the terms used in the definition of “jeopardize” – imply causation, or some new risk of harm, and thus do not require the agency action to include independent or baseline harms to species). Here, the Corps does not retain any discretion (much less, “considerable discretion”) over the ongoing maintenance and inspection of the dams; therefore, such operations are properly part of the environmental baseline along with the dams’ existence.

Also instructive is *California Sport Fishing Protection Alliance*, in which this Court concluded that PG&E’s continued operation of a hydroelectric plant pursuant to a permit was not an affirmative action requiring Section 7 consultation. 472 F.3d 593. There, the Federal Energy Regulatory Commission (“FERC”) granted PG&E a

30-year license to operate the plant, the permitting process was already complete, and PG&E had been operating the plant for almost 20 years. Without any other affirmative action by FERC regarding the operation of the plant, this Court held there was no affirmative action requiring consultation. “The ongoing activity is that of PG&E operating pursuant to the permit. . . . FERC, the agency, has proposed no affirmative act that would trigger the consultation requirement for current operations.” *Id.* at 598. Thus, the alleged proposed action was an ongoing activity and baked into the existing baseline of the area for ESA purposes. Any proposed action that FERC might take in the future would include, as the baseline, that PG&E would continue to operate the plant for the entire 30-year period in the FERC license.

Here, the Corps is engaging in no discretionary action with regard to the dams nor is it proposing any material modification to the dams. *See* Section I.A. The Corps’ routine maintenance and inspections of the dams are carried out pursuant a non-discretionary statutory requirement. *Id.* Like the 30-year FERC license in *California Sport Fishing*, this ongoing maintenance and inspection will continue to occur without any affirmative action or discretionary decision-making from the Corps. In fact, as the Federal Appellees note, the Corps lacks the authority to remove or significantly modify the dams. Fed. Gov’t Answering Brief at 7-8. Because no action is proposed on the dams (and the dams will continue to exist as they are into

the future), they were properly included in the environmental baseline for the proposed action.

As the Federal Appellees explain, the Daguerre and Englebright dams have been in place for decades. Fed. Gov't Answering Brief at 5-7. The Corps inherited the duty to operate and maintain the dams when Congress abolished the California Debris Commission—the federal agency that built the dams—and transferred its authority to the Corps. *Id.* In doing so, Congress did not give the Corps any discretion to remove or significantly modify the dams. To the contrary, Congress has required ongoing non-discretionary maintenance and inspection of the dams.

The Corps' proposed action is the maintenance of recreational facilities, administration of outgrants and service contracts, and a variety of conservation measures, including maintaining fish ladders, sediment management, and the administration of various licenses. ER442, 462. These activities are related to the dams, but do not include discretionary ongoing inspection or maintenance activities or the dams' existence. Any ongoing inspection or maintenance of the dams is non-discretionary and therefore, consistent with *National Wildlife Federation*, should be included in the environmental baseline of the proposed action.

D. Appellant Has Not Established That The Corps' Ongoing Maintenance Of The Dams Or Proposed Action Actually Causes A Take Under Section 9

Appellant has failed to show that the Corps' ongoing maintenance of the dams or proposed actions are actually causing a take in violation of Section 9 of the ESA. NMFS issued an Incidental Take Statement to the Corps for the operation of the Daguerre dam. ER371-377. For the Englebright dam, NMFS determined that an Incidental Take Statement was not required, finding that the Corps' operation of the dam would not adversely affect the listed species. ER1046.

Appellant presents no evidence that the Corps' ongoing maintenance and inspections of the dams is causing a Section 9 take. A causal link, supported by sufficient evidence, is required to establish that an agency action has resulted in a Section 9 take. *Cold Mountain v. Garber*, 375 F.3d 884, 890 (9th Cir. 2004). Instead, Appellant alleges that the Corps should be held liable for take caused by the existence of the dams. Op. Br. at 63. As described above, the Corps has no discretion over the continued existence of the dams. See Section II.A. Rather, the Corps is required to maintain and inspect the dams but does not have the discretion to remove or significantly modify them. As such, if the dams are causing any take, then that take will occur regardless of whether the Corps performs its mandatory inspections and maintenance. Fed. Gov't Answering Brief at 52-53. The Corps cannot be ordered to remove or significantly modify these dams if it does not have the

jurisdiction to do so. See *Platte River Whooping Crane Critical Habitat Maintenance Trust v. F.E.R.C.*, 962 F.2d 27, 34 (D.C. Cir. 1992) (“[the ESA] does not *expand* the powers conferred on an agency by its enabling act”). Therefore, Appellant has not established that the Corps violated Section 9 for the operation, maintenance or the existence of the dams.

CONCLUSION

As described above, Appellant’s characterization of proposed actions and the environmental baseline under Section 7 conflict with the ESA, its implementing regulations and the case law interpreting them. Section 7 consultations should be limited to the action proposed by the federal agency, not the potential actions that the federal agency could take. Existing dams, where a federal agency is not taking action on the dams and especially where, as here a federal agency does not have the discretion to remove or significantly modify the dams, should be included in the environmental baseline.

Adopting Appellant’s position will result in severe impacts and regulatory uncertainty for members of amici, likely cause delays in approving projects and activities and increased costs of or reductions in water supplies. At a minimum, members and the Services would be required to expand limited resources and time on exploring project alternatives that are unrealistic and infeasible.

For the foregoing reasons, the Court should uphold the District Court's order granting summary judgment to the Federal Appellees and YCWA.

Dated: October 22, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g)(1), the undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), in that it is set in a 14-point proportionally spaced typeface and contains no more than 6,187 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013, Times New Roman 14-point font. According to that word count, this brief contains 6,187 or fewer words.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, *Amicus Curiae*, the Association of California Water Agencies, the Metropolitan Water District of Southern California, the National Water Resources Association, the State Water Contractors, Western Coalition of Arid States, and Western Urban Water Coalition (collectively “Western Water Providers”) hereby states that it knows of no cases pending in this Court that are related to this appeal within the meaning of rule 28-2.6.

Dated: October 22, 2018

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