

NATIONAL ASSOCIATION OF HOME BUILDERS V. DEFENDERS OF WILDLIFE

*Katharine Mapes**

Under the Clean Water Act, states may assume control of the NPDES permitting process; to date, forty-six states have done so. In that light, *National Association of Home Builders v. Defenders of Wildlife*,¹ in which the Supreme Court held that EPA need not consult with the Fish and Wildlife Service under the Endangered Species Act before delegating that authority, seems to be of little import. In actuality, though, even within the narrow context of NPDES delegation the case could have important implications,² and outside of that context, the effects on the protection of endangered species could be tremendous. The Court's willingness to find NPDES delegation non-discretionary and to conclude that non-discretionary actions are not covered under the statute suggests that the Court might be distancing itself from its statement in *TVA v. Hill* that Congress has made "a conscious decision to give endangered species priority over the 'primary missions' of federal agencies."³ As the dissents of both Justice Stevens and Justice Breyer point out, there is scarcely an agency action that cannot be construed as, in some respects, "non-discretionary." This decision is likely to spur enormous amounts of litigation as courts struggle with the question of what constitutes a covered action under the statute. Even in the short term, this decision is likely to have immediate effects; in fact, litigation currently working its way through the Ninth Circuit suggests several situations in which this decision is likely to reverse existing precedent and correspondingly limit the protections given to endangered species.

BACKGROUND

I. Statutory Framework

Under the Clean Water Act ("CWA"), the National Pollutant Discharge Elimination System ("NPDES") allows the Administrator of the Environmental Protection Agency ("EPA") to issue permits for the discharge of any pollutants or combination of pollutants into the navigable waters of the United States.⁴ Section 402 of the CWA, however, allows the governor of any state desiring to administer its own permit program to "submit to the

* J.D. Candidate, Harvard Law School, Class of 2008.

¹ 127 S. Ct. 2518 (2007).

² One of the states not to have assumed control — and currently in the process of doing so — is the State of Alaska, home to enormously fragile ecosystems and more subsistence users of those ecosystems than other areas of the country. State of Alaska, Division of Water, NPDES Primacy, <http://www.dec.state.ak.us/water/npdes/npdes.htm> (last visited Oct. 6, 2007).

³ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 177 (1978).

⁴ 33 U.S.C. § 1342(a) (2000).

Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.”⁵

The Administrator, the statute specifies, “*shall* approve each submitted program unless he determines that” the proposed program does not meet nine specified criteria, among them that the permits issued will meet the requirements of the CWA, that public notice and comment opportunities will be provided, and that no permit will be issued that substantially impairs navigable waters.⁶ No provision conditions EPA approval of delegation on concerns about endangered or threatened species or specifically authorizes EPA to reject delegation on grounds not listed.

Section 7(a)(2) of the Endangered Species Act (“ESA”), meanwhile, mandates that:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical⁷

An agency action “may include programmatic agency standards and agency programs that govern a number of individual agency actions that are part of an agency’s administration or management of standards or a program in large geographical areas under the agency’s jurisdiction.”⁸ This has included actions as broad as a Bureau of Land Management logging strategy that established annual allowable timber harvests over an area of several states but did not specify any particular areas in which logging would occur.⁹ Regulations promulgated in interpretation of Section 7 limit its application “to all actions in which there is discretionary Federal involvement or control.”¹⁰

The U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”), under the auspices of the Department of the Interior and the Department of Commerce, respectively, are jointly responsible for administering the Act.¹¹ If an agency judges that its action *might* affect listed species, formal consultation with FWS (or NMFS, if marine species are implicated) is required.¹² In carrying out the consultation process, each Federal agency is required to “review its actions at the earliest possible time to determine whether any action may affect listed species or

⁵ *Id.* § 1342(b).

⁶ *Id.* (Emphasis added).

⁷ 16 U.S.C. § 1536(a)(2) (2000).

⁸ Steven G. Davison, *Federal Agency Action Subject to Section 7(A)(2) of the Endangered Species Act*, 14 MO. ENVTL. L. & POL’Y REV. 29, 43 (2006).

⁹ *Id.*; Lane County Audubon Soc’y v. Jamison, 958 F.2d 290 (9th Cir. 1992).

¹⁰ 50 C.F.R. § 402.03 (2007).

¹¹ *Id.* § 402.01.

¹² *Id.* § 402.14.

critical habitat.”¹³ The Ninth Circuit, in a widely cited opinion, has described the consultation process as follows:

The [ESA] prescribes a three-step process to ensure compliance with its substantive provisions by federal agencies. Each of the first two steps serves a screening function to determine if the successive steps are required. The steps are:

(1) An agency proposing to take an action must inquire of [FWS or NMFS] whether any threatened or endangered species “may be present” in the area of the proposed action. *See* 16 U.S.C. § 1536(c)(1).

(2) If the answer is affirmative, the agency must prepare a “biological assessment” to determine whether such species “is likely to be affected” by the action. *Id.* The biological assessment may be part of an environmental impact statement or environmental assessment. *Id.*

(3) If the assessment determines that a threatened or endangered species “is likely to be affected,” the agency must formally consult with [FWS or NMFS]. *Id.* § 1536(a)(2). The formal consultation results in a “biological opinion” issued by [FWS or NMFS]. *See id.* § 1536(b). If the biological opinion concludes that the proposed action would jeopardize the species or destroy or adversely modify critical habitat, *see id.* § 1536(a)(2), then the action may not go forward unless [FWS or NMFS] can suggest an alternative that avoids such jeopardization, destruction, or adverse modification. *Id.* § 1536(b)(3)(A). If the opinion concludes that the action will not violate the Act, [FWS or NMFS] may still require measures to minimize its impact. *Id.* § 1536(b)(4)(ii)-(iii).¹⁴

The Biological Opinion issued by FWS or NMFS is intended to be quite formal. This opinion must include “a summary of the information on which the opinion is based,” a “detailed description of the effects of the action on listed species or critical habitat,” and “the Service’s opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.”¹⁵

This section of the statute, of course, applies only to federal agencies and thus excludes private individuals, corporations, state governments, and other bodies. Those actors *are* subject to Section 9 of the Endangered Species Act, which prohibits the importation, exportation, and trade of endan-

¹³ *Id.*

¹⁴ *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).

¹⁵ 50 C.F.R. § 402.14(h).

gered species and the “taking” of any endangered species.¹⁶ There is, however, no consultation requirement, meaning that state governments who have assumed authority over NPDES permitting need not consult with FWS prior to issuing a NPDES permit. Thus, despite the protections of Section 9, which states that individual actors should not damage endangered species, the biological expertise of FWS and NMFS are not brought to bear in determining whether a particular NPDES permit — which may allow discharges that have quite complex ecological impacts — will damage endangered or threatened species or their critical habitat.

II. Legal and Factual Background

National Association of Home Builders v. Defenders of Wildlife (“NAHB”) arose when the State of Arizona submitted an application to EPA to assume control of the NPDES process. EPA consulted with FWS about the effect of this delegation on endangered species, and FWS returned a Biological Opinion “premised on the proposition that [] EPA lacked the authority to take into account the impact of that decision on endangered species and their habitat.”¹⁷ EPA thus granted the application, and Defenders of Wildlife filed suit, arguing that EPA’s reliance on FWS’s Biological Opinion was arbitrary and capricious.¹⁸ In a 2-1 decision, the Ninth Circuit agreed with the plaintiffs, and a petition for rehearing was denied.¹⁹

The Ninth Circuit concluded first that EPA’s failure to consult failed arbitrary and capricious review²⁰ because it “relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations,” and its reasoning was, as a result, “internally inconsistent and inad-

¹⁶ 16 U.S.C. § 1538 (2000). To “take” is defined by the statute as “to harass, harm, kill, capture, or collect,” any endangered animal species. *Id.* § 1536. It is also illegal to remove or destroy endangered plant species. *Id.* § 1541.

¹⁷ *Defenders of Wildlife v. EPA*, 420 F.3d 946, 950 (9th Cir. 2005).

¹⁸ *Id.* at 950.

¹⁹ *Id.*; *Defenders of Wildlife v. EPA*, 450 F.3d 394 (9th Cir. 2006) (denying petition for rehearing en banc).

²⁰ The court wrote:

An agency decision will survive arbitrary and capricious review if it is: “rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency experience.”

420 F.3d at 959 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983)). In this context, the standard is quite weak; an agency may survive arbitrary and capricious review of its decision to consult under section 7(a), the Ninth Circuit admitted, “even if it relies on an ‘admittedly weak’ Biological Opinion, if there is no ‘information the Service did not take into account which challenges the [biological] opinion’s conclusions.’” 420 F.3d at 959 (quoting *Pyramid Lake Paiute Tribe v. U.S. Dep’t of the Navy*, 898 F.2d 1410 (9th Cir. 1990)).

quately explained.”²¹ In particular, the court pointed to a number of occasions on which EPA itself had affirmatively stated that section 7 requires consultation prior to NPDES permitting delegation, including in its announcement of approval of Arizona’s application.²² In these earlier stages, EPA had also determined that Arizona’s assumption of the NPDES program “‘may affect’ listed species and their critical habitat.”²³ EPA, then, acted upon the position that it had an *obligation* to consult but, in accordance with FWS’s Biological Opinion, that it did not have any *authority* to act upon the results of that consultation.

The Ninth Circuit found this to be a nonsensical position, finding that the statute’s mandate, that an agency “shall . . . 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”²⁴ and the general thrust of the statute demonstrate that an “agency’s obligation to consult is thus *in aid* of its obligation to shape its own actions so as not to jeopardize listed species, not independent of it.”²⁵ The court ended this discussion with a prescription that it “must remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute.”²⁶

Rather than remanding, however, the Ninth Circuit then addressed the statutory question, ruling that the NPDES delegation process was, in fact, a discretionary action within the meaning of 50 C.F.R. 402.03. In describing its interpretation of the regulation, the court stated:

In sum, we understand our cases applying the “discretionary . . . involvement” regulation to interpret that regulation to be coterminous with the statutory phrase limiting section 7(a)(2)’s application to those cases “authorized, funded, or carried out” by a federal agency. Where a challenged action has not been “authorized, funded, or carried out” by the defendant, we have held that section 7(a)(2) does not apply. Where the challenged action comes within the agency’s decisionmaking authority and remains so, it falls within section 7(a)(2)’s scope.²⁷

III. The Supreme Court Decision

The Supreme Court — in a 5-4 decision — reversed the Ninth Circuit’s ruling. It first addressed the Ninth Circuit’s holding that EPA’s transfer decision was arbitrary and capricious because it “relied . . . on legally contradic-

²¹ 420 F.3d at 959.

²² *Id.* at 959-60.

²³ *Id.* at 960.

²⁴ *Id.* at 961 (quoting 16 U.S.C. § 1536).

²⁵ *Id.*

²⁶ *Id.* at 962.

²⁷ *Id.* at 970.

tory positions regarding its section 7 obligations,”²⁸ criticizing it on two grounds. First, it stated, if the action was indeed arbitrary and capricious, “the proper course would have been to remand to the agency for clarification of its reasons,”²⁹ as the Ninth Circuit itself stated. Instead, the appellate court “jumped ahead to resolve the merits of the dispute. In so doing, it erroneously deprived the agency of its usual administrative avenue for explaining and reconciling the arguably contradictory rationales that sometimes appear in the course of lengthy and complex administrative decisions.”³⁰ In making this argument, the Court relied on *Gonzales v. Thomas*,³¹ which concerned appellate review of immigration decisions, and stated, somewhat more narrowly, that “[a] court of appeals ‘is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.’”³² Ultimately, however, the Court found this error to be inconsequential; EPA’s decision was not arbitrary and capricious in the first place. The Court rejected the Ninth Circuit’s contention that the agency decision was “internally inconsistent,” writing that “the only ‘inconsistency’ respondents can point to is the fact that the agencies changed their minds — something that, as long as the proper procedures were followed, they were fully entitled to do.”³³

The Court then addressed the substance of the apparent statutory conflict between the CWA and the ESA. To apply the ESA in such a context would effectively repeal section 402(b) of the CWA, adding a tenth mandatory criterion to the statute (indeed, Justice Berzon, who wrote the majority opinion in the Ninth Circuit, argued that it did just that in her concurrence to the denial for the petition for rehearing *en banc*). The Court held that while such a repeal would be possible, it must not be inferred “unless the later statute ‘expressly contradicts the original act’ or unless such a construction ‘is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.’”³⁴ At the conclusion of this section, the Court made what could be an influential statement on future interpretations of the Endangered Species Act: “While the language of §7(a)(2) does not explicitly repeal any provision of the CWA (or any other statute), reading it for all that it might be worth runs foursquare into our presumption against implied repeals.”³⁵

Finally, the Court turned to the question of *Chevron* deference, citing the joint Commerce and Interior regulations that state that “Section 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control.”³⁶ The Court recognized that “[t]he

²⁸ 127 S. Ct. 2518, 2529 (2007).

²⁹ *Id.*

³⁰ *Id.*

³¹ 547 U.S. 183 (2006).

³² *Id.* at 186.

³³ 127 S. Ct. at 2530.

³⁴ *Id.* at 2532 (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988)).

³⁵ *Id.* at 2533.

³⁶ *Id.* (quoting 50 CFR § 402.03 (emphasis added by the Court)).

latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement establishes that we owe some degree of deference to the Secretary's reasonable interpretation' of the statutory scheme."³⁷ Thus, the Court "read § 7(a)(2) against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal if it were construed as broadly as the Ninth Circuit did below" and found the statute ambiguous; it was thus appropriate to defer to the agency's reasonable interpretation.³⁸ The Court did not discuss whether — in light of its discussion about the presumption against implied repeal and the mandatory agency directives that would be abrogated by a looser interpretation of section 7(a)(2) — it would have reached a similar conclusion should the agency have adopted an opposite position or no position at all.

The Court did not address *TVA v. Hill* until late in the opinion and quickly dismissed its relevance to the instant case, noting that it was decided a decade before 50 C.F.R. § 402.03 was adopted and, in any case, that the Tellico Dam project at issue was discretionary; although Congress had allocated funds to TVA informally earmarked for the project, "Congress did not *mandate* that the TVA put the dam into operation."³⁹ Similarly, the Court dismissed the respondents' contention that delegation of the NPDES permitting program to a state is, in fact, discretionary. "Nothing in the text of § 402(b)," it wrote, "authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application."⁴⁰

In a dissent joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens argued, first, that section 7(a)(2) must be construed so as to include agency actions that the majority might term non-discretionary, and, second, that section 402(b) is not a non-discretionary action after all. In *TVA v. Hill*, he noted, the Court "held that the ESA 'reveals a conscious decision by Congress to give endangered species priority over the 'primary missions of federal agencies.'"⁴¹ At no point did *Hill* describe the "completion of the Tellico Dam as a discretionary act. How could it?"⁴² Had the snail darter not been discovered and classified as an endangered species, TVA "surely would have been obligated to spend the additional funds that Congress appropriated to complete the project."⁴³

It is clear from *Hill*, Justice Stevens continued, that if any statute is to yield in this clash, it should be the CWA. The first step of analysis, however, is to determine whether the two statutes can be harmonized. Where a

³⁷ *Id.* at 2534 (quoting *Babbitt v. Sweet Home Chapter, Communities for a Greater Or.*, 515 U.S. 687, 703 (1995)).

³⁸ *Id.* at 2534-35.

³⁹ *Id.* at 2536.

⁴⁰ *Id.* at 2537.

⁴¹ *Id.* at 2538 (quoting *TVA v. Hill*, 437 U.S. 153, 185 (1978)).

⁴² *Id.* at 2540.

⁴³ *Id.*

proposed agency action would jeopardize endangered or threatened species, the ESA mandates that “the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.”⁴⁴ Thus, EPA and Interior or Commerce need not deny the transfer altogether, but may rather work through a mechanism by which the transfer could take place without jeopardizing species survival. Justice Stevens noted, as well, that “[t]his should come as no surprise to EPA, as it has engaged in pre-transfer consultations at least six times in the past and has stated that it is not barred from doing so by the CWA.”⁴⁵

It is interesting to note that the approach of Justice Stevens is in marked contrast with that of the Ninth Circuit majority, which, of course, reached the same conclusion as to the merits. Judge Berzon wrote that it would be nonsensical to have a statutory scheme in which the agency had the duty to consult but not the authority to act on the results of that consultation. Conversely, Justice Stevens found completely comprehensible a scheme in which the agency had a duty to consult even where it had no authority to halt an agency action. In the discussion of whether section 7 grants actual substantive authority to agencies, the minority’s framework suggests that the authority conferred by the ESA need not be the authority to accept or deny the transfer, but rather to undertake subtler and more cooperative forms of action. For “the rare case” where this subtler form of authority is not sufficient, where “no ‘reasonable and prudent alternative’ can be found,” Justice Stevens wrote, “Congress has provided yet another mechanism for resolving any conflicts between the ESA and a proposed agency action” — the “Endangered Species Committee” or “God Squad,” which can consider whether to grant the agency an exemption.⁴⁶ He added, as well, that EPA requires the State to enter into a Memorandum of Agreement (“MOA”) with the agency detailing the manner in which the agency will retain oversight over state NPDES permitting.⁴⁷ There is no reason, he argues, that EPA may not use those MOAs to give effect to section 7 while still effecting the transfer.⁴⁸

Finally, Justice Stevens argued that, even if section 7(a)(2) only applies to discretionary federal actions, the delegation of NPDES permitting authority is not non-discretionary at all. The first of the nine criteria, he wrote, “requires the EPA Administrator to examine five other statutes and ensure that the State has adequate authority to comply with each . . . One of those five statutes, in turn, expressly directs the Administrator to exercise his ‘judgment.’”⁴⁹ Similarly, the EPA has ample room for judgment and discretion in its application of MOAs required by regulation.

⁴⁴ 16 U.S.C. § 1536(b)(3)(A) (2000).

⁴⁵ 127 S. Ct. at 2546.

⁴⁶ *Id.* at 2546.

⁴⁷ *Id.* at 2547.

⁴⁸ *Id.*

⁴⁹ *Id.* at 2548.

Justice Breyer also wrote a short dissent reserving judgment “as to whether § 7(a)(2) of the [ESA] really covers every possible agency action even of totally unrelated agencies — such as, say, a discretionary determination by the Internal Revenue Service whether to prosecute or settle a particular tax liability.”⁵⁰ Perhaps more importantly, however, he then elaborated on his view of agency action, arguing that “grants of discretionary authority always come with *some* implicit limits attached.”⁵¹ Prior to the enactment of the ESA, he wrote, no doubt, “species preservation” might have been outside those limits. That the fundamental purpose of the Clean Water Act, just as the fundamental purpose of the ESA, is to protect the natural environment only aids the conclusion that endangered species protection is now encompassed by section 402(b).⁵²

ANALYSIS

The Court’s conclusion that the Ninth Circuit should not have made an “arbitrary and capricious” determination without remanding to the agency for further consideration hardly seems a stretch but may demonstrate an important facet of the Court’s attitude about arbitrary and capricious review. In *Gonzales v. Thomas*, the Court considered whether membership in the family of a particular, persecuted person can constitute “kinship ties” and thus fall within the “particular social group” category of the Immigration and Nationality Act for purposes of granting asylum. In that case, the Court criticized the Ninth Circuit for reversing the agency finding without remanding to consider the kinship question further, adding that it could find no “special circumstance” that “might have justified the Ninth Circuit’s determination of the matter in the first instance.”⁵³ This line of reasoning is consistent with precedent on the matter; “an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.”⁵⁴ As a general rule, the Court has found, “a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.”⁵⁵

Under what circumstances do the “special circumstances” alluded to in *Gonzales* exist? The Court has enumerated several factors that support a decision to remand: “the agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.”⁵⁶ All of these factors might superficially seem to apply in the

⁵⁰ *Id.* at 2552.

⁵¹ *Id.*

⁵² *Id.*

⁵³ 547 U.S. 183, 187 (2006).

⁵⁴ *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

⁵⁵ *INS v. Ventura*, 537 U.S. 12, 16 (2002).

⁵⁶ *Id.* at 17.

present case — EPA routinely deals with the Endangered Species Act and with section 7(a)(2) consultations and can elucidate a new decision based on the results of that consultation for the court to review. However, that argument fails to consider the fact that the agency's decision was made in reliance on a Biological Opinion, issued by another agency, that the Ninth Circuit found to be fundamentally inconsistent with the statute. The dicta of *NAHB*, it seems, require remand for further clarification even in situations where the appellate court found that a statute has only a single interpretation and where the agency's decision was based on precisely the contrary interpretation. This seems an expansion on earlier decisions that required remand so the agency could consider, say, possible gradations of meaning in an asylum context. It is hard, in fact, to imagine a situation after this decision in which arbitrary and capricious review would *not* require remand. For all intents and purposes, this decision may have extinguished that narrow exception.

It is *NAHB*'s limitation of section 7(a)(2)'s consultation requirements, however, that is likely to have the greater effect. It seems almost certain that it will lead to a great deal of litigation over the question of what, precisely, defines an action as discretionary or non-discretionary. This is particularly true given — as per Justice Breyer's dissent — the limits on agency discretion in most agency actions. If courts choose to interpret statutes strictly, consultation could be severely limited. A looser approach, on the other hand, could yield nary an effect outside of the NPDES delegation process. One wonders, in fact, whether the legal question at issue in *NAHB* will simply be resurrected in the definition of "discretionary." Another possibility, of course, is that courts may extrapolate from the majority opinion the mechanistic approach of looking primarily at whether the statute specifies that the agency "may" take a specific action or that the agency "shall" do so.⁵⁷ Given its lack of discussion of the issue, this seems to be the approach of the majority, which treated the question as an open-and-shut one. It also seems to be the view of some commentators; one wrote, for instance, that "[w]hereas Justice Stevens' suggestions would have required significant bureaucratic effort, the agencies' solution is easy to implement: simply determine whether a federal action is mandatory and, if so, forego consultation."⁵⁸ As Justice Breyer's dissent implies, however, this approach must often produce absurd results. Many statutes have wording akin to that seen in, for instance, the Federal Power Act, which required the Federal Power Commission (now the Federal Energy Regulatory Commission) to take action in a particular circumstance as required "by the present or future

⁵⁷ See 127 S. Ct. at 2518 ("Thus, § 402(b) does not just set forth *minimum* requirements for the transfer of permitting authority; it affirmatively mandates that the transfer "shall" be approved if the specified criteria are met.").

⁵⁸ *The Supreme Court – Leading Cases*, 121 HARV. L. REV. 185, 413, n. 66. This comment argues that the agency has — as usual — developed a more elegant solution than the courts. This is, of course, true where the agency's goal is merely the minimization of regulatory inefficiency with the protection of endangered species as an incidental side benefit.

public convenience and necessity.”⁵⁹ To discuss actions such as these in “discretionary” and “non-discretionary” terms is facially ludicrous.

The line drawn by the Ninth Circuit in its opinion in *NAHB* is, perhaps, clearer without being less arbitrary. In *NAHB* itself, the Ninth Circuit attempted to distinguish its decision from two cases where section 7(a)(2) was found inapplicable by holding that the section does not apply only “where the challenged action was legally foreordained by an earlier decision.” In *Sierra Club v. Babbitt*, the Ninth Circuit determined that consultation was not required before the holder of a right-of-way over BLM lands could proceed with the construction of roads on that land, even though there was evidence that a listed species of spotted owl would be threatened, on the ground that “the agency’s continuing ability to influence the private conduct [was] limited to three factors unrelated to the conservation of the threatened [owl species].”⁶⁰ Similarly, in *Environmental Protection Information Center v. Simpson Timber Company*, the court held that the discretionary control FWS held over an incidental take permit issued to the Simpson Timber Company was not sufficiently general to require FWS to reinstate consultation proceedings due to the listings of two new species that might be threatened by Simpson’s activities.⁶¹ “Nowhere in the various permit documents,” the court wrote, “did the FWS retain discretionary control to make new requirements to protect species that subsequently must be listed as threatened.”⁶² The Ninth Circuit in *NAHB*, however, distinguished this line of cases, writing that those cases found section 7(a)(2) inapplicable only “where the challenged action was legally foreordained by an earlier decision, such as where the agency lacked the ability to amend an already-issued permit ‘to address the needs of endangered or threatened species.’”⁶³ Thus, instead of asking whether or not an agency action is mandatory, the Ninth Circuit asked, essentially, whether the rights granted by the agency’s decision have already vested.

This is more protective of endangered species than the Supreme Court’s rule simply by virtue of the fact that it is more inclusive. Jurisprudence from the Ninth Circuit after the appellate court’s ruling in *NAHB* (but before the Supreme Court’s reversal) has borne out this intuition. One case, at least, has cited it for the proposition that Section 7 “includes an affirmative grant of authority to attend to protection of listed species within agencies’ authority when they take actions covered by section 7(a)(2).”⁶⁴ In 2006, a district court ruled that the U.S. Forest Service had to consult with FWS on a Challenge Cost Share Agreement concerning maintenance of snowmobile trails that could affect endangered caribou.⁶⁵ In a later iteration of the case, the

⁵⁹ 127 S. Ct. at 2553 (Breyer, J., dissenting) (quoting 15 U.S.C. § 717f(c)(1)(A)).

⁶⁰ 65 F.3d 1502, 1504, 1508 (9th Cir. 1995).

⁶¹ 255 F.3d 1073, 1075 (9th Cir. 2001).

⁶² *Id.* at 1075.

⁶³ 420 F.3d at 968.

⁶⁴ *Defenders of Wildlife v. EPA*, 420 F.3d 946, 965 (9th Cir. 2005).

⁶⁵ *Defenders of Wildlife v. Martin*, 454 F. Supp. 2d 1085 (E.D. Wash. 2006).

court affirmed that “when consultation occurs, agencies must still operate ‘under the assumption that all of section 7(a)(2)’s substantive requirements apply to the action agency.”⁶⁶ The Supreme Court’s decision in *NAHB*, however, went a long way toward putting to rest entirely the idea that section 7(a)(2) confers affirmative authority — except perhaps in those vague situations Justice Breyer discusses — and this will have a direct and immediate result around the country. As *NAHB* affirmed the agency’s reliance on a Biological Opinion that was premised on the agency’s lack of authority to protect endangered species, it seems likely that, in the future, agencies will be inclined and able to limit the scope of the consultation process at the outset, perhaps at the informal consultation stage when FWS or NMFS determines that it does not have the authority to protect endangered species in a particular case.

Similarly, in another matter perpetually litigated in the circuit, the National Oceanic and Atmospheric Administration (“NOAA”), for instance, has attempted to exclude parts of Federal Columbia River Power System (“FRCPS”) operations — including flood control, navigation, irrigation, and power generation operations — from its section 7 consultation obligations on the ground that those operations are beyond the scope of its discretionary authority. Oregon District Judge Redden, pre-*NAHB*, dismissed this argument on the ground that agency action need not be considered discretionary to be covered under the ESA.⁶⁷ In particular, he wrote:

The ESA contains but a single exemption for agencies that claim their statutory mandate to “authorize, fund, or carry out” a project leaves them with insufficient discretion to avoid jeopardizing a listed species. The exemption came into being when Congress amended the ESA after the Supreme Court’s 1978 decision in [*Hill*] to create the Endangered Species Committee. . . . “[T]he [Endangered Species] Committee is known as the God Squad” because “it is the ultimate arbiter of the fate of an endangered species. . . . NOAA’s current interpretation of § 402.03 would create a second exemption far broader than the only one thus far created by Congress. Under NOAA’s interpretation, an action agency would be able to exempt itself from accountability by characterizing some, even lethal, elements of any proposed action as “nondiscretionary.” The consequences would be, as in the [Biological Opinion relied upon by NOAA] a jeopardy analysis that ignores the reality of past, present, and future effects of federal actions on listed species.⁶⁸

⁶⁶ *Defenders of Wildlife v. Martin*, No. CV-05-248-RHW, 2007 U.S. Dist. LEXIS 13061, at *21 (E.D. Wash. Feb. 26, 2007).

⁶⁷ *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, No. CV 01-640-RE, 2005 WL 1278878 (D. Or. May 26, 2005).

⁶⁸ *Id.* at 10-11 (internal citations omitted). This decision was later affirmed by the Ninth Circuit; that court wrote that the “ESA does not permit agencies to ignore potential jeopardy risks by labeling parts of an action nondiscretionary. . . . We cannot approve NMFS’s interpre-

In the wake of *NAHB* there is far less cause for courts to find that agencies cannot isolate out “non-discretionary” parts of their large-scale plans and programs. Of course, it is possible that even under *NAHB*, the non-discretionary aspects of NOAA’s management of the FRCPS will be considered intertwined enough with the discretionary aspects that courts may require them to be included within the scope of the consultation. However, the argument against segregation looks much weaker when it is clear that non-discretionary agency actions are not within the scope of section 7(a)(2). While it is logical, given the Supreme Court’s ruling, that an agency need not consult on segments of a project that do not constitute action under the statute, it also will result in fragmented analysis that not only ignores the effects of those non-discretionary actions but may make it impossible to get a cohesive picture of the “discretionary” action as well.

That said, the Ninth Circuit has been markedly inconsistent on this issue. Some cases decided before *NAHB* serve as a likely reflection of the direction in which the Circuit may move. In one case, a community organization, Ground Zero, challenged the Navy’s failure to consult regarding the possibility of an accidental Trident II missile explosion at missile test sites. Section 7(a)(2) did not apply in part, the court wrote, “because the Navy lacks the discretion to cease Trident II operations at Bangor for the protection of the threatened species.”⁶⁹ However, the court also stated that this decision was made in spite of the fact that “there are some aspects of the Backfit Program as to which the Navy has discretion in its actions,” as “Ground Zero’s ESA claim rests wholly on the risks of accidental Trident II missile explosion. In these circumstances, [the court did] not think that risks of missile explosion, based on any discretionary acts of the Navy, required additional ESA Section 7 consultations because the likelihood of jeopardy is too remote,” the Navy having found in previous studies that the risk of explosion was infinitesimal.⁷⁰ Had the risk been found substantial, it is difficult to tell what type of consultation the court might have required; the comment here that the action is largely not discretionary is essentially dicta. However, if this court does overrule itself on the segregation question presented in *NWF v. NMFS*, such a decision would seemingly be pushed closer to acceptability by *NAHB*.

Whatever shift away from requiring ESA consultation in marginal agency actions the Ninth Circuit sees, the First Circuit is likely to see a similar one. In *Conservation Law Foundation v. Andrus*, conservation groups brought suit against the Secretary of the Interior after he attempted to execute leases for oil and gas exploration.⁷¹ The court found that “any con-

tation of this rule as excluding from the agency action under review any *portions* of admittedly-discretionary actions that the agency deems nondiscretionary, since this approval conflicts with ESA’s basic mandate.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 481 F.3d 1224, 1233 (9th Cir. 2007).

⁶⁹ *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep’t of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004).

⁷⁰ *Id.*

⁷¹ 623 F.2d 712 (1st Cir. 1979).

tract which [the Secretary] enters into (e.g., a lease) which requires a future action on his part (e.g., approval of plans) will contain as an implied term a condition that the Secretary will behave lawfully (e.g., not violate the ESA).⁷² The First Circuit, of course, seems to go further than even the Ninth Circuit did in its *NAHB* ruling, as it ruled that consultation was required, even in a situation in which action had been legally foreordained. This approach, in fact, seems in line with Justice Stevens's discussion in his dissent of, essentially, the agency's power to negotiate for compliance when initially entering into an agreement. That this approach was rejected by the majority weakens a powerful use of the ESA in the First Circuit to protect endangered species.

Jurisprudence from the Fifth and D.C. Circuits, on the other hand, had found against application of section 7(a)(2) where agency action is "non-discretionary," creating a circuit split, and, with it, a jurisprudential environment that is unlikely to differ markedly in the wake of *NAHB*. In Louisiana, EPA conditioned its approval of the State's assumption of the NPDES permitting program on state consultation with FWS and NMFS and retained veto power to be exercised if Louisiana refused to modify the permit on the basis of that consultation.⁷³ The Fifth Circuit found such a contingency unacceptable, writing that the language of Section 402(b) "is firm: [i]t provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements. . . . 'Unless the Administrator of the EPA determines that the proposed state program does not meet these requirements, he must approve the proposal.'"⁷⁴ The ESA, the court held, "serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction."⁷⁵ The D.C. Circuit has not considered the precise question of the ESA in the context of NPDES delegation, but has ruled on a similar question. In *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, it ruled that the Federal Energy Regulatory Commission ("FERC") did not have to consult formally with FWS about annual licenses issued to two hydroelectric projects on the Platte River (FERC did consult with FWS informally and largely adopted its recommendations).⁷⁶ As in the jurisprudence arising out of the Ninth and Fifth Circuits, the question of whether the ESA confers an agency with additional substantive responsibility and additional substantive duty became critical. The D.C. Circuit ruled that it does not, writing that *TVA v. Hill*, "which did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA, is hardly authority to the contrary."⁷⁷

⁷² *Id.* at 715.

⁷³ *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 294 (5th Cir. 1998).

⁷⁴ *Id.* at 297 (quoting *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1285 & n.3 (5th Cir. 1977)).

⁷⁵ *Id.* at 299.

⁷⁶ 962 F.2d 27 (D.C. Cir. 1992).

⁷⁷ *Id.* at 34.

Finally, it is worth addressing the Court's application of *Chevron* deference in this case — it speaks to be an extremely narrow application of the doctrine. In concluding that the statute was fundamentally ambiguous, the Court wrote that the statutory language of the CWA and the ESA “does not itself provide clear guidance as to which command must give way.”⁷⁸ The Court thus showed itself unwilling to look beyond the text of the statute itself in performing this analysis — it did not, in its opinion, perform any kind of analysis of the legislative history of the ESA. This is in marked contrast to *TVA v. Hill*, long considered the seminal ESA case. In that case, citizens brought suit against the Tennessee Valley Authority seeking to enjoin the building of Tellico Dam, which, were it to become fully operational, would destroy the habitat of the endangered snail darter.⁷⁹ TVA argued that the close of the multimillion dollar, ten-year Tellico Dam, just before completion of the final stage of the project, “falls outside the legitimate purview of the Act if it is rationally construed.”⁸⁰ When the case reached the Supreme Court, a majority ruled that the fish must be protected and the dam closed. “One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act.”⁸¹ The Court opined that “examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”⁸² This case established what is often thought of as the “trump card” view of the Endangered Species Act — that the high priority Congress gave to the protection of endangered species is enough to overrule a myriad of other interests. If *TVA*'s analysis of the statute is taken as correct, it is bordering on the disingenuous to say — where there is truly a conflict between two statutes — that *Congress*, at least, didn't make it clear which statute should yield. It is only when this history is ignored in favor of the text of the statute alone that the ambiguity becomes central. The Court's willingness to back away from the strong emphasis on legislative history contained in *Hill* could be a vivid demonstration of a shift away from the traditionally strong interpretation of the ESA.

⁷⁸ 127 S. Ct. at 2534.

⁷⁹ 437 U.S. 153 (1978). Construction of the dam had begun long before passage of the Endangered Species Act, and the snail darter had been discovered and listed as an endangered species only a few months before the commencement of the lawsuit.

⁸⁰ *Id.* at 168.

⁸¹ *Id.* at 174.

⁸² *Id.* Further, the Court quoted extensively from the legislative history of the statute, including one commentator's statement that:

The dominant theme pervading off Congressional discussion of the proposed [Endangered Species Act of 1973] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources. Much of the testimony at the hearings and much debate was devoted to the biological problem of extinction. Senators and Congressmen uniformly deplored their irreplaceable loss to aesthetics, science, ecology, and the national heritage should more species disappear.

Id. at 177 (emphasis added by the Court).

CONCLUSION

Ultimately, for those who are concerned about the protection of endangered species, *NAHB* should be troubling on two levels. The first is that it increases the substantial chaos surrounding the question of when consultation is required. District courts and courts of appeals were already unclear as to whether section 7(a)(2) applies to discretionary agency actions and as to what, precisely, constitutes an agency action. By removing what effectively amounted to a strong presumption in favor of the Endangered Species Act's applicability — the legacy of *Hill*'s statement that Congress placed the protection of endangered species as the top priority of agencies — and stating that the statute does not grant affirmative authority and does not apply to discretionary actions, the Court has done little to clarify what qualifies as a discretionary agency action, while simultaneously lowering the bar for agency consultations. Particularly in circuits like the Ninth that have traditionally applied the ESA fairly strictly, this result is likely to reopen a tremendous amount of litigation. *NAHB* represents a willingness of the Court to abrogate the ESA in favor of other priorities. Ultimately, it seems wholly possible — if by no means certain — that we will point back to *NAHB* as the point at which the Endangered Species Act could no longer be referred to as a “trump card,” and the protection of endangered species became just one national concern among others.