Wyoming Law Review

Volume 8 | Number 2 Article 5

2008

ENVIRONMENTAL LAW—A Tale of Two Conflicting Mandates: Limiting Agency Authority under the Endangered Species Act or Resolution of the Statutory Overlap?, National Association of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007)

Alicia D. Kisling

CASE NOTE

ENVIRONMENTAL LAW—A Tale of Two Conflicting Mandates: Limiting Agency Authority under the Endangered Species Act or Resolution of the Statutory Overlap?, *National Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007).

*Alicia D. Kisling**

Introduction

In February 2002, officials from the State of Arizona applied for Environmental Protection Agency (EPA) authorization to administer and oversee the National Pollution Discharge Elimination System (NPDES) within the state's borders, pursuant to section 402(b) of the Clean Water Act (CWA).[1] Section 402(b) of the CWA authorizes any state to request a transfer of NPDES permitting authority to state officials.[2] This section directs the EPA, the agency originally responsible for administering the NPDES program within each state, to approve a state's transfer application as long as that state meets the nine criteria laid out in the statute.[3] The State of Arizona satisfied all nine statutory criteria.[4]

After reviewing the state's application, however, the EPA determined a transfer of NPDES permitting authority could potentially affect endangered and threatened species in Arizona.[5] Consequently, the EPA initiated consultation with the United States Fish and Wildlife Service (FWS) pursuant to section 7(a)(2) of the Endangered Species Act (ESA).[6] The FWS concluded a transfer of permitting authority would not directly impact listed species, however, the FWS expressed

---

* Candidate for J.D., University of Wyoming, 2009. I would like to thank my husband Jeremy for his continued love and support.

[1] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2526 (2007); Clean Water Act of 1972, 33 U.S.C. § 1342(b) (2000). Under Arizona's petition, the Arizona Department of Environmental Quality would be responsible for administering and overseeing the State's NPDES pollution permitting system. Defenders of Wildlife v. EPA, 420 F.3d 946, 952 (9th Cir. 2005). At the time of Arizona's transfer application, the EPA had already granted forty-four other states and several United States territories authority to administer the NPDES permitting system within their borders. *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2527 n.3.

[2] 33 U.S.C. § 1342(b).

[3] 33 U.S.C. § 1342(b); *see infra* note 39 and accompanying text (stating the nine criteria a state must satisfy prior to obtaining NPDES pollution permitting authority).

[4] *Defenders of Wildlife*, 420 F.3d at 963 n.11.

[5] *Id.* at 952.

[6] *Id.* Section 7(a)(2) of the ESA requires each federal agency to consult the Secretary charged with administering the ESA to insure any agency action will not jeopardize endangered and threatened species. Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2000). The FWS is

concern that the transfer would lead to an issuance of more permits, which could indirectly jeopardize listed species.[7]

The EPA disagreed, stating a transfer of permitting authority to Arizona would not negatively impact endangered species in the future.[8] Furthermore, the EPA maintained section 402(b) of the CWA required the EPA to approve Arizona's transfer application once the state met the section's nine statutory criteria.[9] In support of the EPA's position, the FWS issued a biological opinion indicating the transfer of permitting authority would not jeopardize listed species.[10] As a result of the biological opinion, the EPA determined Arizona satisfied the nine statutory requirements set forth in section 402(b) of the CWA, and subsequently approved the state's transfer application.[11]

Respondents Defenders of Wildlife, the Center for Biological Diversity, and Craig Miller, an Arizona Resident (collectively, "Defenders") filed a petition for review of the EPA's transfer decision in the United States Court of Appeals for the Ninth Circuit.[12] Defenders also brought a lawsuit against the EPA in the United States District Court for the District of Arizona alleging the FWS's biological opinion did not comply with ESA standards.[13] The Ninth Circuit allowed three

---

responsible for administering the ESA with respect to species under the jurisdiction of the Secretary of the Interior; the National Marine Fisheries Services (NMFS) administers the ESA with respect to species under the jurisdiction of the Secretary of Commerce. *See* 50 C.F.R. §§ 17.11, 222.101(a), 223.102, 402.01(b) (2007).

[7] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2527 (2007) (noting the FWS' fear that because section 7(a)(2) of the ESA applies only to federal agency actions, transferring permitting authority to Arizona could allow Arizona officials to issue NPDES permits without considering the potential effect on listed species).

[8] *Id.*

[9] *Id.*; 33 U.S.C. § 1342(b) (2000) (stating the EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" to meet the nine statutory requirements).

[10] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2527. Pursuant to ESA section 7(c)(1), "each Federal agency shall . . . request of the [Secretary of the Interior] information whether any species which is listed or proposed to be listed may be present in the area" of the agency's proposed action, prior to undertaking the proposed action. 16 U.S.C. § 1536(c)(1) (2000). If the Secretary of the Interior determines a listed species may exist, the FWS shall conduct a biological assessment to determine whether any endangered or threatened species are likely to be affected by the agency action. *Id.*

[11] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2527-28.

[12] *Id.* at 2528; 33 U.S.C. § 1369(b)(1)(D) (2000) (stating the Court of Appeals has jurisdiction to hear a petition regarding the EPA's transfer decision under section 402(b) of the CWA). Defenders prevailed on their petition to the United States Court of Appeals for the Ninth Circuit, and became respondents before the Supreme Court when the State of Arizona appealed the Ninth Circuit's decision to the United States Supreme Court. *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2528.

[13] Defenders of Wildlife v. EPA, 420 F.3d 946, 955 (9th Cir. 2005). The district court held the Ninth Circuit Court of Appeals had exclusive jurisdiction over Defenders' biological opinion challenge pursuant to 33 U.S.C. § 1369(b)(1)(D) and ordered the challenge transferred to the Ninth Circuit and consolidated with the EPA transfer suit. *Id.*

other parties to intervene as petitioners in the case: the National Association of Home Builders, the Arizona Chamber of Commerce, and the State of Arizona (collectively, "Home Builders").[14] Defenders' two lawsuits were consolidated and brought before the Ninth Circuit where a divided panel granted Defenders' petition and vacated the EPA's transfer decision, holding the decision was arbitrary and capricious.[15] The Ninth Circuit found the EPA's decision arbitrary and capricious because the EPA relied on legally contradictory positions regarding its obligations under ESA section 7.[16]

The United States Supreme Court granted certiorari to determine whether ESA section 7(a)(2) effectively functions as a tenth criterion a state must satisfy prior to obtaining NPDES permitting authority under CWA section 402(b).[17] In a five-four decision delivered by Justice Alito, the Supreme Court reversed the Ninth Circuit's decision, holding that section 7(a)(2) of the ESA applies only to federal agency "actions in which there is discretionary Federal involvement or control."[18] Since section 402(b) of the CWA mandates the EPA grant a state's transfer application after a state satisfies the nine statutory criteria, the decision to transfer NPDES permitting authority is nondiscretionary and does not trigger section 7(a)(2)'s no-jeopardy considerations.[19]

This case note demonstrates how the Supreme Court's interpretation of section 7(a)(2) of the ESA in *National Association of Home Builders v. Defenders of Wildlife* (*NAHB*) balances competing public interests and agency actions with the continued protection of endangered and threatened species and their habitats.[20] Specifically, this case note first examines the legislative history surrounding the ESA's enactment and demonstrates how the Court's decision furthers the ESA's intent as applied to federal agency actions.[21] Second, this case note explains how the Court's decision effectively resolved the statutory overlap between the ESA and the CWA.[22] By resolving the statutory overlap between the two statutes, the Court also resolved a split of authority among the circuits and provided federal courts

---

[14] *Id.*

[15] *Id.* at 950.

[16] *Id.* at 959.

[17] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2525, 2529; 16 U.S.C. § 1536(a)(2) (2000) (requiring all federal agencies to insure their actions will not jeopardize listed species).

[18] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538.

[19] *Id.*; 16 U.S.C. § 1536(a)(2) (prohibiting federal agencies from undertaking any action that could jeopardize threatened or endangered species).

[20] *See infra* notes 159-235 and accompanying text.

[21] *See infra* notes 170-81 and accompanying text.

[22] *See infra* notes 182-211 and accompanying text.

with a clearer, more definitive answer regarding the ESA's scope.[23] Finally, this case note illustrates the Court's decision in *NAHB* should not restrict Congress's ability to protect listed species in the future, because the opinion exempts only those actions that are truly nondiscretionary.[24]

BACKGROUND

Section 402(b) of the CWA states the EPA "shall" approve a state's request for a transfer of NPDES permitting authority upon a showing the state satisfied the nine statutory criteria.[25] The statute goes on to state the EPA "shall" approve a transfer application unless EPA determines the state does not possess sufficient authority to adequately administer the NPDES program.[26] Section 7(a)(2) of the ESA states each federal agency "shall" consult the Secretary of the Interior to "insure" any agency action will not jeopardize endangered and threatened species.[27] Clearly, the two statutes present conflicting mandates and result in a statutory overlap.[28] The U.S. Supreme Court's early interpretation of the two statutes indicated a preference for the ESA to preside over all federal agency actions, regardless of the cost.[29] Recent U.S. Supreme Court decisions, however, have found the ESA inapplicable to federal agency actions in certain limited circumstances.[30] Nevertheless, many courts remained confused about how to balance the competing interests of the ESA and the CWA, resulting in a split of authority among the circuits.[31]

---

[23] *See infra* notes 212-23 and accompanying text. Prior to the Supreme Court's decision in *NAHB*, the circuits were divided regarding whether the ESA imposes a duty to consider listed species independent of the agency statute. *See infra* notes 68-90 and accompanying text.

[24] *See infra* notes 224-35 and accompanying text.

[25] 33 U.S.C. § 1342(b) (2000).

[26] *Id.*

[27] 16 U.S.C. § 1536(a)(2) (2000).

[28] *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2538 (2007) (Stevens, J., dissenting) (stating *NAHB* presents a problem of conflicting "shalls" and discusses the proper way to resolve "competing statutory mandates"). The ESA makes it difficult for the EPA to transfer permitting authority to state officials as soon as the State satisfies the nine statutory criteria if the EPA must also insure its transfer decision will not jeopardize listed species since a consideration of listed species is not one of the nine expressly enumerated statutory criteria set forth in CWA section 402(b). *Id.*

[29] *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 172-73 (1978) (reasoning section 7(a)(2) of the ESA required a permanent halting of the construction and operation of a virtually completed $100 million dam because the dam's operation would jeopardize a listed species).

[30] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538; 16 U.S.C. § 1536(e)-(h) (2000); Sherry L. Bosse, Defenders of Wildlife v. EPA: *Testing the Boundaries of Federal Agency Power under the ESA*, 36 ENVTL. L. 1025, 1054 (2006) (reasoning ESA section 7(a)(2) is inapplicable when the statute a federal agency is administering neither provides the agency with authority to consider listed species, nor provides the agency with sufficient discretion to consider its impact on listed species).

[31] *See infra* notes 68-90 and accompanying text.

The Clean Water Act

1n 1972, Congress established the CWA as a way to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[32] The CWA created the National Pollution Discharge Elimination System (NPDES) program, designed to protect the nations' waters from the discharge of harmful pollutants.[33] Under the NPDES program, any individual or organization desiring to discharge pollutants into the nations' waters must apply for and receive a permit.[34] The EPA is the agency initially responsible for administering the program within the United States.[35]

Recognizing Congress's policy to protect the rights of states to prevent and reduce water pollution within their borders, Congress enacted section 402(b) of the CWA, which authorizes any state to apply for a transfer of NPDES pollution permitting authority to state officials.[36] Section 402(b) of the CWA instructs the governor of each state desiring to administer its own NPDES program to submit to the EPA a complete description of the plan the state proposes to administer.[37] In addition, the state must submit a statement indicating it possesses adequate authority to carry out the desired program.[38] Any state requesting a transfer of permitting authority to state officials must conclusively establish it has the authority to oversee nine statutory criteria laid out in the CWA.[39] Once a state has

---

[32] 33 U.S.C. § 1251(a) (2000).

[33] 33 U.S.C. §§ 1342(a) (2000), 1251(a).

[34] 33 U.S.C. § 1342(a).

[35] 33 U.S.C. § 1251(d).

[36] 33 U.S.C. §§ 1251(b), 1342(b) (stating "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources").

[37] 33 U.S.C. § 1342(b).

[38] *Id.*

[39] *Id.* Section 402(b) of the CWA states that the EPA "shall" approve a transfer application once the State demonstrates it has the ability achieve the following nine criteria: (1) issue fixed-term permits that insure compliance with the CWA, and that can be terminated or modified for cause; (2) issue permits and inspect, monitor, and require reports to the extent necessary to satisfy section 308 of the CWA; (3) insure the public, and any other state whose waters might be affected by the transfer, receive notice of each permit application and provide that state with an opportunity to hold a public hearing; (4) insure the EPA receives notice of each permit application; (5) insure any other state whose waters might be affected by the issuance of a permit be afforded the opportunity submit written comments to the state requesting the transfer of authority, and that the permitting state will notify the affected state in writing if the affected state's recommendations are not accepted; (6) insure a permit will not be issued if the Secretary of the Army believes the anchorage and navigation of navigable waters would be substantially impaired thereby; (7) decrease violations of the permit program; (8) insure any permit for a discharge from a publicly owned treatment works facility be accompanied by a statement identifying the character and volume of pollutants being discharged; and (9) insure any industrial user of any publicly owned treatment works facility will comply with the CWA. *Id.*

satisfied these nine criteria, the statute mandates the EPA "shall" transfer NPDES permitting authority.[40]

The Endangered Species Act

One year after Congress enacted the CWA it established the ESA to provide a program for the conservation of endangered and threatened species and their habitats.[41] Section 7 of the ESA requires federal agencies to cooperate to further the conservation of listed species.[42] In addition, ESA section 7(a)(2) requires each federal agency to "insure" its actions do not jeopardize threatened and endangered species or their habitats.[43] Furthermore, the Secretaries of the Interior and Commerce promulgated a joint regulation which states section 7 applies to all actions involving "discretionary" federal involvement or control.[44]

Prior to undertaking a federal agency action, an agency must consult the Secretary of the Interior if the action could potentially jeopardize threatened or endangered species.[45] As soon as practicable upon completion of the consultation process, the Secretary of the Interior shall provide the federal agency with a written biological opinion discussing whether the agency action affects listed species.[46] If the Secretary determines the proposed agency action could jeopardize listed species, the Secretary shall suggest possible alternatives which likely would not violate section 7(a)(2) and which would allow the federal agency to undertake its proposed action.[47] An agency has three options if the Secretary determines its proposed action would jeopardize listed species: (1) terminate the action;

---

[40] *Id.* (stating the EPA "*shall* approve each submitted program unless [it] determines that adequate authority does not exist" (emphasis added)).

[41] 16 U.S.C. § 1531(b) (2000).

[42] 16 U.S.C. § 1536 (2000).

[43] 16 U.S.C. § 1536(a)(2) (stating "[e]ach Federal agency *shall*, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical" (emphasis added)). The FWS administers the ESA with respect to species listed under the jurisdiction of the Secretary of the Interior, while the National Marine Fisheries Service (NMFS) administers the ESA with respect to species under the jurisdiction of the Secretary of Commerce. *See* 50 C.F.R. § 402.01(b) (2007). The affected species in *NAHB* involved species under the jurisdiction of the FWS, thus any reference to the "Secretary" in this case note implies the Secretary of the Interior. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2527 (2007).

[44] 50 C.F.R. § 402.03 (2007) (stating ESA section 7 "[applies] to all actions in which there is *discretionary* federal involvement or control" (emphasis added)).

[45] 16 U.S.C. § 1536(a)(2).

[46] 16 U.S.C. § 1536(b)(3)(A).

[47] *Id.*

(2) implement the proposed alternative; or (3) seek an exemption from the Endangered Species Committee.[48]

Because both the ESA and the CWA impose conflicting statutory mandates upon federal agencies, a clear overlap exists between the ESA and the CWA.[49] CWA section 402(b) states the EPA "shall" grant a state's transfer request once the state satisfies the nine statutory criteria; ESA section 7(a)(2) states all agencies "shall" insure their actions will not jeopardize listed species or their habitats.[50] As a result, courts have had difficulty in determining which statute, if any, should yield to better serve Congress's intent.[51]

Court Applies ESA Section 7(a)(2) to "All" Agency Actions

The U.S. Supreme Court's first major attempt to determine the extent of the ESA's reach arose in *Tennessee Valley Authority v. Hill*.[52] *Hill* presented the issue of whether the ESA required the Court to enjoin the construction of a nearly complete federal dam upon the Secretary of the Interior's determination that the dam's operation would eradicate a listed species.[53] The Tennessee Valley Authority (TVA) nearly completed the Tellico Dam when a researcher discovered a previously unknown species, the snail darter, in the waters near the dam.[54] Believing the dam's construction and operation would either eradicate the snail darter or destroy its critical habitat, thus resulting in the creature's demise, the

---

[48] 16 U.S.C. §§ 1536(a)(2), 1536(b)(3)(A), 1536(h). Congress established the Endangered Species Committee (Committee) which consists of seven Cabinet-level members authorized to grant exemptions under section 7 of the ESA. 16 U.S.C. § 1536(e)-(h). Congress realized certain species must necessarily submit to important agency actions, thus Congress granted the Committee the power to determine when it is acceptable for a species to become extinct in order to allow a beneficial agency action to proceed. 16 U.S.C. § 1536(h).

[49] *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2534 (2007) (stating an "agency cannot simultaneously obey the differing mandates" set forth in ESA section 7(a)(2) and CWA section 402(b)).

[50] 33 U.S.C. § 1342(b) (2000) (stating the EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" to meet the nine statutory requirements); 16 U.S.C. § 1536(a)(2) (stating "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize" listed species).

[51] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2533-37 (indicating since Congress enacted CWA section 402(b) prior to enacting ESA section 7(a)(2), the CWA should prevail because holding otherwise would effectively repeal the CWA by adding a tenth criterion to the statute's exclusive list of factors).

[52] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 156 (1978).

[53] *Id.* In 1967, Congress appropriated and spent over $100 million for the construction of the Tellico Dam. *Id.* at 157. The Tellico Dam involved a multipurpose development project designed to increase shoreline development, generate electricity, and provide recreation and flood control. *Id.*

[54] *Id.* at 159. The snail darter, a three-inch, tannish-colored fish, numbered approximately 10,000 to 15,000 when a researcher discovered the fish. *Id.* A University of Tennessee ichthyologist located the snail darter when the TVA nearly completed construction of the Tellico Dam. *Id.* at 158-59.

Supreme Court determined the TVA would violate the ESA if it operated the dam as planned.[55] According to the Court, the dam's continued operation would violate the ESA because Congress, in enacting the ESA, clearly intended to afford threatened and endangered species the highest of priorities.[56]

Congress Creates an Exception to Section 7(a)(2)

Concerned the *Hill* Court's application of section 7(a)(2) of the ESA to "all" federal agency actions created an overly-broad standard, Congress amended the ESA and established the Endangered Species Committee (Committee).[57] Congress granted the Committee the power to authorize exemptions from section 7(a)(2) of the ESA.[58] An exemption issued by the Committee authorizes the requesting agency to undertake its proposed action, despite such action jeopardizing or even eradicating endangered and threatened species or their habitats.[59]

The Committee represents the single statutory exception to the stringent ESA requirements.[60] The Committee, comprised of six high-ranking cabinet members and a presidential nominee from each effected state, has the authority to balance the interest of endangered species with those of the public.[61] In amending

---

[55] *Id.* at 171-72.

[56] *Id.* at 173.

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in [section] 7 of the [ESA]. Its very words affirmatively command all federal agencies 'to *insure* that actions *authorized*, *funded*, or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species.' This language admits of no exception.

Id. (quoting 16 U.S.C. § 1536 (2000) (emphasis in the original)).

[57] 16 U.S.C. § 1536(e)-(h) (2000); *see Tenn. Valley Auth.*, 437 U.S. at 196 (Powell, J., dissenting) (arguing the Court's holding, preventing the operation of a virtually complete $100 million dam due to the discovery of an endangered species of snail darter, "absurd"); *see also* Rio Grande Silvery Minnow v. Keys, 356 F. Supp. 2d 1222, 1224 (D.N.M. 2002) (stating Congress created the Committee as an exception to the stringent requirements of ESA section 7(a)(2) because the broad ramifications of the ESA concerned Congress). The Committee members include: (1) the Secretary of Agriculture; (2) the Secretary of the Army; (3) the Chairman of the Council of Economic Advisors; (4) the Administrator of the EPA; (5) the Secretary of the Interior; (6) the Administrator of the National Oceanic and Atmospheric Administration; and (7) a presidential nominee from each state effected by the petition for an exemption from the requirements of section 7(a)(2) of the ESA. 16 U.S.C. § 1536(e)-(h).

[58] 16 U.S.C. § 1536(e)-(h).

[59] 16 U.S.C. § 1536(h).

[60] *Rio Grande Silvery Minnow*, 356 F. Supp. 2d at 1224 (stating Congress created the Committee as the "single exception to the stringent requirements of the ESA"). Section 7(a)(2) of the ESA requires all federal agencies to "insure" their actions will not jeopardize listed species or their habitats. 16 U.S.C. § 1536(a)(2).

[61] 16 U.S.C. § 1536(e)-(h).

the ESA, Congress specifically provided the Committee, not the courts, with the power to grant exemptions under section 7(a)(2).[62] Thus, even after the creation of the Committee, Congress still required the federal courts to apply the ESA as interpreted by the Supreme Court in *Hill*.[63] This meant continuing to give endangered species the highest of priorities regardless of the cost.[64]

However, even if an agency's proposed action could jeopardize listed species, Congress entrusted the Committee with authority to grant exemptions to ESA section 7(a)(2) if the Committee determines the agency has met certain requirements.[65] Additionally, the Committee must establish reasonable mitigation and enhancement measures to minimize the adverse effects of the agency action upon listed species and their critical habitats.[66] If the agency satisfies the Committee's mitigation measures, the Committee may grant an exemption to the requirements of section 7(a)(2), thereby allowing the agency to proceed with its proposed action.[67]

Circuit Split of Authority

Even after Congress created the Endangered Species Committee as a way to limit the overly broad application of the ESA, many courts remained unsure regarding the extent of the ESA's reach.[68] This resulted in a split of authority

---

[62] *Rio Grande Silvery Minnow*, 356 F. Supp. 2d at 1225.

[63] *Id.* (stating Congress "specifically and exclusively" delegated the power to balance the interests of the public with the interests of endangered species to the Committee, rather than to the federal courts; thus, the federal courts must continue to give endangered species the highest of priorities "whatever the cost").

[64] *Id.*

[65] 16 U.S.C. § 1536(h)(1)(A). An agency must establish four requirements in order to receive an exemption from the Committee:

> (i) there are no reasonable and prudent alternatives to the agency action; (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; (iii) the action is of regional or national significance; and (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) [of section 7(a)(2) of the ESA].

Id. Section 7(d) of the ESA states the Federal agency and the exemption permit applicant must not make any "irreversible or irretrievable" commitment of resources that would have the affect of prohibiting the implementation of any reasonable and prudent alternative. 16 U.S.C. § 1536(d).

[66] 16 U.S.C. § 1536(h)(1)(B). The subsection lists several reasonable mitigation measures including live propagation, transplantation, and habitat acquisition and improvement. *Id.*

[67] 16 U.S.C. §§ 1536(a)(2), 1536(h)(1).

[68] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 203 (1978) (Powell, J., dissenting) (characterizing the Court's holding as a "sweeping construction" of the ESA); *see* Bosse, *supra* note 30, at 1047 (indicating circuits have reached divergent conclusions).

among the circuits.[69] In particular, the circuit split involved the question of whether the ESA provides an affirmative grant of authority to agencies to protect listed species.[70] One line of cases, followed by the First Circuit and the Eighth Circuit, suggests ESA section 7(a)(2) confers additional authority on agencies to consider listed species.[71] Under this approach, an agency possessing sufficient discretion to consider listed species must give species protection the highest of priorities if the agency action could jeopardize listed species.[72] In contrast, the Fifth Circuit and the D.C. Circuit have determined the ESA does not confer any additional authority on the agencies.[73] The Fifth and D.C. Circuit cases held an agency only needs to consider its impact to listed species if the statute in question specifically provides for the consideration of species.[74]

One line of cases in the split, followed by the Fifth and D.C. Circuit, holds an agency does not have authority to consider the agency action's impact on listed species if the agency interprets a statute without a species consideration provision.[75] In *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC* (*FERC*), the United States Court of Appeals for the District of Columbia

---

[69] *See* Bosse, *supra* note 30, at 1047 (stating the First and Eighth Circuits interpreted ESA section 7(a)(2) to confer additional authority on agencies to consider species, while the Fifth and Tenth Circuits held section 7(a)(2) does not grant agencies additional authority). *Compare* Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291, 299 (5th Cir. 1998) (stating ESA section 7(a)(2) does not grant an agency authority to take listed species into account when the agency is interpreting a statute that does not provide some authority for the agency to do so), *and* Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992) (holding ESA section 7(a)(2) does not confer additional powers upon agencies to consider listed species), *with* Defenders of Wildlife v. EPA, 882 F.2d 1294, 1299 (8th Cir. 1989) (holding ESA section 7(a)(2) imposed substantial obligations upon agencies to consider the effect of their actions on listed species), *and* Conservation Law Found. of New England, Inc. v. Andrus, 623 F.2d 712, 714 (1st Cir. 1979) (determining ESA section 7(a)(2) imposes an obligation upon agencies to protect listed species).

[70] *See* Bosse, *supra* note 30, at 1047 (stating the circuit split involved the issue of whether ESA section 7 provides agencies with additional authority to protect listed species).

[71] *Id.* The courts that found ESA section 7(a)(2) conferred additional authority on agencies to take species considerations into account did so because the statute those agencies were interpreting already provided for limited species consideration. *See infra* notes 84-90 and accompanying text. Thus, by holding section 7(a)(2) applied to the particular statutes, the Courts essentially conferred "additional authority" on the agencies to consider their impacts on listed species. *See infra* notes 84-90 and accompanying text.

[72] *Conservation Law Found. of New England*, 623 F.2d at 714 (interpreting the OCSLA which possessed sufficient discretion for the agency to consider listed species because the OCSLA required approval of an oil and gas exploration plan unless approval would likely cause serious harm or danger to life); Bosse, *supra* note 30, at 1047 (stating ESA section 7(a)(2) requires agencies with sufficient discretion to give listed species the highest of priorities).

[73] Bosse, *supra* note 30, at 1047 (stating the ESA does not bestow any additional authority upon agencies to consider listed species).

[74] *See infra* notes 75-83 and accompanying text (discussing the Fifth and D.C. Circuit decisions).

[75] *See infra* notes 75-83 and accompanying text (discussing the Fifth and D.C. Circuit decisions).

Circuit held section 7 of the ESA does not confer additional powers upon agencies to consider potential negative impacts to endangered and threatened species.[76] The court stated the ESA "does not *expand* the powers conferred on an agency by its enabling act."[77] According to the court, the statute does not require agencies to go beyond their statutory authority to carry out the ESA's purposes.[78]

Six years later, the United States Court of Appeals for the Fifth Circuit relied on the D.C. Circuit's *FERC* holding.[79] The Fifth Circuit determined the ESA does not grant an agency authority to take species into account when the agency interprets a statute that does not provide some authority for the agency to do so.[80] The court determined the ESA does not create additional authority to consider listed species, but merely requires agencies to use their existing authority to protect species.[81] The court applied section 7(a)(2) of the ESA to section 402(b) of the CWA and determined ESA section 7 does not grant the EPA the authority to add additional criteria to the CWA requirements.[82] Rather, ESA section 7 merely requires the EPA to consult with the FWS before undertaking any agency action.[83]

In contrast, the United States Court of Appeals for the First Circuit in *Conservation Law Foundation of New England, Inc. v. Andrus Authority* (*Conservation Law*) determined ESA section 7(a)(2) imposed an affirmative obligation on agencies to protect species.[84] *Conservation Law* discussed the issue of whether ESA section 7 applied to the Outer Continental Shelf Lands Act (OCSLA).[85] OCSLA required the approval of an oil and gas exploration plan

---

[76] Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992).

[77] *Id.* (emphasis in the original) (stating agencies are not required to do "whatever it takes" to protect listed species because agencies are not required to look beyond the powers Congress granted them in their enabling acts, and agencies have no authority to consider listed species when Congress did not confer any statutory authority on the agencies to take species into account).

[78] *Id.*

[79] Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291, 299 (5th Cir. 1998) (reasoning unless the statute an agency is interpreting provides for some, albeit limited, authority to consider listed species, the agency is not required to consider its impact on endangered and threatened species).

[80] *Id.*

[81] *Id.* (stating "the ESA serves not as a front of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction" (emphasis in the original)).

[82] *Id.* at 298.

[83] *Id.* at 299.

[84] Conservation Law Found. of New England, Inc. v. Andrus, 623 F.2d 712, 714 (1st Cir. 1979).

[85] *Id.*

unless such approval would "probably cause serious harm or danger to life."[86] The First Circuit determined the ESA and OCSLA were "complimentary" because the OCSLA provided some consideration for listed species.[87] However, *Conservation Law* did not address whether ESA section 7(a)(2) grants agencies additional authority to consider listed species under a statute that does not explicitly provide for the consideration of species.[88]

Similarly, the United States Court of Appeals for the Eighth Circuit in *Defenders of Wildlife v. EPA* held the ESA "impose[d] substantial and continuing obligations on federal agencies" to consider the effects of their actions on listed species.[89] Once again, however, the Eighth Circuit did not address the question of whether the ESA applies to a statute that does not, itself, allow an agency to take into account potential impacts to species.[90]

Even though the First Circuit and the Eighth Circuit determined the ESA confers additional powers on agencies, these circuits did not address the same issue presented in the Fifth Circuit and D.C. Circuit cases, resulting in an important distinction.[91] Thus, the Ninth Circuit in *Defenders of Wildlife v. EPA* further muddied the waters surrounding the ESA's scope by holding ESA section 7(a)(2) applies to CWA section 402(b).[92] Unlike the statutes involved in the First Circuit and Eighth Circuit decisions, nothing within the text of CWA section 402(b)

---

[86] *Id.* at 715 n.2; Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(a)(2)(A)(i) (2000); *see* 43 U.S.C. § 1340(c)(1) (2000) (setting forth requirements for plan approval).

[87] *Conservation Law Found. of New England, Inc.*, 623 F.2d at 714; 43 U.S.C. § 1334(a)(2)(A)(i)(2005) (requiring approval of an exploration plan unless approval would "probably cause serious harm or danger to life"). Although section 1334(a)(2)(A)(i) provided a lower standard for species protection than ESA section 7(a)(2)'s "no jeopardy" mandate, the First Circuit held the ESA applied to the OCSLA because it provided for limited species consideration. *Conservation Law Found. of New England, Inc.*, 623 F.2d at 714.

[88] Bosse, *supra* note 30, at 1048 (stating because OCSLA provides for the consideration of species, *Conservation Law* did not address whether the ESA applies to a statute, such as the CWA, that does not provide for the consideration of species).

[89] Defenders of Wildlife v. EPA, 882 F.2d 1294, 1299 (8th Cir. 1989) (holding the agency's compliance with the Federal Insecticide, Fungicide, and Rodenticide Act did not exempt the agency from compliance under the ESA).

[90] *See* Bosse, *supra* note 30, at 1050 (stating the court found the ESA applies when an agency acts under a statute with less-protective species standards, but the court did not address whether ESA section 7(a)(2) confers any additional power to protect species).

[91] *Id.* at 1054 (stating while ESA section 7(a)(2) imposes a substantive mandate upon agencies to insure their actions will not jeopardize listed species, this mandate only applies if an agency action possess sufficient discretion to allow the agency to take species into account).

[92] *See id.* (reasoning the Ninth Circuit's failure to recognize the important distinction in the split, that ESA section 7(a)(2) applies only if an agency action includes sufficient discretion to allow the agency to consider listed species, resulted in the Ninth Circuit's failure to explain how the ESA could confer additional authority on an agency to consider listed species when interpreting a statute that does not provide discretion for the agency to consider additional factors in its decision).

requires federal agencies to consider their impacts to listed species.[93] Consequently, the Ninth Circuit's decision necessitated the Supreme Court's involvement in the principal case to shed some light on this complicated issue.[94]

PRINCIPAL CASE

National Association of Home Builders v. Defenders of Wildlife presented the question of whether ESA section 7(a)(2) effectively imposes an additional requirement that states must satisfy to obtain pollution permitting power under the CWA.[95] The EPA originally granted the State of Arizona's request to administer its NPDES program with regard to Arizona waterways.[96] Respondent Defenders of Wildlife (Defenders) subsequently filed a petition for review of the EPA's decision in the United States Court of Appeals for the Ninth Circuit.[97] The Ninth Circuit vacated the EPA's decision, holding the EPA had the authority and the obligation to consider the potential harm to threatened and endangered species in making the transfer decision.[98] The Ninth Circuit determined the EPA failed to take into account the possible jeopardy to listed species and held the EPA made an arbitrary and capricious decision.[99]

Petitioner National Association of Home Builders (Home Builders) appealed to the United States Supreme Court.[100] The Supreme Court granted certiorari because the Ninth Circuit's construction of ESA section 7(a)(2) contradicts the construction adopted by other Courts of Appeals.[101] The United States Supreme Court began its discussion by addressing whether the EPA acted arbitrarily and capriciously in granting the State of Arizona's request for pollution permitting

---

[93] *Compare* Conservation Law Found. of New England, Inc. v. Andrus, 623 F.2d 712, 714-16 (1st Cir. 1979) (interpreting the OCSLA which required approval of an exploration plan unless approval would "probably cause serious harm or danger to life"), *with* Defenders of Wildlife v. EPA, 420 F.3d 946, 959-71 (9th Cir. 2005) (interpreting CWA section 402(b) which does not include a species consideration provision).

[94] Mary B. Hubner, Defenders of Wildlife v. EPA: *Reconciling the Endangered Species Act and Clean Water Act or Further Confusing the Statutory Overlap?*, 17 VILL. ENVTL. L.J. 433, 456-57 (2006) (stating Supreme Court review would likely be necessary to resolve the statutory overlap between the CWA and the ESA).

[95] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2525 (2007).

[96] *Defenders of Wildlife*, 420 F.3d at 954.

[97] *Id.* at 954-55; s*ee supra* note 12 and accompanying text (stating the Court of Appeals has jurisdiction to review an EPA transfer decision under CWA section 402(b)).

[98] *Defenders of Wildlife*, 420 F.3d at 950.

[99] *Id.* (holding the EPA's transfer decision was arbitrary and capricious because it had the authority to consider jeopardy to listed species and failed to properly do so when it granted Arizona's transfer request).

[100] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2529.

[101] *Id.* (stating the Court granted certiorari to resolve the conflict among the Courts of Appeals).

authority.[102] The Court noted it should uphold an agency decision of "less than ideal clarity" so long as the "agency's path may reasonably be discerned."[103] According to Defenders, the EPA's path was not reasonably discernable because the agency changed its mind regarding its section 7(a)(2) obligations when determining whether to grant the transfer request.[104] The Court, however, reasoned that, as long as agencies follow the proper procedures, agencies may change their minds.[105] Furthermore, the Court asserted the fact that a preliminary agency determination "is later overruled at a higher level . . . does not render the decisionmaking process arbitrary and capricious."[106]

The Court then addressed the substantive statutory question raised by petitioners, Home Builders.[107] Home Builders argued the use of the word "shall" in section 402(b) of the CWA requires mandatory agency action once the state satisfies the nine statutory criteria.[108] The Court agreed, holding the statutory language mandatory and the list of criteria a state must satisfy to obtain a transfer of pollution permitting authority exclusive.[109] The Court reasoned the word "shall" typically does not allow room for discretion; rather, it indicates a requirement an individual or state must meet.[110] Similarly, the word "shall" appears in section 7(a)(2) of the ESA, which requires agencies to insure their actions are unlikely to jeopardize listed species or their habitats.[111] The use of the word "shall" in both

---

[102] *Id.* at 2529-31; Administrative Procedure Act of 1946, 5 U.S.C. § 706(2)(A) (2000) (stating "the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). The Administrative Procedure Act (APA) governs the procedure agencies follow to establish rules and regulations and provides for judicial review of agency decisions. *See* 5 U.S.C. §§ 500-96, 701-06. The APA specifically allows the reviewing court to set aside agency decisions that are arbitrary and capricious. 5 U.S.C. § 702(2)(A).

[103] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2530 (quoting Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974)).

[104] *Id.* Defenders argued that the EPA's decision was of "less than ideal clarity" because the EPA engaged in ESA section 7 consultations and later determined that CWA section 402(b) required it to approve Arizona's transfer request as soon as the State satisfied the nine criteria. *See id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at 2531.

[108] Opening Brief of Petitioners National Association of Home Builders, et. al. at 25, *Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (Nos. 06-340, 06-549), 2007 WL 549100; 33 U.S.C. § 1342(b) (2000). Section 402(b) states "[t]he [EPA] *shall* approve each such submitted program unless [it] determines that adequate authority does not exist." 33 U.S.C. § 1342(b)(2000) (emphasis added).

[109] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2531.

[110] *Id.* (citing Ass'n of Civilian Technicians v. FLRA, 22 F.3d 1150, 1153 (D.C. Cir. 1994)).

[111] 16 U.S.C. § 1536(a)(2) (2000). Section 7(a)(2) provides that "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize" endangered or threatened species or their habitats. *Id.*

the ESA and the CWA results in the imposition of conflicting statutory mandates upon federal agencies.[112]

In resolving the contradiction regarding the use of the word "shall" in both the ESA and the CWA, the Court first considered the general presumption against an implied repeal of a statute.[113] The Court noted that "repeals by implication are not favored" in the law.[114] Thus, courts will not construe a later enacted statute (such as the ESA) to repeal an earlier enacted statute (such as the CWA) unless Congress clearly intended to repeal the earlier enacted statute.[115] According to the Court, construing section 7(a)(2) of the ESA literally—requiring every agency to insure its actions do not jeopardize listed species—would impliedly repeal section 402(b) of the CWA by adding a tenth criterion that states must satisfy before they can obtain a transfer of pollution permitting authority.[116]

Furthermore, the Court found it impossible for an agency to simultaneously obey the conflicting mandates outlined in section 7(a)(2) of the ESA and section 402(b) of the CWA.[117] The Court went on to note the presumption against implied repeals does not, by itself, indicate which statute should prevail.[118] Consequently, the Court conducted a review of the FWS' regulations to determine which statute, if any, should prevail.[119] The FWS, acting on behalf of the Secretary of the Interior, promulgated a regulation that states the ESA section 7 requirements "apply to all actions in which there is *discretionary* Federal involvement or control."[120] According to the Court, by factoring in the provisions of this regulation, ESA section 7(a)(2) would only take effect when an agency action results from the use of agency discretion.[121]

Defenders argued the Court's decision in *Hill*, holding section 7(a)(2) of the ESA prohibited the Tennessee Valley Authority (TVA) from operating a dam due to the negative impact such operation would have on the endangered snail

---

[112] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2531-32 (determining CWA section 402(b) and ESA section 7(a)(2) are contradictory to one another because both impose conflicting statutory mandates on federal agencies).

[113] *Id.* at 2532-33 (discussing the presumption against "implied repeals" which occurs when a later enacted statute operates to amend or repeal an earlier statutory provision).

[114] *Id.* at 2532.

[115] *Id.* at 2532 (citing Watt v. Alaska, 451 U.S. 259, 267 (1981)).

[116] *Id.*

[117] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2534.

[118] *Id.*

[119] *Id.* at 2533-37.

[120] 50 C.F.R. § 402.03 (2007) (emphasis added). The FWS promulgated the regulation in cooperation with the NMFS, which acts on behalf of the Secretary of Commerce. *See* 50 C.F.R. § 402.01(b).

[121] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2533.

darter, required the Court to decide in Defenders' favor.[122] The Court, however, found *Hill* distinguishable from the present action because *Hill* did not address the question of whether the FWS' regulation applies to nondiscretionary, as well as discretionary, agency actions.[123] Rather, *Hill* involved a discretionary project, which the Court already determined ESA section 7(a)(2) applies.[124]

Next, Defenders argued even if section 7(a)(2) of the ESA applies only to discretionary agency actions, the EPA's decision to transfer pollution permitting authority to Arizona involved the use of agency discretion.[125] According to Defenders, the EPA's transfer decision was not "entirely mechanical" and involved "some exercise of judgment" as to whether Arizona met the criteria set forth in CWA section 402(b).[126] The Court found this argument unpersuasive because section 402(b) does not grant an agency the discretion to consider an "entirely separate" criterion when deciding whether to grant a state's transfer request.[127]

Finally, Defenders argued the section 402(b) criteria incorporate references to wildlife conservation that bring ESA section 7(a)(2) under the purview of agency discretion.[128] The Court also rejected this argument on the ground that nothing in the text of CWA section 402(b) permits the EPA to consider the potential danger to listed species "as an end in itself" when deciding whether to grant a state's application for a transfer of permitting power.[129]

Justice Stevens's Dissent

In a dissenting opinion, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, disagreed with the majority's opinion on the ground that the Court should attempt to give full effect to each of the two competing statutes, if possible.[130] The dissent stated "when 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."[131] In advancing its position, the dissent indicated ESA section 7(a)(2) and CWA section 402(b) can co-exist and provided two separate

---

[122] Brief for Respondents Defenders of Wildlife, et. al. at 38, *Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (Nos. 06-340, 06-549), 2007 WL 951129; Tenn. Valley Auth. v. Hill, 437 U.S. 153, 173 (1978).

[123] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2536.

[124] *Id.*

[125] *Id.* at 2537.

[126] *Id.*

[127] *Id.*

[128] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2537.

[129] *Id.*

[130] *Id.* at 2538 (Stevens, J., dissenting).

[131] *Id.* (Stevens, J., dissenting) (internal quotations omitted).

approaches to harmonize the two conflicting statutes.[132] Finally, the dissent argued that even if the Court should only apply section 7(a)(2) to discretionary agency actions, the EPA's transfer decision constituted a discretionary act, and thus falls under the purview of the ESA.[133]

The dissent's first argument centered on the Court's decision in *Hill*, where the Court determined the ESA should receive first "priority over the primary missions of federal agencies."[134] The dissent noted the *Hill* Court plainly held section 7 admits "no exception."[135] According to the dissent, no exception to the protections granted to endangered species under ESA section 7 should exist.[136] Thus, forming an exception for nondiscretionary agency actions goes against the precedent set by the Court in *Hill* and the ESA's statutory text.[137]

Reasoning the *Hill* decision granted the highest of priorities to endangered species, the dissent stated the CWA should yield to the ESA if necessary.[138] Nevertheless, the dissent searched for a way for the two statutes to coexist.[139] The dissent reasoned the plain language of 50 C.F.R. § 402.03 does not limit the provisions of the ESA only to discretionary actions.[140] Rather, the dissent stated that while 50 C.F.R. § 402.03 states ESA section 7(a)(2) applies to discretionary actions, nothing in the regulation's text prohibits the application of section 7(a)(2) to nondiscretionary actions.[141] To advance this point, the dissent relied on 50 C.F.R. § 402.02, which states an agency "action means all activities or programs of any kind authorized . . . by Federal agencies."[142] By definition, the term "action" applies to all agency activities, and the Court's reading of the term "discretionary" as a limitation on "action" contradicts the FWS's own regulations, according to the dissent.[143]

---

[132] *Id.* at 2539-48 (Stevens, J., dissenting) (stating there are two possible ways in which the ESA and the CWA can co-exist: (1) an extensive consultation with the Secretary of the Interior, and (2) requiring the EPA and the FWS to enter into a Memorandum of Agreement (MOA) setting forth continuing obligations to consider impacts to listed species).

[133] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2548-50 (Stevens, J., dissenting).

[134] *Id.* at 2538 (Stevens, J., dissenting) (internal quotations omitted).

[135] *Id.* at 2539 (Stevens, J., dissenting).

[136] *Id.* at 2541 (Stevens, J., dissenting).

[137] *Id.* (Stevens, J., dissenting).

[138] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2541 (Stevens, J., dissenting).

[139] *Id.* at 2541-44 (Stevens, J., dissenting).

[140] *Id.* at 2541 (Stevens, J., dissenting); 50 C.F.R. § 402.03 (2007) (stating section 7 of the ESA applies to "all actions in which there is discretionary Federal involvement or control").

[141] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2542 (Stevens, J., dissenting); 50 C.F.R. § 402.03.

[142] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2543 (Stevens, J., dissenting) (quoting 50 C.F.R. § 402.02 (2007) (internal quotations omitted)).

[143] *Id.* (Stevens, J., dissenting).

Next, the dissent argued two possible ways existed to give effect to both section 7(a)(2) of the ESA and section 402(b) of the CWA without sacrificing either statute.[144] First, the text of ESA section 7(a)(2) provides that each federal agency shall consult the Secretary of the Interior or Commerce to insure its actions will not jeopardize endangered and threatened species.[145] If, after consulting the Secretary, the agency determines the proposed action will not affect listed species, the agency satisfies its obligation under section 7(a)(2).[146] If, however, the Secretary determines the agency action could potentially harm listed species, the Secretary shall suggest "reasonable and prudent alternatives" that would not violate section 7(a)(2) and that would allow the agency to proceed with its proposed action.[147] In the rare circumstance that no "reasonable and prudent alternatives exist," the agency could consult the Committee, which has the authority to grant exemptions to ESA section 7(a)(2).[148] Second, an agency may harmonize the provisions of the ESA and the CWA by entering into a Memorandum of Agreement (MOA) that details the particulars of an agency's "oversight duties."[149] Entering into a MOA would allow a state to obtain control of the NPDES permitting system within its borders while still allowing the EPA to protect endangered species in accordance with section 7(a)(2) of the ESA.[150]

Finally, the dissent argued even if section 7(a)(2) only applies to discretionary agency actions, the EPA engaged in a discretionary action subject to the provisions of the ESA when it transferred permitting power to Arizona.[151] The dissent cited the *Hill* decision, in which the Court held a "federal statute using the word 'shall' will sometimes allow room for discretion."[152] Thus, according to the dissent, the

---

[144] *Id.* at 2544 (Stevens, J., dissenting).

[145] *Id.* (Stevens, J., dissenting). The FWS is responsible for administering the ESA with respect to species under the jurisdiction of the Secretary of the Interior; the NMFS administers the ESA with respect to species under the jurisdiction of the Secretary of Commerce. *See* 50 C.F.R. §§ 17.11, 222.101(a), 223.102, 402.01(b) (2007).

[146] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2545 (Stevens, J., dissenting).

[147] *Id.* (Stevens, J., dissenting).

[148] *Id.* at 2546 (Stevens, J., dissenting).

[149] *Id.* at 2547 (Stevens, J., dissenting). Regarding the EPA's oversight duties, the MOA may include additional terms, conditions, or agreements "relevant to the administration and enforcement of the State's regulatory program." 40 C.F.R. § 123.24(a) (2007). For example, additional terms or conditions could specify the "frequency and content of reports, documents and other information" which the state must submit to the EPA. 40 C.F.R. § 123.24(b)(3) (2007). Additionally, terms or conditions could provide for coordination and compliance monitoring activities by the state and by EPA. 40 C.F.R. § 123.24(b)(4)(i) (2007).

[150] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2547 (Stevens, J., dissenting). EPA must approve an MOA prior to transferring NPDES permitting authority. *Id.* As a result, EPA can include a provision in the MOA allowing the EPA to protect endangered species, even after EPA has transferred permitting authority. *Id.*

[151] *Id.* at 2548 (Stevens, J., dissenting).

[152] *Id.* (Stevens, J., dissenting) (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 211-12 (1978)).

Court should take a closer look at the nine specified criteria in section 402(b) of the CWA to determine whether there is room for discretion within the statute.[153]

Justice Breyer's Dissent

Justice Breyer joined in Justice Stevens's dissent but reserved judgment regarding whether section 7(a)(2) of the ESA applies to all possible agency actions.[154] Justice Breyer indicated section 7(a)(2) likely does not apply to all agency actions, especially those actions undertaken by totally unrelated agencies, such as the Internal Revenue Service.[155]

In summary, the Court in *NAHB* concluded that ESA section 7(a)(2) does not apply to the CWA.[156] The Court reached its conclusion after determining section 7(a)(2) does not apply to nondiscretionary agency actions.[157] In particular, the Court reasoned an agency does not have sufficient authority to "insure" its actions will not jeopardize listed species when the agency lacks the discretion to consider the action's impact on such species.[158]

ANALYSIS

The Supreme Courts' 1978 decision in *Hill* presented a broad interpretation of the ESA as applying to *all* federal agency actions, without exception, and regardless of cost.[159] Over the years, the courts, as well as Congress, have attempted to limit the overarching provisions of the ESA to prevent the "absurd result" that came about in *Hill* from occurring in the future.[160] However, not until the Supreme Court's recent decision in *NAHB* did the courts receive clear

---

[153] *Id.* (Stevens, J., dissenting).

[154] *Id.* at 2552 (Breyer, J., dissenting).

[155] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2552 (Breyer, J., dissenting).

[156] *Id.* at 2538.

[157] *Id.* at 2533-36.

[158] *Id.* at 2534-35 (stating "when an agency is *required* to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species" (emphasis in the original)).

[159] *See* Rio Grande Silvery Minnow v. Keys, 356 F. Supp. 2d 1222, 1224 (D.N.M. 2002) (stating the broad reach of the ESA after the Supreme Court's holding in *Hill* concerned Congress).

[160] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 196 (1978) (Powell, J., dissenting) (describing the majority's holding, which prevented the operation of a virtually complete $100 million dam due to the discovery of an endangered species of snail darter, as "absurd"); Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992) (holding ESA section 7(a)(2) does not confer additional authority on agencies to consider negative impacts to listed species); 16 U.S.C. § 1536(e)-(h) (2000) (granting the Endangered Species Committee authority to grant exemptions to the ESA).

and logical precedent to follow when determining the extent of the ESA's reach.[161] The *NAHB* Court concluded the ESA does not apply to statutes that do not grant agency discretion to consider impacts on listed species.[162] In doing so, the Court resolved the statutory overlap that existed between the ESA and the CWA and indirectly reconciled the split of authority among the circuits.[163]

Resolution of the Statutory Overlap

The Supreme Court correctly determined the "no jeopardy" provision in section 7(a)(2) of the ESA does not apply to CWA section 402(b)'s statutory mandate.[164] In doing so, the Court resolved the problematic statutory overlap between the ESA and the CWA.[165] The Court arrived at its decision after determining the ESA applies only to discretionary agency actions.[166] The legislative history surrounding the ESA's enactment indicates the section 7 phrase, "utilize their authorities," requires agencies to "insure" their actions do not jeopardize listed species only when they have discretion to do so, but not when faced with a nondiscretionary statutory mandate, such as the CWA.[167] The EPA does not have discretion to "insure" its actions do not jeopardize listed species when determining whether to grant a State's transfer request because CWA section 402(b) does not contain a species consideration provision.[168] Thus, because the EPA does not have

---

[161] *See* Hubner, *supra* note 94, at 457 (stating determination of the extent of the EPA's authority under the EPA likely necessitates Supreme Court Review).

[162] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538 (indicating a transfer of NPDES permitting authority does not trigger ESA section 7(a)(2)'s no-jeopardy requirement because a transfer of permitting authority is not discretionary).

[163] *See infra* notes 164-223 and accompanying text. Even though the *NAHB* Court did not directly decide the question presented in the circuit split—whether the ESA provides an affirmative grant of authority to consider listed species—the Court indirectly resolved the circuit split by holding that ESA section 7 only applies to discretionary agency actions. *See infra* notes 212-23 and accompanying text. Consequently, ESA section 7 does not apply where the agency does not possess sufficient discretion to consider listed species, and thus, ESA section 7 cannot confer additional authority on agencies to consider listed species if the agencies do not possess sufficient discretion to consider species. *See infra* notes 212-33 and accompanying text.

[164] *See* Bosse, *supra* note 30, at 1054 (reasoning ESA section 7(a)(2) does not apply to nondiscretionary agency actions such as the CWA); 16 U.S.C. § 1536(a)(2) (2000). CWA section 402(b) mandates a transfer of permitting authority to state officials once the state satisfies the nine statutory criteria. 33 U.S.C. § 1342(b) (2000).

[165] *See infra* notes 164-223 and accompanying text (discussing how the *NAHB* Court's decision resolved the statutory overlap between the ESA and the CWA).

[166] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538.

[167] *See* H.R. REP. NO. 95-1804, at 18 (1978) (Conf. Rep.) (stating a new ESA section 7(a) was created, which "essentially restates section 7 of existing law"); 16 U.S.C. § 1536(a) (1978) (requiring all federal agencies shall "utilize their authorities" to carry out the purposes of the ESA).

[168] 33 U.S.C. § 1342(b). None of the nine criteria enumerated in CWA section 402(b) allow an agency to consider its impact on listed species. *Id.*

the authority to consider listed species, and because an agency must have some discretion to consider impacts to species to trigger ESA section 7 requirements, ESA section 7(a)(2) clearly applies only to discretionary agency actions.[169]

Agencies Must "Utilize Their Authorities" to Protect Species

In 1973 when Congress originally enacted the ESA, section 7 obligations required all federal agencies to "utilize their authorities" to further the protection of endangered species.[170] While the phrase "utilize their authorities" currently appears only in section 7(a)(1) of the ESA, the legislature clearly intended for this phrase to apply to section 7(a)(2) as well.[171] In its original form, section 7 obligated federal agencies to carry out conservation programs and to avoid jeopardizing listed species.[172] Later, in 1978, Congress amended the ESA and split the original section 7 into separate subsections.[173] Subsection 7(a) in the 1978 version of the ESA contained essentially the same language as the original 1973 version of ESA section 7.[174] Once again in 1979, Congress amended the ESA and further divided section 7(a) into subsections 7(a)(1) and 7(a)(2).[175] In the current version of the ESA, section 7(a)(1) requires agencies to "utilize their authorities" to further conservation efforts, while section 7(a)(2) imposes the "no jeopardy" requirement on agency actions.[176]

As petitioners, Home Builders, in *NAHB* correctly argued, Congress intended for the phrase "utilize their authorities" to apply to both subsection

---

[169] *See infra* notes 182-211 and accompanying text (explaining ESA section 7 is inapplicable when Congress fails to provide an agency with discretion under a given statute to consider listed species).

[170] 16 U.S.C. § 1536 (1973) (stating all federal agencies "shall . . . utilize their authorities in furtherance of the purposes of this act by carrying out programs for the conservation of endangered species and threatened species . . . and by taking such action necessary to insure that [their actions] do not jeopardize the continued existence of such endangered species and threatened species").

[171] *See infra* notes 177-81 and accompanying text (indicating the legislature's intent for the phrase "utilize their authorities" to apply to subsection 7(a)(2)).

[172] 16 U.S.C. § 1536 (1973).

[173] 16 U.S.C. § 1536(a) (1978).

[174] 16 U.S.C. § 1536 (1973) (directing all federal agencies to "utilize their authorities in furtherance of the purposes of this act by carrying out programs for the conservation of endangered species and threatened species . . . and by taking such action necessary to insure that [their actions] do not jeopardize the continued existence of such endangered species and threatened species"); 16 U.S.C. § 1536(a) (1978) (requiring all federal agencies "shall . . . utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species . . . . Each Federal agency shall, . . . insure that any [agency action] does not jeopardize the continued existence of any endangered species or threatened species").

[175] 16 U.S.C. § 1536(a) (1979).

[176] 16 U.S.C. § 1536(a) (2000).

7(a)(1) and 7(a)(2).[177] According to the Conference Report that accompanied the 1978 Amendments, the new subsection 7(a) "essentially restates section 7 of existing law."[178] Consequently, even though Congress set forth the "no jeopardy" requirement in a separate sentence that did not contain the phrase "utilize their authorities," the 1978 legislative history indicates Congress's intent to preserve the substantive requirements of section 7's original form.[179] The fact that Congress amended ESA section 7(a) again in 1979 does not undermine this intent because the 1979 amendments did not substantively alter section 7(a).[180] Accordingly, the legislative history surrounding the ESA's enactment clearly indicates an agency's ability to "utilize [its] authorities" under existing law continues to limit an agency's duty to "insure" its actions do not jeopardize listed species.[181]

ESA Section 7 Applies Only to "Discretionary" Agency Actions

ESA section 7(a)(1)'s requirement that agencies must "utilize their authorities" to further the conservation of threatened or endangered species does not mandate that agencies must do "whatever it takes" to protect species.[182] Rather, section 7(a)(1) merely requires agencies utilize the authority Congress granted them to further conservation efforts.[183] According to the D.C. Circuit in *FERC*, the ESA "does not expand the powers conferred on an agency by its enabling act" and

---

[177] *See* H.R. REP. NO. 95-1804, at 18 (1978) (Conf. Rep.) (indicating the 1978 amendments were a restatement of the existing ESA section 7 even though the 1978 amendments divided section 7 into subsections).

[178] H.R. REP. NO. 95-1804, at 18 (Conf. Rep.); Brief for Petitioner Environmental Protection Agency at 32, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) (Nos. 06-340, 06-549), 2007 WL 542243 (stating Congress, in rewording ESA section 7, "did not seek to expand the scope of federal agencies' no-jeopardy and consultation duties in potentially far reaching ways, but rather intended to preserve the substance of the requirements in their prior form").

[179] Brief for Petitioner Environmental Protection Agency, *supra* note 178, at 32 (noting the phrase "utilize their authorities" attached to the "no jeopardy" requirement in ESA section 7's original form).

[180] *Id.* at 33. In 1978, ESA section 7(a) stated all federal agencies "shall . . . utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species . . . . Each Federal agency shall, . . . insure that any [agency action] does not jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a) (1978). In 1979, Congress divided ESA section 7(a) into subsections. 16 U.S.C. § 1536(a) (1979). ESA section 7(a)(1) stated all federal agencies "shall . . . utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). ESA section 7(a)(2) required all federal agencies "shall . . . insure that any [agency action] is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

[181] Brief for Petitioner Environmental Protection Agency, *supra* note 178, at 30-33.

[182] Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992) (stating ESA section 7 requires agencies to "utilize their authorities" to carry out the statute's objectives, but it "does not *expand* the powers conferred on an agency by its enabling act" (emphasis added)).

[183] *Id.*

thus does not confer additional power upon agencies to protect listed species.[184] Although section 7(a)(2) of the ESA mandates that all agencies "insure" that their actions do not jeopardize listed species, this obligation only applies if an agency has sufficient discretion to consider listed species.[185]

Regulations promulgated jointly by the FWS and the NMFS specifically state section 7 of the ESA applies to "all actions in which there is *discretionary* Federal involvement or control."[186] The term "discretionary" refers to an act or duty "involving an exercise of judgment and choice."[187] As Justice Stevens correctly articulated in the dissenting opinion, this regulation does not state ESA section 7(a)(2) "only" applies to discretionary actions.[188] However, sufficient authority exists to indicate section 7(a)(2) does not apply to nondiscretionary actions.[189] In fact, the regulation becomes superfluous and unnecessary if ESA section 7(a)(2) applies to discretionary actions.[190] Nothing within the text of section 7(a)(2) or the other agency regulations indicate the ESA excludes discretionary actions.[191] Consequently, the FWS did not need a separate regulation to bring discretionary actions within the scope of the ESA because they were never explicitly excluded.[192]

---

[184] *Id.*

[185] Brian P. Gaffney, *A Divided Duty: The EPA's Dilemma under the Endangered Species Act and Clean Water Act Concerning the National Pollutant Discharge Elimination System*, 26 REV. LITIG. 487, 498 (2007) (stating that if an agency action is nondiscretionary, "ESA section 7(a)(2) would not apply").

[186] 50 C.F.R. § 402.03 (2007) (emphasis added).

[187] BLACK'S LAW DICTIONARY 499 (8th ed. 2004).

[188] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2418, 2541-42 (2007) (Stevens, J., dissenting).

[189] *E.g.*, Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (reasoning the ESA does not apply to nondiscretionary agency actions); Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073-74 (9th Cir. 1996) (reasoning an agency action does not exist, as contemplated under ESA section 7(a)(2), when an agency lacks discretion); Sierra Club. v. Babbit, 65 F.3d 1502, 1509 (9th Cir. 1995) (indicating ESA section 7(a)(2) cannot apply when a discretionary agency action does not exist).

[190] *See* Gaffney, *supra* note 185, at 497-98 (stating where an agency lacks discretion, "to require compliance with section 7 of the ESA would be an exercise in futility" (internal quotations omitted)). Canons of statutory construction instruct courts to construe statutes so that "no clause, sentence, or word shall be superfluous, void, or insignificant." TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001).

[191] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2535-36; *see, e.g.,* 16 U.S.C. § 1536 (2000) (listing no section or text stating ESA section 7 excludes discretionary actions).

[192] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2535-36 (stating no need for a separate regulation to bring discretionary actions within the reach of the ESA since nothing within the text of the ESA, or the regulations interpreting that section, specifically excludes discretionary actions from the ESA's reach); 50 C.F.R. § 402.03 (2007) (stating ESA applies to "all actions in which there is discretionary Federal involvement or control").

Thus, 50 C.F.R. § 402.03 becomes unnecessary unless it serves to exclude nondiscretionary actions from the ESA's reach.[193]

In the dissenting opinion, Justice Stevens argued that limiting the ESA's application to discretionary actions upsets the Supreme Court's previous decision in *Hill*.[194] However, the Court in *Hill* did not address the question presented in *NAHB*, and thus, the *NAHB* decision did not overrule the *Hill* decision.[195] The construction project at issue in *Hill*, while expensive, involved a discretionary action.[196] The *Hill* Court determined Congress did not mandate the construction of the dam, and no statute required TVA to put the dam into operation.[197] Thus, the dam's construction constituted a discretionary action, to which ESA section 7(a)(2) properly applied.[198] Consequently, the Supreme Court's decision in *NAHB* did not upset the Court's previous holding in *Hill* because *NAHB* involved a nondiscretionary agency action, whereas *Hill* involved a discretionary action.[199]

Since ESA section 7(a)(2) does not apply to nondiscretionary agency actions, the Supreme Court in *NAHB* correctly held ESA section 7(a)(2) does not apply to CWA section 402(b), a nondiscretionary statute.[200] CWA section 402(b) imposes a nondiscretionary statutory mandate upon the EPA to transfer permitting authority to state officials once the state satisfied the nine specified criteria.[201] As the mandatory nature of CWA section 402(b) illustrates, not all agency actions involve the agency's exercise of discretion.[202] CWA section 402(b) explicitly states the EPA "*shall* approve each submitted program unless [it] determines that adequate authority does not exist" to meet the nine statutory criteria.[203] The

---

[193] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2535-36; 50 C.F.R. § 402.03 (stating ESA section 7 applies to discretionary federal actions).

[194] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2541 (Stevens, J., dissenting).

[195] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 189-93 (1978) (viewing the dam's construction and operation as discretionary because Congress did not mandate the TVA put the dam into operation, and because Congress did not obligate TVA to spend the funds Congress appropriated to complete the dam).

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *See id.* (characterizing the dam's construction as discretionary because Congress did not mandate that the TVA put the dam into operation); *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2537 (stating the decision to transfer NPDES permitting authority involves a nondiscretionary action).

[200] *See* Gaffney, *supra* note 185, at 502 (stating the nine statutory requirements in CWA section 402(b) "appear mandatory and exclusive, suggesting that no other federal statute may be considered in its application").

[201] 33 U.S.C. § 1342(b) (2000) (requiring the EPA to approve a State's transfer request upon a showing that the State satisfied the nine statutory criteria).

[202] *Id.*

[203] *Id.* (emphasis added).

mandatory nature of the word "shall" in the statute does not provide the EPA with discretion to consider outside factors when determining whether to grant a state's transfer request.[204] While the statute does allow the EPA to exercise some discretion in determining whether a state has satisfied the nine criteria, this discretion ends once the EPA determines the state has satisfied those nine requirements.[205] As a result, the Supreme Court correctly held ESA section 7(a)(2) does not apply to CWA section 402(b)'s statutory mandate.[206]

In conclusion, ESA section 7(a)(2) does not apply to CWA section 402(b) because of the nondiscretionary nature of the CWA.[207] The CWA's nondiscretionary statutory mandate does not permit agencies to look outside the nine statutory criteria when deciding whether to grant a state's transfer request.[208] Further, ESA section 7(a)(1)'a requirement that agencies must "utilize their authorities" to "insure" their actions will not jeopardize listed species does not confer additional power upon agencies to look beyond the existing law of the CWA.[209] Thus, ESA section 7(a)(2)'s requirement that agencies must "insure" their actions will not jeopardize listed species does not extend to agencies lacking the discretion to consider potential negative impacts to listed species.[210] This determination resolves the statutory overlap between the ESA and the CWA by giving effect to the ESA only when an agency has discretion to consider listed species.[211]

---

[204] *See* Bosse, *supra* note 30, at 1062-63 (reasoning the ESA has no authority to confer upon agencies the authority to create additional discretion to consider listed species if the agency did not already possess sufficient discretion to consider listed species).

[205] *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2537 (2007) (stating that while CWA section 402(b) allows the EPA to exercise some judgment in deciding whether to grant a State's transfer request, the "statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list); Gaffney, *supra* note 185, at 502 (stating the EPA's only source of discretion involves determining whether a state has fully satisfied the nine enumerated criteria set forth in CWA section 402(b)).

[206] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538.

[207] *Id.*

[208] *Id.*; 33 U.S.C. § 1342(b) (2000).

[209] *See* Gaffney, *supra* note 185, at 495 (stating "the ESA directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act" (internal quotations omitted)).

[210] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538 (stating non-discretionary statutory mandates, such as the CWA, do not trigger ESA section 7(a)(2)'s consultation and no-jeopardy requirements).

[211] *Id.* at 2533-34 (interpreting the ESA to apply only to discretionary agency actions which result in a harmonization of the ESA and the CWA "by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors").

Resolution of the Circuit Split of Authority

In addition to resolving the statutory overlap between the ESA and the CWA, the Supreme Court's decision in *NAHB* also indirectly resolved the split of authority among the circuits and clarified the particular law courts should follow when determining the ESA's scope.[212] Prior to *NAHB*, two competing bodies of law existed among the circuits.[213] The D.C. Circuit and the Fifth Circuit held that ESA section 7 does not confer additional power on agencies to consider effects on endangered and threatened species.[214] Conversely, the First Circuit and the Eighth Circuit both held section 7 grants additional power on the agencies to consider the effect their actions would have on listed species.[215] The cases decided by the First Circuit and the Eighth Circuit, however, involved statutes which either indicated the agency had some authority to consider species, or provided sufficient discretion for the agency to consider extra-statutory factors.[216] In contrast, the D.C. Circuit and Fifth Circuit cases both addressed the ESA's application to statutes that provided limited, if any, discretion to consider factors not specifically enumerated in the statute.[217]

CWA section 402(b) is similar to the statutes addressed by the D.C. Circuit and Fifth Circuit cases.[218] Nothing in the text of section 402(b) confers authority

---

[212] *See* Jan Hasselman, National Association of Home Builders v. Defenders of Wildlife: *Supreme Court's Endangered Species Act Decision Should Have Limited Impacts*, 22 J. ENVTL. L. & LITIG. 343, 354-56 (2007) (reasoning the *NAHB* decision solidified the view that ESA section 7(a)(2) applies only to discretionary agency actions and gave important guidance about how much discretion is enough to trigger ESA section 7 consultation).

[213] Bosse, *supra* note 30, at 1047-54.

[214] *Id.* at 1050-54.

[215] *Id.* at 1048-50.

[216] Defenders of Wildlife v. EPA, 882 F.2d 1294, 1299 (8th Cir. 1989) (interpreting FIFRA); Conservation Law Foundation of New England, Inc. v Andrus, 623 F.2d 712, 714 (1st Cir. 1979) (interpreting the OCSLA); Bosse, *supra* note 30, at 1048-50. The OCSLA requires the approval of an oil exploration plan unless approval would "probably cause serious harm or danger to life." Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(a)(2)(A)(i) (2000). FIFRA authorizes the EPA to approve a pesticide registration only after determining that when used in compliance with a "commonly recognized practice," the pesticide "will perform its intended function without unreasonable adverse effects on the environment." Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(c)(5)(C)-(D) (2000).

[217] Am. Forest & Paper Ass'n v. EPA, 137 F. 3d 291, 299 (5th Cir. 1998) (interpreting section 402(b) of the CWA); Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992) (holding the EPA did not provide sufficient discretion for FERC to consider listed species in the issuance of an annual license when the original license did not grant FERC the ability to amend the license); Bosse, *supra* note 30, at 1054. The FPA requires FERC to issue annual licenses "under the terms and conditions of the existing license." Federal Power Act, 16 U.S.C. § 808(a)(1) (2000).

[218] *See* 16 U.S.C. § 808(a)(1); 33 U.S.C. § 1342(b) (2000). The FPA, the statute in question in *FERC*, does not authorize FERC to consider factors outside those specifically stated in an original license. 16 U.S.C. § 808(a)(1);. Thus, if an original license does not include a species consideration

on the EPA to consider impacts to listed species when deciding whether to grant a state's transfer request.[219] Nor does the statute provide the EPA with discretion to consider factors not specifically enumerated in the statute itself.[220] Thus, although ESA section 7(a)(2) mandates all agencies "insure" that their actions will not jeopardize listed species, this mandate only applies if an action provides the agency with sufficient discretion to take species into account.[221] The Supreme Court in *NAHB* correctly applied this rule and properly held ESA section 7(a)(2) does not apply to the nondiscretionary statutory mandate in CWA section 402(b).[222] By holding section 7(a)(2) of the ESA inapplicable to statutes that provide agencies with neither statutory authority, nor discretion to consider listed species, the Supreme Court resolved the split of authority and clarified the law regarding whether the ESA applies to a particular statute.[223]

ESA Effectiveness Remains Intact After NAHB

While the *NAHB* decision provided agencies with guidance on the applicability of ESA section 7(a)(2) to federal agency actions, the Supreme Court's decision worried environmentalists.[224] In particular, environmentalists argue the Court's decision creates a loophole in the effectiveness of the ESA, and allows federal agencies to circumvent ESA section 7(a)(2)'s no-jeopardy requirement.[225] However, environmentalists need not worry that the *NAHB* decision will hinder the protection of listed species in the future because the opinion exempts only those truly nondiscretionary actions from the ESA's reach.[226] Additionally, the

---

provision, FERC does not have authority to take listed species into account when deciding whether to renew the license. *Platte River Whooping Crane Critical Habitat Maint. Trust*, 962 F.2d at 34. Since neither the FPA nor the CWA authorize an agency to consider factors outside the statute, the two statutes are similar. *See* Bosse, *supra* note 30, at 1054 (reasoning the CWA, like the FPA, involves a statutory mandate and does not include a provision, however slight, requiring agencies to consider impacts to species).

[219] 33 U.S.C. § 1342(b). The statute does not include an express provision allowing for species consideration, and the mandatory nature of the statute does not provide the EPA with discretion to consider impacts to species once the nine criteria have been met. *Id.*

[220] *Id.*

[221] Bosse, *supra* note 30, at 1054.

[222] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2538 (2007).

[223] *See* Hasselman, *supra* note 212, at 354-56 (stating the *NAHB* decision provides agencies with important guidance regarding the application of ESA section 7 to other statutes and duties).

[224] *Id.*; Allison Winter, *Enviros fear Supreme Court Ruling Creates ESA 'Loopholes'*, E&N NEWS PM, June 25, 2007, *available at* LEXIS.

[225] *See* Winter, *supra* note 224 (stating the Court's ruling could open the door for agencies to ignore listed species when implementing other laws).

[226] *See* Hasselman, *supra* note 212, at 354 (stating the *NAHB* opinion is written in a way that strongly suggests a narrow application).

decision provides agencies with important guidance regarding the amount of discretion necessary to trigger ESA section 7 requirements.[227]

First and foremost, the *NAHB* decision reaffirmed the position the ESA exempts only truly nondiscretionary agency actions.[228] This exemption exists only when an agency cannot possibly comply with the ESA and some other statute or duty.[229] If a given statute detailing an agency's obligation to undertake a particular action also provides some flexibility for the agency to consider listed species, the agency likely possesses sufficient discretion to take species considerations into account.[230] Thus, such an action would be discretionary and subject to ESA section 7(a)(2)'s no-jeopardy provision.[231]

In addition, the *NAHB* decision does little to undermine the ESA's effectiveness because the decision provides agencies with important guidance regarding the amount of discretion necessary to trigger ESA section 7.[232] The opinion suggests that in the presence of an unambiguous statutory mandate from Congress, where compliance with the ESA would result in a violation of the statute, an agency likely lacks sufficient discretion to consider potential impacts to species.[233] Conversely, absent such an unambiguous statutory mandate, an agency likely possesses sufficient discretion to take species considerations into account.[234] As a result, the *NAHB* Court's decision should not limit the ESA's application in the future, because the decision merely reaffirmed the position that ESA section 7 exempts nondiscretionary agency actions.[235]

---

[227] *Id.* at 356 (stating the Court provided important guidance about the level of discretion necessary to trigger ESA section 7).

[228] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2538 (2007). Prior to the Ninth Circuit's holding in *Defenders of Wildlife*, the courts generally agreed that ESA section 7 exempted nondiscretionary agency actions. Hasselman, *supra* note 212, at 354. Thus, the *NAHB* decision merely restored the status quo and reaffirmed the general consensus that existed among the courts prior to *Defenders of Wildlife*. Hasselman, *supra* note 212, at 358.

[229] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538 (exempting nondiscretionary agency actions from the ESA's reach).

[230] Hasselman, *supra* note 212, at 358 (stating if any flexibility exists regarding how to carry out the action so that species may also be protected, the exemption does not apply).

[231] *Id.*

[232] *Id.* at 356 (stating the Court provided important guidance on the amount of discretion necessary to trigger ESA section 7).

[233] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2536-37 (characterizing the *Hill* Court's decision, where Congress did not mandate nor require completion of a federally funded dam as discretionary, while classifying the *NAHB* Court's decision, where the CWA unambiguously mandates a transfer of NPDES permitting authority once a state has satisfied the nine statutory criteria, as nondiscretionary).

[234] *Id.*

[235] Hasselman, *supra* note 212, at 357.

CONCLUSION

When the United States Supreme Court reversed the Ninth Circuit's decision in *NAHB*, it struck a balance between section 7(a)(2) of the ESA and CWA section 402(b).[236] The *NAHB* Court restricted the scope of ESA section 7(a)(2) by holding section 7(a)(2) no longer applies to "all" federal agency actions "without exception."[237] The Court clarified the previous confusion regarding which agency actions are subject to the provisions of the ESA by stating that section 7 applies to all federal agency actions in which there is discretionary involvement or control.[238] The Court's decision represents a positive step forward toward encouraging federal agency actions while continuing to place importance on the conservation of endangered and threatened species and their habitats.[239]

---

[236] *See supra* notes 159-235 and accompanying text.

[237] *See supra* notes 164-211 and accompanying text; Tenn. Valley Auth. V. Hill, 437 U.S. 153, 173 (1978) (stating the language of the ESA "admits of no exception").

[238] *See supra* notes 182-211 and accompanying text.

[239] *See supra* notes 159-235 and accompanying text.