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National Association of Home Builders v. Defenders of Wildlife and the Meaning of Agency "Discretion"

by Linus Chen

Editors' Summary: The Supreme Court's decision in National Ass'n of Home Builders v. Defenders of Wildlife *left unresolved the question of the meaning of discretion and agency authority. This decision and ensuing litigation over the meaning of discretionary agency action could impact the fate of over 1,300 endangered and threatened species. In this Article, Linus Chen explains the circuit court split over the conflicting statutory requirements of ESA §7 and CWA §402(b) regarding consultation and agency discretion. He argues that the Court wrongly decided that EPA did not have to consider ESA §7 and the loss of §7 protections before delegating CWA permitting program authority to the states. He cautions that by dismissing the plain language of §7(a)(2) requiring consultations to occur for any action by the federal government, the Court has placed new attention on the issue of discretion, and that the Supreme Court's decision may only increase the trend of using discretion as a defense for agency action or inaction.*

I. Introduction

The U.S. Supreme Court's five-to-four decision in *National Ass'n of Home Builders (NAHB) v. Defenders of Wildlife*[1] resolved a circuit split,[2] along with one issue about the interpretation of two conflicting statutes: that the U.S. Environmental Protection Agency (EPA), a federal agency, lacked discretion to consider the Endangered Species Act (ESA)[3] before transferring clean water compliance authority from the federal government to the states under the Clean Water Act (CWA).[4] But the Court's decision left unresolved the question of the meaning of discretion and when an agency has authority to comply with other laws. The Supreme Court's decision, and future litigation over the meaning of discretionary agency action, may likely impact the fate of over 1,300 endangered and threatened species.[5]

Previously, the circuits were split on the conflicting statutory requirements of ESA §7 and CWA §402(b). ESA §7 protects threatened and endangered species by requiring federal agencies to consult with the Services[6] and take precautionary actions based on the consultation so as to avoid jeopardizing a species or adversely modifying the species' critical habitat.[7] The Services may propose mitigation to a

Linus Chen is a third-year student at the Emory University School of Law. He wishes to thank Prof. William Buzbee and the seven students in his fall 2006 seminar, and Prof. Larry Sanders for their comments. This Article was a runner-up in the Environmental Law Institute's 2007 Endangered Environmental Laws writing competition prior to issuance of the decision. This revised Article incorporates the Court's recent decision.

1. Defenders of Wildlife v. EPA (*Defenders I*), 420 F.3d 946, 35 ELR 20172 (9th Cir. 2005), *rev'd sub nom.* National Ass'n of Home Builders (NAHB) v. Defenders of Wildlife, 127 S. Ct. 2518, 37 ELR 20153 (2007). Because petitioners (who were initially intervenor-defendants at the appellate level) submitted their petition for a writ of certiorari before the federal government submitted its petition for writ of certiorari, the case name changed. The nongovernment petitioners included the NAHB, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce, and American Forest & Paper Association.
2. Petitioners argued that the U.S. Court of Appeals for the Ninth Circuit's *Defenders I* was in direct conflict with *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 294, 28 ELR 21122 (5th Cir. 1998) and *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Comm'n (FERC)*, 962 F.2d 27, 22 ELR 21167 (D.C. Cir. 1992). However, as will be explained *infra* Part IV.A., petitioners erred in that there is no conflict with *Platte River*.
3. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
4. Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
5. As of this writing, there are 1,351 U.S. species listed under the ESA, http://ecos.fws.gov/tess_public/Boxscore.do (last visited Sept. 3, 2007).
6. "Services" is used to describe the two federal agencies with authority to implement the ESA. Under the ESA, the U.S. Fish and Wildlife Service (FWS) generally implements the ESA for terrestrial and freshwater species, and National Oceanographic and Atmospheric Administration (NOAA) Fisheries generally implements the ESA for marine species.
7. 16 U.S.C. §1536(a)(2).

federal agency, if mitigation is possible, to avoid violating ESA §7.[8] A court can also enjoin a federal agency that ignores the Services' mitigation recommendation as a violation of ESA §7. Thus, a federal agency like EPA is subject to the ESA §7 protection requirements before it can issue a CWA pollution discharge permit to a private actor.[9] CWA §402(b) outlines explicit criteria a state must meet in order to delegate a permitting program from EPA, the federal agency responsible for the transfer program, to the state; none of the criteria include wildlife protection. However, once EPA transfers the CWA delegation authority to the states so that states can grant permits to an individual actor, ESA §7 no longer applies to state grants of permits, and endangered species lose the ESA §7 protections they would have enjoyed had EPA retained authority.[10] As a result of these potential lost protections, environmental interests have sued EPA (and industry groups have intervened) to consider the loss of ESA §7 protections before EPA can transfer CWA §402(b) delegation authority to a state. Meanwhile, the federal government appears to have initiated a trend in its defense that it lacks discretion to consider the ESA for these actions, and the Supreme Court's decision will likely encourage this trend.[11]

Thus, the question before the Supreme Court that the circuits have grappled with was the manner in which EPA must consider the effects from the loss of ESA §7 protection before EPA can transfer CWA §402(b) authority to the states. The U.S. Court of Appeals for the Ninth Circuit in *Defenders of Wildlife v. U.S. Environmental Protection Agency (Defenders I)*,[12] held that EPA had to comply with the ESA and consider the loss of ESA §7 protection to federally listed species as a result of the proposed decision to transfer the delegated permitting program from the federal government to the states. However, the U.S. Court of Appeals for the Fifth Circuit in *American Forest & Paper Ass'n v. EPA*[13] determined that CWA §402(b) precludes EPA from considering the ESA. The Supreme Court in *NAHB* implicitly agreed with the Fifth Circuit when the Court reversed the Ninth Circuit.[14]

This Article will evaluate the majority's decision in *NAHB*, specifically how to reconcile the apparent statutory conflict, if one exists, of ESA §7's requirement for federal agencies to protect species (prohibition against jeopardy and adverse modification) and CWA §402(b)'s transfer of permitting authority from the federal government to the states. Part II includes general background first on the ESA, focusing on §7, and then the CWA, focusing on §402. Part III summarizes the relevant opinions: *American Forest, Defenders I, Defenders II* (en banc denial), and *NAHB*. Part IV analyzes the issues raised in the various opinions. This Section will focus on the proper interpretation of ESA §7's mandatory duties, statutory interpretation to harmonize conflicting statutes, whether EPA had discretion to consider the ESA in its decision to delegate the permitting program to the state, and implications of *NAHB* for future ESA litigation.

II. Background

The circuit split presented the Supreme Court with the task of interpreting two powerful environmental laws—the ESA and the CWA, which are discussed respectively below—and the specific provisions of those statutes that possibly create a conflict between these two laws.[15] The ESA discussion will focus on its historical development, and highlight §7's federal agency action and consultation requirement. The subsequent discussion on the CWA will focus on §402(b)'s national pollution discharge elimination system (NPDES) provision transferring clean water delegated permitting authority from EPA to the states.

A. The ESA

The ESA provides several different types of protections for endangered and threatened species. These varying protections are outlined in the different sections of the ESA. Sections 2 and 3 demonstrate the U.S. Congress' strong intent to protect species in general. One level of protection is provided by §9, which prohibits all actors from taking a species. Section 7 provides a greater level of protection for species, requiring federal agencies to consult prospectively with the Services to ensure that an agency's action does not jeopardize a species or adversely modify its critical habitat. However, §7 protections do not extend to states so species only receive the lesser §9 protections. Because ESA §7 is at

8. If mitigation is not possible, ESA §7(e) provides an extensive process to provide an exception for a federal agency from complying with the protection requirements of ESA §7, which is discussed *infra* Part II.A.2.

9. 33 U.S.C. §1342(a).

10. The failure to require state agencies to consult with the Services is arguably a statutory flaw of the ESA, which allows states to avoid complying with §7 protections. However, the U.S. Congress, wary of imposing extraordinary burdens on the state, may have limited the consultation requirement only to the federal government, and allowing ESA §9 "take" provisions, which apply to states and federal government, to set a minimum floor of protection. States could then choose to impose additional protections, perhaps comparable to those in ESA §7, in their own state "endangered species" statutes.

11. As the subject of this Article, *Defenders*, before being reversed by the Supreme Court in *NAHB*, rejected EPA's claim that EPA lacked discretion to consider ESA §7 before transferring CWA NPDES authority to the state, as discussed *infra* Part III.B. Also, the Federal Emergency Management Agency (FEMA) argued that it lacked discretion to consider the ESA in implementing the National Flood Insurance Program; the district court in *Florida Key Deer v. Brown*, 386 F. Supp. 2d 1281 (S.D. Fla. 2005) rejected that argument (citing *National Wildlife Fed'n v. Federal Emergency Management Agency*, 345 F. Supp. 2d 1151, 1173 (W.D. Wash. 2004) and *American Rivers v. Corps of Eng'rs*, 271 F. Supp. 2d 230, 252 (D.D.C. 2003), which found that the federal government does have discretion to consider the ESA). However, the government has appealed this case, which is pending before the U.S. Court of Appeals for the Eleventh Circuit. Similarly, a recent decision by the Ninth Circuit suggests that the federal government has recently changed its definition of discretion to avoid considering the ESA for various actions. National Wildlife Fed'n v. National Marine Fisheries Serv., 481 F.3d 1224, 1232, 35 ELR 20209 (9th Cir. 2007); *see also* Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109, 1143, 33 ELR 20224 (10th Cir. 2003) (dissent), *vacated*, 355 F.3d 1215 (2004), *infra* Part IV.D.

12. 420 F.3d 946, 35 ELR 20172 (9th Cir. 2005). Also, a petition for en banc rehearing was denied. *Defenders II*, 450 F.3d 394 (9th Cir. 2006), which is discussed *infra* Part III.C.

13. 137 F.3d 291, 294, 28 ELR 21122 (5th Cir. 1998).

14. However, *NAHB* never explicitly upheld *American Forest*, in fact only citing *American Forest* once to establish a split in the circuit courts. *See infra* note 59.

15. This Article will discuss the ESA first because of its prominent reputation (or notoriety) deriving from its strong legislative language and past Supreme Court precedence, which has lead scholars to label the ESA as a "super-statute," *infra* notes 29 and 189. However, the majority discusses the CWA first in its opinion apparently for chronological purposes. *NAHB*, 127 S. Ct. at 2525. The order that these two acts were discussed in the Court's decision may suggest their relative importance to the majority.

the core of this Article's analysis, §7 is discussed below separately from the other above-mentioned ESA sections.

1. General Background of the ESA: Sections 2, 3, and 9

As explicitly stated in §2 of the ESA, the purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . and to take such steps as may be appropriate. . . ."[16] Congress outlined the policy of the ESA in subsection (c):

> (1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purpose of this chapter. (2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.[17]

In the next section, §3, Congress defined many of the terms in the ESA. Congress defined "[t]he terms 'conserve,' 'conserving,' and 'conservation' [to] mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[18]

The use of strong and clear language in §§2 and 3 reveals Congress' intent to place priority on saving endangered and threatened species. The use of "shall" in subsection (c)(1) indicates a nondiscretionary duty. Subsection (c)(2) indicates a desire by Congress to avoid direct conflict with states on water and endangered species issues that could result in potential §9 take violations. Likewise, subsection (c)(2) suggests that Congress directed federal agencies to avoid indirect conflict with states that could result from §7 agency compliance. Lastly, §3 suggests that Congress granted broad power to federal agencies, in addition to the Services, to conserve and recover species.

Section 9 provides a minimum level of protection for species listed under the ESA, in contrast to §7 where Congress provides greater protections that are prospective, preventative, and extend to all listed species. Though the protections of §9 apply to all actors (individuals, state, and federal) and despite §9's substantial penalties,[19] successfully suing under §9 is more difficult than under §7.[20] Second, plants receive less take protection under §9 than do animals (though plants get full ESA §7 protections).[21] Likewise, ESA §9 is not effective for extremely rare, but wide-ranging species (such as the cactus ferruginous pygmy owl which was at issue in *Defenders I*)[22] because §9's take protections are not equivalent to §7's threshold of "may adversely affect," nor does it consider the impact of an agency's action on the recovery of the species. Thus, §9 does not provide protections comparable to §7, for jeopardy and adverse modification of critical habitat of a federal agency action, as discussed next.

2. ESA §7 Consultation and Its Jurisprudential Development

Section 7 of the ESA has two provisions that have given the ESA much of its potency.[23] ESA §7(a)(1) creates an affirmative duty for all federal agencies to utilize their authorities to further the purposes of the ESA for those listed species. In contrast, ESA §7(a)(2) provides much greater protections through its prohibitive requirements than §7(a)(1). ESA §7(a)(2) provides protections that combine both procedural and substantive requirements.[24] The procedural component

16. 16 U.S.C. §1531(b), ELR STAT. ESA §2(b).

17. *Id.* §1531(c), ELR STAT. ESA §2(c).

18. *Id.* §1532, ELR STAT. ESA §3.

19. A knowing violation against an endangered species can be punished by imprisonment for a year and a fine of up to $50,000; violations for threatened species carry punishments of imprisonment for six months and a fine of up to $25,000. 16 U.S.C. §1540(b)(1).

20. First, the evidentiary standard is higher for prosecuting violations of §9 than §7. *See* Defenders of Wildlife v. Bernal, 204 F.3d 920, 925, 30 ELR 20403 (9th Cir. 1999) ("preponderance of the evidence" standard used for §9 actions, compared to §7's standard of "best available" scientific evidence). Second, evidence must be compiled to sue under §9, where as an agency record is more easily produced in a §7 suit. Though a dead body is not necessarily needed to enforce ESA §9, an act must be discerned that leads to the consequential take and that is not speculative. Unless this act is extraordinarily extreme to establish sufficient "proximate causation," *See* Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 515 U.S. 687, 708, 25 ELR 21194 (1995) (O'Connor, J., concurring), it is difficult to show that an act such as habitat modification constitutes "harm" to a species, and consequently a violation of §9.

21. For animals, §9(a)(1) prohibits import and "take" of the species anywhere. However for plants, though the ESA prohibits import and commerce of endangered or threatened plants, §9(a)(2) limits take of plants to the occurrence of the species on federal land, transport, or sale, unless a state's "ESA" law provides additional protection. "Take" is defined under §3(18) as "to harass, harm, pursue, hunt, shoot, wound, kill, trap capture, or collect, or to attempt to engage in any such conduct." Though the broad interpretation of harm extends to all species, it is generally limited only to animals. Over one-half, 744, of the 1,351 U.S. listed species are plants. *See* http://ecos.fws.gov/tess_public/Boxscore.do (last visited Sept. 3, 2007).

22. *Defenders I*, 420 F.3d at 954. As a result of the lower protections of §9, the FWS in *Defenders I* did not believe that §9 enforcement offsets the effects of approving the transfer of the delegated permitting program authority from EPA to the state of Arizona under CWA §402(b).

23. 16 U.S.C. §1536. The following is the full text for ESA §7:

> Interagency cooperation
> (a) Federal agency actions and consultations.
>
> (1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act [16 U.S.C. §1533].
>
> (2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") 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 which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

24. *Defenders I*, 420 F.3d at 950; *see also* Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation From Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45, 59 (2002).

is the "consultation" between the action agency and the Services on the likely impacts to the species and its critical habitat from the action; the Services form a formal biological opinion (BO) to determine if there could be "jeopardy" to the species, or "adverse modification" to its critical habitat.[25] The substantive component mandates a duty to prohibit an action if it will likely jeopardize a species or adversely modify the species' critical habitat.[26] These two provisions of §7 are silent to the potential conflict of complying with other statutes, such as the CWA, but nevertheless ESA §7(a)(2) protections apply to all agency actions. Also, jeopardy is defined as an action that reasonably, directly or indirectly, reduces appreciably the likelihood of both the survival and recovery of a listed species.[27] The §7 requirement that agencies consider the impact of their action on the future recovery of the species provides greater protection than the take protections of §9. Again, §7, though applying to all species, only limits these prospective protections to federal agencies and does not extend the consultation and prohibition requirements upon states.

The Supreme Court in *Tennessee Valley Authority (TVA) v. Hill*[28] affirmed Congress' broad mandate to protect species through the use of ESA §7.[29] *TVA* held that the ESA could be applied retroactively to protect the snail darter, supersede "specific" congressional appropriations,[30] and prohibit operation of the dam.[31] The majority wrote that

> [o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded*, or *carried out* by them do not *jeopardize*" [a species]. . . . This language admits of no exception.[32]

The majority continues that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[33] Also, *TVA* held that ESA's policy of institutionalized caution requires federal agencies to consider the effect of their actions on endangered species, and that Congress clearly intended the utmost priority for protecting endangered species.[34] It is the strength of *TVA*'s language, reflected in the ESA's absolute mandates, that has made the ESA the "pit bull" of environmental laws.[35]

TVA thus suggests that the ESA has priority over most other laws (such as CWA §402).[36] *TVA* concluded that federal agencies have a broad mandate, under §§2, 3, 9, and 7, to protect species in every available manner possible.[37] Though Congress amended ESA §7 in the wake of *TVA*,[38] Congress formalized the §7 consultation process that ensured continued species protection[39] and retained the requirement that any federal agency action must not jeopardize a species or modify its critical habitat (unless granted an exception by the "God Squad").[40] Section 7 does not allow for the balancing of any additional factors,[41] such as the requirements of the CWA §402's transfer of permit program authority from the federal government to the state. Similarly, the 1978 Amendment does not suggest that Congress changed the priority of endangered species protection over other statutory requirements. Thus, a transfer of program authority from a federal agency constitutes an agency action

25. ESA §7(b). BOs are required in the formal process for consultation. Informal consultation is an optional process that is designed to help the applicant and the action agency determine whether formal consultation is needed.

26. The ESA's original action required that a federal agency ensure that their actions "does not jeopardize" a species. The ESA Amendments of 1979, Pub. L. No. 96-159, §4(1)(C), 93 Stat. 1225, 1226 (1979) changed the language to the current "is not likely to jeopardize" a species. Michael Bean & Melanie Rowland, The Evolution of National Wildlife Law, 240 n.232 (3d ed. 1997), determined that the legislative history did not intend a change to the standard. Though Michael Bean and Melanie Rowland further note that *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1048, 12 ELR 20903 (1st Cir. 1982), stated that this change "softened the obligation" of federal agencies, but imposed duties more far-reaching than any previously imposed by any court in an ESA case.

27. 50 C.F.R. §402.02. No definition has been promulgated yet by the Services for "adverse modification." The Services previously determined that the protections from adverse modification were equivalent to jeopardy protections under §7; however *Sierra Club v. Fish & Wildlife Serv.*, 245 F.3d 434, 31 ELR 20500 (5th Cir. 2001) and *Gifford Pinchot Task Force v. Fish & Wildlife Serv.*, 378 F.3d 1059, 34 ELR 20068 (9th Cir. 2004) have invalidated that interpretation, concluding that the ESA prohibition against adverse modification provides greater protection for a species than the prohibition against jeopardy.

28. 437 U.S. 153, 8 ELR 20513 (1978).

29. *See* Bean & Rowland, *supra* note 26, at 240-44; Jan Hasselman, *Holes in the Endangered Species Act Safety Net: The Role of Agency "Discretion" in Section 7 Consultation*, 25 Stan. Envtl. L.J. 125 (2006); and William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215 (2001). William Eskridge and John Ferejohn claim that *TVA* validated the ESA as a "super-statute," a statute that creates a new paradigm with a broad effect on the law with lasting public impact.

30. An appropriation bill is a more "specific" statute then a general and substantive statute such as the CWA or the ESA, although the latter usually provides more judicial deference. However, Prof. William Popkin suggests that that presumption against inferring substantive changes from appropriations is rebuttable. William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. Cal. L. Rev. 543 (1988).

31. *TVA*, 437 U.S. at 153.

32. *Id.* at 173.

33. *Id.* at 184-85.

34. *Id.* at 194. However, see Richard Lazarus, *Human Nature, the Laws of Nature, and the Nature of Environmental Law*, 24 Va. Envtl. L.J. 231 (2005), who suggests that the Supreme Court used such forceful language in the hope that Congress would amend the ESA and curtail, what some Justices considered, overly broad protections.

35. *See* Erik Stokstad, *What's Wrong With the Endangered Species Act?*, 309 Science 2150-52 (2005) and Stephen Quarles, *The Pit Bull Goes to School: The Endangered Species Act at 25: What Works?*, Envtl. F., Sept./Oct. 1998, at 55.

36. *TVA*, 437 U.S. at 194.

37. *Id.* at 184-85.

38. Pub. L. No. 95-632, 92 Stat. 3751 (1978). Most notably, Congress added the Endangered Species Committee, or "God Squad," exception, §7(e), that allowed for the federal government to take action that would knowingly allow the extinction of a species in very limited and extraordinary circumstances.

39. 16 U.S.C. §1536(a).

40. The Services' regulations for agency action generally reflect the language in the amended ESA §7. The Services did expound in their regulations three items worth noting. First, the regulations include agency action to include permits in which the action impacts water. 50 C.F.R. §402.02 (Definitions) Second, these actions may be indirect, which "are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." *Id.* Lastly, the regulations apply to actions in which there is "discretionary Federal involvement or control." *Id.* §402.03.

41. However, Congress did allow some balancing with respect to critical habitat designation. Section 4 does allow for the consideration of economics or other circumstances, such as the implementation of a conservation plan, in the determination in whether to designate a species' critical habitat.

that would require ESA §7 consultation and duty to avoid jeopardy. But whether the obligations of §402(b) could exempt EPA from ESA §7 requires a review of CWA and §402.

B. CWA

Before exploring the specifics of CWA §402, this section will first briefly discuss the CWA generally. Though the CWA predates the ESA, later amendments to the CWA do not appear to show that Congress intended for the CWA to supersede other laws. In fact, the CWA generally complements all other environmental laws, including the ESA.

1. CWA General Background

The precursor to the CWA was the Federal Water Pollution Control Act of 1948.[42] As amended in 1977, this law became the more commonly known CWA.[43] The CWA establishes the basic structure for regulating discharges of pollutants into the waters of the United States, giving EPA the authority to implement a pollution discharge permit program.[44]

The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[45] Furthermore, the CWA seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife."[46] Thus, the purposes of the CWA appear to be in harmony with the purposes of the ESA. Congress also recognized that the "primary responsibilities and rights" of the states would be instrumental in attaining these goals, especially in "implement[ing] the permit programs under sections 402 and 404 of this Act [33 U.S.C.S. §§1342, 1344]."[47]

Because of Congress' intent to incorporate significant state involvement, the CWA establishes a scheme of "cooperative federalism," especially in the control of nonpoint source pollution by both the state and federal governments.[48] Congress nevertheless intended the federal government to take an active lead in directing regulatory policy.[49] The states were to then create and execute measures to attain the goals set by the federal government.[50] The federal government established some requirements for all states to meet, such as interstate water quality standards,[51] and some additional requirements if the states wished to assume authority for their clean water compliance program. CWA §402, discussed next, enumerates these state requirements to transfer clean water compliance authority from EPA to the states.

2. Section 402: Requirements to Delegate Authority to the States

Section 402 of the CWA, titled the national pollutant discharge elimination system (NPDES), sets forth the criteria a state must meet in order for EPA to delegate a permitting program to a state. A state first applies to EPA to take over the CWA pollution permitting program. EPA then reviews the application to transfer clean water authority where, "[t]he Administrator shall approve each such submitted program unless he determines that adequate authority does not exist."[52] If a party believes that the Administrator improperly granted or denied a §402 delegation of authority, CWA §509(b)(1)(F) allows any person to request judicial review by a circuit court of EPA's decision.

Under §402(b), an Administrator shall approve a state's program if the state meets nine explicit requirements.[53] Thus, if a state meets these nine requirements, EPA shall transfer clean water compliance authority to the states. One of these requirements is that permits are issued for a fixed term, not to exceed five years, and can be terminated or modified due to a change in any condition that may require action to the permitted discharge.[54] However, none of these nine requirements considers wildlife nor the effect of the authority transfer to endangered species. Since states are not obligated to follow ESA §7, any endangered or threatened species that may be affected by a states' clean water compliance and pollution permitting program after the CWA §402(b) transfer will have only minimal ESA §9 take protections.[55] Clearly EPA cannot impose ESA §7 requirements upon a state, either through the CWA or the ESA itself. Recognizing this limitation, the federal government

42. Originally enacted by Act of June 30, 1948, ch. 758.

43. Pub. L. No. 95-217, §1, 91 Stat. 1566, provided: "This Act may be cited as the 'Clean Water Act of 1977.'"

44. CWA §404, 33 U.S.C. §1344, ELR STAT. FWPCA §404.

45. FWPCA §1251(a).

46. *Id.* §1251(a)(2).

47. *Id.* §1251(b).

48. Shanty Town Assocs. Ltd. Partnership v. EPA, 843 F.2d 782, 792, 18 ELR 21227 (4th Cir. 1988).

49. *Id.*

50. *Id.*

51. CWA §303(a)(1).

52. FWPCA §1342(b).

53. CWA §402(b)(1) through (9) list the nine criteria a state must meet in order to transfer clean water authority from EPA to the states. First, the permits are issued for fixed terms up to five years in compliance with other sections of the CWA which can be modified or terminated for cause. Second, permits are issued that comply with the CWA monitoring and reporting requirements. Third, EPA and the state ensure public notice and public hearing for the permit application. Fourth, the state ensures that EPA receives notice of the application. Fifth, the Administrator allows any state whose waters may be affected by the issuance of the permit to submit written recommendations. Sixth, EPA ensures that permits will not be issued which will impair navigation as determined by the U.S. Army Corps of Engineers, in consultation with the U.S. Coast Guard. Seventh, the program enforces permit violations with civil and criminal penalties. Eighth, the program ensures discharges from public treatment works meet CWA standards. Lastly, the Administrator ensures that industrial users of public treatment works will comply with the CWA.
One scholar notes that

> [b]oth courts and legislators have been careful to characterize state program approval not as a functional delegation of federal authority, but as an independent qualification of state powers. The principal consequence is to defeat attempts to secure federal judicial review of state actions on NPDES permits under some version of "agency" theory.

William H. Rodgers Jr., *Water Pollution*, *in* 2 ENVIRONMENTAL LAW §4:26 (West 1996).

54. CWA §402(b)(1):

> To issue permits which . . . (B) are for fixed terms not exceeding five years; and (C) can be terminated or modified for cause including, but not limited to, the following: . . . (iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

55. See *supra* Part II.A.1., for comparison of protections under ESA §§7 and 9.

previously tried to have states voluntarily consult with the Services; however, *American Forest* found such a voluntary consultation requirement illegal as a contravention of CWA §402(b).[56] Despite the Fifth Circuit's decision in *American Forest*, the Ninth Circuit concluded in *Defenders of Wildlife v. U.S. Environmental Protection Agency*[57]—after reviewing the above-discussed CWA and ESA statutes, legislative history, and jurisprudence—that EPA must still consider the loss of ESA §7 protections when transferring CWA §402(b) permit program authority to the states. A review of these circuit court decisions will establish that *Defenders* answered this question correctly, and that the Supreme Court was wrong to reverse the Ninth Circuit.

III. Review of the Cases That Split the Circuits' and the Supreme Court's Decision

The Supreme Court was presented with the three cases that split the circuits,[58] along with its precedents, to determine whether EPA must consider ESA §7 when deciding to delegate a permitting program to a state. The Court considered the Fifth Circuit's decision in *American Forest*, the Ninth Circuit's decision in *Defenders I*, the Ninth Circuit's en banc denial in *Defenders II*, and its own decision of *TVA*. Interestingly, the Court did not rely on the Fifth Circuit's decision in *American Forest*.[59] Each decision is discussed in turn below chronologically, starting with *American Forest* and culminating in the Supreme Court's decision in *NAHB*.

A. American Forest

The *American Forest* court concluded that EPA could not consider ESA §7 protections in its decision on whether to delegate permitting authority to a state.[60] In *American Forest*, the state of Louisiana requested a transfer of permitting program authority under CWA §402(b).[61] Environmental groups were concerned that EPA's NPDES transfer to Louisiana would harm endangered species because ESA §7(a)(2) does not apply to state agency actions.[62] Louisiana consented to an arrangement, as a condition of EPA delegating CWA permitting authority to Louisiana, whereby EPA could veto a permit to an individual actor if Louisiana failed to modify the permit to EPA's satisfaction to protect endangered species.[63] However, the plaintiff industry group challenged this rule, and the Fifth Circuit agreed with the plaintiff that EPA acted beyond its authority by imposing new legal requirements beyond those statutorily granted by the CWA.[64]

American Forest focused its analysis on the CWA, and not the ESA. According to the Fifth Circuit: "The key question is whether EPA may deny a state's proposed program based on a criterion—the protection of endangered species—that is not enumerated in §402(b)."[65] The Fifth Circuit determined that CWA §402(b) provides firm nondiscretionary language that EPA "shall" approve a state's submitted proposal unless the state fails to meet one of the nine explicitly listed requirements.[66] *American Forest* concluded that Congress could have granted EPA the ability to consider the ESA, just as Congress had allowed EPA to consider anchorage and navigation.[67] But since Congress did not explicitly allow the consideration of protecting species when EPA decides whether to delegate a permitting program to a state, the Fifth Circuit concluded that the plain language of CWA §402 "cannot be construed to allow EPA to expand the list of permitting requirements."[68]

The *American Forest* court disagreed with EPA that the Supreme Court's holding in *TVA* allowed the government to consider species protection in transferring permitting program authority. The Fifth Circuit stated that "[t]he 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."[69] *American Forest* (further erring in its analysis of §7) analogized its case to *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*.[70] The Fifth Circuit (misconstruing *Platte River*), stated that *Platte River* held that ESA §7(a)(2) "does not expand the powers conferred on an agency by its enabling act," but rather directs the agencies to "utilize" their existing powers to protect endangered species.[71] The Fifth Circuit then concluded that EPA could not invoke the ESA to create and impose additional requirements not authorized by the CWA.[72] Consequently, the Fifth Circuit vacated the portion of the rule that imposed the voluntary consultation requirement between the state and the Services, declared that EPA could not veto any proposed permit based on the Services' objection, and remanded the rule to EPA.[73]

56. *American Forest*, 137 F.3d at 294. See *infra* Part III.A., for a discussion of *American Forest*.

57. 420 F.3d 946, 35 ELR 20172 (9th Cir. 2005); 450 F.3d 394 (9th Cir. 2006) (en banc denied).

58. However, *Platte River* will not be featured since that case answered an unrelated question, as discussed *infra* Part IV.A.

59. In fact, *American Forest* is mentioned only once in the majority opinion of *NAHB*, 127 S. Ct. at 2529, where it mentions the split in the circuit courts.

60. *American Forest*, 137 F.3d at 294. The concurrence in *Defenders II* though interpreted the question in *American Forest* to be "whether the EPA must impose Endangered Species Act requirements on the states as a condition of transfer." *Defenders II*, 450 F.3d at 404.

61. *American Forest*, 137 F.3d at 294.

62. *Id.*; *see also* 16 U.S.C. §1536(a)(2).

63. *American Forest*, 137 F.3d at 294.

64. *Id.* at 299.

65. *Id.* at 297.

66. *Id.*

67. 33 U.S.C. §1342(b)(6).

68. *American Forest*, 137 F.3d at 298.

69. *Id.* The Fifth Circuit wrongly concluded that ESA §7 conferred only procedural protections; §7 confers both procedural and substantive protections, which is discussed in more detail *infra* Part IV.A.

70. 962 F.2d 27 (D.C. Cir. 1992). *See infra* Part IV.A., specifically note 167, for more criticism of *American Forest*'s interpretation of §7. For further criticism of the narrow application of ESA §7 in *Platte River* and *American Forest*, see Hasselman, *supra* note 29.

71. *American Forest*, 137 F.3d at 299 (quoting *Platte River*, 962 F.2d at 34). One of *American Forest*'s mistakes is that ESA §7(a)(1) calls for agencies to "utilize their existing powers to protect endangered species," not ESA §7(a)(2).

72. *American Forest*, 137 F.3d at 299.

73. *Id.* The Fifth Circuit also determined that EPA could not point to CWA §304(i) to justify its consideration of endangered species since §304(i)'s requirements did not include any mention of wildlife protection. *Id.* at 297-98 (citing the requirements of monitoring, report-

As a result of *American Forest*, the government in its memorandum of agreement (MOA) between EPA and the Services, declined to undertake consultation on permitting procedures (for endangered species) related to state CWA §402 NPDES permitting authority transfer.[74] Seven years later, in the Ninth Circuit's *Defenders I*, environmental interests successfully challenged the government's position that EPA did not have authority to consider ESA §7 in determining whether to delegate a permitting program to a state.[75] The Ninth Circuit the next year reaffirmed its decision when it denied an en banc rehearing in *Defenders II*.[76]

B. Defenders I

In *Defenders I*, environmental plaintiffs challenged EPA's decision to delegate administration of the NPDES program to Arizona. Plaintiffs challenged EPA's reliance on an inadequate BO issued by the U.S. Fish and Wildlife Service (FWS),[77] and alleged that EPA lacked the authority to take into account the impact to endangered species in its permit transfer decision.[78] The Ninth Circuit held that EPA had authority "to consider jeopardy to listed species in making the [CWA §402 pollution permitting program] transfer decision, and erred in determining otherwise."[79]

After determining that the court had subject matter jurisdiction,[80] and that plaintiffs had standing,[81] the court addressed the central issue of whether EPA had authority to consider the impacts on federally listed species as a result of its transfer of CWA §402 NPDES authority to the state. *Defenders I* determined that since the ESA empowers EPA to make decisions for the benefit of listed species, despite no explicit grant of authority from the CWA, EPA had the duty to deny the CWA §402 permit where such action would jeopardize a species.[82] After evaluating legislative history, statutory structure, and Supreme Court precedent, the Ninth Circuit ruled that ESA §7(a)(2)

> specifies that agencies *when acting affirmatively* refrain from jeopardizing listed species, even if the agency's governing statute does not so provide. . . . We conclude that the obligation of each agency to insure that its covered actions are not likely to jeopardize listed species is an obligation in addition to those created by the agencies own governing statute.[83]

Thus, *Defenders I* interpreted ESA §7 broadly to determine that "[a]n agency's obligation to consult is thus in aid of its obligation to shape its own actions so as not to jeopardize listed species, not independent of it."[84] *Defenders I* later looked to the U.S. House of Representatives Report to distinguish between the sections, and found that §7(a)(2) imposes a "further require[ment]" beyond that of §7(a)(1).[85] The Ninth Circuit described this distinction as "between using existing authority to promote conservation of species and conferring an additional, do-no-harm obligation—and reciprocal authority—applicable when the agency's own actions could cause harm to endangered species."[86] As the Court observed in its earlier case *Washington Toxics Coalition v. U.S. Environmental Protection Agency*,[87] "an agency cannot escape its obligation to comply with the [ESA] merely because it is bound to comply with another statute that has consistent, complementary objectives."[88]

Furthermore, *Defenders I* determined that EPA had "discretionary . . . involvement or control" to consider the effects to endangered species from the NPDES transfer since EPA still had "continuing decision-making authority."[89] In reviewing Ninth Circuit case history, *Defenders I* determined that EPA had "discretionary . . . involvement" to interpret its regulations "to be coterminous with the statutory phrase limiting section 7(a)(2)'s application to those cases 'authorized, funded, or carried out' by a federal agency."[90] But again, the Ninth Circuit focused not on whether "the agency ha[d] 'discretion'[91] to take measures to protect listed species, but whether the challenged action comes within the agency's decision making authority and remains so."[92]

The Ninth Circuit likewise found EPA's decision on whether the Agency had discretion and its decision that ESA §7 did not apply arbitrary and capricious because "EPA relied during the administrative proceedings on legally contradictory positions regarding its Section 7 obligations."[93] On one hand, EPA stated throughout the administrative record

ing, enforcement provisions, funding, personnel qualifications, and manpower requirements).

74. 66 Fed. Reg. 11205 (2001), Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act. Originally, EPA planned to consult with the Services on its permitting procedures for NPDES. EPA also initially believed that *American Forest* was wrongly decided, though proposed a draft MOA procedures that EPA believed were within EPA's authority under *American Forest*'s reading of the CWA. *See* 64 Fed. Reg. 2746 (1999), Draft Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and the Endangered Species Act.

75. *Defenders I*, 420 F.3d at 953.

76. *Defenders II*, 450 F.3d at 394.

77. The BO noted that "the loss of section 7 conservation benefits is an indirect effect of the [NPDES transfer] authorization. . . . [T]his loss of conservation benefits will appreciably reduce the conservation status of the cactus ferruginous pygmy-owl and the Pima pineapple cactus." *Id.* at 953. However, on April 14, 2006, the cactus ferruginous pygmy owl was recently delisted (71 Fed. Reg. 19452), since it was determined as "not a listable entity," under the Ninth Circuit's decision in *National Ass'n of Homebuilders v. Norton*, 340 F.3d 835, 33 ELR 20259 (9th Cir. 2003). During the summer 2006, the District Court of Arizona granted arguments for expedited hearing on the merits of the delisting of the owl; as of this date, no decision has been issued on the matter, http://www.sahba.org/pygmy_owl/June3-06.html (last visited Sept. 3, 2007). Also, beside the 60 species the FWS identified in its BO, additional species that could be negatively impacted by the CWA authority transfer included the southwestern willow flycatcher and the Huachuca water umbel, a plant. *Defenders I*, 420 F.3d at 952.

78. *Id.*

79. *Id.* at 950.

80. *Id.* at 955-56.

81. *Id.* at 956-58.

82. Hasselman, *supra* note 29, on *Defenders I*, 420 F.3d at 963.

83. *Defenders I*, 420 F.3d at 967.

84. *Id.* at 961.

85. *Id.* at 965.

86. *Id.* at 965.

87. 413 F.3d 1024 (9th Cir. 2005).

88. *Defenders I*, 420 F.3d at 969.

89. *Id.* at 968-69.

90. *Id.* at 970.

91. As defined by the Services in 50 C.F.R. §402.03.

92. 420 F.3d at 969.

93. *Id.* at 953.

that ESA §7 required EPA to consult with the Services on the effect of a permit transfer to listed species.[94] On the other hand, "EPA decided that it had to consult but had no authority to do anything concerning the matter about which it had to consult. One would not expect that Congress would set up such a nonsensical regime. Not surprisingly, it did not."[95]

Defenders I next addressed the split in the circuit courts on the broad versus narrow interpretation of ESA §7. The Court noted the decisions in the U.S. Courts of Appeals for the First and Eighth Circuits,[96] which found the importance of a broad §7 interpretation to ESA compliance.[97] The Ninth Circuit criticized *American Forest*'s misunderstanding of ESA §7(a)(2), originating in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit's narrow interpretation of §7, and the Fifth Circuit's failure in relying upon *Platte River*[98] to distinguish the difference between §7(a)(1) and §7(a)(2).[99] The Ninth Circuit distinguished its decision from the Fifth Circuit's *American Forest* decision by determining that the latter did not address the question of whether the ESA compelled EPA to consider §7 regarding delegating the permitting program to the state.[100] *Defenders I* also criticized the Fifth Circuit's "fundamental misconception concerning *section 7(a)(2)*."[101] Not that "EPA lacks authority to require states to protect a listed species,"[102] but that "*[s]ection 7(a)(2)* however specifies that *if* an agency is contemplating a covered "agency action," it has an obligation *both* to consult and to ensure against taking action likely to jeopardize a species. The Fifth Circuit's notion that the consultation and assurance aspects of the statute are independent is simply incorrect."[103]

Lastly, the Ninth Circuit considered whether EPA could have relied on any other analysis other than the flawed BO. In considering the remainder of the BO[104] and alternative protections to ESA §7 (the MOA, EPA oversight, ESA §9 take provisions, and Arizona state law),[105] *Defenders I* held EPA's decision to still be arbitrary and capricious. Thus, the Ninth Circuit determined that the proper remedy would be to remand the decision to the Agency, and vacate the current rule.[106]

In contrast, the short two-page dissent relied on the Fifth Circuit's reasoning in *American Forest* to find that EPA did not have discretion to consider the ESA in the delegated permit program transfer.[107] The dissent found that the permit program transfer was not an "agency action" under ESA §7, and that EPA could not impose additional ESA obligations to the CWA §402(b) delegation requirements.[108] Thus, with a split in the circuits on whether EPA must consider the ESA in its decision to transfer clean water compliance authority to the states, federal defendants in *Defenders I* petitioned the Ninth Circuit for en banc rehearing.

C. Defenders II*: Denial of Petition for En Banc Rehearing*

The Ninth Circuit, in highly contentious opposing opinions, denied en banc rehearing in *Defenders of Wildlife v. U.S. Environmental Protection Agency (Defenders II)*.[109] The judges' disagreements focused on three main issues, discussed respectively: (1) reconciling the conflicting statutes; (2) the extent to which the *Defenders I* decision created a split in the circuits; and (3) applicability of *Department of Transportation v. Public Citizen*[110] to the instant case.

First, the dissent determined that the plain language of the CWA precluded EPA from considering anything else, other than the nine explicit factors of §402(b), such as ESA §7.[111] The dissent's analysis of basic statutory interpretation and plain language concludes that "shall" under the CWA means that EPA lacked discretion to deny transferring authority to the state under §402 once the nine statutory criteria were sat-

94. *Id.* at 959-60.

95. *Id.* at 961.

96. Conservation Law Found. v. Andrus, 623 F.2d 712, 10 ELR 20067 (1st Cir. 1979) and Defenders of Wildlife v. Administrator, EPA, 882 F.2d 1294, 19 ELR 21440 (8th Cir. 1989).

97. *Defenders I*, 420 F.3d at 970.

98. *Platte River*, 962 F.2d 27.

99. *Defenders I*, 420 F.3d at 970-71. The Ninth Circuit stated:

> *Platte River* did not recognize the obvious differences between §7(a)(1) and (a)(2) in both language and purpose. The D.C. Circuit did not, for example, discuss at all the meaning of the term "insure" in §7(a)(2), absent from §7(a)(1). Nor did it notice the difference between affirmative agency attempts to protect listed species (§7(a)(1)) and a do-no-harm directive pertaining to affirmative agency actions with likely adverse impact on listed species (§7(a)(2)). Finally, the D.C. Circuit in *Platte River* did not mention the availability of exemptions from §7(a)(2) under the 1978 amendments, or the repeated decision of Congress not to approve proposed amendments that would have limited the reach of §7(a)(2) so as to accord with the D.C. Circuit's reading of the unamended statute. For all these reasons, we do not find *Platte River*'s cursory consideration of the question persuasive.

However, the Ninth Circuit also misconstrues *Platte River*'s narrow interpretation of §7. *See infra* note 167.

100. *Id.* at 960. Instead, the Ninth Circuit determined that the Fifth Circuit rejected requiring states to follow §7 procedures as a condition of transfer when issuing permits.

101. *Id.* at 971.

102. *Id.* (internal quotes omitted).

103. *Id.*

104. *Id.* at 972-73.

105. *Id.* at 973-77.

106. *Id.* at 978-79. The Court justified vacating Arizona's permit transfer, invoking ESA's "institutionalized caution mandate" to protect species, since the record provided inadequate assurances that listed species would not be harmed. However, the Ninth Circuit's vacation analysis can be criticized as slightly suspect since the greatest impact of the permit transfer was arguably on the very rare cactus ferruginous pygmy owl, which was finally de-listed as a "non-listable species [entity]" about eight months after the *Defenders I* decision, per the Ninth Circuit's decision in *National Ass'n of Homebuilders v. Norton*. *See supra* note 77. The Court did acknowledge the pending delisting of the pygmy owl at 953 n.4: "While we illustrate our analysis with examples of individual listed species, including the pygmy owl, our analysis applies with equal force even if the FWS de-lists any such species." *Id.*

107. *Id.* at 979 (dissent).

108. *Id.* at 980. Also, the dissent in *Defenders I* did not mention *Department of Transp. v. Public Citizen*, 541 U.S. 752, 34 ELR 20033 (2004), though the majority did in justifying its decision. The dissent in the en banc denial, *Defenders II*, 450 F.3d at 394, made *Public Citizen* part of its focus. *See infra* Part III.C.

109. *Defenders II*, 450 F.3d at 394. Judge Berzon, who authored *Defenders I*, concurred in the en banc denial. *Id.* at 402. Six judges dissented to the petition denial: Circuit Judge Alex Kozinski authored the primary dissent, with whom Judges Diarmuid O'Scannlain, Andrew Kleinfeld, Richard Tallman, Connie Callahan, and Carlos Bea joined for the denial of rehearing en banc. *Id.* at 395. Judge Kleinfeld wrote a separate short dissent echoing some of Judge Kozinski's arguments.

110. 541 U.S. 752, 34 ELR 20033 (2004).

111. *Defenders II*, 450 F.3d at 398 (dissent).

isfied.[112] The dissent considered such an interpretation a *sub silentio* repeal of the CWA.[113] However, the concurrence (correctly) responds that the various canons of statutory interpretation clearly suggest the opposite since the dissent's interpretation would be a *sub silentio* repeal of the ESA, a later enacted statute.[114] The concurrence considered the requirements of ESA §7 to be an additional consideration separate from CWA §402(b).[115]

Second, the dissent[116] noted that the majority opinion conflicts with the Fifth Circuit's decision in *American Forest*[117] and the D.C. Circuit's *Platte River*[118] decision.[119] However, the concurrence responds that the question at issue in *Defenders I* was different from that in *American Forest*: "[N]ot what factors the EPA must consider in making the transfer decision but whether the EPA must impose Endangered Species Act requirements on the states as a condition of transfer."[120] Furthermore, the concurrence criticized *American Forest*'s analysis of ESA §7(a)(2), noting that *American Forest*'s decision conflicts with the two other circuits' decisions on ESA §7(a)(2).[121]

Third (and the dissent's main argument), the dissent criticized the majority's failure to properly interpret *Public Citizen*, in which the dissent did not perceive any substantial difference between that case and *Defenders I*.[122] In *Public Citizen*, the agency in question lacked the ability under the Federal Motor Carrier Safety Administration to consider the National Environmental Policy Act (NEPA). The dissent believed that under *Public Citizen*, since NEPA was similar to the ESA, EPA lacked the ability to consider the ESA.[123] Thus, the dissent concludes that "[t]he Supreme Court's holding in *Public Citizen* applies equally to this case: Because EPA had no discretion under the CWA to prevent the transfer of permitting authority to Arizona, it did not need to consider the transfer's effects on endangered species."[124]

However, the concurrence explained that they did not apply *Public Citizen* in *Defenders I* because the dissent "is so wrong that there was no reason [the majority] would have addressed [the dissent's] argument in the first instance."[125] Specifically, the concurrence noted that NEPA, the statute at issue in *Public Citizen*, was a procedural statute and thus quite different from ESA §7, which has dual substantive and procedural elements.[126] Because of the ESA issue in *Defenders II*, the concurrence states that the correct Supreme Court analysis should be *TVA*,[127] rather than *Public Citizen*.

As the concurrence correctly points out, the *Defenders I* dissent, in adopting *American Forest*'s analysis, failed to consider the proper standard for ESA §7. The dissent and *American Forest* should have considered ESA §7(a)(2), which requires that a federal agency, such as EPA, prohibit undertaking an action that may jeopardize a species or adversely modify its critical habitat. In the process, the dissent and *American Forest* ignored Congress' and *TVA*'s mandate to place considerations of endangered species foremost in agency action, which *Defenders I* and *II* correctly highlight. Instead, the dissent and *American Forest* wrongly turned to ESA §7(a)(1) to answer the question of whether an agency may consider the effects of its action on endangered or threatened species. After the Ninth Circuit denied rehearing en banc, the Supreme Court then accepted certiorari to resolve these questions and the circuit split.

D. NAHB[128]

The majority opinion (authored by Justice Samuel A. Alito Jr.) framed the question presented as "whether §7(a)(2) [of the ESA] effectively operates as a tenth criterion"[129]; not surprisingly, the majority agreed with the petitioners, reversed the Ninth Circuit, and held that §7(a)(2) was an impermissible tenth criteria for EPA to consider as part of the exclusive nine criteria of CWA §402(b). The majority in Part II of the opinion then analyzes the history of the two acts in question, discussing the CWA first[130] and the history of the case, and briefly discusses the arbitrary and capricious standard for final Agency action. Despite EPA's "internally inconsistent" decision and the Agency changing its mind at different levels, the majority decided that the only matter to resolve was the final Agency action.[131] The dissent did not address this issue directly, but rather criticized the majority for finding a categorical exception to the ESA §7 consultation requirement by challenging the internally inconsistent regulations underlying EPA's decision.[132]

In analyzing the Agency's final action, the majority found that analysis of the inconsistent regulations the agencies relied upon was a reasonable manner to reconcile these two conflicting statutes. First, after briefly mentioning standard canons of interpretation and precedence supporting these

112. *Id.* at 399.

113. *Id.* at 398 n.2 and 399.

114. *Id.* at 404 n.2 (concurrence). *Infra* Part IV.B. provides additional discussion of statutory interpretation for conflicting statutes.

115. *Id.* n.2.

116. *Id.* at 400-01 (dissent).

117. *American Forest*, 137 F.3d at 291.

118. *Platte River*, 962 F.2d at 27.

119. The Seventh Circuit in *Home Builders Ass'n of Greater Chicago v. Corps of Eng'rs*, 335 F.3d 607, 33 ELR 20236 (7th Cir. 2003), cited with approval *American Forest* in a CWA §404 case, not §402. *Home Builders* determined that plaintiffs presented a nonjusticiable claim since plaintiffs had not alleged a concrete injury stemming from a final agency action. It thus appears that there may be an additional circuit which interpret ESA §7 narrowly.

120. *Defenders II*, 450 F.3d at 404 (concurrence).

121. *Id.* (citing Defenders of Wildlife v. Administrator, 882 F.2d 1294, 19 ELR 21440 (8th Cir. 1989), and Conservation Law Found. v. Andrus, 623 F.2d 712 (1st Cir. 1979)).

122. *Defenders II*, 450 F.3d at 398-99 (dissent). The dissent characterized the agency in *Public Citizen* as lacking discretion regarding motor vehicle carrier registration, so an "agency cannot be considered a legally relevant 'cause' of the effect." The dissent similarly concluded that since EPA had no discretion under the CWA to take account of the ESA to prevent the §402 permit program delegation to the state, the majority's decision contradicts the Supreme Court's unanimous *Public Citizen* decision. *Id.* at 399.

123. *Id.* at 399.

124. *Id.*

125. *Id.* at 404 (concurrence). Also, the original dissent in *Defenders I* does not cite to *Public Citizen*, which the concurrence criticizes earlier that the dissents of rehearing en banc consideration "raise issues not addressed by that opinion because [sic] not articulated by the parties before the petition for rehearing state—or ever." *Id.* at 402.

126. *Id.* at 404.

127. 437 U.S. at 153.

128. Again, the name of the case changed because NAHB petitioned the Supreme Court for certiorari before the federal government submitted their petition for certiorari. *See supra* note 1.

129. *NAHB*, 127 S. Ct. at 2525.

130. See *supra* note 15 on the majority's possible subjective decision to discuss ESA second.

131. *NAHB*, 127 S. Ct. at 2530.

132. *Id.* at 2541-44 (Stevens, J., dissenting).

canons (later enacted statutes may repeal earlier statutes, specific controls general),[133] the majority, without much analysis, determined that the provision of CWA §402(b) "operates as a ceiling as well as a floor," and that adding any additional requirement would violate "§402(b)'s statutory command."[134] Wrongly citing *Platte River*,[135] the majority held that the Ninth Circuit's interpretation of ESA §7(a)(2) "would thus partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species."[136]

The dissent (authored by Justice John Paul Stevens), however, finds fault with the majority's failure to reconcile both statutes under *Morton v. Mancari*,[137] and to respect the precedence of *TVA*,[138] which applied to all agency actions, regardless of whether the action was discretionary or mandatory.[139] The dissent also points out that the ESA provides several statutory provision safety valves that would allow EPA to comply with both Acts. If EPA consults with the Services, under ESA §7(b) the consultation could result in a "no jeopardy" determination.[140] Also, if the Services determined possible jeopardy to the species, EPA could still continue with its action if it complied with the Services' "reasonable and prudent actions."[141] There was also the God Squad exception that could allow EPA's action to continue.[142] Lastly, the dissent proposed that EPA could harmonize the statutes by complying with its regulation 40 C.F.R. §123.24(a) that requires a state to enter into an MOA that retains some oversight duties to EPA.[143]

Second, the majority found the Services' regulations at 50 C.F.R. §402.03, which state that "[s]ection 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control,"[144] a reasonable tool to reconcile the conflict between these two statutory provisions.[145] The majority deferred to the expert agencies on the issue of reconciling these two statutes under *Chevron*,[146] and determined that this regulation effectively harmonized both statutes "by applying §7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates."[147] To further support the Services' interpretation of regulation 50 C.F.R. §402.03 being limited to only discretionary agency action, the majority obliquely relies on the "basic principle announced in *Public Citizen*[148]—that an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion *not* to take."[149] The majority also distinguishes *TVA*,[150] finding that *TVA* and ESA §7(a)(2) apply only to discretionary actions in support of 50 C.F.R. §402.03.[151]

However, the dissent fails to find that 50 C.F.R. §402.03 harmonizes the ESA and the CWA. The dissent disagrees with the majority that these regulations are limited to only discretionary actions.[152] Next, the dissent challenges the validity of the regulations. Looking to the Services' history in promulgating this regulation, the dissent notes that the word discretionary was not present in the proposed regulation; was only added in the final version of the regulation; and that the final rule that explained the regulation did not even address discretion, retaining broad language that ESA §7(a)(2) applies to "*all* Federal actions."[153]

Lastly on the issue of discretion, the majority determined that though the act of transferring NPDES permitting authority from EPA to the state may include some discretion by the Services, the exercise of that discretion did not mean that EPA could "add another entirely separate prerequisite to that list."[154] To further support its reasoning, the majority cited the Services' post hoc formal agency letter to the state of Alaska "concluding that the authorization of an NPDES permitting transfer is not the kind of discretionary agency action that is covered by [50 C.F.R.] §402.03."[155] However, the dissent identifies that, as the majority admits, "once any discretion has been identified—as it has here—§7(a)(2) must apply."[156] The dissent further disapproves of the majority's reliance on the Service's post hoc formal letter, chiding "[w]e have long held, that courts may not affirm an agency action on grounds other than those adopted by the agency in the administrative proceedings.[157] The majority ignores this hoary principle of administrative law and substitutes a post-hoc interpretation of §7(a)(2) and §402.03 for that of the relevant agency."[158] Also, in a short separate dissent, Justice Stephen Breyer suggests that there are some unrelated statutes, such as with drugs regulated by the U.S. Food and Drug Administration (FDA), where ESA §7 would not reach; but since the ESA and the CWA are complementary statutes, that question was not before the Court.[159]

133. *Id.* at 2532 (majority opinion).

134. *Id.* at 2533.

135. *Platte River*, 962 F.2d at 27.

136. *NAHB*, 127 S. Ct. at 2533.

137. 417 U.S. 535 (1974): "[W] hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." 417 at 551.

138. 437 U.S. at 153. ESA §7 "admits no exception." *Id.* at 173.

139. *NAHB*, 127 S. Ct at 2538, 2541 (Stevens, J., dissenting).

140. *Id.* at 2545.

141. *Id.*

142. *Id.* at 2546.

143. *Id.* at 2547. However, this may run into some problems that the Fifth Circuit in *American Forest* found improper.

144. 50 C.F.R. §402.03 (emphasis added).

145. *NAHB*, 127 S. Ct. at 2533 (majority opinion).

146. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 14 ELR 20507 (1984).

147. *NAHB*, 127 S. Ct. at 2534.

148. *Public Citizen*, 541 U.S. at 752.

149. *NAHB*, 127 S. Ct. at 2535.

150. 437 U.S. at 153.

151. *NAHB*, 127 S. Ct. at 2536.

152. *Id.* at 2542 (Stevens, J., dissenting):

> The Court is 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. . . ." Ante, at 21 [127 S. Ct. at 2536] (emphasis added). That is not, in fact, what §402.03 "says." The word "only" is the Court's addition to the text, not the agency's.

153. *Id.* at 2542-43.

154. *Id.* at 2537 (majority opinion).

155. *Id.*

156. *Id.* at 2549 (Stevens, J., dissenting).

157. *See* Securities & Exchange Comm'n v. Chenery Corp., 318 U.S. 80, 87 (1943).

158. *NAHB*, 127 S. Ct. at 2544.

159. *Id.* at 2553 (Breyer, J., dissenting).

IV. Analysis of the Issues

Much of the Supreme Court's, and the Ninth and Fifth Circuit's, analysis focused on whether EPA had discretion to consider the impacts to endangered and threatened species in anticipation of delegating federal permitting program authority to the states under CWA §402(b). Although CWA §402(b) imposes specific and discrete requirements upon EPA before transferring permitting program authority to the states, the *NAHB* majority, *American Forest*, and the dissent in *Defenders I* misconstrue the application of ESA §7 to the issue before them. Furthermore, the Supreme Court majority, *American Forest*, and the dissent in *Defenders I* fail to properly reconcile the conflicting statutes, affecting the discretion analysis. By relying on the Services' regulation at 50 C.F.R. §402.03, *NAHB* removes an important tool in the conservation of endangered and threatened species and eliminates an incentive to avoid future harms to imperiled species, which may result in future conflicts for EPA and the states to perform their NPDES permitting authority. Lastly, *NAHB*'s holding of discretion, besides throwing into question the meaning of discretion, possibly creates a new excuse for the federal government to shirk its responsibilities under the ESA. Each of these issues will be discussed further below.

A. Appropriate §7 Standard: ESA §7(a)(2)

As the Ninth Circuit states in its opinions, the *Defenders I & II* dissents and the Fifth Circuit's *American Forest* decision incorrectly interpreted ESA §7.[160] By applying the wrong standard, specifically ESA §7(a)(1), *American Forest* and the Ninth Circuit dissent wrongly determined that EPA did not have authority to consider endangered and threatened species. The ESA, however, provides such authority to EPA under ESA §7(a)(2), mandating that an agency's action not further imperil a federally listed species. Though *NAHB* analyzes the issue under the correct standard of ESA §7(a)(2) (not §7(a)(1)), the Court perpetuates the misinterpretation of *Platte River*'s holding, and should not have deferred to the federal agency on its unsupported regulations on §7(a)(2).

First, *American Forest* mistakenly held that "[s]ection 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers."[161] As the *NAHB* majority and the Ninth Circuit correctly noted, §7(a)(2) imposes both substantive and procedural requirements on "each Federal agency."[162] An interpretation that ESA §7 provides only procedural protections would misread the affirmative and prohibitory duties of §7(a)(2) as irrelevant.[163] *American Forest*'s failure to recognize the dual protections of §7(a)(2) may have played a role in its decision to focus its analysis on CWA §402, rather than ESA §7.

Second, a more fundamental error of both *NAHB*'s and *American Forest*'s analysis was to narrowly interpret ESA §7 such that an agency could not consider the impacts of its action on endangered species. To support its conclusion, *NAHB* and *American Forest* turned to the D.C. Circuit in *Platte River*.[164] But again, both decisions misconstrued *Platte River*'s holding of §7. The Supreme Court wrote: "*See*, *e.g.*, Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 962 F.2d, at 33-34 (considering whether §7(a)(2) overrides the Federal Power Act's prohibition on amending annual power licenses)"; similarly, the Fifth Circuit wrote: "[T]he District of Columbia Circuit construed ESA §7(a)(2) in [*Platte River*], holding that the statute 'does not expand the powers conferred on an agency by its enabling act,' but rather directs the agencies to 'utilize' their existing powers to protect endangered species."[165] Neither court recognized that *Platte River* paraphrased ESA §7(a)(1) for the provision that agencies "utilize their existing powers to protect endangered species."[166] The Fifth Circuit thus ignored the prohibitory requirements of ESA §7(a)(2) in its decision.[167] Thus, a CWA §402 delegation without ensuring against jeopardy, as *American Forest* read the law, would "vitiate[ ] the ESA, tying agencies' hands whenever an affirmative duty—no matter how destructive—has been placed upon them."[168] The Supreme Court majority, however, dismissed the plain language of

160. *Defenders I*, 420 F.3d at 970-71, and *Defenders II*, 450 F.3d at 403.

161. *American Forest*, 137 F.3d at 298.

162. *NAHB*, 127 S. Ct. at 2535; *Defenders I*, 420 F.3d at 949.

163. The argument that ESA §7 provides only procedural protections is that an agency, after consultation with the Services that finds "jeopardy" or "adverse modification of critical habitat" can choose to continue with the action and subject itself to ESA §7 violation. As the Supreme Court noted: "Although the action agency is 'technically free to disregard the Biological Opinion and proceed with its proposed action . . . it does so at its own peril.'" Bennett v. Spear, 520 U.S. 154, 170, 27 ELR 20824 (1997).

164. *Platte River*, 962 F.2d at 27.

165. *NAHB*, 127 S. Ct. at 1533, *American Forest*, 137 F.3d at 299 (quoting *Platte River*, 962 F.2d at 34).

166. *Platte River*, 962 F.2d at 34.

167. In doing so, *American Forest* also ignored Congress' intention that §7(a)(2) creates a "strict roadblock," to absolutely prohibit actions that may cause jeopardy. Hasselman, *supra* note 29. Furthermore, it does not appear that the D.C. Circuit in actuality narrowly interpreted ESA §7 as *NAHB*, *American Forest*, and *Defenders* believed. Instead, *Platte River* appears to have addressed an ESA §7(a)(1) question, not an ESA §7(a)(2) question. The environmental plaintiffs in *Platte River* alleged that the federal agency failed to protect species by doing "whatever it takes to protect endangered and threatened species to protect the threatened and endangered species that inhabit the Platte River basin." (*Platte River*, 962 F.2d at 34 (internal quotes omitted).) Thus, the plaintiffs appeared to make an ESA §7(a)(1) argument. Also, the D.C. Circuit appeared to hold that defendants fulfilled their obligations under ESA §7(a)(2). In a footnote, Platte River explained that federal defendants did *informally* consult with the Services and adopted the Services' recommendation to protect species, apparently complying with ESA §7(a)(2). (*Platte River*, 962 F.2d at 33 n.2.) Thus, defendants failure to *formally* consult with the Services was not a violation when defendants appeared to again comply with ESA §7(a)(2). In other words, *Platte River* answered the question whether defendants had authority under §7(a)(1) to create new protections for the species. *Platte River* did not consider whether defendant's actions were prohibited under §7(a)(2), since defendant's apparently complied with §7(a)(2). Unfortunately, *Platte River* did not make the distinction clear that the D.C. Circuit was focusing on the plaintiff's ESA §7(a)(1) arguments when the court later abbreviated §7 for §7(a)(1) in the statement the Fifth Circuit quotes. *American Forest* failed to catch *Platte River*'s subtle characterization of §7, and mischaracterized the whole of §7 as the limited affirmative ESA §7(a)(1) provision. Again in doing so, the Fifth Circuit did not consider that ESA §7(a)(2) provided EPA with the authority to consider the impacts to endangered and threatened species as a result of the decision to delegate the permitting program to the states. Thus, *American Forest* wrongly interpreted that ESA §7 only provided limited authority to other federal agencies to protect species, and that the EPA could not consider the ESA under CWA §402(b).

168. Hasselman, *supra* note 29.

§7(a)(2), holding that "[r]eading the provision broadly would thus partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species."[169] That statement by the majority may be correct for §7(a)(1), but is incorrect for §7(a)(2). The *NAHB* majority wrongly narrowed the scope of §7(a)(2) to discretionary actions, ignoring the provision's plain language, the Court's past precedence, Congress' firm mandate in the ESA, but with safety valves such as the God Squad exception clause.

ESA §7(a)(2), as a condition separate from CWA §402(b), requires that all related actions, not just discretionary actions, undergo consultation. Congress clearly intended for an agency to consider the impacts of their action upon an endangered or threatened species. The plain language of §7(a)(2) requires an agency to insure against jeopardy for "any action authorized, funded, or carried out," suggesting that §7 protections apply for even a nondiscretionary agency action.[170] As *TVA* pointed out, Congress' general intent was that the ESA provide "institutionalized caution" to protect species,[171] which the plain language supports from Congress' use of the word "any" to modify all actions. As the Supreme Court has repeatedly noted, the use of the term "any" is to be interpreted broadly, and thus does not distinguish between discretionary and nondiscretionary actions.[172] Nevertheless, the *NAHB* majority, as the dissent points out, fails to abide by *TVA* and the plain language of §7(a)(2).[173]

As the dissent further points out, the ESA provides several statutory provision safety valves that would allow EPA to comply with both Acts.[174] From the Services' experience, ESA §7(a)(2) does not mandate an automatic ceasing of an agency's activity or perhaps even a modification of an agency's action.[175] The mere obligation to consider impacts to endangered species does not necessarily override other statutory requirements since §7 provides a procedure to avoid jeopardy,[176] and even a safety valve to allow jeopardy via the God Squad.[177] Thus, the requirement to consider the loss of protection under §7(a)(2), especially when the Services determine that there is no jeopardy to the species, does not result in a statutory conflict with CWA §402(b). Instead, the *NAHB* majority narrows the breadth of §7, and carves a new exception to consultation not in the ESA.

Thus, the Ninth Circuit appropriately considered the interpretation of ESA §7(a)(2) in its decision.[178] Not only did EPA rely on conflicting interpretations of its ESA §7 responsibilities,[179] it ultimately used the wrong interpretation of §7(a)(2) in its determination that the NPDES transfer would not affect endangered species.[180] Thus, ESA §7(a)(2), not §7(a)(1), is the correct provision to use to analyze whether EPA should consider consultation results and loss of §7 protections before transferring clean water authority. But while *NAHB* properly considered §7(a)(2), the Court ignored the plain meaning of §7(a)(2) and previous precedent, narrowing the reach of §7 before determining that CWA §402(b) precluded the consideration of threatened and endangered species. *NAHB* wrongly looked exclusively to §402(b) and regulation 50 C.F.R. §402.03 to resolve the apparent statutory conflict. Rather, as the dissent and following section will discuss, these two statutes can be harmonized while allowing §7 to apply.

B. Resolving Statutory Conflicts Between the ESA and the CWA

Again, both statutes at issue have mandatory requirements that at first blush seem to conflict with each other. *NAHB* and *American Forest* insisted that the exclusive factors of CWA §402(b) did not allow for the consideration of endangered and threatened species, as required by ESA §7. However as the *NAHB* dissent and *Defenders* correctly determined, the CWA does not trump the ESA; the ESA's legislative history and *TVA* mandates that species protection be given utmost priority. The *NAHB* dissent and *Defenders I* correctly held that these two complementary statutes support their conclusion that EPA must consider endangered species in its decision on whether to transfer the delegated permitting program authority to the states.[181] In fact, both statutes can be construed to harmonize any seeming conflicts, as suggested by jurisprudence on resolving statutory conflicts.

It is unusual that *NAHB* and *American Forest* would consider that two flagship environmental laws could not be harmonized, considering their similar aims of environmental protection. The Supreme Court majority and the Fifth Circuit read CWA §402(b), and its nine exclusive factors for transferring clean water authority to the states, so narrowly that they failed to consider the other provisions of the CWA and the ESA. Though the *NAHB* majority gives token acknowledgment to the various canons of statutory interpretation,[182] the majority ignores these canons. Consequently, *NAHB* and *American Forest* implicitly repealed the requirements of ESA §7. In considering conflicting statutory provisions, as the *NAHB* dissent points out,[183] the Supreme Court in the past has repeatedly cautioned against implicit repeals

169. *NAHB*, 127 S. Ct. at 2533.

170. Of course there is no requirement to consult for a presidential decision or action. *See* Ground Zero Ctr. for Non-Violent Action v. Department of the Navy, 383 F.3d 1082, 1092, 34 ELR 20100 (9th Cir. 2004) and *infra* note 211. Likewise, *Public Citizen*, 541 U.S. 752, was a presidential action, in addition to a congressional action, that precluded discretionary action.

171. *TVA*, 437 U.S. at 194.

172. *See*, *e.g.*, United States v. Gonzales, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' Webster's Third New International Dictionary 97 (1976).").

173. *NAHB*, 127 S. Ct at 2538, 2541 (Stevens, J., dissenting).

174. *Id.* at 2545.

175. One study, Terry Rabot, *The Federal Role in Habitat Protection*, Endangered Species Bull., Nov./Dec. 1999, at 10, 11, *available at* http://www.fws.gov/endangered/esb/99/11-12/10-11.pdf, suggests that virtually all consultations never result in formal action. In fiscal year 1999, the FWS informally consulted on about 12,000 actions, while conducting 83 formal consultations and issuing only 1 "jeopardy" opinion.

176. 16 U.S.C. §1536(b).

177. *Id.* §1536(e).

178. The Ninth Circuit appears to have continued to discuss in dicta the interpretation of ESA §7(a)(2) in subsequent cases. *See* Western Watersheds Project v. Matejko, 486 F.3d 1099 (9th Cir. 2006).

179. *Defenders I*, 420 F.3d at 959.

180. *Id.* at 960.

181. *NAHB*, 127 S. Ct. at 2544 (Stevens, J., dissenting), and *Defenders I*, 420 F.3d at 971.

182. *NAHB*, 127 S. Ct. at 2532.

183. *Id.* at 2538 (Stevens, J., dissenting).

except in only the most extreme situation,[184] and instead to reconcile statutes if at all possible.[185] Rather, as the Supreme Court held in *Morton*: "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[186]

Morton is particularly apt to the issues presented in this analysis since *Morton* reconciled two statutes that from a formalistic perspective appeared irreconcilable.[187] *Morton* determined that the fundamental purposes of those statutes were not in conflict despite the apparent conflicting statutory language. The Supreme Court determined that both statutes' legislative histories showed that the statutes had different purposes: "Any perceived conflict [between the two statutes at issue] is thus more apparent than real. . . . Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians."[188] Thus, in considering CWA and ESA provisions at issue more broadly (construed liberally and purposively)[189]—their purpose, provisions, and legislative intent—there should not be a conflict. Despite the apparent conflicting "shall" language of both the CWA and the ESA, these statutes are not in conflict when considering the legislative history and purpose of these environmental statutes as *Defenders I* correctly decided.

First, in considering the purposes of these two statutes, reading CWA §402 so narrowly ignores Congress' purpose in CWA §1251(a) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[190] and attain "water quality, which provides for the protection and propagation of fish, shellfish, and wildlife."[191] Protecting water is integral to allowing endangered species, especially aquatic species, to survive and recover. Conversely, Congress recognized that the loss of federally listed species threatens the biological integrity of the nation's waters. Also, a narrow reading of CWA §402 ignores ESA's policy intent in §2, that agencies "shall utilize their authorities"[192] and "shall cooperate with State[s] . . . to resolve water resource issues"[193] to protect species; and definitions in §3 that for "conservation" that actors use "all methods and procedures which are necessary" for species protection.[194] Thus, Congress' intent of the CWA is in complete harmony with the ESA. Again, under *Morton* the fundamental purposes of these statutes do not conflict, and there is only a conflict if one adopts the purely formalistic analysis of the *NAHB* majority.[195] Unfortunately, the *NAHB* majority failed to consider the purposes of these statutes in attempting to reconcile the apparent statutory conflict.

Likewise, the "purposive whole act" rule to the canon of construction calls for a court to consider a clause in connection to the whole statute, and the objects and policy of the law.[196] The Supreme Court has interpreted the "purposive whole act" rule to allow a court to disregard the plain meaning of the text in order to implement the greater purpose of a statute in instances of statutory conflicts.[197] Thus, even though the plain meaning of CWA §402 lists nine exclusive factors, the purpose of the ESA allows EPA to consider the loss of ESA §7 protections as a result of the CWA NPDES authority transfer. In other words, omitting ESA §7 requirements during the consideration of CWA §402 NPDES transfer would violate ESA's purpose to protect species. However, adding the requirement of ESA §7 separately after meeting the nine factors in CWA §402(b) would not violate the CWA's purpose to protect waters of the US. So under this canon EPA should be allowed to consider ESA §7 despite this consideration not being an exclusive CWA §402(b) factor that EPA "shall" consider for NPDES clean water authority transfer. As Justice Breyer concludes in his dissent: "That shared purpose shows that 7(a)(2) must apply to the Clean Water Act *a fortiori*."[198]

Next, since the ESA was enacted one year after the CWA, the latter ESA statute "controls" the earlier laws under traditional canons of interpretation in resolving statutory conflicts, provided there are no exceptions or amendments that

184. *See e.g.*, Branch v. Smith, 538 U.S. 254 (2003). Karen Petroski, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487 (2004), argues further that six of the Justices in *Branch* perceive the presumption against implied repeals as an absolute rule that is virtually forbidden.

185. However, many critics, such as Judge Richard Posner, have criticized the presumption against implied repeals on the "unrealistic premise" that Congress was omniscient to consider possible statutory conflicts. Edwards v. United States, 814 F.2d 486, 488 (7th Cir. 1987); *see also* William W. Buzbee, *The One Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 180 (2000).

186. *Morton*, 417 U.S. at 551. Furthermore, *Morton* held it appropriate for courts to consider legislative history in reconciling apparently conflicting statutes in order to avoid implied repeals. *Id.* at 553.

187. In *Morton*, the 1934 Indian Reorganization Act, which provided employment preferences for qualified Indians in the Bureau of Indian Affairs (BIA), appeared to directly conflict with the Equal Employment Opportunity Act (EEOA) of 1972, which forbade discrimination in hiring and placement for competitive civil service positions within the federal government. No exception was included for the BIA, though the EEOA allowed exceptions in other areas.

188. *Id.* at 547, 550.

189. Eskridge & Ferejohn, *supra* note 29, identify the ESA as a "super-statute," which "should be construed liberally and in a common law way, but in light of the statutory purpose and principle as well as compromises suggested by statutory texts." Thus, the ESA should be interpreted in the broadest terms to affect its purpose, giving this statute greater precedence over others, as *TVA* suggested. Eskridge and Ferejohn also show that the Supreme Court has declined to allow super-statutes to modify or trump lesser statutes. They give the example of *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), where the Court declined the FDA the authority to regulate tobacco products (through FDA's power to regulate drugs, in this case nicotine) even though the Food, Drug, and Cosmetic Act of 1938 was a super-statute that the Court previously ruled should be given "a liberal construction consistent with [its] overriding purpose to protect the public health." *United States v. Article of Drug Bacto-Unidisk*, 394 U.S. 784, 798 (1969).

190. FWPCA §1251(a).

191. *Id.* §1251(a)(2).

192. ESA §2(c)(1).

193. *Id.* §2(c)(2).

194. 16 U.S.C. §1532(3).

195. The provision of CWA §402(b) "operates as a ceiling as well as a floor," and that adding any additional requirement would violate "§402(b)'s statutory command." *NAHB*, 127 S. Ct. at 2533.

196. Kokoszka v. Belford, 417 U.S. 642, 650 (1974).

197. Eskridge & Ferejohn, *supra* note 29, suggests that the Supreme Court invoked the purposive whole act rule in several cases when the plain meaning of the text conflicted with the purpose of the statute. They give the example of *Kelly v. Robinson*, 479 U.S. 36 (1986), where the Supreme Court looked to the "provisions of the whole law, and its object and policy" of the Bankruptcy Code, *id.* at 43, ignoring clear text and supporting legislative history, to reconcile a state criminal restitution order with the Bankruptcy Act; however the Court's holding that state criminal restitution orders are not discharged in bankruptcy was in tension with §523(7) of the Bankruptcy Act.

198. *NAHB*, 127 S. Ct. at 2553 (Breyer, J., dissenting).

change the statutory landscape. As the concurrence in *Defenders II* noted: "[W]e do not see the Endangered Species Act as repealing any part of the Clean Water Act. Rather, the Endangered Species Act, a later-enacted statute, adds one requirement to the list of considerations under the Clean Water Act permitting transfer provision."[199] The later amendments to both the CWA and the ESA do not indicate a "repeal" of any other provision, or, for example, that one section of the ESA is clearly superior to control over the CWA.[200] The *Defenders II* dissent, however, counters that the concurrence's interpretation leads to a *sub silentio* repeal of EPA's categorical obligation under the CWA.[201] Likewise, the *NAHB* majority discounts this canon, labeling the ESA as a later enacted statute that does not repeal an earlier statute, and prohibited under *Watt v. Alaska*.[202] However, ESA §7 does not repeal CWA §402(b), but places an additional separate requirement for EPA to comply with both Acts; even the *NAHB* majority, in contradictory language, suggests that ESA §7 is "another entirely separate prerequisite."[203] Furthermore, the suggestion that CWA implicitly repeals ESA §7 considerations ignores the traditional understanding regarding the canon of the later enacted statutes, in addition to the weight of legislative history and Supreme Court jurisprudence to protect endangered and threatened species.[204] That these two statutes were passed almost contemporaneously would seem to suggest that either no repeal of ESA §7 was implied, since Congress could have expressly included it in the ESA or discussed it in its legislative history, or (as the *Defenders II* concurrence again correctly noted) that the ESA just adds one additional consideration to CWA §402(b).[205]

Another generally accepted canon of statutory interpretation is where a "specific" mandate controls a more "general" legislative directive ("where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . . ."[206]). So if CWA §402 is found to be more specific than ESA §7, then this would be an exception to the later act controlling the earlier act. The *NAHB* majority (and *American Forest* and the dissents in *Defenders I* and *II*) interpret CWA §402(b) to be specific,[207] thus preventing the consideration of federal agency discretion to consider ESA §7's mandate to protect endangered species. This interpretation is arguably reasonable considering the restrictive *expressio unius* language in CWA §402 that "[t]he Administrator shall approve" the permit for the state program ("unless he determines that adequate authority does not exist")[208] if the state meets the nine criteria of CWA §402(b). But even assuming that CWA §402(b) is found to be more specific than ESA §7, *TVA* provides a precedent that this traditional statutory consideration should not be followed. Again, *TVA* held that a more specific appropriation for the dam did not repeal the more general ESA substantive requirements for protecting the snail darter by prohibiting the dam's construction. Granted a congressional appropriation is a different type of statute than substantive statutes such as the CWA and the ESA.[209] However, even if §402(b) is more specific than the ESA, the CWA's silence to consider other federal statutes suggests that, as in *TVA*, federal agencies must follow §7 per Congress' underlying intent of the ESA.

Nevertheless, ESA §7 should also be read to be sufficiently specific enough to control CWA §402(b). *TVA* held that save "only a limited number of 'hardship exemptions,' . . . we applied the maxim *expressio unius est expressio alterius* to conclude that 'there are no exemptions in the Endangered Species Act for federal agencies."[210] Section 7(a)(2) also uses the restrictive language that an agency "shall" consult with the Service(s) to "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize" a species unless granted an exception by the Endangered Species Committee under §7(e). The language of §7(a)(2) is specific enough *not* to include an exception for an action where an agency lacks discretion, and the only exception is for convening the God Squad.[211] Also, CWA §402(b) includes an exception to approving the transfer of clean water program authority to the states where "adequate authority does not exist."[212] Thus, the authority of ESA §7 is more specific than the general exception of CWA §402(b)'s inadequate authority. Again, in considering the additional various canons of statutory interpretation discussed above, it is clear that CWA §402(b) does not impliedly repeal ESA §7(a)(2), but rather that these statutes can be harmonized. But since neither CWA §402(b) or ESA

199. *Defenders II*, 450 F.3d at 404.

200. However, Hasselman, *supra* note 29, argues that the ESA 1978 Amendments, enacted after *TVA* indicated that Congress adopted the Supreme Court determination that ESA gave listed species "priority over the primary missions" of federal agencies, and thus to rectify the supremacy of the ESA over other legislative statutes, Congress amended ESA §7 to include the Endangered Species Committee to find an exception to allow a federal action to cause the extinction of a species.

201. *Defenders II*, 450 F.3d at 399.

202. "[R]epeals by implication are not favored . . . . The intention of the legislature to repeal must be 'clear and manifest.'" 451 U.S. 259, 267, 11 ELR 20378 (1981) (internal citations omitted).

203. *NAHB*, 127 S. Ct. at 2537. *Compare* "Whether §7(a)(2) effectively operates as a tenth criterion." *Id.* at 2525.

204. *Defenders II*, 450 F.3d at 404. The Supreme Court's ruling in *Branch* regarding the later-enacted-statute rule is not helpful to analyzing this case because there is no real repugnancy between the CWA and the ESA, so reconciling these statutes is defensible; also these laws were passed only within a year of each other. Petroski, *supra* note 184 (citing *Branch*, 538 U.S. at 287-88 & n.4).

205. *Defenders II*, 450 F.3d at 404.

206. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 375 (1990) (citing *Morton*, 417 U.S. at 550-51).

207.

> The Ninth Circuit's reading of §7(a)(2) would not only abrogate §402(b)'s statutory mandate, but also result in the implicit repeal of many additional otherwise categorical statutory commands. Section 7(a)(2) by its terms applies to "any action authorized, funded, or carried out by" a federal agency—covering, in effect, almost anything that an agency might do. Reading the provision broadly would thus partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species.
>
> *NAHB*, 127 S. Ct. at 2533.

208. FWPCA §1342(b).

209. However, Professor Popkin, *supra* note 30, suggests that the presumption against inferring substantive changes from appropriations is rebuttable, and that "courts must reconcile substantive and appropriations statutes on the basis of the political values associated with preserving or rejecting the underlying substantive law."

210. *NAHB*, 127 S. Ct. at 2541 (Stevens, J., dissenting) (citing *TVA*, 437 U.S. at 188).

211. Again, Hasselman, *supra* note 29, primarily argues that the Endangered Species Committee is the only exception that Congress intended, and exceptions to §7 consultations do not extend to nondiscretionary actions.

212. FWPCA §1342(b).

§7(a)(2) is dispositive on specificity, the contrasting opinions also focused on EPA's discretion, or lack of discretion, to consider the ESA.

C. 50 C.F.R. §402.03 and the Implications of Retaining the Term "Discretionary" in the Regulation

In the face of these supposedly conflicting statutes, the federal government offered the Services' regulation at 50 C.F.R. §402.03[213] as a means to reconcile the supposed conflict.[214] The *NAHB* majority wrongly accepted the government's explanation because, as explained by the dissent, this regulation was improperly promulgated and supported,[215] in addition to being improper since under *TVA* ESA §7 consultation applies to *all* actions.[216]

As with any regulation, the Services have the ability to promulgate new regulations to replace its own regulations.[217] Thus, the proper course for a future executive administration would be to propose and finalize new 50 C.F.R. §402.03 regulations that omitted the word discretionary under the current regulations. Such action would comply with and respect *TVA*'s precedence, in addition to correctly harmonizing the statutes as explained by the *NAHB* dissent.[218] The author is unaware of any precedence that would prevent such change in the regulation. However, such change would undoubtedly be challenged by industry interests,[219] and such a challenge may be successful considering that an agency had already been granted *Chevron* deference by the Supreme Court for an interpretation of the regulations including the term discretionary.

Granted, correcting 50 C.F.R. §402.03 would be unlikely because of the difficulties of overcoming agency inertia[220] and the possible perception that correcting these regulations would be too late since most states have received CWA §402 NPDES permitting authority.[221] However, it would be in the interest of the relevant agencies involved to correct these regulations, or at least for EPA to consult with the Services before transferring NPDES authority to the states. First, there is the possibility that after permitting authority has been transferred to the state, these states may be vulnerable to ESA §9 take liability if a state-issued permit can be linked to the take of an endangered or threatened species by a state actor. EPA can still voluntarily channel its existing authority under ESA §7(a)(1) to consult with the Services to determine what "reasonable and prudent alternatives" may be required to avoid "jeopardy" to the species and/or "adverse modification" of critical habitat.[222] After considering the results of the consultation and determining the reasonable and prudent alternatives needed, the state would then be put "on notice" and warned that its possible actions, and failure to follow the Service's proposed reasonable and prudent alternatives, may result in ESA §9 "take."[223] To prevent further ESA §9 liability, the state would then also have the incentive to enter into an ESA §10 habitat conservation plan that would permit "incidental take."[224] However, there may be little incentive for EPA to consult with the Services, and thereby warn the states, since their liability may be limited; as mentioned in the majority's decision, "an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion not to take."[225]

Furthermore, there may be an additional reason for EPA to consider correcting 50 C.F.R. §402.03 to omit the term discretion (and to consult with the Services under §7). Again, part of the first criteria of CWA §402(b)) allows EPA to issue permits that "(B) are for fixed terms not exceeding five years; and (C) can be terminated or modified for cause including, but not limited to, the following: . . . (iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge." Thus, EPA could terminate its permit to a state under the condition where the state continues to issue permits to activities that harm an affected federally listed species, especially where the status of a species is not improving.[226] Such an action would likely be very unpopular and politically problematic. EPA thus would likely decline to terminate the permit, despite the change in condition, since it would likely have discretion not to enforce this provision of CWA §402(b). Environmental interests could also sue when the permit expires after five years, forcing EPA to consider the ESA before re-authorizing the permit in a modified form. But the claims would be limited to ESA §7(a)(1) and perhaps §9. Nevertheless, in the interest of protecting state agencies and private actors from ESA §9, it would be advantageous for EPA to consult with the Services in order to consider the needs of endangered and threatened species to prospectively avoid further harm to them. Likewise, it would thus be in EPA's in-

213. Again, the whole regulations reads: "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."

214. *See NAHB*, 127 S. Ct. at 2533-36 (Part III-C).

215. *See id.* at 2541-44 (Stevens, J., dissenting) (Part II).

216. *Id.* at 2543.

217. *See*, *e.g.*, National Labor Review Bd. v. Bell Aerospace Co. Div. of Textron, Inc. 416 U.S. 267 (1974).

218. Another possible fix to the regulation would be a statement that EPA retains the discretion to consult with the Services. EPA promulgated regulations including a similar "retaining discretion" provision in its regulation 50 C.F.R. §402.42 for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *See infra* note 242. Such an amendment would be consonant with ESA §7(a)(1), and if supported in its promulgation, should be granted *Chevron* deference.

219. Such as in the case of *American Forest*.

220. Especially under the current Administration.

221. Over 46 states had already been granted NPDES permitting authority by EPA by the time *NAHB* was argued, with Alaska being the most recent state to have been granted authority, as mentioned in the decision.

222. As Hasselman, *supra* note 29, observes, opponents of any reasonable and prudent alternatives would still have the opportunity to challenge the reasonable and prudent alternatives offered by the Services on the grounds that the reasonable and prudent alternatives exceeded the scope of the agencies' authority and jurisdiction.

223. *Cf.* Conservation Council v. Babbitt, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998). Designation of critical habitat puts parties "on notice" of potential issues helpful for recovering the species. ("In the absence of such designation, the determination of the importance of a species' environment will be made piecemeal, as individual federal projects arise and agencies consult with the FWS. This may create an inconsistent or short-sighted recovery plan.") *Id.*

224. Section 10 grants permits to parties to conduct activities that may incidentally take a species if the parties implement the terms of the permit to prevent take of a species. If the parties accidentally incidentally take a species, within the amount allowed by the permit, the parties would not be subject to prosecution under §9. Direct take of a species would still be prohibited.

225. *NAHB*, 127 S. Ct. at 2523.

226. Such as changing the listing of a species from threatened to endangered, or the endangered species continues to decline in status. Such an evaluation could be conducted since the Services are required to reevaluate the status of each species every five years under ESA §4(c)(2).

terests to propose new regulations that indicate that 50 C.F.R. §402.03 applies to all federal actions.

D. EPA Had Discretion to Consider the ESA and the Future of ESA Litigation on the Meaning of Discretion

NAHB's holding on discretion muddles the meaning of discretion, with ramifications for both endangered and imperiled species under the ESA and another environmental law. Again, whether EPA had discretion to consider ESA §7 as part of CWA §402(b) is irrelevant since §7 is a consideration separate from the CWA, and not a tenth factor to consider as framed by the *NAHB* majority.[227] Nevertheless, *NAHB* held that "[w]hile the EPA may exercise some judgment in determining whether a state has demonstrated that it has the authority to carry out §402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list."[228] But as the *NAHB* dissent points out, though EPA has discretion throughout CWA §402(b), "[i]f we are to take the Court's approach seriously, once any discretion has been identified—as it has here—§7(a)(2) must apply."[229] In addition to the discretion admitted by the *NAHB* majority and found by the dissent,[230] as just mentioned above in the previous section, EPA would likely have the additional discretion not to terminate a permit transferring NPDES authority to a state due to a change in any condition.

The majority's understanding of discretion should have been broader because of the strong language in ESA and forceful precedent of *TVA*. As described earlier, the purpose of CWA is consonant with ESA's policy of institutionalized caution in which Congress intended for the utmost priority for protecting endangered species.[231] Furthermore, as *Defenders I* explained, EPA had discretion in its involvement or control of CWA §402(b) to consider endangered species since EPA's permit transfer action was coterminous with ESA §7(a)(2)'s statutory obligation to consider actions "authorized, funded, or carried out" by a federal agency.[232]

Likewise, the 1992 Supreme Court decision *Arkansas v. Oklahoma*,[233] which was only cited by Justice Steven's dissent on the issue of harmonizing the two statutes, suggests that EPA had discretion to look outside of CWA §402 before delegating NPDES authority to the state of Arizona.[234] *Arkansas* found that although "the Act's [CWA] legislative history indicates that Congress intended to grant the Administrator discretion in his oversight of the issuance of NPDES permits,[235] we find nothing in that history to indicate that Congress intended to preclude EPA from establishing a general requirement that such permits be conditioned to ensure compliance with downstream water quality standards."[236] So *Arkansas* suggests that EPA would have the discretion to consider downstream water quality standards outside its requirements under CWA §402. If under *Arkansas* EPA has discretion to consider downstream water quality standards for granting individual NPDES permits, then EPA should similarly have discretion to consider impacts to endangered species before delegating the permitting program to the state.

Arguably however, *Arkansas*' discussion of NPDES was limited only to CWA §402(a), where EPA retains authority to grant a NPDES permit, not 402(b).[237] CWA §402(a) reserves broad authority to the Administrator to oversee permits that EPA issues.[238] In *Arkansas*, the determination that NPDES permits should not be issued if permittees could not comply with "applicable water quality requirements of all affected States" was supported by referencing the CWA's broad purpose in 33 U.S.C. §1251(a)[239] and central objectives of complying with §301(b)(1)(C)'s state water quality standards.[240] But because of CWA's broad purpose, *NAHB* should have held that EPA had broad discretion to consider other congressionally identified statutory concerns, namely the ESA, outside of §402(b), like *Arkansas* identified for §402(a), before delegating a permit program to the state. Instead, the majority again determined that though EPA had discretion to consider some factors within CWA §402(b), it lacked discretion to consider anything outside of §402(b)'s nine factors.[241]

227. *Id.* at 2525 (majority opinion).

228. *Id.* at 2537.

229. *NAHB*, 127 S. Ct. at 2549 (Stevens, J., dissenting).

230. *Id.*

231. *TVA*, 437 U.S. at 194.

232. *Defenders I*, 420 F.3d at 970; *see also* National Wildlife Fed'n v. National Marine Fisheries Serv., 481 F.3d 1224, 1235 (9th Cir. 2007). (The agencies may have nondiscretionary *types* of obligations, but they still maintain discretion—indeed, a duty—to balance the competing demands and honor their ESA obligations).

233. 503 U.S. 91, 22 ELR 20552 (1992).

234. Arkansas sought an individual NPDES permit from EPA for a new point source 39 miles upstream from Oklahoma's state line. EPA issued the permit, which Oklahoma challenged on grounds that the discharge violated Oklahoma's water quality standards. The Supreme Court held that when a new permit was being issued by the source state's permit-granting agency, the downstream state did not have the authority to block the issuance of the permit if it was dissatisfied with the proposed standards. The Court further held that an affected state's only recourse was to apply to the EPA Administrator, who then had the discretion to disapprove the permit if he concluded that the discharges would have an undue impact on interstate waters, pursuant to 33 U.S.C. §1342(d)(2). Finally, the Court stated that the Clean Water Act made it clear that affected states occupied a subordinate position to source states in the federal regulatory program.

235. *See*, *e.g.*, 1 Legislative History of Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1, pp. 322, 388-89, 814 (1973); *see also* 33 U.S.C. §1342(d)(3).

236. Legislative History, *supra* note 235, at 106.

237. Another distinguishing characteristic is that *Arkansas* dealt with a point source, not a nonpoint source: "Limits on an affected State's direct participation in permitting decisions, however, do not in any way constrain the EPA's authority to require a point source to comply with downstream water quality standards." *Id.*

238. *Id.* at 105 (citing CWA §402(a)(1) and 402(a)(2)). Conversely, with the broad authority retained by the EPA in §402(a), it can be argued that Congress was aware of the possible need for the federal government to retain this broad authority, but declined to grant broad authority in §402(b).

239. "[T]o restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

240. *Arkansas*, 503 U.S. at 105-06. Albeit, EPA's regulations also supported the Administrator's discretion.

241. *NAHB*, 127 S. Ct. at 2537. It should be noted that the Court has made such distinctions before in the past, such as in *Board of Pardons v. Allen*, 482 U.S. 369 (1987) (which was not cited in either opinion; nor was any similar case cited). In that case, the Court (citing Ronald Dworkin, Taking Rights Seriously, 32-33 (1977)) made a distinction between two entirely distinct uses of the term discretion: In one sense of the word, an official has discretion when he or she "is simply not bound by standards set by the authority in question." But the term discretion may instead signify that "an official must use judgment in applying the standards set him [or her] by authority"; in other words, an official has discretion when the standards set by a statutory or regulatory scheme "cannot be applied mechanically." *Id.* at 375-76 (bracketed text in original).

With all these various interpretations of discretion, the question of whether a federal agency has discretion in its action will likely be the future of ESA litigation. The most comparable situation that may come before the courts is if EPA determines that it does not have to consult with the Services for actions related to its authorities under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Like the CWA regulations at issue in *NAHB*, 50 C.F.R. §402.42 limits ESA §7(a)(2) consultations to "FIFRA actions authorized, funded, or carried out by EPA in which EPA has discretionary Federal involvement or control."[242] EPA, though, can opt to retain discretion to consult under 50 C.F.R. §402.42. However, this provision retaining discretion may be in question under *NAHB*. Though this provision may be allowed under *NAHB* since the majority gave *Chevron* deference to the agencies to resolve a possible statutory conflict, *NAHB*'s underlying reasoning would also suggest that EPA could not consider other factors related to FIFRA if they were not explicitly listed.[243]

Whether the federal government or industry intervenors can extend the "lack of discretion" argument beyond statutory conflicts with the CWA to other ESA related cases is an open question. Most likely these arguments will propose that environmentally harmful conditions have become part of the baseline, and that a federal agency will no longer have the discretion to consider changing the harmful condition. As a further consideration of what is included in the baseline, the discretionary act will still need to be considered an affirmative act, and not an omission of an affirmative act. In passing, *NAHB* states that "the basic principle announce in *Public Citizen* [is] that an agency cannot be considered the legal "cause" of an action that it has no statutory discretion *not* to take."[244] The Ninth Circuit has also similarly upheld this principle in *Western Watersheds Project v. Matejko*.[245]

For example, in the recent decision *National Wildlife Federation v. National Marine Fisheries Service*,[246] the Ninth Circuit found that the federal government tried to avoid its ESA obligations, writing that the "ESA does not permit agencies to ignore potential jeopardy risks by labeling parts of an action nondiscretionary."[247] The district and appellate courts held that the federal government wrongly considered the existing dams to be part of the baseline, or "reference operation,"[248] and beyond the discretion of the government to consider in its ESA §7 BO for federally listed salmon. Similarly, in *Rio Grande Silvery Minnow v. Keys*,[249] the Bureau of Reclamation argued that it lacked discretion to reallocate water stored to meet contract deliveries so as to use the water for purposes of avoiding jeopardy to an endangered species. Though the majority relied on contract law to find that the agency could retain the water for the endangered silvery minnow,[250] the dissent relied upon *American Forest* to determine that the federal agency lacked the discretion to retain water to aid the minnow.[251] These cases may be a taste of ESA litigation to come.[252]

V. Conclusion: Affirming *Defenders* Harmonizes the Statutory Conflict

The Supreme Court in *NAHB* wrongly decided that EPA did not have to consider ESA §7 and the loss of §7 protections before delegating CWA permitting program authority to the states. The Court should have instead adopted the Ninth Circuit's reasoning, and rejected the Fifth Circuit's reasoning, since *Defenders* reconciled the conflicting provisions reading §7(a)(2)'s plain language requiring consultation for any agency action, using the proper cannons of statutory interpretation,[253] and properly analyzed Congress' intent as reflected in the Court's decision in *TVA*. As *Defenders I* noted, despite the absence of an explicit grant of authority from the CWA, EPA had the duty to utilize its existing authority as required by the ESA, here considering the loss of §7 protections to prevent jeopardy to the species.[254] To find otherwise would constitute an incorrectly determined implied repeal of ESA §7, especially since the Supreme Court in *TVA* found a clear mandate to protect endangered and threatened species.[255] Thus, in sum, *Defenders* rightly determined that ESA §7 is another requirement separate from CWA §402(b), and not an exception as created by the Supreme Court; such agency action is not an impermissible tenth criteria as the majority held.[256]

The Court's decision on one hand resolved the split between the Fifth and Ninth Circuits on the issue of reconcil-

242. The full regulation follows for §402.42 scope and applicability: available consultation procedures. This subpart describes consultation procedures available to EPA to satisfy the obligations of §7(a)(2) of the Act in addition to those in Subpart B of this part for FIFRA actions authorized, funded, or carried out by EPA in which EPA has discretionary federal involvement or control. EPA retains discretion to initiate early, informal, or formal consultation as described in §§402.11, 402.13, and 402.14 for any FIFRA action.

243. Portions of this regulation were held invalid by *Washington Toxics Coalition v. Department of the Interior*, 457 F. Supp. 2d 1158, 36 ELR 20190 (W.D. Wash. 2006), because portions of the FIFRA counterpart regulations were invalid since they failed to comply with the consultation and "is not likely to jeopardize" requirements of §7(a)(2). *NAHB* may throw into question the validity of parts of *Washington Toxics*; however, *Washington Toxics* limited the interpretation of agency action to discretionary actions.

244. *NAHB*, 127 S. Ct. at 2535.

245. 456 F.3d 922 (9th Cir. 2006). *Western Watersheds Project* clarified that a failure to exercise agency discretion is not an affirmative action, and thus there was no corresponding duty to consult under ESA §7. *Western Watersheds Project* (citing *Defenders I*, explicitly states "that 'action' under §7(a)(2) must be 'affirmative'"). *Id.* at 931. The Ninth Circuit also notes that plaintiffs or others can file an action against "taking" of endangered or threatened species under §9 of the ESA (16 U.S.C. §1538), though agency enforcement §9 suits differ substantially from §7. *Id.* at 933.

246. 481 F.3d 1224 (9th Cir. 2007).

247. *Id.* at 1232.

248. *Id.* at 1224.

249. 333 F.3d 1109, 33 ELR 20224 (10th Cir. 2003), *vacated*, 355 F.3d 1215 (2004).

250. *Id.* at 1141.

251. *Id.* at 1143 (dissent). However, the U.S. Court of Appeals for the Tenth Circuit later vacated its decision, which was under consideration for an en banc rehearing, dismissing the case as moot due to new events.

252. See *supra* note 11, for additional cases before the courts that involve the issue of agency "discretion."

253. Considerations of the policies and legislative history of the act under *Morton*, 417 U.S. at 535, and the "purposive whole act" rule which considers the purpose of both Acts, thus allows EPA to consider endangered and threatened species despite the limited "shall" language of CWA §402(b) which restricts consideration to only nine explicit factors, and does not include imperiled species as a factor.

254. *Defenders I*, 420 F.3d at 967.

255. *NAHB*, 127 S. Ct. at 2539-40 (Stevens, J., dissenting) (citing *TVA*, 437 U.S. at 173).

256. *NAHB*, 127 S. Ct. at 2525.

ing the statutory conflict between these two environmental laws. The Court limited its decision to resolving the statutory conflict by granting *Chevron* deference to the government's regulation at 50 C.F.R. §402.03 that ESA §7 consultation was limited only to discretionary action. However, the Court's holding also suggests that the Court favors a narrow interpretation of ESA §7, unlike the decisions of the Ninth, First, and Eighth Circuits that favor a broader interpretation. By dismissing the plain language of §7(a)(2) that consultation occur for any action by the federal government, the Court has placed new attention on the issue of discretion. So far, the federal government has limited the use of discretion in two regulations involving the ESA, the CWA, and FIFRA. Whether the federal government will expand the definition of discretion in its regulations remains to be seen. However, it appears likely that the trend of using discretion as a defense for agency action or inaction will only be emboldened by the Supreme Court's decision.

The Supreme Court in *NAHB* had an opportunity to resolve conflicting statutory provisions in two complementary environmental laws under several canons of interpretation, decades of precedence and legislative history. In doing so, the Supreme Court would have harmonized these two flagship environmental laws, carried out Congress' intent to both the CWA and the ESA, and furthered the protection of our nation's waters and our endangered and threatened species. But rather than harmonize these two complementary environmental laws, by one vote, the Court has likely sown the seeds of discord over the meaning of discretion and of further litigation under the ESA.