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 U.S. District Court for the Eastern District of California
Case No. 2:16-cv-00818

BRIEF OF *AMICI CURIAE* AMERICAN PUBLIC POWER ASSOCIATION, EDISON ELECTRIC INSTITUTE, MERCED IRRIGATION DISTRICT, NATIONAL HYDROPOWER ASSOCIATION, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, NEVADA IRRIGATION DISTRICT, NORTHWEST HYDROELECTRIC ASSOCIATION, PACIFIC GAS AND ELECTRIC COMPANY, PLACER COUNTY WATER AGENCY, AND PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON IN SUPPORT OF DEFENDANTS-APPELLEES, DEFENDANT-INTERVENOR-APPELLEE, AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for *Hydropower Amici* in support of Defendants-Appellees and Defendant-Intervenor-Appellee state:

American Public Power Association ("APPA") is a national trade organization representing the interests of more than 2,000 community-owned electric utilities throughout the United States. APPA has no parent company or stockholders.

Edison Electric Institute ("EEI") is the association of U.S. investor-owned electric utility companies, international affiliates, and industry associates worldwide. EEI is a 501(c)(6) not-for-profit, non-stock corporation. EEI has no parent company or stockholders.

Merced Irrigation District ("MID") is an irrigation district organized under the laws of the State of California. MID has no parent company or stockholders.

National Hydropower Association ("NHA") is a non-profit trade association that represents and advocates on behalf of the hydropower industry. NHA has 240 members from all segments of the industry. NHA has no parent company or stockholders.

National Rural Electric Cooperative Association ("NRECA") is a non-profit trade association that represents and advocates for over 900 consumer-owned, not-

for-profit electric cooperatives, public power districts, and public utility districts in the United States. NRECA has no parent company or stockholders.

Nevada Irrigation District ("NID") is an irrigation district organized under the laws of the State of California. NID has no parent company or stockholders.

Northwest Hydroelectric Association ("NWHA") is a non-profit trade association that represents and advocates on behalf of the Northwest hydropower industry. NWHA has over 132 members from all segments of the industry. NWHA has no parent company or stockholders.

Pacific Gas and Electric Company ("PG&E") is a corporation organized under the laws of the State of California, with its principal executive offices in San Francisco, California. PG&E is an operating public utility engaged principally in the business of providing electricity and natural gas distribution and transmission services throughout most of Northern and Central California. PG&E Corporation is the holding company parent of PG&E and has a 10% or greater ownership interest in PG&E. PG&E Corporation holds 100% of the issued and outstanding shares of PG&E common stock, which comprises approximately 96% of the total outstanding, voting stock of PG&E. Holders of PG&E's preferred stock hold approximately 4% of PG&E's total outstanding voting stock.

Placer County Water Agency ("PCWA") is a public agency established in 1957 under its own act (the Placer County Water Agency Act) to supply water for

homes, industry, and agriculture within western Placer County. PCWA has no parent company or stockholders.

Public Utility District No. 1 of Snohomish County, Washington is a municipal corporation and consumer-owned electric utility that owns and operates several hydropower projects in Washington State. It has no parent company or stockholders.

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IDENTITY AND INTEREST OF *HYDROPOWER AMICI*

The American Public Power Association ("APPA"), Edison Electric Institute ("EEI"), Merced Irrigation District ("MID"), National Hydropower Association ("NHA"), National Rural Electric Cooperative Association ("NRECA"), Nevada Irrigation District ("NID"), Northwest Hydroelectric Association ("NWHA"), Pacific Gas and Electric Company ("PG&E"), Placer County Water Agency ("PCWA"), and Public Utility District No. 1 of Snohomish County, Washington ("Snohomish") (together "*Hydropower Amici*") represent electric utilities and hydropower project owners and operators from across the nation, as well as others who rely on such projects and other riparian facilities that may be affected by the Court's decision in this case.[1]

APPA is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. It represents public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. APPA advocates and advises on electricity policy, technology, trends, training, and operations. Hydroelectric projects generate nearly 20% of the total generation of APPA

[1] Pursuant to FRAP Rule 29(a)(4)(E), *Hydropower Amici* state that no counsel for any party to this case authored this brief in whole or in part, and no person other than *Hydropower Amici* and their members made monetary contributions to preparation and submission of this brief. All parties have consented to the filing of this brief.

members and a number of APPA members purchase power from federal and non-federal hydropower facilities.

EEI is the association that represents all U.S. investor-owned electric utility companies. EEI's members provide electricity to about 220 million Americans and operate in all 50 states and the District of Columbia, delivering three-quarters of the electricity used by families, businesses, and government agencies throughout the nation. In providing these services, many EEI members rely on hydropower, and many own and operate hydropower projects licensed by the Federal Energy Regulatory Commission ("FERC"). In fact, EEI members comprise the largest group of FERC hydropower project license holders. EEI members also own and operate other electric generation and transmission facilities, located on or near rivers, that could be affected by the outcome of this case.

MID is an irrigation district organized under the laws of the State of California. MID owns, operates and maintains the New Exchequer, McSwain, and Merced Falls dams, reservoirs, and hydroelectric facilities in California. It supplies electric services to commercial, industrial, and residential customers in Eastern Merced County. It also provides affordable irrigation water for its approximately 2,200 local growers.

NHA is a non-profit national association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped

storage, and new hydrokinetic technologies. NHA seeks to secure hydropower's place as a clean, renewable, and reliable energy source that serves national environmental and energy policy objectives. NHA's membership consists of 240 organizations, including public power utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, and environmental and engineering consultants and attorneys.

NRECA is a national service organization for America's electric cooperatives. It represents and advocates for over 900 consumer-owned, not-for-profit electric cooperatives, public power districts, and public utility districts in the United States that provide electric service to approximately 42 million customers across 47 states. NRECA's member cooperatives include 63 generation and transmission ("G&T") cooperatives and 600 distribution cooperatives that purchase hydropower either directly from the hydro generator or through their G&T.

NID is a public agency organized under the provisions of the California Water Code, operating in Nevada and Placer Counties, California. NID is the licensee of the Yuba-Bear Hydroelectric Project, which has a generation capacity of 82.2 megawatts ("MW"). NID also supplies treated drinking water and irrigation water to nearly 25,000 homes, farms, and businesses in Northern California.

NWHA is a non-profit trade association that represents and advocates on behalf of the hydroelectric industry located in U.S. states that comprise the Pacific Northwest. NWHA has 132 members from all segments of the hydroelectric industry. NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region.

PG&E is one of the largest combined natural gas and electric energy companies in the United States. It owns and operates one of the nation's largest investor-owned hydroelectric systems, which is located along 16 river basins that span more than 500 miles in California. PG&E is the owner and operator of 25 FERC-licensed hydroelectric projects. These projects include approximately 100 reservoirs, 66 powerhouses, and extensive appurtenant facilities, such as penstocks, canals, and transmission lines. PG&E's hydroelectric system has a combined generating capacity of nearly 3,900 MW of clean power, which is enough power to meet the needs of nearly four million homes.

PCWA is a California public agency with a broad range of responsibilities and functions, including water resource planning and management, retail and wholesale supply of irrigation water and drinking water, and production of hydroelectric energy. PCWA is the owner and operator of the 224 MW, FERC-

licensed Middle Fork American River Hydroelectric Project, located on the west slope of the Sierra Nevada range primarily in Placer County, California.

Snohomish is a municipal corporation of the State of Washington, formed by a majority vote of the people in 1936 for the purpose of providing electric and/or water utility service. Snohomish is the second largest consumer-owned utility in Washington State and has experienced rapid growth within its service territory in recent years. Snohomish owns and operates several FERC-licensed hydropower projects in Washington State, including the 112 MW Jackson Hydroelectric Project. Snohomish has recently developed two run-of-the-river hydroelectric projects which will generate enough clean energy annually to serve up to 10,000 homes on average.

Hydropower Amici own, operate, and/or rely on generation from federal and non-federal hydropower projects that must operate in compliance with the Endangered Species Act ("ESA"). This case raises the significant question of whether the ESA requires consulting agencies (i.e., the National Marine Fisheries Service ("NMFS") and U.S. Fish and Wildlife Service ("USFWS")) to analyze the effects of pre-existing structures, such as dams, on listed species and critical habitat as part of the agency action when conducting ESA Section 7 consultation. This case also raises a corollary question of whether entities responsible for the operation or maintenance of existing structures are liable for any take of listed

species under Section 9 of the ESA due to non-discretionary activities or the mere passive existence of such structures.

While involving ESA consultation for the continued operation of two federal dams, the case also is highly relevant to owners and operators of non-federal hydropower projects, including FERC-licensed dams. If this Court were to overturn the district court's opinion and hold that ESA Section 7 requires agencies to analyze the effects attributable to existing dams as part of the agency action, rather than as part of the environmental baseline, then federal action agencies like FERC and the consulting agencies could be required to speculate regarding the effects of previously constructed projects as if they do not yet exist—something ESA Section 7 was not intended to do. Moreover, any expansion of the scope of Section 7 consultation to include actions that are beyond the authority of the action agency to control or implement would disrupt FERC's established licensing regime, under which certain actions are non-discretionary and do not trigger an obligation to consult under the ESA. To address the important issues regarding the application of ESA Sections 7 and 9 to federal and non-federal dams, *Hydropower Amici* file this amicus brief in support of Defendants-Appellees and Defendant-Intervenor-Appellee.

ARGUMENT

I. The Federal Action Agency Defines the Scope of the Proposed Action that Is Subject to Section 7 Consultation.

Appellant erroneously argues that NMFS, and not the U.S. Army Corps of Engineers ("Corps") as the agency responsible for the dams, had a duty to define the proposed action for purposes of the Section 7 consultation. Appellant's Opening Br. ("OB") at 29-34. Appellant asserts that NMFS "abdicated" its "responsibility to determine the scope of the action under consultation independently" from the action agency. *Id*. at 29. Appellant's argument must be rejected as it has no support in the ESA, the implementing regulations, or NMFS's ESA Consultation Handbook. USFWS & NMFS, *Endangered Species Consultation Handbook* (1998) ("Consultation Handbook") (ER1618-1762).

Under ESA Section 7, the federal action agency (here, the Corps) has the obligation to ensure that its proposed action does not jeopardize listed species or destroy or adversely modify critical habitat. Specifically, the ESA provides:

> [e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that <u>any action authorized, funded, or carried out by such agency</u> . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat . . . .

16 U.S.C. § 1536(a)(2) (emphasis added). Thus, the duty to consult is dictated and bounded by the proposed agency action. The action agency, and not NMFS,

determines the scope of the proposed action because only the action agency can determine what action it intends to authorize, fund, or carry out.[2]

As a threshold matter, an agency must have discretion to take a particular action in order for that action to necessitate a Section 7 consultation. 50 C.F.R. § 402.03 ("Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control"). The Supreme Court has held that "§ 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions . . . that an agency is required by statute to undertake once certain specified triggering events have occurred." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007) (emphasis in original). Non-discretionary actions are excluded from consideration under ESA Section 7 for two primary reasons. First, an agency action that does not cause jeopardy or adverse modification is not barred by the Section 7(a)(2) prohibitions. 16 U.S.C. § 1536(a)(2). For an action that is taken pursuant to a categorical statutory mandate, the statutory mandate, not the agency action, is the cause of the impacts on listed species. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 769 (2004). Second,

[2] 51 Fed. Reg. 19,926, 19,928 (June 3, 1986) ("The Service performs strictly an advisory function under section 7 by consulting with other Federal agencies to identify and help resolve conflicts between listed species and their critical habitat and proposed actions. As part of its role, the Service issues biological opinions to assist the Federal agency in conforming their proposed actions to the requirements of section 7. However, the Federal agency makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2).").

when an agency undertakes a non-discretionary action, the agency does not have an opportunity to structure the action to avoid jeopardy or adverse modification. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183 (1978) (referring to examples from legislative history); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 n.10 (9th Cir. 1995) ("[o]bviously, without authority to modify [a project], identification of reasonable and prudent alternatives serves no purpose"); *Turtle Island Restoration Network v. NMFS*, 340 F.3d 969, 974 (9th Cir. 2003) (agency's discretionary control must have the ability to inure to the benefit of the species). Accordingly, Section 7 consultation does not apply to an agency's non-discretionary actions and, as in this case, the scope of the consultation is appropriately limited to only those discretionary actions that the action agency proposes to carry out.

Furthermore, as the ESA regulations make clear, the action agency has the sole responsibility to identify the specific action being proposed that will be subject to ESA Section 7 consultation. For example, as a precursor to consultation, the action agency, or a designated non-federal representative, typically prepares a biological assessment evaluating "the potential effects <u>of the action</u>" to determine whether that action is likely to adversely affect listed species or critical habitat. 50 C.F.R. § 402.12(a) (emphasis added). During informal consultation, NMFS "may suggest modifications to the action" that could be implemented to avoid adverse effects. *Id*. § 402.13(b). If these modifications are not adopted, and formal

consultation is necessary, the action agency must submit "[a] description of the action to be considered" to initiate the consultation. *Id*. § 402.14(c)(1) (emphasis added). For proposed actions that are anticipated to take listed species, NMFS will provide an incidental take statement and those reasonable and prudent measures ("RPMs") necessary to minimize the impact of such taking. *Id*. § 402.14(i)(1)(ii). These RPMs "cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes."[3] *Id*. § 402.14(i)(2). All of these provisions clearly demonstrate that it is the action agency's sole responsibility, and not the responsibility of NMFS as the consulting agency, to identify the components of the proposed action for purposes of defining the scope of the Section 7 consultation.[4]

Contrary to Appellant's selective and misleading citations, OB at 29-30, the guidance that NMFS provides in its ESA Consultation Handbook also supports this conclusion. Notably, NMFS states that, during preparation of the biological

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[3] Only when NMFS determines that the proposed action will *jeopardize* continued existence of the species or destroy or adversely modify critical habitat may it provide a reasonable and prudent alternative ("RPA") to the proposed action, if available. 50 C.F.R. § 402.14(h)(3). Even in such cases, any RPA must be "consistent with the intended purpose of the action." *Id*. § 402.02.

[4] *Pacificans for a Scenic Coast v. Cal. Dep't of Transp.*, 204 F. Supp. 3d 1075, 1089 (N.D. Cal. 2016) ("the action agency has complete knowledge of and control over its proposed project. The action agency also bears the risk of significant inaccuracies in its project description: if the action agency undertakes a project other than the one described in the Biological Opinion, it exposes itself to significant civil and criminal liability under the [ESA].").

opinion, "[t]he draft project description may be sent to the action agency for review to eliminate any inaccuracies regarding the scope of the action." Consultation Handbook at 4-15 (ER1713) (emphasis added). This requirement clearly establishes that the responsibility for correctly identifying the scope of the action subject to consultation resides with the action agency. Reinforcing that the scope of consultation is dictated by the action agency, NMFS states that "[t]he Services can evaluate only the Federal action proposed, not the action as the Services would like to see that action modified." *Id*. at 4-33 (ER1731) (emphasis added); *WildEarth Guardians v. U.S. Envtl. Prot. Agency*, 759 F.3d 1196, 1209 (10th Cir. 2014) ("When an agency action has clearly defined boundaries, we must respect those boundaries and not describe inaction outside those boundaries as merely a component of the agency action. . . . [R]equiring consultation on everything the agency might do would hamstring government regulation in general and would likely impede rather than advance environmental protection.").

The district court correctly held that the ESA does not allow NMFS to redefine the proposed agency action. *Friends of the River v. NMFS*, 293 F. Supp. 3d 1151, 1172 (E.D. Cal. 2018) ("the action agency has the final say"). This determination is properly assigned to the action agency, which is in the best position to determine the scope and limitations on its discretionary authority and

what actions it intends to undertake. Accordingly, Appellant's arguments to the contrary must be rejected.

II. Effects of the Construction and Ongoing Existence of a Dam Are Included in the Environmental Baseline.

Case law over recent years has established that the effects to listed species caused by the physical existence of dams are part of the environmental baseline.[5] *See, e.g.*, *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008). Appellant concedes that "the past and present impacts of a dam's existence are part of the environmental baseline," OB at 35 (emphasis omitted), but then argues that this Court should find that "the future expected effects of a dam's existence are not part of the baseline so long as the action agency has some discretion to change the dam's configuration, operation or maintenance in a fashion beneficial to listed species." *Id*. at 36 (emphasis omitted). Appellant's interpretation of Section 7 is incorrect and, if adopted, would necessitate a tortured analysis of theoretical conditions predicated on the absence of pre-existing structures.

Properly understood, the environmental baseline provides the basis for determining whether the effects of the proposed action subject to consultation are

[5] For example, the environmental baseline includes effects from the impacts associated with initial dam construction and the ongoing effects associated with the dam's continued presence, such as blocked fish migration and the existence of a reservoir. The effects associated with the proposed action, such as future operation of a dam, are a separate consideration and can be subject to Section 7 consultation when such operations are being relicensed or approved for an additional term.

likely to jeopardize the species or adversely modify critical habitat.[6] NMFS's regulations specify that:

> The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

50 C.F.R. § 402.02 (emphasis added).[7] The environmental baseline serves as "a 'snapshot' of a species' health at a specified point in time," and is an "analysis of 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." Consultation Handbook at 4-22 (ER1720) (emphasis added); *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir. 2005) (consultation considers what

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[6] 83 Fed. Reg. 35,178, 35,184 (July 25, 2018) ("the environmental baseline is a separate consideration that sets the stage for analyzing the effects of the proposed action on the listed species and critical habitat within the action area by providing the foundation upon which to build the analysis of the effects of the action under consultation.").

[7] *See also* 51 Fed. Reg. at 19,932 ("In determining the 'effects of the action,' the Director first will evaluate the status of the species or critical habitat at issue. This will involve consideration of the present environment in which the species or critical habitat exists, as well as the environment that will exist when the action is completed, in terms of the totality of factors affecting the species or critical habitat. The evaluation will serve as the baseline for determining the effects of the action on the species or critical habitat.") (emphasis added).

"jeopardy might result from the agency's proposed actions in the present and future human and natural contexts").

Contrary to Appellant's argument, the past, present, and future effects attributable to the existence of a previously constructed dam are properly considered as part of the environmental baseline. Here, Daguerre Point Dam was constructed in 1906, and Englebright Dam was constructed in 1941. These actions were completed in the past, and there is no proposed action related to their continued existence.[8] This Court has already considered and squarely resolved this issue when it recognized that dams constitute an "existing human activity," and stated that "the existence of the dams must be included in the environmental baseline."[9] *Nat'l Wildlife Fed'n*, 524 F.3d at 930. Thus, the consultation analysis properly focuses on dam operations "in their actual context," with jeopardy only

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[8] The ESA's consultation obligation does not apply retroactively to dams constructed prior to November 10, 1978. 16 U.S.C. § 1536(c); *see also Idaho Dep't of Fish & Game v. NMFS*, 850 F. Supp. 886, 894 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995).

[9] Appellant's reference to the U.S. Court of Appeals for the Second Circuit's decision in *Cooling Water Intake Structure Coalition* is not to the contrary. OB at 36. That case involved the promulgation of regulatory standards for the operation of cooling water intake structures, not the existence of the structures themselves, and the Second Circuit held that the effects associated with the continued operation of those facilities were "not a 'past' or 'present' impact of previous federal action" for inclusion in the environmental baseline. *Cooling Water Intake Structure Coal. v. U.S. Envtl. Prot. Agency*, No. 14-4645, 2018 WL 4678440, at **18-19 (2d Cir. Sept. 27, 2018).

possible if the "agency action causes some deterioration in the species' pre-action condition." *Id*.

Other courts have also held that the environmental baseline includes the effects associated with the construction and existence of dams and other physical structures. *E.g.*, *In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 632-33 (8th Cir. 2005) (baseline included the permanent physical presence of dams and channel modifications). Recently, the U.S. Court of Appeals for the D.C. Circuit concluded that a biological opinion was flawed when the environmental baseline failed to account for "certain past harms" associated with a hydropower project "that triggered ongoing impacts." *Am. Rivers v. FERC*, 895 F.3d 32, 46 (D.C. Cir. 2018) ("the [USFWS] acted arbitrarily in establishing the environmental baseline without considering the degradation to the environment caused by the . . . Project's operation and its continuing impact."). Thus, a proper jeopardy analysis must include consideration of any environmental degradation caused by the existence of a dam and its continuing impacts, but that does not transmute the ongoing existence of the dam, which is part of the environmental baseline, into part of the proposed action itself. This is a crucial distinction, because Section 7 consultation focuses on the proposed action and its effects on listed species and designated critical habitat.

Furthermore, the inclusion of impacts associated with the existence of a dam in the environmental baseline is consistent with NMFS guidance on how the effects of ongoing water and hydropower projects should be considered during Section 7 consultation on their reauthorization. NMFS's Consultation Handbook states that:

> The total effects of all past activities, *including effects of the past operation of the project*, current non-Federal activities, and Federal projects with completed section 7 consultations, form the environmental baseline[.] To this baseline, future direct and indirect impacts of the operation of the new license or contract period, including effects of any interrelated and interdependent activities, and any reasonably certain non-Federal activities (cumulative effects), are added to determine the total effect on listed species and their habitat.

Consultation Handbook at 4-30 (ER1728) (italics in original, underline added). Thus, "all past activities"—such as the construction of a dam and the effects attributable to its existence—are included in the environmental baseline. The proposed action, which is the subject of NMFS's jeopardy analysis, is analyzed in the context of this baseline.

Separately, Appellant asserts that construction and maintenance of the dams' continued existence is an ongoing action that should be subject to consultation. OB at 41, 43. While contradicted by its own briefing, and contrary to established case law, Appellant's argument also fails because it is not possible to recreate historic conditions to form a hypothetical pre-project environmental baseline. As this Court has stated, "once a project begins, the 'pre-project environment'

becomes a thing of the past. Evaluating the project's effects on pre-project resources is simply impossible." *LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988). Similarly, in a subsequent case involving the relicensing of a hydropower project, the Court recognized that:

> [i]t defies common sense and notions of pragmatism to require [FERC] or license applicants to "gather information to recreate a 50-year-old environmental base upon which to make present day development decisions." . . . To the extent a hypothetical pre-project or no-project environment can be recreated, evaluation of such an environment against current conditions at best serves to describe the current cumulative effect on natural resources of these historical changes.

Am. Rivers v. FERC, 201 F.3d 1186, 1197 (9th Cir. 1999) (rejecting argument that FERC was required to evaluate the proposed action against a theoretical reconstruction of what the impacted habitat would look like had the project never been built).[10] These cases, while not interpreting the ESA, are consistent with the purpose of the environmental baseline in the Section 7 context, which is to provide a "snapshot" of the species' health and environmental conditions that exist at the time of consultation. Because the dams have been constructed, and will continue to exist, the environmental effects associated with their past and ongoing presence are included within the environmental baseline.

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[10] The Court found support in the legislative history of the Federal Power Act, which "noted that [FERC] must take into account existing structures and facilities . . . in relicensing proceedings under section 15." *Id*. at 1196 (quoting HR Conf. Rep. No. 99-934, at 27) (emphasis in original).

Finally, Appellant's assertion that future effects attributable to the dams' construction and existence are not part of the environmental baseline if the Corps has some discretion to change the dams' configuration is equally unavailing. OB at 36. Here, construction of the dams is complete, and the Corps is not proposing to make any modifications to their configuration. Any subsequent modifications are separate and distinct actions that may be subject to Section 7 consultation, and do not incorporate impacts of the already-existing dams into the effects of the later action. For example, as NMFS has explained, if a new turbine will be added to a dam post-construction, the "[o]ngoing effects of the existing dam are already included in the [e]nvironmental [b]aseline and would not be considered an effect of the proposed action under consultation." Consultation Handbook at 4-28 (ER1726). Thus, the effects associated with the past, present, *and future* existence of the dams are required to be described in the environmental baseline when considering the effects of any subsequently proposed federal agency action. As such, NMFS's decision to focus its analysis on effects of the identified operation and maintenance activities was proper.

III. The ESA Does Not Expand an Agency's Discretion Beyond What Is Provided by Its Authorizing Statute.

In arguing that the Corps violated its Section 7 procedural consultation duty, Appellant asserts that the Corps has discretion to modify the dams' configuration and their operation and maintenance. OB at 44. Based on its erroneous

interpretation of the Corps' authority, Appellant seeks to impermissibly expand the scope of the Section 7 consultation to include actions that are beyond the authority of the Corps to control or implement. *Id*. at 42. In addition to the Appellees' and Intervenor's arguments, NMFS Br. at 34-40, Intervenor Br. at 34-48, Appellant's expansive views of agency discretion, and how it applies in the ESA context, must be rejected because the ESA does not expand an agency's discretion or provide additional authority to act beyond what is conferred by the agency's enabling statute.

It is beyond dispute that the ESA Section 7 consultation obligation does not apply to non-discretionary agency actions. 50 C.F.R. § 402.03; *Home Builders*, 551 U.S. at 669. Furthermore, the ESA does not expand an agency's existing authority to require that it do "whatever it takes" to protect listed species. *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992). In *Platte River*, the court considered whether the ESA obligated FERC to impose additional environmental conditions in annual hydropower operating licenses. *Id*. at 33. As the court explained, Section 7 simply "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act." *Id*. at 34 (emphasis in original). Thus, the ESA does not supersede limitations imposed by

an agency's enabling statute, and it does not authorize an agency to go beyond its statutory authority to pursue ESA implementation.

Within this established construct, certain actions with respect to the operation of hydropower projects are non-discretionary and do not trigger an obligation to consult under the ESA. For example, upon the expiration of a project's original license term, FERC will issue an annual license under the same terms and conditions as the existing license to allow for the continued operation of the project until a new license is issued. 16 U.S.C. § 808(a)(1); 18 C.F.R. § 16.18(b). Courts have held that the issuance of an annual license is a "non-discretionary act, in that [FERC] has no choice but to issue the licenses to the existing licensees." *Cal. Trout, Inc. v. FERC*, 313 F.3d 1131 (9th Cir. 2002) (quotation omitted). Such non-discretionary actions do not trigger a requirement to impose additional conditions upon licensees pursuant to other statutes, such as the Clean Water Act or the ESA. *Id*. at 1137-38; *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1020-21 (9th Cir. 2012) (adoption of annual operating plan was non-discretionary action).

Contrary to Appellant's assertions, even when an agency retains discretionary authority over an action, the obligation to consult under ESA Section 7 does not arise until the federal agency takes an affirmative act. OB at 42. For example, FERC's granting of a license to operate a hydropower project is a federal

action that is complete upon issuance of the license, and the continued operation of the project by the licensee is not a federal agency action. *Cal. Sportfishing Prot. All. v. FERC*, 472 F.3d 593, 599 (9th Cir. 2006). Thus, ESA Section 7 does not apply to the continued operation of a project under an existing license absent a subsequent, affirmative exercise of discretionary involvement or control.

As explained above, Appellant's erroneous assertions about the role and application of discretion in the Section 7 consultation process must be rejected. The scope of an agency's discretion only applies when determining whether there is an affirmative proposed action, and does not dictate the scope of any resulting consultation. In the FERC regulatory context, established case law already delineates when consultation is triggered and to what it applies. When addressing Appellant's arguments, the *Hydropower Amici* respectfully urge this Court not to disrupt the existing precedent regarding consultation on federally licensed hydropower projects.

IV. "Take" Can Only Result from Discretionary, Affirmative Actions.

Appellant erroneously asserts that the mere existence of the dams is causing an unlawful take of listed species in violation of ESA Section 9. OB at 61-69. Ignoring established principles of causation and existing case law, Appellant asserts that an entity can be liable for a take when there is no discretion to avoid or cease the relevant action. *Id*. at 68-69. Appellant also argues that the dams block

anadromous fish migration thereby causing "harm" through habitat modification.[11] *Id*. at 64-65. Appellant's arguments fail because a non-discretionary action cannot be considered the legal cause of any take of an ESA-listed species. Furthermore, the passive existence of a previously constructed structure is not a present "act" that would constitute a take.

A. ESA Take Liability Does Not Apply to Non-Discretionary Agency Actions.

Contrary to Appellant's arguments, it is well established that liability under ESA Section 9 requires a plaintiff to demonstrate that a person's act actually and proximately caused a take of the species in question.[12] *E.g.*, *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 700 n.13 (1995); *Aransas Project v. Shaw*, 775 F.3d 641, 656 (5th Cir. 2014) ("[p]roximate cause and foreseeability are required to affix liability for ESA violations"). As the Supreme Court has observed, "an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion not to take." *Home Builders*, 551 U.S. at 667-68 (emphasis in original); *Public Citizen*, 541 U.S. at 767 (proximate cause includes

[11] Appellant's suggestion that the district court erred in failing to consider whether take occurred through the adverse modification of critical habitat is incorrect. OB at 64 n.12. Critical habitat has limited application under the ESA, and effects to areas designated as critical habitat are only considered during Section 7 consultation. 16 U.S.C. § 1536(a)(2).

[12] The term "take" is defined in the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

"considerations of the 'legal responsibility' of actors."). Accordingly, when a federal agency has limited statutory authority over a particular action with no ability to prevent a certain effect, "the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen*, 541 U.S. at 770.

As the district court correctly held, applying *Home Builders* and *Public Citizen* to the present context, the Corps cannot be the legal cause of any take resulting from existence of the dams, assuming take could occur, when it has no discretion to modify or control the actions alleged to be in violation of the Section 9 take prohibition. *Friends of the River*, 293 F. Supp. 3d at 1177; *see also Nat. Res. Def. Council v. Norton*, 236 F. Supp. 3d 1198, 1239 (E.D. Cal. 2017) (agency not liable when it has no discretion over the activities alleged to cause the taking).[13]

This conclusion is further supported by the scope and structure of the ESA itself. The ESA provides two separate mechanisms by which parties can receive authorization for the incidental take of listed species—through a Section 7 consultation or a Section 10 incidental take permit. 16 U.S.C. §§ 1536(o)(2),

[13] One district court has held that *Public Citizen*, as construing the National Environmental Policy Act, does not apply in the ESA context. *Seattle Audubon Soc'y v. Sutherland*, No. C06–1608MJP, 2007 WL 1577756, at *1 (W.D. Wash. May 30, 2007). However, the court failed to recognize that the proximate causation principles articulated in *Public Citizen* have broader application, and have been directly applied to the ESA by the Court in *Home Builders*. *Norton*, 236 F. Supp. 3d at 1238-39; *Friends of the River*, 293 F. Supp. 3d at 1177.

1539(a)(1)(B). Section 7 applies to federal agencies, and applicants seeking federal action, and formal consultation concludes with the issuance of a biological opinion that includes an incidental take statement. 50 C.F.R. § 402.14(i). However, as discussed above, the Section 7 consultation process is only triggered by actions where there is discretionary federal involvement or control. *Id.* § 402.03; *Home Builders*, 551 U.S. at 669. An incidental take permit under Section 10 is only available for activities conducted by non-federal applicants without federal action agency involvement. 81 Fed. Reg. 93,702, 93,703 (Dec. 21, 2016); *Ramsey v. Kantor*, 96 F.3d 434, 439 (9th Cir. 1996) (Section 10 provides the "procedure whereby private parties may apply for and obtain permits authorizing incidental taking"). As a result, the ESA provides no mechanism by which a federal agency can receive take authorization when undertaking a non-discretionary action. Finding that such actions are subject to the Section 9 take prohibition would put federal agencies in the untenable position of incurring liability for actions they must undertake with no ability to seek protection from such liability under the statute.

As the Appellees and Intervenor explain in their briefing, the Corps has no authority to abandon the dams, fail to maintain their safety, or to take unilateral actions to modify their existence. *E.g.*, NMFS Br. at 3-5, 34-38; Intervenor Br. at 43-45. Because these responsibilities are non-discretionary, the Corps has no

ability to address or control any corresponding adverse impacts on the ESA listed species. As such, the Corps' actions regarding the existence and maintenance of the dams cannot be the proximate cause of any alleged take in violation of ESA Section 9.

B. The Passive Existence of a Structure without Injury or Mortality to a Species Is Not Take.

While the district court did not find it necessary to decide this issue, Appellant's assertion that the mere existence of the dams causes a take is insufficient to meet the requirements of Section 9. *See* OB at 64-65. The standard for whether a habitat-modifying activity causes a take is set forth in the regulatory definition of "harm." NMFS defines the term "harm" to mean:

> [A]n act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.[14]

50 C.F.R. § 222.102. This definition provides the exclusive criteria when

[14] Habitat modification or degradation alone does not constitute a taking. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995) (definition of harm "preclude[s] claims that only involve habitat modification without any attendant requirement of death or injury to protected wildlife.") (emphasis in original); *Ariz. Cattle Growers' Ass'n v. USFWS*, 273 F.3d 1229, 1238 (9th Cir. 2001) ("To be subject to section 9, the modification or degradation [1] must be significant, [2] must significantly impair essential behavioral patterns, and [3] must result in actual injury to a protected wildlife species.") (emphasis in original) (citation omitted).

determining whether there is a take of listed fish or wildlife as a result of habitat modification.[15] Thus, Appellant's argument that the dams are causing a take by harassment or by trapping and impeding movement of the listed fish or wildlife is a misdirected attempt to apply an inapplicable standard.[16] OB at 67-68.

Application of the harm criteria demonstrates that the mere passive presence of an existing structure, such as a dam, cannot cause a take. As the threshold criterion, harm can only apply if there is an affirmative "act." *Sweet Home*, 515 U.S. at 700 n.13 ("[E]very term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures wildlife.'") (emphasis added). The cases considering take in the context of a dam or other riverine obstruction are predicated on an "act" which is the alleged cause of the harm. *See, e.g.*, *Alabama v. U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1125 (N.D. Ala. 2006) (insufficient flows released from reservoir); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 880 (D. Ariz. 2003) (draining

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[15] 40 Fed. Reg. 44,412, 44,413 (Sept. 26, 1975) ("By moving the concept of environmental degradation to the definition of 'harm,' potential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish or wildlife.") (emphasis added).

[16] Two recent district court decisions considered similar arguments that a dam could cause take by "trapping or harassment," but instead determined that the appropriate legal issue was whether there was an alleged take under the ESA harm standard. *Our Children's Earth v. Leland Stanford Junior Univ.*, No. 13-CV-00402-EDL, 2015 WL 12745786, at *6 (N.D. Cal. Dec. 11, 2015); *Wishtoyo Found. v. United Water Conservation Dist.*, No. CV 16-3869-DOC, 2017 WL 6940510, at *19 (C.D. Cal. Dec. 1, 2017).

reservoir), *aff'd on other grounds*, 417 F.3d 1091 (9th Cir. 2005); *Friends of Merrymeeting Bay v. Hydro Kennebec, LLC*, 759 F.3d 30, 32-33 (1st Cir. 2014) (passing fish through dam turbines); *Swinomish Indian Tribal Cmty. v. Skagit Cty. Dike Dist. No. 22*, 618 F. Supp. 2d 1262, 1270 (W.D. Wash. 2008) (replacement of tidegate). As NMFS has acknowledged, "simply holding title to a barrier that affects access to the habitat of listed species is not necessarily a take under the ESA." 64 Fed. Reg. 60,727, 60,729 (Nov. 8, 1999). Thus, the passive existence of a decades-old structure does not constitute the present affirmative action necessary to trigger the Section 9 prohibition.[17]

Accordingly, the Appellant has failed to establish that, as a matter of law, the passive existence of the dams constitutes an act that is harming listed species. Furthermore, even if the mere presence of an existing structure could somehow cause a take, which it cannot, the Appellant has failed to show that the existence of the dams causes harm through actual injury or mortality of the listed fish species.

[17] Appellant's reliance on *Our Children's Earth* is not to the contrary. Regarding whether the existence of a dam could cause a take, the Magistrate Judge noted that the defendant did not merely hold title to the dam at issue, but also operated and maintained it. *Our Children's Earth*, 2015 WL 12745786, at *7. While discretionary maintenance and operation activities may constitute an "act" for purposes of the harm inquiry, the passive existence of a dam itself cannot cause a take. To the extent the Magistrate Judge suggested otherwise in *Our Children's Earth*, any such suggestion was in error.

CONCLUSION

For the reasons set forth above, in addition to those stated by the Defendants-Appellees and Defendant-Intervenor-Appellee, *Hydropower Amici* respectfully request that the Court affirm the district court's decision.

Respectfully submitted,

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DATED: October 22, 2018

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Date: Oct 22, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

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Dated at Washington, D.C., this 22nd day of October, 2018.

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ADDENDUM

Addendum Contents

16 U.S.C. § 808. New licenses and renewals

(a) Relicensing procedures; terms and conditions; issuance to applicant with proposal best adapted to serve public interest; factors considered

(1) If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

16 U.S.C. § 1536. Interagency cooperation

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.

16 U.S.C. § 1539. Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j); or

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

18 C.F.R. § 16.18 Annual licenses for projects subject to sections 14 and 15 of the Federal Power Act.

(a) This section applies to projects with licenses subject to sections 14 and 15 of the Federal Power Act.

(b) The Commission will issue an annual license to an existing licensee under the terms and conditions of the existing license upon expiration of its existing license to allow:

(1) The licensee to continue to operate the project while the Commission reviews any applications for a new license, a nonpower license, an exemption, or a surrender;

(2) The orderly removal of a project, if the United States does not take over a project and no new power or nonpower license or exemption will be issued; or

(3) The orderly transfer of a project to:

(i) The United States, if takeover is elected; or

(ii) A new licensee, if a new power or nonpower license is issued to that licensee.

HOUSE CONFERENCE REPORT NO. 99–934

. . . It should be noted that the Commission must take into account existing structures and facilities in imposing section 10 terms and conditions in relicensing proceedings under section 15. The Senate bill contained language to this effect. The conference agreement does not include this language because the conferees feel it is already required by section 10.

The Senate provisions on 'economic impact' were not adopted. Instead, the conference agreement includes a 'need for power' criterion that is much broader than in either the Senate or House bill. The conference agreement would require the Commission to evaluate the relative need of each applicant for the project to serve its customers over the short and long term, including consideration of the reasonable costs and the reasonable availability of alternative sources of power (taking into account conservation and other relevant factors), the effect on the applicant's operating and load characteristics, and the effect on the communities served by the project. By applicants, the conferees mean both the existing licensees and their utility and nonutility challengers.

Customers are to be defined broadly, and are to include both existing and future customers. In a case where an existing licensee is in competition for the project with one of its customers, the existing licensee is not to be permitted to include that customer in its demand projections to the extent that the customer will no longer be served by the existing licensee. Similarly, where an existing licensee is in competition with an independent power producer, the Commission must recognize the possibility that the small power producer may sell the electricity from the project back to the existing licensee.

In many cases, applicants may not be able to directly use all of the power from the project. This will not disqualify an applicant. The conference agreement is not intended to alter current law which permits need to be based, in part, upon sales of power in excess of the applicant's direct consumption. This would, of course, have to take into account the benefits to those purchasing the power, such as a reduction in rates, and would have to be tempered by common sense and our intent that licenses ought to be given to applicants who, among other things, actually need the projects.

The need for power is consistent with the Commission's expansive interpretation of 'need for power' in South Fork II, Inc., 31 FERC section 61,097 (April 25, 1985), and accommodates many of the concerns that led the Senate to include 'economic impact' in the section 15 criteria, and with the concerns which caused the House

not to adopt any economic impact test. However, it is not the conferees' intention for this provision to be used to reward utilities for inefficient management.

This provision also addresses the situation confronted by both existing licensees and competing applicants regarding the availability and cost of replacement or alternative power. This includes consideration of increased fuel and capital costs, such as the expense of building needed new generating capacity, for an applicant's customers due to its failure to obtain the project, as well as the costs of replacement power that has to be purchased from other sources.