

*National Association of Home Builders  
v. Defenders of Wildlife*

**LIMITS ON THE APPLICABILITY OF SECTION 7  
OF THE ENDANGERED SPECIES ACT**

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## I. INTRODUCTION

The Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, was enacted in 1973 to provide a program for the conservation of endangered species and to comply with certain treaties and conventions concerning species of wildlife, fish and plants. *See* 16 U.S.C. § 1531. Since its enactment, the ESA has evolved into one of the nation’s most demanding environmental laws. In *TVA v. Hill*, 437 U.S. 153 (1978), the Supreme Court, in affirming an injunction preventing the completion of the Tellico Dam to protect the snail darter, a species of minnow, stated that the “plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the cost,” and that the ESA “reveals a conscious decision to give endangered species priority over the ‘primary missions’ of Federal agencies.” 437 U.S. at 184-85.

Perhaps the most complex and troublesome provision of the ESA is Section 7(a)(2), 16 U.S.C. § 1536, which imposes both substantive and procedural requirements on federal agencies and, in some cases, non-federal “applicants.” Section 7(a)(2) requires federal agencies to ensure that “any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species” that has been designated as critical. Thus, federal actions may not proceed if they would either jeopardize the existence of a listed species or destroy or adversely modify a listed species’ critical habitat, unless an exemption is granted by Endangered Species Committee. Indeed, this was the legal basis for the injunction that halted construction of the Tellico Dam in *TVA v. Hill*.

In addition, Section 7(a)(2) imposes a procedural obligation to “consult” with the Fish and Wildlife Service (“FWS”), or with NOAA Fisheries-National Marine Fisheries Service (“NMFS”) in the case of marine species,<sup>1</sup> to ensure that the federal action does not violate the provision’s substantive requirements. The procedural requirements of Section 7 are set forth in the joint regulations of FWS and NMFS, codified at 50 C.F.R. Part 402, and are summarized below. A violation of these consultation procedures can lead to an injunction halting the federal action until consultation has been completed. *See, e.g., National Wildlife Fed. v. Nat’l Marine Fisheries Serv.*, 481 F.3d 1224 (9th Cir. 2007) (“The ESA imposes a procedural consultation duty whenever a federal action may affect an ESA-listed species.”) (following *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985); petitions for rehearing pending).

Nevertheless, the applicability of Section 7(a)(2) is limited. On its face, this provision applies only to *federal* actions, and not to non-federal projects and activities. Moreover, by rule, the applicability of Section 7(a)(2) has been limited to activities “in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. As other federal regulatory programs have expanded, however, an increasing number of non-federal activities require some sort of federal permit or approval, or have some other federal nexus that potentially triggers Section 7(a)(2). At the same time, the agencies responsible for administering the ESA have become increasingly aggressive in exploiting the Section 7 consultation process to control how land and water resources are used.

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<sup>1</sup> Where appropriate in context, FWS and NMFS are jointly referred to as the “Services.”

These regulatory problems came to a head in 2005, when the Ninth Circuit of Appeals held that the Environmental Protection Agency (“EPA”) violated Section 7(a)(2) of the ESA when the agency approved the State of Arizona’s NPDES permitting program under Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). *Defenders of Wildlife v. EPA*, 420 F.3d 946, 963-67 (9th Cir. 2005), *rehearing denied*, 450 F.3d 394 (9th Cir. 2006). The Ninth Circuit held that Section 7(a)(2) independently grants authority to federal agencies to act for the benefit of listed species; such authority overrides any conflicting mandates imposed by Congress in other statutes; and any “authorizing action” by a federal agency creates an obligation to exercise this authority. *Defenders of Wildlife*, 420 F.3d at 963-71. Judge Kozinski, who dissented with five other judges from the denial of en banc rehearing, explained that this decision “treats the ESA as superior to all other laws, thereby nullifying a crucial ESA regulation and forcing agencies to violate their governing statutes.” *Id.*, 450 F.3d at 396.

Earlier this year, in an opinion that clarifies the obligations of federal agencies under Section 7(a)(2), the Supreme Court agreed with Judge Kozinski and the other dissenters and reversed the Ninth Circuit. *National Ass’n of Home Builders v. Defenders of Wildlife*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2518 (2007) (“*NAHB*”). In contrast to the Ninth Circuit, the Court deferred to and applied 50 C.F.R. § 402.03, holding that Section 7(a)(2) does *not* apply to federal actions when the agency lacks discretion to consider impacts on listed species. In its opinion, authored by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas, the Court concluded that “[Section 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.” *NAHB*, 127 S.Ct. at 2536.

This is the first time the Supreme Court has addressed the requirements imposed by Section 7(a)(2) of the ESA since *TVA v. Hill* was decided in 1978. The present case differed from the Tellico Dam case because, as the Court recognized, the federal action at issue in that case was a discretionary public works project. The Court explained that, in contrast to *TVA v. Hill*, “the transfer of NPDES permitting authority is not discretionary, but rather is mandated once a State has met the criteria” set forth in Section 402(b) of the Clean Water Act. *Id.* at 2538.

This paper will discuss the Supreme Court’s reasoning in greater detail, as well as the dissenting opinion of Justice Stevens, who was a member of the Court in 1978 when *TVA v. Hill* was decided, and argued that Congress intended that the ESA override all other statutory mandates. To place the Court’s decision in the proper context, the paper will also provide an overview of the relevant provisions of the ESA and the Clean Water Act and summarize the administrative proceedings and litigation before the Ninth Circuit. The paper will also discuss FWS’s practice of using the Section 7 consultation process to regulate private land uses in Arizona, which was the genesis of this litigation and led to the Ninth Circuit’s determination that approval of Arizona’s NPDES program would result in a loss of “conservation benefits” for listed species.

## **II. OVERVIEW OF THE RELEVANT PROVISIONS OF THE CLEAN WATER ACT AND THE ENDANGERED SPECIES ACT**

### **A. The Clean Water Act and the NPDES Program**

#### **1. The National Pollutant Discharge Elimination System Program**

Congress enacted the Clean Water Act to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Congress also stated:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use ... of land and water resources ... . *It is the policy of Congress that States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act.*

33 U.S.C. § 1251(b) (emphasis supplied); *see also Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (the extension of jurisdiction under the Clean Water Act to isolated, intrastate waters “would result in a significant impingement of the States’ traditional and primary power over land and water use”).

Section 301 of the Clean Water Act provides that “the discharge of any pollutant by any person shall be unlawful” except as authorized by one of several regulatory programs established by the Act. 33 U.S.C. § 1311(a).<sup>2</sup> One of the primary regulatory programs established by the Clean Water Act is the National Pollutant Discharge Elimination System (“NPDES”) program, under which the permitting authority (either EPA or an authorized State) issues permits authorizing “the discharge of any pollutant, or combination of pollutants” from point sources. *Id.* at § 1342(a)(1). “Generally speaking, the NPDES [program] requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation’s waters.” *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (summarizing the NPDES program); *see also EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-08 (1976) (describing the Federal Water Pollution Control Act Amendments of 1972 and the requirements imposed under the NPDES program). The effluent discharge limits imposed by NPDES permits are, put simply, either technology-based or water quality-based. *See* 33 U.S.C. §§ 1311(b), 1312(a), 1314(b); *see also Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 109-11 (D.C. Cir.1987) (describing standards created by the Clean Water Act) (“*NRDC I*”).

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<sup>2</sup> A “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” *Id.* at § 1362(12)(A); *see also id.* at § 1362(16). The term “pollutant” is broadly defined to include, *inter alia*, solid waste; industrial, municipal and agricultural waste; sewage sludge; biological and radioactive materials; and sand and cellar dirt. *Id.* at § 1362(6). A “point source” is “any discernible, confined and discrete conveyance.” *Id.* at § 1362(14). Finally, the Clean Water Act defines “navigable waters” as “the waters of the United States, including the territorial seas.” *Id.* at § 1362(7).

The NPDES program originally relied on individual permits issued on a site-specific basis to authorize discharges from sources such as industrial facilities and wastewater treatment plants. Currently, however, many discharges are authorized under general permits, which cover an entire category or group of discharges and are developed by EPA through notice-and-comment proceedings similar to rulemaking. *See generally* 40 C.F.R. § 122.28. General permits are used extensively in permitting storm water discharges produced by various municipal and industrial activities, including construction projects one acre or larger in size. 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26; *see also Texas Indep. Prod. and Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 967-69 (7<sup>th</sup> Cir. 2005) (describing EPA's general permit system for regulating storm water discharges). Facilities seeking coverage under a general permit must submit a notice of intent describing the nature of the facility, where it is located and why the facility qualifies for coverage under the general permit, and must comply with the terms and conditions of the permit. 40 C.F.R. § 122.28(b)(2); *see also Texas Indep. Prod.*, 410 F.3d at 968-69.<sup>3</sup>

Although the NPDES program authorizes EPA (or a State with an approved program) to regulate discharges of pollutants from point sources, it does *not* authorize EPA to regulate the activity from which the discharge results. For example, in striking down EPA regulations authorizing the imposition of non-water quality related conditions in NPDES permits, the District of Columbia Circuit explained that “EPA’s jurisdiction under the operative statute is limited to regulating the discharge of pollutants. Thus, just as EPA lacks authority to ban construction of new sources pending permit issuance, so the agency is powerless to impose permit conditions unrelated to the discharge itself.” *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) (“*NRDC II*”). For the same reason, that court held in *NRDC I* that EPA lacks authority to impose a ban on the construction of a new facility that, when operating, will require an NPDES permit to discharge pollutants. 822 F.2d at 127-31. In short, “the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges – not potential discharges, and certainly not point sources themselves.” *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005); *accord United States v. Mango*, 199 F.3d 85, 93 & n. 7 (2d Cir. 1999) (conditions imposed in permits issued under Clean Water Act Section 404, 33 U.S.C. § 1344, must be related to the discharge).

## 2. The States’ Authority to Administer the NPDES Program

Under the Clean Water Act, each State has the right to administer the NPDES program if the State’s program satisfies the criteria in Section 402(b), which provides in relevant part:

[T]he governor of each State desiring to administer its own permit program for discharges into the navigable waters within its jurisdiction may submit to the Administrator [of EPA] a full and complete description of the program it proposes to establish and administer under State law .... *The Administrator shall approve each such submitted program unless he determines that adequate*

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<sup>3</sup> A large portion of the permits issued by Arizona relate to storm water discharges from construction sites. The “pollutant” is typically loose soil washed from an unstabilized construction site during a period of heavy rain, and the “navigable water” is a desert wash.

*authority does not exist [to administer the program in compliance with nine specific criteria].*

33 U.S.C. § 1342(b) (emphasis supplied); *see also* 40 C.F.R. §§ 123.1(c), 123.61(b); *EPA v. California*, 426 U.S. at 208. Thus, the plain language of the statute indicates that Congress intended that the States administer the NPDES program if the statutory criteria are satisfied. Likewise, Congress' policy statement in 33 U.S.C. § 1251(b) (quoted above) provides that Congress intended the States to implement the NPDES program.

The legislative history also shows that Congress deliberately chose the mandatory "shall/unless" phrasing found in Section 402(b)(2). The bills originally enacted by each house contained different language, with the Senate's bill allowing, but not requiring, EPA to approve State programs. *Compare* H.R. Conf. Rep. No. 92-1465, at 138 (1972) ("[u]nder section 402, the Administrator *can* delegate permit authority to a State if the State program is adequate"; describing Senate Bill 2770 (1972) (emphasis supplied)) *with id.* at 139 ("the Administrator is *required to approve* a submitted State program *unless* he finds that there is not adequate authority ..."; describing House Bill 11896 (1972) (emphasis supplied)). The Conference Committee substituted the House of Representatives' amendment, resulting in Section 402(b)'s mandatory direction. *Id.* at 139.

Based on the plain language of the statute, courts have consistently recognized that EPA lacks discretion to deny approval if a State's program meets the criteria in Section 402(b). For example, in *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297-99 (5th Cir. 1998), the Fifth Circuit squarely addressed the mandatory nature of Section 402(b) in connection with a challenge to EPA's approval of Louisiana's NPDES permitting program. As a condition of approval, EPA required Louisiana to submit proposed permits to the Services, which EPA would veto if either FWS or NFMS determined that the permit would adversely impact listed species. *American Forest*, 137 F.3d at 293-94. The Fifth Circuit held EPA lacked authority under the Clean Water Act to impose conditions to benefit listed species, explaining:

[Section 402(b)'s] plain language directs EPA to approve proposed state programs that meet the enumerated criteria; particularly in light of the command "shall approve," § 304(i) cannot be construed to allow EPA to expand the list of permitting requirements. Applying *Chevron*, we conclude that Congress *has* spoken directly to the precise question at issue: EPA's discretion lies not in modifying the list of enumerated criteria, but simply in ensuring that those criteria are met.

*Id.* at 298 (following *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *see also* *NRDC II*, 859 F.2d at 173-74 (Section 402(b) "commands" EPA to "approve the state permit system" once the statutory requirements are met); *Citizens for a Better Environment v. EPA.*, 596 F.2d 720, 722 (7th Cir. 1979) ("If the state program satisfies the statutory requirements of section 402(b) ... [EPA] must approve the program."); *Save the Bay, Inc. v. Administrator of EPA*, 556 F.2d 1282, 1285 (5th Cir. 1977) ("Unless the Administrator of EPA determines that the proposed state program does not meet these requirements, he must approve the proposal.").

As stated, Section 402(b) contains nine specific criteria that a State's program must satisfy. These criteria relate specifically to administering the NPDES program and do not mention the protection of endangered species. For example, the State's program must contain adequate authority for the State to issue permits that meet minimum regulatory requirements under the Clean Water Act; ensure that the public, affected states and EPA receive notice of permit applications; provide an opportunity for public comment and a hearing on permit decisions; and provide adequate enforcement authority, including authority to impose fines and penalties for violations. 33 U.S.C. § 1342(b)(1)-(9); *see also* 40 C.F.R. §§ 123.21-123.30 (describing the required elements of a State's program submission). In addition, the State program must meet guidelines adopted by EPA under Section 304(i), 33 U.S.C. § 1314(i), which "establish[] the minimum procedural and other elements of any State program" under Section 402, including monitoring, reporting, enforcement, funding and manpower requirements.<sup>4</sup>

In addition, under Section 402(c) of the Clean Water Act, EPA must act on a State's application within 90 days of submission and suspend the issuance of federal permits unless EPA determines that the State permit program does not meet the requirements of Section 402(b) or does not conform to the Section 304(i) guidelines. 33 U.S.C. § 1342(c)(1). EPA's regulation governing the approval process similarly provides that within 90 days of receiving a complete program submission, EPA must approve or disapprove the State's program. 40 C.F.R. § 123.61(b). At that time, businesses requiring a NPDES permit to lawfully discharge pollutants must obtain an individual permit, or coverage under a general permit, under the State's program. 33 U.S.C. § 1342(c).

As the foregoing discussion suggests, EPA does not actually "transfer" or "delegate" authority to the States. Instead, the States administer their own NPDES programs, established under each State's laws, subject to EPA's oversight authority. Following approval, the State must comply with Section 402(b) and EPA's Section 304(i) guidelines. 33 U.S.C. § 1342(b). If a State fails to comply, EPA, after public hearing, may order the State to take corrective action or withdraw approval of its program. *Id.* at § 1342(c). The State also must transmit copies of each permit application to EPA and provide notice to EPA of every action taken concerning an application, including each NPDES permit the State proposes to issue. *Id.* at § 1342(d)(1); 40 C.F.R. §§ 123.43, 123.44. EPA may veto a proposed state permit "as being outside the guidelines and requirements" of the Clean Water Act by objecting in writing within 90 days of the date of the permit's transmittal. 33 U.S.C. § 1342(d)(1); *see also Save the Bay*, 556 F.2d at 1284-87 (discussing the legislative history of the Federal Water Pollution Control Act Amendments of 1972 and the respective roles of EPA and the States in administering the NPDES program).

## **B. The Endangered Species Act and the Section 7 Consultation Process**

### **1. The "No Jeopardy" and "No Adverse Modification" Standards**

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), requires each federal agency, "in consultation with and with the assistance of the Secretary," to ensure that "any action authorized,

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<sup>4</sup> EPA has promulgated regulations containing these guidelines (as well as implementing Section 402(b)), which are codified at 40 C.F.R. Part 123.

funded or carried out” by that agency “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat” designated as critical. The joint regulations promulgated by the Services interpreting and implementing Section 7, codified at 50 C.F.R. Part 402, provide that Section 7 applies “to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. Thus, federal actions may not proceed if they would either jeopardize the existence of a listed species or destroy or adversely modify a listed species’ critical habitat, unless an exemption is granted under Section 7(h), 16 U.S.C. § 1536(h).

The “no jeopardy” and “no adverse modification” standards present high thresholds. Actions that result in adverse effects to a listed species, including deaths of the species’ members, are not prohibited by Section 7. *Interagency Cooperation – Endangered Species Act of 1973, as amended; Final Rule*, 51 Fed. Reg. 19,926, 19,934-35 (June 3, 1986). To “jeopardize the continued existence of” is defined as:

[T]o engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

50 C.F.R. § 402.02. The term “destruction or adverse modification” is similarly defined as:

[A] direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and the recovery of a listed species. Such alterations include, but are not limited to alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

50 C.F.R. § 402.02. The Services explained that the word “both” was included in these definitions “to emphasize that, except in exceptional circumstances, injury to recovery alone would not warrant the issuance of a ‘jeopardy’ biological opinion.” *Interagency Cooperation*, 51 Fed. Reg. 19,934.

The “continued existence” of the species is the key to the jeopardy standard, placing an emphasis on injury to a species’ “survival.” However, significant impairment of recovery efforts or other adverse effects which rise to the level of “jeopardizing” the “continued existence” of a listed species can also be the basis for issuing a jeopardy opinion. ...

Congress intended that the “jeopardy” standard be the ultimate barrier past which Federal actions may not proceed, absent the issuance of an exemption. The commenters’ argument [that an action that would adversely affect recovery of a listed species should be prohibited] would require Federal actions to halt if they

failed to conserve listed species, a result clearly not intended by Congress.

*Id.* at 19,934.

The Ninth Circuit Court of Appeals has held, however, that the regulatory definition of the term “destruction or adverse modification” is invalid because it defines the destruction/adverse modification standard in terms of both survival and recovery, while Section 3(5)(a) of the ESA defines critical habitat as areas which are “essential to the conservation of the species” – a broader concept than survival. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1069-71 (9th Cir. 2004); *see also Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 442-44 (5th Cir. 2001) (finding the definition of the terms “destruction or adverse modification” is invalid on similar grounds in the context of critical habitat designation).

More recently, the Ninth Circuit suggested, but did not hold, that the definition of “jeopardy” may be similarly defective. While acknowledging that the Services’ regulatory definition of “jeopardize the continued existence of” requires that an action “reduce appreciably the likelihood of *both* the survival and recovery of a listed species,” the court held that NMFS must analyze the effects of the proposed action on both survival and recovery because, in exceptional circumstances, adverse effects on a species’ recovery could result in a jeopardy finding. *National Wildlife Fed.*, 481 F.3d at 1238. This ruling was based on the statement in the preamble to the Services’ 1986 rulemaking, quoted above, that “in exceptional circumstances,” injury to recovery alone is sufficient to support a jeopardy finding. *Compare Forest Guardians v. Veneman*, 392 F.Supp.2d 1082, 1083-86 (D. Ariz. 2005) (discussing and distinguishing *Gifford Pinchot*, and concluding that the regulatory definition of “jeopardy” is valid).

## **2. The Basic Requirements of the Consultation Process**

The process by which federal agencies satisfy their obligation to avoid jeopardy under Section 7 is referred to as “consultation.” A federal agency that is proposing a discretionary action initially determines if the proposed action “may affect” listed species or critical habitat. *See* 50 C.F.R. § 402.12(c) & (d). If no listed species or critical habitat will be affected by the action, it may proceed without consultation. *See Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1069-70 (9th Cir. 2005) (affirming “no effect” determinations made by the Army Corps of Engineers).

If the federal agency believes that its proposed action is *not likely to adversely affect* the listed species or critical habitat, the agency may request that FWS<sup>5</sup> concur with its evaluation. If FWS concurs, formal consultation is not required, and no biological opinion is prepared. This is known as informal consultation. *See* 50 C.F.R. §§ 402.13, 402.14(b)(1). If the proposed federal action is *likely to adversely affect* listed species or critical habitat, however, formal consultation is required, during which a more thorough evaluation of the proposed action is undertaken. *Id.* at

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<sup>5</sup> This paper will focus on FWS because that agency was involved in the administrative and legal proceedings that led to the Supreme Court’s decision in *NAHB*. NFMS’s responsibilities under the ESA and its implementing regulations are generally identical to those of FWS, and, therefore, the discussion that follows is also applicable to NMFS.

§§ 402.12(k), 402.14(a).<sup>6</sup> Notably, this requirement applies only to species' habitat that has been formally designated as "critical" under Section 4 of the ESA, and not to land or water bodies that are considered suitable or potential species' habitat. See *Arizona Cattle Growers Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1244 (9th Cir. 2001).

Following the completion of formal consultation, FWS provides a biological opinion to the federal agency. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(g) & (h). In formulating its biological opinion, FWS must use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2). FWS first considers the present environmental baseline within the area affected by the proposed action. The environmental baseline includes (1) the past and present impacts of all activities (whether federal, state or private) in the action area, (2) the anticipated impacts of all proposed federal projects in the action area that have already undergone consultation, and (3) the impact of any state or private actions which are contemporaneous with the subject consultation. 50 C.F.R. § 402.02 (definition of "effects of the action"). FWS then evaluates the "effects of the action," which includes both the direct and indirect effects of the action that is subject to consultation. *Id.*

The effects of the proposed action, together with any cumulative effects, are then measured against the environmental baseline:

[A] project passing muster under § 7 is in effect allocated the right to consume (and is presumed to utilize) a certain portion of the remaining natural resources of the area. It is this "cushion" of remaining natural resources which is available for allocation of projects until the utilization is such that any further use may be likely to jeopardize a listed species or adversely modify or destroy its critical habitat. At this point, any additional federal activity in the area requiring a further consumption of resources would be precluded under § 7.

*Cumulative Impacts Under Section 7 of the Endangered Species Act*, Solicitor's Op. M-36938, 88 I.D. 903, 907 (1981).

If FWS ultimately determines that the proposed action is likely to jeopardize a listed species or adversely modify its critical habitat, FWS must suggest reasonable and prudent alternatives that can be taken to avoid a violation of Section 7(a)(2). 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(g) & (h). A reasonable and prudent alternative must be consistent with the intended purpose of the action, be implemented consistent with the federal agency's legal authority and jurisdiction, and be economically and technologically feasible. 50 C.F.R. § 402.02 (definition of "reasonable and prudent alternatives"); see also *Interagency Cooperation*, 51 Fed. Reg. at 19,937. To ensure that these criteria are met, FWS is required to utilize the expertise of the federal agency and any applicant in identifying alternatives. 50 C.F.R. § 402.14(g).

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<sup>6</sup> Most consultations are concluded informally. During fiscal year 1999, for example, FWS informally consulted on about 12,000 actions, while conducting 83 formal consultations and issuing one "jeopardy" opinion. Terry Rabot, The Federal Role in Habitat Protection, *Endangered Species Bulletin* 11 (Nov./Dec. 1999), available at <http://www.fws.gov/endangered/esb/99/11-12/10-11.pdf> (visited Sept. 9, 2007).

The statutory time limit for Section 7 consultation is 90 days or such time as is mutually agreed to between the federal agency and FWS. 16 U.S.C. § 1536(b)(1)(A). Within 45 days from the completion of consultation, the biological opinion must be issued. 50 C.F.R. § 402.14(e). As a practical matter, the 135-day time limit is often exceeded, especially in the case of complex Federal actions.

If a “jeopardy” biological opinion is issued, the federal agency technically may proceed with the proposed action. *Cf. Tribal Village of Akutan v. Hodel*, 869 F.3d 1185, 1193-94 (9th Cir. 1988) (the Interior Secretary’s failure to adopt NMFS’s reasonable and prudent alternative does not violate ESA Section 7(a)(2)). The Supreme Court has recognized, however, that a biological opinion “alters the legal regime to which the action agency is subject,” and exposes the agency (as well as any permit or license applicant) to potential liability. *Bennett v. Spear*, 520 U.S. 154, 169-70 (1997). When there are no viable reasonable and prudent alternatives to avoid jeopardy, the agency is faced with either terminating the proposed action or applying for an exemption from the Endangered Species Committee.<sup>7</sup>

As explained above, a proposed action that may adversely affect a listed species or its critical habitat does not violate the Section 7 “no jeopardy” standard, even if the action is likely to kill or injure members of a listed species. Such action, however, would likely violate Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B), and would be prohibited. *See, e.g., Arizona Cattle Growers*, 273 F.3d at 1237-38. Consequently, the prohibition against the taking of listed species found in Section 9 could prevent an action from going forward even though Section 7 consultation has been completed and the effects of the action do not rise to the level of jeopardy. To eliminate this conflict, Congress amended the ESA in 1982 by authorizing incidental take statements to be issued under Section 7. 16 U.S.C. § 1536(b)(4) & (o). An incidental take statement acts like a permit, authorizing the taking of members of listed species notwithstanding the prohibition found in Section 9, provided that the statement’s terms and conditions are followed. *See Arizona Cattle Growers*, 273 F.3d at 1239-42 (explaining the relationship between incidental take statements and Section 7 consultation).

### **3. Three Key Definitions That Affect the Scope of Consultation**

Many of the difficulties currently encountered in the consultation process result from overbroad or erroneous descriptions of the federal action, the geographic area considered in determining the environmental baseline, or the scope of the effects analysis. The manner in which these concepts are applied in a particular consultation can lead to a dramatic expansion in the scope of the consultation and, in extreme cases, the regulation of private activities by imposing requirements that exceed the permitting agency’s regulatory jurisdiction.

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<sup>7</sup> The Endangered Species Committee is chaired by the Secretary of the Interior, and includes cabinet-level officials and a presidential appointee representing each State affected by the application. 16 U.S.C. § 1536(e). Following a threshold investigation and a hearing, the committee may grant the exemption if it determines that there are no reasonable and prudent alternatives available; the benefits of action outweigh the benefits of alternative courses and are consistent with conserving the species or its critical habitat; and the action is in the public interest and is of regional or national importance. *Id.* at § 1536(g) & (h).

The regulatory definition of the term “action” is broadly defined, and includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.” 50 C.F.R. § 402.02 (definition of “action”). The term includes “the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid.” *Id.* Consequently, the issuance of various federal permits and approvals in connection with developing private land may trigger consultation. However, the “action” must be federal in nature. As explained above, Section 7 does not apply to non-federal activities. Moreover, the definition of “action” is qualified by 50 C.F.R. § 402.03, which limits the application of Section 7 “to all actions in which there is discretionary Federal involvement or control.”

Properly delimiting the “action area,” another term defined in 50 C.F.R. § 402.02, is also important. This term is defined as “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” Note that this term is not defined on the basis of the project, but instead by the *effects* of the underlying federal action. Consequently, the analysis of the federal action’s effects on listed species and critical habitat may extend well beyond the project area, depending on the extent of the action’s direct and indirect effects.

Finally, “effects of the action” include both the direct and indirect effects of the action that is the subject of the consultation. 50 C.F.R. § 402.02. Under this definition, “direct effects” are the direct or immediate effects on listed species or critical habitat caused by the federal action. “Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur.” *Id.*<sup>8</sup> Generally speaking, indirect effects are “the effects on listed species or critical habitat of future activities that are *induced by* the action subject to consultation and that occur after that action is completed,” provided that these effects are reasonably certain to occur. *Interagency Cooperation*, 51 Fed. Reg. at 19932 (emphasis supplied).

For example, the impacts caused by the construction of a street crossing or flood control structure within a watercourse subject to the Army Corps of Engineers’ jurisdiction under Section 404 of Clean Water Act would constitute direct effects of the Corps’ permit, while future impacts caused by the placement of structures and fill material within the watercourse that are reasonably certain to occur (e.g., altered stream flows or increased downstream sedimentation) would constitute indirect effects of the permit. In this example, the “action area” associated with the Corps permit would include not only the portion of the watercourse directly impacted by the

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<sup>8</sup> The definition of “effects of the action” also includes “the effects of other activities that are interrelated or interdependent.” 50 C.F.R. § 402.02. “Interrelated actions” are actions that “are part of a larger action and depend on the larger action for their justification.” *Id.* “Interdependent actions” are actions that “have no independent utility apart from the action under consideration.” *Id.*

In addition, cumulative effects, i.e., the effects of future state or private activities, are also considered. Those activities must be “reasonably certain to occur” within the area impacted by the proposed federal action. 50 C.F.R. § 402.02 (definition of “cumulative effects”). Notably, the analysis of cumulative effects that is to take place under Section 7 is narrower than the analysis required under NEPA. FWS explained in its 1986 rulemaking that Congress did not intend that federal actions be precluded by future, speculative effects. *Interagency Cooperation*, 51 Fed. Reg. at 19,933.

construction of the street crossing, but also any areas upstream or downstream of the crossing reasonably certain to be impacted in the future. *See Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (the Corps properly considered the indirect effects on downstream critical habitat of the whooping crane along the Platte River that would result from the construction of a dam on a tributary of the river).

### **III. REGULATORY ABUSES LEADING TO THE NAHB LITIGATION**

In recent consultations involving the impacts of Clean Water Act permits, the FWS's Arizona field office has routinely extended the consultation's scope to the entire project, ignoring the permitting agency's jurisdictional limits. As previously discussed, EPA, when issuing an NPDES permit, does not have authority to regulate the activity causing the discharge. *See, e.g., Waterkeeper Alliance*, 399 F.3d at 505. Nevertheless, by applying a "but for" causation test, FWS has used the nexus provided by Clean Water Act permits to restrict and control private land uses, without regard to the extent of federal involvement in or control over the project. The species most often involved in these consultations were the cactus ferruginous pygmy-owl and the Pima pineapple cactus, neither of which are aquatic species or otherwise dependent on water quality.<sup>9</sup>

For example, in a consultation that addressed the effects of storm water discharges resulting from the construction of 10 single-family-homes on a 8.92-acre parcel in northwest Tucson, FWS required the landowner to maintain 76 percent of his property (6.7 acres) as natural open space, restore an additional 1.2 acres (including 0.69 acres on site) using specified vegetation, and record a conservation easement restricting various land use activities, including land uses on each lot outside a 6,300 square-foot building envelope, fence locations, pedestrian activities, artificial lighting, and outdoor cooking. Biological Opinion on the Effects of the Proposed Pueblo Oasis Development in Pima County, Arizona (July 9, 2002).<sup>10</sup> While this biological opinion contained a lengthy (and largely generic) discussion about the pygmy-owl, it contained virtually no site-specific information, including then-current owl locations relative to the parcel and the waters affected by the storm water discharge (which were not identified). The opinion simply noted that two juvenile owls used the parcel in 1998 and one juvenile owl used the parcel in 1999, and explained that the parcel contains suitable owl habitat.<sup>11</sup> No incidental take statement was provided because the proposed action was not expected to take any owls.

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<sup>9</sup> FWS background documents on the pygmy-owl are available at <http://www.fws.gov/southwest/es/arizona/Cactus.htm> (visited Nov. 30, 2006). Last year, FWS removed the pygmy-owl from the list of endangered and threatened species. *Final Rule to Remove the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl From the Federal List of Endangered and Threatened Wildlife*, 71 Fed. Reg. 19,452 (April 14, 2006). FWS background documents on the Pima pineapple cactus are available at <http://www.fws.gov/southwest/es/arizona/pima.htm> (visited Sept. 9, 2007).

<sup>10</sup> The biological opinion is available at [http://www.fws.gov/southwest/es/arizona/Documents/Biol\\_Opin/02088\\_Pueblo\\_Oasis.pdf](http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/02088_Pueblo_Oasis.pdf) (visited Sept. 9, 2007).

<sup>11</sup> At that time, no critical habitat was designated for the pygmy-owl.

The Pueblo Oasis opinion is, unfortunately, typical of the biological opinions that have been issued by the FWS Arizona field office in connection with NPDES permits authorizing storm water discharges from construction sites, as well as other Clean Water Act permits. *See, e.g.,* Biological Opinion on the Effects of the Proposed Chaparral Heights Development in Pima County, Arizona (April 30, 2002);<sup>12</sup> Biological Opinion of the Effects of the Proposed Butterfly Mountain Development in Marana, Arizona (April 10, 2002).<sup>13</sup> In these opinions, FWS largely ignored the effects on listed species and critical habitat resulting from the discharge of pollutants into waters of the United States. FWS instead focused on the impact of the entire development (including off-site improvements) on habitat considered suitable for pygmy-owls.

Notably, the “conservation measures” FWS included in these biological opinions were not imposed under an incidental take statement to minimize the taking of species. None of these opinions anticipated that a pygmy-owl would be taken. Instead, they were imposed on the landowner by including them as conditions in a Clean Water Act permit to protect suitable habitat for the species. The scope of the permitting agency’s jurisdiction over the real estate project was not considered. *Compare* 50 C.F.R. § 402.02 (reasonable and prudent alternatives must be “consistent with the scope of the Federal agency’s legal authority and jurisdiction”).

The basic flaw in the analysis employed by FWS is the implicit determination that vegetation removal and related activities outside of “waters of the United States” are authorized by the relevant Clean Water Act permit. For example, a landowners may remove vegetation on their property without a federal permit.<sup>14</sup> While the removal or modification of vegetation may adversely impact the ability of a parcel of land to serve as wildlife habitat, such impact cannot properly be attributed to the Clean Water Act because the destruction of vegetation could take place without the permit.

In short, at the time Arizona sought authority to administer the NPDES program, the Section 7 consultation process was being used by overzealous FWS employees to restrict land

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<sup>12</sup> The biological opinion is available at [http://www.fws.gov/southwest/es/arizona/Documents/Biol\\_Opin/00131\\_Chaparral\\_Heights.pdf](http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/00131_Chaparral_Heights.pdf) (visited Sept. 9, 2007). This project contained 150.6 acres plus an additional 1.8 acres that were disturbed off the site in constructing a sewer line. Seventy-seven percent of the property was designated by FWS as open space, including 69 acres designated as a “dispersal corridor” for pygmy-owls. Land disturbance from the construction of off-site water and sewer improvements were also attributed to the project. The property was not within critical habitat, and incidental take of pygmy-owls was not anticipated.

<sup>13</sup> The biological opinion is available at [http://www.fws.gov/southwest/es/arizona/Documents/Biol\\_Opin/01277\\_Butterfly\\_Mtn.pdf](http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/01277_Butterfly_Mtn.pdf) (visited Sept. 9, 2007). This project contained 100.2 acres, on which 28 residential lots were planned. Eighty-two percent of the property (82.6 acres) was designated by FWS as open space, with limitations on the amount of disturbance within each lot. Again, the property was not within critical habitat, and no incidental take of pygmy-owls was not anticipated.

<sup>14</sup> There may be state or local restrictions on the destruction or relocation of certain types of plants. However, these laws generally recognize that landowners own trees and other vegetation found on their property, which is a basic right incident to land ownership and, in any case, do not provide a federal nexus.

use activities based on the landowners' need for authorization to discharge storm water in connection with construction activities. No attempt was being made to segregate the effects of the activities requiring the permit from the remainder of the project. Instead, the effects of all non-federal activities were being attributed to the Clean Water Act permit, without regard to whether the non-federal activity (or portions of that activity) could be conducted independently.

#### **IV. PRIOR CONSULTATIONS ON STATE NPDES PROGRAM APPROVALS**

##### **A. EPA's Prior Approvals of State Programs**

Since the ESA was enacted in 1973, EPA has rarely consulted with the Services in approving state NPDES program submissions. Prior to Arizona's NPDES program submission in 2002, EPA consulted with the Services on only six occasions, beginning with the approval of South Dakota's application in 1993. In contrast, EPA did not consult in approving NPDES programs for 39 other States. Moreover, a number of those States have received multiple program approvals, resulting in more than 100 opportunities to consult under Section 7(a)(2). *See Approval of Application by Texas to Administer the NPDES Program*, 63 Fed. Reg. 51,164, 51,200 (Sept. 24, 1998) (table listing State NPDES program status).

When it did consult with the Services, EPA did not clearly acknowledge that Section 7(a)(2) applied to State program approvals. For example, in its notice approving Oklahoma's program, EPA explained that "while it may not be clear that the section 7 consultation is specifically required for a program authorization, ESA and its implementing regulations do not restrict any agency from voluntarily consulting and conferring with [FWS] on actions it believes may affect listed species." *Approval of Application by Oklahoma to Administer the NPDES Program*, 61 Fed. Reg. 65,047, 65,051 (Dec. 10, 1996). In connection with approving Texas' NPDES program two years later, EPA explained that "even if [it] was not required by law to consult with the Services, EPA believes it was within its discretion to do so." *Approval of Application by Texas*, 63 Fed. Reg. at 51,198. At the same time, EPA explained:

It was clearly Congress' intent that states have every opportunity to directly administer the NPDES program and that EPA's main role would be providing national consistency and guidelines in an oversight role. EPA was only intended to run the NPDES program until states could develop programs adequate to protect the waters of the U.S. To this end, EPA has never been fully funded to do all the jobs required for full direct implementation of the NPDES program. This is the responsibility of State-run programs, and provides incentives for states to take over the program.

63 Fed. Reg. at 51,167. As the foregoing statements suggest, EPA did not have a formal policy on the applicability of Section 7(a)(2) to State program approvals prior to acting on Arizona's NPDES program submission in 2002.

Moreover, *formal* consultation between EPA and the Services, resulting in a biological opinion, had occurred only two times prior to Arizona's program submission.<sup>15</sup> In both instances, the scope of the consultation was limited to aquatic species, i.e., species dependent on water quality. Prior to approving Maine's NPDES program, EPA consulted on two listed species: with NMFS on the effect of salmon fish farms and hatcheries on listed, wild Atlantic salmon, and with FWS on the effect of NPDES permits for six paper mills on bald eagles. *Approval of Application by Maine to Administer the NPDES Program*, 66 Fed. Reg. 12,791, 12,793-94 (Feb. 28, 2001). In the case of Texas' NPDES program, the consultation also was limited to species affected by the enforcement of surface water quality standards. *Approval of Application by Texas*, 63 Fed. Reg. at 51,201. EPA explained that no "obligations, procedural or otherwise," were imposed on Texas to protect listed species: "The State's only obligation is to issue permits that comply with the procedural and substantive requirements of the CWA and the State program approved by EPA." *Id.* at 51,198.

### **B. The Services and EPA's 2001 Memorandum of Agreement**

In January 2001, the Services and EPA entered into a memorandum of agreement to improve interagency coordination under the Clean Water Act and the ESA. *Memorandum of Agreement Between EPA, FWS and NMFS Regarding Enhanced Coordination Under the CWA and ESA; Notice*, 66 Fed. Reg. 11,202 (Feb. 22, 2001) ("the National MOA"). The operative portion of the National MOA, however, does not address whether Section 7(a)(2) applies to State NPDES program approvals. The Federal Register preamble (not the National MOA itself) states only that EPA's current practice is to consult with the Services, that such consultations are conducted on a case-by-case basis, and that the National MOA does *not* place any conditions on approval of State NPDES programs. 66 Fed. Reg. 11,205. Instead, the National MOA emphasizes that "EPA's oversight of State/Tribal permits will continue to be governed by EPA's CWA authorities. For example, EPA may only object to a permit that is 'outside the guidelines and requirements' of the CWA . . ." *Id.* at 11,206 (quoting 33 U.S.C. § 1342(d)(2)); *see also id.* at 11,215-16 (coordination procedures for State and Tribal permits).

### **C. The Fifth Circuit's Decision in *American Forest***

The prior reluctance of EPA and the Services to adopt a definitive policy was likely the result of the Fifth Circuit's decision in *American Forest*, which, as discussed above, involved EPA's approval of Louisiana's NPDES program. *See Approval of Application by Louisiana*, 61 Fed. Reg. 47,932. As a condition of approval, EPA required Louisiana to submit proposed permits to FWS and NMFS, which EPA would then veto if FWS or NFMS determined that the permit would adversely impact listed species. *American Forest*, 137 F.3d at 293-94. The Fifth Circuit held EPA lacked authority to impose conditions to benefit listed species, and rejected

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<sup>15</sup> The consultations on the South Dakota, Florida, Louisiana and Oklahoma NPDES programs were informal, i.e., the Services concurred with EPA's "not likely to adversely affect" determination, and no biological opinions were prepared. *See Approval of Application by South Dakota to Administer the NPDES Program*, 59 Fed. Reg. 1,535, 1,543 (Jan. 11, 1994); *Approval of Application by Florida to Administer the NPDES Program*, 60 Fed. Reg. 25,718, 25,719 (May 12, 1995); *Approval of Application by Louisiana to Administer the NPDES Program*, 61 Fed. Reg. 47,932, 47,934 (Sept. 11, 1996); *Approval of Application by Oklahoma*, 61 Fed. Reg. at 65,053.

EPA's argument that "its decision is not only authorized but compelled by ESA § 7(a)(2)." *Id.* at 297 (internal citation omitted). The court explained:

EPA argues that ESA § 7(a)(2), when construed alongside the Court's broad reading of the statute in [*TVA v. Hill*], compels EPA to do everything reasonably within its power to protect endangered species. The flaw in this argument is that if EPA lacks the power to add additional criteria to CWA § 402(b), nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers. ...

[T]he ESA serves not as a font of new authority, but as something more modest: a directive to agencies to channel their *existing* authority in a particular direction. The upshot is that EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA.

*Id.* at 298-99 (internal footnotes and citations omitted).

The Fifth Circuit followed *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992), noting that the petitioner in that case "pressed virtually the same argument EPA advances here." *American Forest*, 137 F.3d at 299. *Platte River* involved a challenge to annual licenses issued by the Federal Energy Regulatory Commission ("FERC") to two hydroelectric projects on the Platte River. Environmental groups challenging the annual licenses relied on Section 7(a)(2), as well as ESA Section 7(a)(1) and *TVA v. Hill*, arguing that FERC was required to do "whatever it takes" to protect listed species that inhabit the Platte River basin and that any limitations on FERC's authority under the Federal Power Act are superseded by Congress' mandate in ESA Section 7. 962 F.2d at 33-34. The District of Columbia Circuit rejected that argument, holding that Section 7 "does not *expand* the powers conferred on an agency by its enabling act." *Id.* at 34.

The combination of a lack of a definitive policy regarding whether (and to what extent) Section 7 of the ESA applies to the approval of State NPDES programs and the Fifth Circuit's recent decision in *American Forest*, which struck down EPA's attempt to incorporate a process under which the effects of State NPDES permits on listed species would be reviewed by the Services, undoubtedly contributed to EPA's uncertainty about how Section 7 applied to Arizona's NPDES program submission.

V. **THE ADMINISTRATIVE PROCEEDINGS CONCERNING APPROVAL OF ARIZONA'S NPDES PROGRAM BY EPA**

A. **The Dispute Between EPA Region 9 and FWS's Arizona Field Office**

On December 20, 2001, the Governor of Arizona requested NPDES program approval pursuant to Section 402(b).<sup>16</sup> EPA's regional office in San Francisco (Region 9), which is responsible for the administration of the Clean Water Act in Arizona, received the State's submission package on January 14, 2002, but determined that Arizona's submission did not meet certain requirements. On June 5, 2002, the Governor of Arizona requested partial program approval, and submitted a revised program to EPA. On July 11, 2002, EPA declared that Arizona's program submission was administratively complete. Consequently, EPA was required to approve or disapprove Arizona's program by October 8, 2002. *See* 33 U.S.C. § 1342(c) (deadline for acting on State program submissions); 40 C.F.R. § 123.61(b) (same).

In the meantime, on January 23, 2002, EPA requested initiation of informal consultation with FWS's Arizona field office regarding Arizona's NPDES program submission. EPA indicated the permitting activities that Arizona's program would cover, and requested a list of species and critical habitat that those activities would affect. Informal consultation between the agencies continued into June 2002.

EPA prepared a biological evaluation of the impacts of approving Arizona's program, which was submitted to FWS on June 21, 2002. EPA concluded that no adverse effects would occur and formal consultation was unnecessary:

The Federal action is *an administrative shift of authority* and is not associated with any physical action that will alter habitat or affect biota. The substantive CWA protections currently afforded to Federally-listed species and critical habitat under the NPDES program will continue under the [State] permit program. USEPA oversight of the [State] program, including coordination pursuant to the National MOA, will provide added assurance of this continued protection. ... Therefore, the USEPA concludes that its proposed approval of the [State] program is not likely to adversely affect any Federally-listed species or their designated critical habitat. [Emphasis supplied.]

A dispute immediately developed between EPA Region 9 and FWS's Arizona field office. The FWS field office employees disagreed with EPA's determination that approval of Arizona's program was merely an administrative shift in authority, asserting that private construction is an "indirect effect" of NPDES permits and objecting to EPA's refusal to "federalize" State permits "where the activity causing the discharge adversely affects an upland species" or may cause "decreases in water quantity." They also complained that approval of

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<sup>16</sup> The following discussion of the events relating to the approval of Arizona's NPDES program is based on the administrative record submitted by EPA in *Defenders of Wildlife*, Nos. 03-71439, 03-72894 (9th Cir.).

Arizona's NPDES program would allow "unchecked" real estate development to occur, reducing the conservation status of the cactus ferruginous pygmy-owl, and two plant species, the Pima pineapple cactus and Huachuca water umbel. FWS's views about the effects of Arizona's program undoubtedly resulted from the field office's practice of using of the nexus created by Clean Water Act permits to restrict and control real estate development in southern Arizona, as discussed above.

Initially, FWS attempted to delay the initiation of formal consultation. On August 20, 2002 – two months after EPA's biological evaluation was submitted, the acting supervisor of FWS's Arizona field office acknowledged his agency's receipt of EPA's biological evaluation and request to initiate formal consultation, but requested additional information. He also informed EPA that the 135-day period for consulting (*see* 50 C.F.R. § 402.14(e)) would not begin until EPA provided this information. EPA immediately responded and pointed out that the information had been provided in EPA's June 21, 2002 submission.

On September 13, 2002, a meeting took place between representatives of EPA, FWS and the Arizona Department of Environmental Quality ("ADEQ") to address the interagency dispute. According to FWS's meeting notes, FWS was still unwilling to confirm that consultation had been initiated. More importantly, the FWS representatives argued that the consultation should cover impacts to upland (terrestrial) species caused by private land uses and impacts to water quantity resulting from groundwater pumping. The EPA representatives, in contrast, maintained that EPA lacked authority under the Clean Water Act to regulate those activities:

We then discussed our concerns with aquatic and aquatic-dependent species. We all agreed that the process defined in the [National] MOA would address aquatic concerns, but we [FWS] expressed concerns about issues of water quantity . . . . EPA stated that effects from pumping groundwater to provide water to housing developments is out of their jurisdiction and they have no discretion to modify or condition permits for this type of effect.

At this point, EPA voiced their opinion on indirect effects from their action. They believe there are no indirect effects associated with the delegation because it is simply an administrative action. We disagree with their interpretation and told them that we have to evaluate all the effects (direct, indirect, interrelated and interdependent) *regardless of whether they could do anything about those effects.* . . .

The bottom line is this: EPA believes that the [National] MOA only addresses aquatic species and it is out of their authority and discretion, under the CWA, to address concerns to upland species. They will not federalize those permits and claim that even if they did, they could not condition the permits to address upland species. [Emphasis supplied.]

At this point, the agencies decided to elevate the dispute to their respective Washington headquarters for resolution. In the October 4, 2002 interagency elevation document, FWS's position was summarized as follows:

FWS is concerned that, following EPA Region 9's approval action, endangered species, in particular, the cactus ferruginous pygmy-owl, the Pima pineapple cactus, and perhaps other species, will be adversely impacted in the future by projects that will require State NPDES permits issued by the State of Arizona. The FWS's concerns involve the indirect effects of permit issuance from *non-water-quality-related impacts* from these projects, such as construction, water usage, and similar activities that affect individuals of the species either directly or through disturbance of their habitat. *The concerns do not involve water quality issues related to the discharges that will be regulated under the State NPDES permits.*

... FWS maintains that EPA needs to ensure that a consultation process, or alternative process similar to that which exists, remains in place following the approval of the State program to address effects to listed species. [Emphasis supplied.]

EPA, in contrast, continued to stress its limited regulatory authority under the Clean Water Act and the administrative nature of approving Arizona's NPDES program:

EPA Region 9 believes that it does not have legal authority to regulate the non-water-quality-related impacts associated with State NPDES-permitted projects that are of concern to FWS ... .

EPA Region 9 also believes that its approval action, which is an administrative transfer of authority, is not the cause of future non-discharge-related impacts on endangered species from projects requiring State NPDES permits.

## **B. The Biological Opinion**

The agencies' headquarters resolved the dispute, and on December 3, 2002, FWS issued its biological opinion, concluding that EPA's approval of Arizona's NPDES program is not likely to jeopardize listed species or adversely modify designated critical habitat. Biological Opinion No. 02-21-02-F-0268.<sup>17</sup> In contrast to the position taken by the employees in FWS's Arizona field office, FWS deferred to EPA's interpretation of its jurisdiction under the Clean Water Act, acknowledging EPA's lack of "legal authority to regulate the non-water-quality-related impacts associated with State NPDES-permitted projects that are of concern to FWS" and EPA's inability to object to NPDES permits "based on grounds other than guidelines and requirements of the CWA." *Id.* at 21.

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<sup>17</sup> The biological opinion is available at [http://www.fws.gov/southwest/es/arizona/Documents/Biol\\_Opin/020286-EPA-approval-of-AZ-AZPDES.pdf](http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/020286-EPA-approval-of-AZ-AZPDES.pdf) (visited Sept. 9, 2007).

In its analysis of the effects of the action, FWS explained that the proposed action constituted an administrative shift in authority and would not cause increases in requests for NPDES permits or real estate development:

While development may be reasonably certain to occur in the future, EPA's approval action will not cause development. Therefore, development is not an indirect effect of the approval action. Further, any loss of conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

*Id.*

FWS also concluded that the environmental impacts of future real estate development in Arizona are speculative and, moreover, that it is uncertain whether approval of Arizona's NPDES program would result in a loss of conservation benefits to listed species. "Further, even if the loss of conservation benefit was an indirect effect, it cannot be said that the approval action 'will jeopardize' the species or 'adversely modify' critical habitat, because at this time and for all the reasons discussed above, the amount and location of future development and required mitigation are speculative." *Id.*

On December 5, 2002, EPA approved Arizona's program. *See Approval of Application by Arizona to Administer the NPDES Program*, 67 Fed. Reg. 79,629 (Dec. 30, 2002). Approval occurred nearly two months after the statutory deadline for acting on State program submissions had passed. Since EPA's approval decision, ADEQ has been administering and enforcing the NPDES program (known as the AZPDES program) in all portions of Arizona other than Native American land.

The dispute between EPA Region 9 and FWS's Arizona field office resulted in an administrative record that showcased the views of local FWS employees, who were upset about the potential loss of a federal nexus – NPDES permits – that they had been using to restrict and control real estate development in Arizona. As discussed below, Defenders of Wildlife relied on that record to support its petition challenging approval of Arizona's program.

EPA's position was arguably inconsistent, as the Ninth Circuit subsequently recognized. At a minimum, the findings in the biological opinion indicated that no adverse effects to either listed species or critical habitat would result from approving Arizona's program, which, as EPA repeatedly stated, was merely an administrative shift in authority. Moreover, FWS agreed that Arizona's program would have no adverse *water-quality-related* impacts on listed species and critical habitat. Therefore, formal consultation was not required. In addition, the discussion in the biological opinion suggested that EPA should not have consulted at all, given its inability to deny Arizona's once EPA determined that the statutory criteria in Section 402(b) were satisfied.

## **VI. THE PROCEEDINGS BEFORE THE NINTH CIRCUIT**

On April 2, 2003, Defenders of Wildlife filed a petition with the Ninth Circuit seeking review of EPA's approval of Arizona's program, contending that EPA violated Section 7(a)(2) of the ESA in approving Arizona's program. *See* 33 U.S.C. § 1369(b)(1)(D) (providing for review in the circuit courts of EPA's determinations regarding State permitting programs). They argued that the transfer of NPDES permitting authority to Arizona would result in a significant "loss of conservation benefits" produced by the Section 7 consultation process, citing various documents in the administrative record prepared by the employees in FWS's Arizona field office. The State of Arizona and a group of industry and trade associations representing the interests of Arizona businesses required to obtain NPDES permits ("Home Builders") sought and were granted permission to intervene as respondents.

Defenders of Wildlife also filed an amended complaint in a pending action in a pending district court case challenging FWS's biological opinion under the Administrative Procedure Act. *Defenders of Wildlife v. Flowers*, No. CIV 02-0195-TUC-CJK. The district court subsequently determined that it lacked jurisdiction to decide Defenders of Wildlife's challenge to the FWS's biological opinion, and ordered that the claim be severed and transferred to the Ninth Circuit. *Id.*, Order (filed July 17, 2003). The court of appeals consolidated the cases and issued its opinion on August 22, 2005.

### **A. The Courts of Appeals' Opinion**

The court initially considered whether EPA's approval of Arizona's program was the product of coherent reasoning. *Defenders of Wildlife*, 420 F.3d at 959-62. The court explained that "EPA decided that it had to consult but had no authority to do anything concerning the matter about which it had to consult" due to EPA's limited authority under the Clean Water Act. *Id.* at 961. The court found EPA's position contradictory and not the product of "reasoned decisionmaking." *Id.* The court stated that the decision must be remanded to EPA "for a plausible explanation of its decision, based on a single, coherent interpretation of [Section 7]." *Id.* at 962.

The court did not stop there, but instead went on to address the obligations of federal agencies under Section 7. Acknowledging that Section 402(b) of the Clean Water Act foreclosed EPA's discretion to act for the benefit of listed species, the court instead held that ESA Section 7(a)(2) grants independent authority to federal agencies to act for the benefit of listed species, that such authority overrides any constraints imposed by Congress in the CWA, and that any "authorizing action" creates an obligation to exercise this authority. *Id.* at 967, 969.

To support this holding, the court focused on the phrase "insure that any action ... is not likely to jeopardize" in Section 7(a)(2), concluding that Congress intended this phrase to grant Federal agencies authority to act affirmatively to benefit listed species, rather than simply prohibiting actions that jeopardize species. *Id.* at 963-67. It found support for this reading of the statute in *TVA v. Hill*, and in the distinction between Sections 7(a)(2) and 7(a)(1), which directs agencies to "utilize their authorities" to carry out programs for the conservation of species. *Id.* at 964-66. The majority also discussed the exemption process enacted in the 1978 ESA

amendments, concluding that Congress elected to maintain the Section 7(a)(2) limitations on agency actions discussed in *TVA v. Hill* in subsequent amendments of the ESA. *Id.* at 966.

The court also determined that whenever a federal agency authorizes, funds or carries out an action, Section 7(a)(2) applies: “the EPA had exclusive decisionmaking authority over Arizona’s pollution permitting transfer application. The EPA’s decision authorized the transfer, thus triggering section 7(a)(2)’s consultation *and action* requirements.” *Id.* at 969 (emphasis supplied). Consequently, EPA needed to address “whatever harm may flow from the loss of section 7 consultation” (*id.* at 971), notwithstanding EPA’s obligation to approve Arizona’s NPDES program under Section 402(b) of the Clean Water Act. In the court’s view, EPA could not approve Arizona’s program, even if that program satisfied Section 402(b), unless EPA found “sufficient substitutes for section 7’s consultation and mitigation mandates.” *Id.* at 973. The majority marginalized 50 C.F.R. § 402.03, characterizing the Services’ rule as a “gloss” on the statute. *Id.* at 967.

As the remedy, the court vacated EPA’s decision to approve Arizona’s program based on its concern about the possible risk of species’ extinction (using the pygmy-owl as an example). *Id.* at 978-79. The court noted that typically when an agency action violates the Administrative Procedure Act and ESA, the action is vacated and remanded back to the agency “to act in compliance with its statutory obligations.” *Id.* at 979. The majority recognized that Arizona had “expended significant funds” and had issued a number of NPDES permits. *Id.* It also recognized the “administrative difficulties” in transferring the program to EPA and, possibly, back to Arizona again.” *Id.* However, the majority concluded those factors were outweighed by the potential impacts on listed species caused by private real estate developments proceeding without consultation. *Id.* at 978-79.

## **B. Judge Thompson’s Dissent**

Circuit Judge Thompson dissented, stating that the Ninth Circuit, consistent with 50 C.F.R. § 402.03, has “consistently recognized that an agency may have decisionmaking authority and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered and threatened species.” *Id.* at 979. For example, in *Ground Zero Center v. Dep’t of the Navy*, 383 F.3d 1082 (9th Cir. 2004), the court held that the Navy lacked sufficient discretion to trigger consultation in connection with expanding and operating a submarine base affecting listed species of salmon.<sup>18</sup> In other cases, such as *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005), the court determined that section 7(a)(2) applied to EPA’s registration of pesticides because the agency possessed continuing discretion.<sup>19</sup> In these cases, however, the Ninth Circuit analyzed the agency’s enabling statutes to determine whether sufficient discretionary authority existed, an approach consistent with 50 C.F.R. § 402.03. Judge Thompson also pointed out that the majority’s

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<sup>18</sup> See also *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) (Section 7(a)(2) did not apply to BLM’s approval to construct a logging road because a reciprocal right-of-way agreement limited the agency’s discretion).

<sup>19</sup> See also *Turtle Island Restoration Network v. NMFS*, 340 F.3d 969 (9th Cir. 2003) (NMFS was required to consult when issuing permits to fishing vessels under the High Seas Fishing Compliance Act because the agency was granted sufficient discretion to condition permits to benefit listed species).

interpretation conflicted with other circuits' interpretation of 402(b) of the Clean Water Act, such as *American Forest*, which have held that EPA's obligation in reviewing a State's program submittal under Section 402(b) is limited to evaluating the statute's nine criteria. *Id.* at 980.

### **C. The Dissenting Opinions on Denial of Rehearing**

Home Builders, EPA and FWS, and the State of Arizona filed petitions seeking rehearing *en banc* based on the intra-circuit and inter-circuit conflicts created by the majority's opinion. On June 8, 2006, the court of appeals issued its order denying both panel and *en banc* rehearing. *Defenders of Wildlife*, 450 F.3d at 394. Six circuit judges dissented from the denial of rehearing on multiple grounds. *Id.* Judge Kozinski stated, for example, "the majority tramples all over the [FWS's] reasonable interpretation of the ESA, deliberately creates a square inter-circuit conflict with the Fifth and D.C. Circuits, and ignores at least six prior opinions of our own court." *Id.* at 395. He went on to describe "five fundamental blunders" made by the majority. *Id.* at 396-401. Judge Kleinfeld joined in Judge Kozinski's dissent, but wrote separately to emphasize the mandatory nature of Section 402(b), which "leaves no room for conditions ten, eleven, or whatever else we may think Congress should have added." *Id.* at 402.

## **VII. THE SUPREME COURT'S OPINION**

Home Builders filed their petition for a writ of certiorari on September 6, 2006. EPA obtained an extension of time, and filed its petition on October 23, 2006. Notably, EPA included in its petition appendix copies of letters between EPA and the Services, triggered by the State of Alaska's application to administer the NPDES program, clarifying the positions of the agencies regarding the applicability of Section 7(a)(2) to the approval of state program submissions under Section 402(b) of the Clean Water Act, and concluding that because EPA lacks discretion to deny a State's application when the criteria of Section 402(b) are met, consultation is not required. FWS did not participate in the appeal.

The Court granted both petitions on January 5, 2007, but added an additional question to be addressed by the parties: Whether the court of appeals correctly held that EPA's decision to transfer permitting authority to Arizona under Section 402(b) of the Clean Water Act was arbitrary and capricious because it was based on inconsistent interpretations of the ESA; and, if so, whether the Ninth Circuit should have remanded to EPA for further proceedings without ruling on the interpretation of Section 7(a)(2). In their answering brief, *Defenders of Wildlife* emphasized this issue, arguing that the Court should remand the matter back to EPA for clarification, rather than addressing the Ninth Circuit's holding that Section 7(a)(2) overrides statutory mandates and requires federal agencies to take affirmative steps to benefit listed species.

In its opinion issued on June 25, 2007, however, the Court did address the petitioners' substantive arguments, characterizing the basic issue as "whether § 7(a)(2) effectively operates as a tenth criterion on which the transfer of permitting power under the [Clean Water Act] must be conditioned," and concluded that "it did not." *NAHB*, 127 S.Ct. at 2524. The Court reversed the Ninth Circuit, and remanded the matter for further proceedings consistent with its opinion. *Id.* at 2538. Justice Alito delivered the opinion for the Court, and was joined by Chief Justice

Roberts and Justices Scalia, Kennedy and Thomas. Justice Stevens, joined by Justices Souter, Ginsburg and Breyer dissented. Justice Breyer also wrote a brief, separate dissent.

## **A. The Majority Opinion**

### **1. The Ninth Circuit Erroneously Concluded that EPA's Decision Was Arbitrary and Capricious**

Before turning to the statutory interpretation question, the Court considered whether the Ninth Circuit erred in holding that EPA's decision was arbitrary and capricious. *Id.* at 2529. The Court first noted that if EPA's action were as described by the Ninth Circuit, then a remand to EPA would have been proper, criticizing the Ninth Circuit for "jump[ing] ahead to resolve the merits of the dispute." *Id.* In doing so, the Ninth Circuit "erroneously deprived the [EPA] of its usual administrative avenue for explaining and reconciling the arguably contradictory rationales that sometimes appear in the course of lengthy and complex administrative decisions." *Id.*

The Court, however, found that the Ninth Circuit's determination that EPA's action was arbitrary and capricious "is not fairly supported by the record." *Id.* The Court noted that the purported inconsistencies were based on statements made by the agencies' regional offices, explaining that "the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking arbitrary and capricious." *Id.* at 2530. EPA was not bound by statements by lower-level employees, and entitled to change its mind as long as the proper procedures were followed. *Id.*

The Court also dismissed statements appearing in EPA's Federal Register notice regarding the approval of Arizona's program, which indicated that EPA had consulted with FWS under Section 7(a)(2). The Court reasoned that "the question whether the consultation had been *required*, as opposed to voluntarily undertaken by the agency, was simply not germane to the final agency transfer decision." *Id.* The Court characterized the statements in the notice as dictum, and concluded that they "had no bearing on the final agency action." *Id.*

Finally, the Court rejected Defenders of Wildlife's argument that if the case were remanded to EPA, they would raise additional challenges to the decision, such as financial assistance provided to Arizona for the administration of the AZPDES program. The Court held that the decision to provide financial assistance was separate and independent of EPA's approval of Arizona's program under Section 402(b). *Id.*

### **2. Resolving the Conflict Between the Two Statutes**

The Court next turned to the central issue in the case, which, the Court explained, "requires us to mediate a clash of seemingly categorical – and, at first glance, irreconcilable – legislative commands." *Id.* at 2531. The Court noted that the language of Section 402(b) of the Clean Water Act "is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application." *Id.* The Court also noted that the language of Section 7(a)(2) of the ESA is "similarly imperative." *Id.* at 2532. The Court reasoned that if the language of Section 7(a)(2) were applied literally, "it would effectively

repeal the mandatory and exclusive list of criteria set forth in § 402(b), and replace it with a new, expanded list that includes § 7(a)(2)'s no-jeopardy requirement.” *Id.*

**a. The Ninth Circuit’s Broad Reading of Section 7(a)(2) Violated the Presumption Against Repeals by Implication**

The Court explained that the Ninth Circuit’s reading of Section 7(a)(2) of the ESA would “effectively repeal § 402(b)’s statutory mandate by engrafting a tenth criterion onto the CWA.” *Id.* at 2532. Accordingly, the Court considered whether the ESA, the later enacted statute, operated to amend Section 402(b) of the Clean Water Act by adding additional criteria to the nine criteria specified in the statute.

The Court noted that repeals by implication are strongly disfavored as a matter of statutory construction, and that “a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.” *Id.* (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)). In this case, the Court explained, Section 402(b) “operates as a ceiling as well as a floor” because “it does not just set forth *minimum* requirements for the transfer of permitting authority; it affirmatively mandates that the transfer ‘shall’ be approved if the specified criteria are met.” *Id.* at 2533. By “adding an additional criterion, the Ninth Circuit’s construction of § 7(a)(2) raises the floor and alters § 402(b)’s statutory command.” *Id.* Moreover, the Ninth Circuit’s interpretation of Section 7(a)(2) would “result in the implicit repeal of many other categorical statutory commands.” *Id.* Consequently, the Ninth Circuit’s broad reading of Section 7(a)(2) “runs foursquare into our presumption against implied repeals.” *Id.* at 2533.

**b. The Services’ Regulation Defining the Scope of ESA Section 7 Harmonizes the Two Statutes and Is Entitled to Deference**

Having determined that the enactment of Section 7(a)(2) did not explicitly or implicitly amend Section 402(b) of the Clean Water Act, the Court turned to the Services’ regulation, 50 C.F.R. § 402.03, which provides that Section 7 applies to “all actions in which there is discretionary Federal involvement or control.” As explained, in its opinion, the Ninth Circuit disregarded this regulation, variously describing 50 C.F.R. § 402.03 as a “gloss” on, and as being “congruent” and “coterminous with” the statutory phrase “authorized, funded, or carried out,” and then provided its own view of how the statute should be read. *Defenders of Wildlife*, 420 F.3d at 967-69. The Court rejected the Ninth Circuit’s view and held that the Services’ regulation “harmonizes the statutes by giving effect to the ESA’s no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors.” *NAHB*, 127 S.Ct. at 2533-34.

The Court also determined that the Services’ interpretation of the obligations of federal agencies is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court explained that under the Ninth Circuit’s construction of Section 7(a)(2), a “fundamental ambiguity” exists because “[a]n agency cannot simultaneously obey the differing mandates set forth in § 7(a)(2) of the ESA and § 402(b) of the CWA, and consequently the statutory language – read in light of the canon against implied repeals – does not itself provide clear guidance as to which command must give way.” *Id.* The

Court reasoned that in such circumstances, it is “appropriate to look to the implementing agency’s expert interpretation.” *Id.*

The Court also found that the Services’ interpretation of Section 7(a)(2) is reasonable in light of the statute’s text and the overall statutory scheme. *Id.* Because the regulation focused on “discretionary” actions, it is consistent with the “commonsense conclusion, that when an agency is *required* to do something by statute, it simply lacks the power to ‘ensure’ that such action will not jeopardize endangered species.” *Id.* at 2534-35. The Court also found support in its decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), which held that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered the relevant ‘cause’ of the effect.” *Id.* at 2535 (quoting *Public Citizen*, 541 U.S. at 770). Acknowledging that *Public Citizen* dealt with the National Environmental Policy Act (“NEPA”), the Court explained that *Public Citizen*’s “basic principal,” “that an agency cannot be considered the legal ‘cause’ of an action that it has no statutory discretion *not* to take,” supports the reasonableness of the Services’ interpretation of Section 7(a)(2) as applying only to discretionary actions. *Id.*

The Court then discussed the Ninth Circuit’s failure to defer to the Services’ regulation, stating that, as the mandatory language of Section 402(b) itself demonstrates, “not every action authorized, funded, or carried out by a federal agency is a product of that agency’s exercise of discretion.” *Id.* The Court also addressed the dissent’s construction of 50 C.F.R. § 402.03, under which the regulation would be read as merely confirming that discretionary actions are subject to Section 7(a)(2), but not excluding nondiscretionary actions. The Court found that construction “implausible,” robbing the regulation of any meaning. *Id.* at 2535-36.

The Court concluded by emphasizing that “we read § 402.03 to mean what it says: that § 7(a)(2)’s no-jeopardy duty covers only discretionary agency actions,” that this reading is “reasonable, inasmuch as it gives effect to the ESA’s provisions,” and that it “comports with the canon against implied repeals” because it stops short of overriding otherwise mandatory statutory duties. *Id.* at 2536.

### **3. *TVA v. Hill* Is Not Controlling Authority in this Context**

The Ninth Circuit relied on *TVA v. Hill* as support for its holding that “the authority conferred on agencies to protect listed species goes beyond that conferred by agencies’ own governing statutes.” *Defenders of Wildlife*, 420 F.3d at 964. The Court dismissed the argument that the broad language in *TVA v. Hill* was controlling, distinguishing that case on the basis that the construction of the Tellico Dam was a discretionary action, and, as a result, the Court “had no occasion to answer the question presented” here. *NAHB*, 127 S.Ct. at 2536-37. *TVA v. Hill* supports the position, expressed in 50 C.F.R. § 402.03, that Section 7(a)(2) applies to *discretionary* federal actions, but does not “speak to the question whether § 7(a)(2) applies to *non-discretionary* actions.” *Id.* at 2537.

#### **4. EPA's Discretion in Approving State NPDES Programs Does Not Extend to Adding Criteria**

Finally, Defenders of Wildlife argued that even if 50 C.F.R. § 402.03 applied, the decision by EPA to approve Arizona's NPDES program under Section 402(b) was discretionary because the agency necessarily exercised its judgment in determining whether Arizona's program satisfied the criteria in the Clean Water Act. The Court explained, however, that the "statute clearly does not grant [EPA] the discretion to add another entirely separate prerequisite to that list," and there is "no dispute that Arizona has satisfied each of th[e] statutory criteria." *Id.* The Court also noted that the Services and EPA had recently issued formal letters "concluding that the authorization of an NPDES permitting transfer is not the kind of discretionary agency action that is covered by § 402.03" and held that the agencies' interpretation is entitled to deference. *Id.*, at. 2537-38 (following *Auer v. Robbins*, 519 U.S. 452 (1997)).

#### **B. Justice Stevens' Dissenting Opinion**

Justice Stevens issued a lengthy dissent that relied heavily on *TVA v. Hill*. In short, he agreed with the Ninth Circuit that Section 7(a)(2) applies to any authorization by a federal agency regardless of the agency's authority under its governing statutes. He concluded by emphasizing that "[t]his Court offered a definitive interpretation of the [ESA] nearly 30 years ago in [*TVA v. Hill*]. Today the court turns its back on our decision ... and places a great number of endangered species in jeopardy, including the cactus ferruginous pygmy-owl and Pima pineapple cactus at issue here." *Id.*, at 2550. Notably, Justice Stevens did not acknowledge that the pygmy-owl had been delisted in 2006 or that approval of Arizona's NPDES program would have no adverse effects on any aquatic species.

#### **1. *TVA v. Hill* Is Controlling Authority**

Justice Stevens began his dissent by asserting that the Court's opinion in *TVA v. Hill* "could not have been clearer" and "plainly held that [Section 7] 'admits of *no exception*.'" *Id.* at 2539 (quoting *TVA v. Hill*, 437 U.S. at 173). He noted that "[n]ot a word in the opinion stated or suggested that § 7 obligations are inapplicable to mandatory agency actions, ... [n]or did the opinion describe the ... attempted completion of the Tellico Dam as a discretionary act." *Id.* at 2539-40. He also argued that the Tennessee Valley Authority "would have been obligated to spend the additional funds that Congress appropriated" and that the Court was "[u]nconcerned with whether an agency action was mandatory or discretionary" in that case. *Id.* at 2540.

Justice Stevens criticized the majority for "erroneously conclud[ing] that the ESA contains an unmentioned exception for nondiscretionary agency action and that the statute's command to enjoin the completion of the Tellico Dam depended on the unmentioned fact that TVA was attempting to perform a discretionary act." *Id.* at 2541. Consequently, he believed that Section 7(a)(2) applies to approval of state NPDES programs, "whether they are mandatory or discretionary," because, under the plain language of the statute, the "transfer of NPDES permitting authority under § 402(b) of the CWA is undoubtedly one of those 'actions' that is 'authorized' or 'carried out' by a federal agency." *Id.*

## 2. The Services' Regulation Does Not Limit the Applicability of Section 7

Justice Stevens also objected to the majority's reliance on 50 C.F.R. § 402.03 to harmonize Section 402(b) of the Clean Water Act and Section 7(a)(2) of the ESA. He contended that the majority's interpretation of the regulation "conflicts with the text and history of the regulation, as well as [the Court's] interpretation of § 7 in" *TVA v. Hill*. *Id.* In Justice Stevens' view, the majority was "simply mistaken when it says that it reads § 402.03 'to mean what it says: that § 7(a)(2)'s no-jeopardy duty covers *only* discretionary agency actions ...'" *Id.* at 2542 (quoting *id.* at 2536). Instead, "[t]he word 'only' is the Court's addition to the text [of 50 C.F.R. § 402.03], not the agency's," and "[i]f the drafters of the regulation had intended such a far-reaching change in the law, surely they would have said so by using language similar to that which the Court uses today." *Id.* Comparing the language of 50 C.F.R. § 402.03 with the regulatory definition of "action" in 50 C.F.R. § 402.02, Justice Stevens concluded that the former regulation confirms that Section 7 applies to discretionary actions, but does not limit the applicability of Section 7. *Id.* at 2542-43.<sup>20</sup>

## 3. Alternative Ways to Harmonize the Statutes

Justice Stevens believed that there are at least two alternative ways in which the Clean Water Act and ESA can be given full effect without compromising either statute: (1) by allowing federal agencies to complete consultation with the Services, and (2) by EPA's use of memorandum of agreements to compel States to protect listed species.

With respect to the first alternative, Justice Stevens believed that "the consultation process would generate an alternative course of action under which the transfer could still take place – as required by § 402(b) of the CWA – but in such a way that would honor the mandatory requirements of § 7(a)(2) of the ESA." *Id.* at 2546. He also asserted that if in the "rare case in which no 'reasonable and prudent alternative' can be found, Congress has provided yet another mechanism for resolving conflicts," through the Endangered Species Committee exemption process. *Id.* Justice Stevens argued that "the God Committee embodies the primacy of the ESA's mandate and serves as the final mechanism for harmonizing [the ESA] with other federal statutes," asserting that "when all else has failed and two federal statutes are incapable of resolution, Congress left the choice to the Committee – not to this Court." *Id.* at 2546-47.

With respect to the second alternative, Justice Stevens noted that EPA may object to State permits that are "outside the guidelines and requirements" of CWA under Section 402(d) of the Clean Water Act, and explained that "EPA has enacted a regulation that requires a State to enter into a Memorandum of Agreement (MOA) that sets forth the particulars of the agency's oversight duties." *Id.* at 2547 (citing 40 CFR § 123.24(a)).<sup>21</sup> He maintained that "MOAs

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<sup>20</sup> In this discussion, Justice Stevens stated several times that 50 C.F.R. § 402.03 was promulgated by EPA, rather than by the Services. *See NAHB*, 127 S.Ct. at 2542-43. It is unclear whether these were typographical errors, or whether Justice Stevens believed that the regulation was promulgated by EPA.

<sup>21</sup> Justice Stevens did not discuss this regulation, which identifies specific items that must be included in the MOA, and authorizes EPA to "include other terms and conditions, or agreements consistent with this part and relevant to the administration and enforcement of the State's regulatory program." 40 CFR § 123.24(a). Nor did Justice Stevens acknowledge EPA's interpretation that its authority under Section

provide a potential mechanism for giving effect to § 7 of the ESA while also allowing the transfer of permitting authority to a State.” *Id.* Justice Stevens asserted that “EPA can use – and in fact has used – the MOA process to structure its later oversight in a way that will allow it to protect endangered species in accordance with § 7(a)(2) of the ESA.” *Id.* He also provided brief examples of how an MOA can be structured, and noted that there are “many possibilities” for “other ways EPA could use the MOA process to comply with the ESA.” *Id.*

#### **4. EPA’s Authority under Section 402(b) is Discretionary**

Finally, Justice Stevens agreed with Defenders of Wildlife’s argument that EPA’s authority under Section 402(b) of the Clean Water Act is discretionary, noting that “there is significant room for discretion in EPA’s evaluation of § 402(b)’s nine conditions.” *Id.* at 2548. He noted that under the first criterion in Section 402(b)(1), EPA must evaluate whether a State’s program complies with five other provisions of the Clean Water Act, one of which “expressly directs the Administrator to exercise his ‘judgment.’” *Id.* (citing 33 U.S.C. § 1312). In Justice Stevens’ view, the exercise of any discretion should be sufficient to trigger Section 7(a)(2), regardless of the agency’s authority to address listed species in its decision-making process.

### **VIII. CONCLUDING COMMENTS: WHAT HAPPENS NOW?**

It is, obviously, too early to know precisely how the Supreme Court’s decision in *NAHB* will affect the application of Section 7 to federal actions. At a minimum, it will become even more important to correctly and precisely define the scope of the agency’s “action,” which, as discussed above, is often given short shrift during the consultation process. Although 50 C.F.R. § 402.03 provides that Section 7 applies “to all actions in which there is discretionary Federal involvement or control,” the Services sometimes forget that the term “action” is itself limited to *federal* actions, as is Section 7 generally. Consequently, a federal permit or other federal involvement in a larger, non-federal project normally does not federalize the entire project for the purposes of Section 7.

A useful analogy may be the Army Corps of Engineers’ regulations governing the scope of analysis required under NEPA, which are codified at 33 C.F.R. Part 325, Appendix B. Those regulations require the Corps’ NEPA analysis to “address the impacts of the [Corps’] permit and those portions of the entire project over which the [Corps] has sufficient control and responsibility to warrant Federal review.” 33 C.F.R. Pt. 325, App. B § 7(b)(1). *See, e.g., Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1116-18 (9th Cir. 2000) (applying the Corps’ scope of analysis regulations and upholding the agency’s decision to limit its analysis to the effects caused by the activities authorized by the federal permit). The Supreme Court’s reliance on *Public Citizen*, another NEPA case that involved the issue of the scope of analysis under NEPA, to support its holding that the Services’ interpretation of Section 7(a)(2) is reasonable, suggests that a similar approach should be utilized under Section 7.

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402(d) to object to State NPDES permits is limited to ensuring that State permits comply with the Clean Water Act and that statute’s implementing regulations. *See, e.g., National MOA*, 66 Fed. Reg. 11,206, 11,215-16.

In complex projects that involve both federal and non-federal interests, however, it may prove difficult (and controversial) to properly separate those portions of the project that are, first, federal, and, second, subject to discretionary control from the balance of the project. For example, there are many water-related projects operated by agencies such as the Bureau of Reclamation that have significant non-federal components. These projects also have significant non-discretionary components that, while federal in nature, are not subject to Section 7. In the past, the consulting agencies have provided descriptions of the federal action that do not clearly identify what activities are discretionary and, therefore, subject to Section 7. For example, a biological opinion issued by FWS on the Bureau of Reclamation's operations and maintenance program for the lower Colorado River contained a description of the proposed action that was 33 pages long, but was remarkably imprecise regarding the discretionary aspects of the agency's river operations. Biological and Conference Opinion on Lower Colorado River Operations and Maintenance – Lake Mead to Southerly International Boundary (April 30, 1997).<sup>22</sup>

Under *NAHB*, more effort will be required to specifically identify and segregate both the non-federal and the non-discretionary portions of a complex project. The effects caused by those portions of the project should be included in the existing environmental baseline and should not be attributed to the remaining, discretionary portions of the project. This will in turn require the federal agency that is proposing the action to properly identify and describe the scope of its discretionary authority. In the case of the consultation on the Bureau of Reclamation's operations and maintenance program, for example, the biological opinion should have identified the legal and regulatory constraints imposed on the Bureau under the Law of the River. This may prove problematic as agencies may be reluctant to fully acknowledge the limits of their authority, leading to disputes with interested parties.

It is also important to remember that the non-discretionary components of the project are not excluded from the effects analysis under Section 7. As suggested, those effects should be included in the environmental baseline. *See* 50 C.F.R. § 402.03 (definition of "effects of the action"). The effects of a project's non-discretionary components may be significant enough to warrant a "jeopardy" or "adverse modification" determination, preventing the discretionary portions of the project from proceeding. In that situation, it may become difficult to develop a meaningful reasonable and prudent alternative that would allow the agency to conduct any discretionary activities. This may be especially problematic in the case of large water projects with dams and other infrastructure that were constructed many years ago, and must continue to be operated in some fashion under the project's authorizing legislation. *Cf. National Wildlife Fed.*, 481 F.3d at 1233-35 (holding biological opinion issued by NMFS on the operation of the Columbia River Power System dams violated Section 7 by excluding impacts from non-discretionary operations).

Consequently, while the Supreme Court's opinion is certainly helpful to land and resource users, the devil remains in the details.

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<sup>22</sup> The biological opinion is available at [http://www.fws.gov/southwest/es/arizona/Documents/Biol\\_Opin/95216\\_CO\\_River\\_Operation\\_Lake\\_Mead.pdf](http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/95216_CO_River_Operation_Lake_Mead.pdf) (visited Sept. 9, 2007).

