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## **An Uncivil Action: The Supreme Court Dilutes the Endangered Species Act. *National Association of Homebuilders v. Defenders of Wildlife***

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# AN UNCIVIL ACTION: THE SUPREME COURT DILUTES THE ENDANGERED SPECIES ACT

*National Association of Homebuilders v. Defenders of Wildlife*<sup>1</sup>

## I. INTRODUCTION

A fuller recognition of human impact on the environment became prevalent when Congress enacted the Endangered Species Act (“ESA”):<sup>2</sup> “a comprehensive science-based approach to protecting the United States’ most vulnerable species and the ecosystems upon which these species depend.”<sup>3</sup> President Richard Nixon signed the ESA into effect on December 28, 1973 and noted “[n]othing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, [of] value to scholars, scientists, and nature lovers alike and it forms a vital part of the heritage we all share as Americans.”<sup>4</sup> Congress justified the ESA as a means “to conserve species facing extinction...these species of fish, wildlife, and plants are of aesthetic, educational, historical, recreational and scientific value to the nation and its people.”<sup>5</sup> Congress was concerned “economic growth and development untempered by conservation [had] led to many species’ decline and even extinction.”<sup>6</sup>

While some see the preservation of endangered species as a hindrance to economic progress, scientists have begun to realize that many species are vital to economic progress, and the destruction of these species negatively impacts economies. For example, “in 1997, scientists estimated the total economic value of the renewable ecosystem services

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<sup>1</sup> Nat’l Ass’n of Homebuilders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) [hereinafter *Defenders II*].

<sup>2</sup> 16 U.S.C. §§ 1531-1544 (2000).

<sup>3</sup> Brief for Jared M. Diamond et al. as Amici Amicus Curiae Supporting Respondents at 3, Nat’l Ass’n National Association of Homebuilders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) (Nos. 06-549, 06-340) [hereinafter *Brief for Jared M. Diamond*].

<sup>4</sup> *Id.* at 5 (citing BONNIE B. Burgess, *Fate of the Wild: the Endangered Species Act and the Future of Biodiversity* 3 (2001)).

<sup>5</sup> *Id.* at 5-6 (citing 16 USC § 1531(a)(3) (2000)).

<sup>6</sup> *Id.* at 6 (citing 16 USC § 1531(a)(1)).

important to human health and welfare as between \$16 and \$54 trillion per year.”<sup>7</sup> An example of conservation’s economic benefits to people is New York’s expenditure of “over a billion dollars to purchase forested lands in the Catskills watershed to provide the city with drinking water – thereby avoiding \$6 to \$8 billion in costs for a mechanical water filtration system.”<sup>8</sup> However, any financial estimate of the renewable ecosystem’s value to humans will be inaccurate because it will fail to factor the value of human survival. Without these renewable systems, humans would not survive, and it is the ESA’s strong and comprehensive mandate which has protected the organisms that compose these valuable ecosystems.

## II. FACTS AND HOLDING

In February of 2002, the State of Arizona applied to the EPA for a transfer of permitting authority pursuant to section 1342 of the Clean Water Act (“CWA”). The EPA consulted with the Fishery and Wildlife Service “to determine whether the transfer of permitting authority would adversely affect any listed species” in Arizona.<sup>9</sup> The FWS concluded that a transfer of permitting authority would not have a directly adverse impact on any listed species, but might result in the “issuance of more discharge permits.”<sup>10</sup> The FWS feared more discharge permits could “lead to more development”, which could indirectly, adversely impact the habitat of endangered species.<sup>11</sup> Because section 7(a)(2)’s consultation requirement applies to “action[s] authorized, funded, or carried out by Federal agenc[ies]”, the FWS worried that Arizona state officials could issue permits “without considering and mitigating their indirect impact....”<sup>12</sup> However, the EPA felt the “link between the transfer of permitting

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<sup>7</sup> *Id.* at 7-8 (citing Robert Costanza et al., *The Value of the World’s Ecosystem Services and Natural Capital*, 387 *Nature* 253-60 (1997)). “The study’s authors calculated that the estimated annual value of ecosystem services at the time, \$33 trillion, was 1.8 times the global gross national product. In the U.S., there is a growing awareness of the economic and practical importance of ecosystem services.” *Id.* n.2.

<sup>8</sup> *Id.* at 8 n.2. See EDWARD O. Wilson, *The Future of Life* 107-08 (Knopf 2002).

<sup>9</sup> *Defenders II*, 127 S. Ct. at 2526-27.

<sup>10</sup> *Id.* at 2527.

<sup>11</sup> *Id.* The FWS was concerned about the “habitat of certain upland species, such as the cactus ferruginous pygmy-owl, and Pima pineapple cactus.” *Id.*

<sup>12</sup> *Id.*

authority and the potential harm that could result from increased development was too attenuated.”<sup>13</sup> Because Section 402(b) of the CWA requires the EPA to approve a transfer of permitting authority if section 402(b)’s nine criteria are satisfied, the EPA believed section 402(b) “stripped them of authority to disapprove a transfer based on any other considerations.”<sup>14</sup> These other considerations would include a proposed permit’s effect on endangered species.

In December 2002, the FWS delivered its “biological opinion”, which reached the opposite conclusion of its initial consultation with the EPA: that the transfer of permitting authority would not indirectly jeopardize endangered species.<sup>15</sup> The FWS reasoned:

[L]oss of any conservation benefit is not caused by EPA’s decision to approve the State of Arizona’s program. Rather the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress’ decision to grant States the right to administer these programs under state law provided the State’s program meets the requirements of [§] 402(b) of the Clean Water Act.<sup>16</sup>

Additionally, because the EPA would continue its oversight of Arizona’s program, “along with other statutory protections”, the FWS believed that the listed species and their habitats would be adequately protected.<sup>17</sup> Arizona met the nine statutory criteria under section 402(b) of the CWA<sup>18</sup>,

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 33 U.S.C. §§ 1342(b) (1)-(9). The nine criteria are the state’s ability:

(1) to issue fixed-term permits that apply and ensure compliance with the CWA’s substantive requirements and which are revocable for cause; (2) to inspect, monitor, and enter facilities and the require reports to the extent required by the CWA; (3) to provide for public notice and public hearings; (4) to ensure that the EPA receives notice of each permit application; (5) to ensure that any other State whose waters may be affected by the issuance of a permit is issued if the Army Corps of Engineers concludes that it would substantially impair the anchoring and navigation of navigable waters; (7) to abate violations of permits or the permit program, including through civil and criminal penalties;

and the EPA granted the transfer of permitting authority, noting “the issuance of the FWS’s biological opinion had ‘conclude[d] the consultation process required by ESA section 7(a)(2) and reflects the [FWS]’ agreement with the EPA that the approval of the State program meets the substantive requirements of the ESA.”<sup>19</sup>

Plaintiffs and Defenders of Wildlife, Center for Biological Diversity, and Craig Miller, a resident of Pima County, Arizona (“Defenders”) filed a lawsuit in the United States Court of Appeals for the Ninth Circuit challenging the EPA’s decision to transfer permitting authority to Arizona.<sup>20</sup> The Ninth Circuit suit sought to review the EPA’s grant of permitting authority, alleging the EPA’s transfer decision was arbitrary and capricious and the EPA had erred in not considering the transfer of permitting authority’s impact on endangered species as required by the ESA.<sup>21</sup>

The Defenders of Wildlife also filed an action in United States District Court for the District of Arizona, “alleging...the biological opinion issued by the FWS in support of the proposed transfer did not comply with the ESA’s standards.”<sup>22</sup> The action in the District Court concerns the ESA and the Administrative Procedure Act, “alleging...the Biological Opinion supporting the pollution permitting transfer does not comply with Endangered Species Act standards.”<sup>23</sup> The United States District Court for the District of Arizona severed the claim and transferred the suit to the United States Court of Appeals for the Ninth Circuit holding that the Circuit court has “exclusive jurisdiction over the Biological Opinion challenge pursuant to [Title 13, section 1369(b)(1)(D) of the

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(8) to ensure that any permit works for a discharge from a publicly owned treatment works includes conditions requiring the identification of the type and volume of certain pollutants; and (9) to ensure that any industrial user of any publicly owned treatment works will comply with certain of the CWA’s substantive provisions.

*Id.*

<sup>19</sup> Defenders II, 127 S. Ct. at 2527-28.

<sup>20</sup> *Id.* at 2528.

<sup>21</sup> Defenders of Wildlife v. EPA, 420 F.3d 946, 977954 (9th Cir. 2005) [hereinafter Defenders I].

<sup>22</sup> Defenders II, 127 S. Ct. at 2528 (citing Defenders I, 420 F.3d at 954).

<sup>23</sup> *Id.* at 2528.

United States Code]....”<sup>24</sup> The United States District Court for the District of Arizona case was consolidated with Defender’s first suit challenging the EPA transfer in the United States Circuit Court of Appeals for the Ninth Circuit.<sup>25</sup>

The United States Court of Appeals for the Ninth Circuit held the EPA’s decision was arbitrary and capricious because “the EPA relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations.”<sup>26</sup> The Ninth Circuit decided “it was required to ‘remand to the agency for a plausible explanation of its decision....’”<sup>27</sup> Instead of allowing the EPA to explain its decision, the panel majority proceeded “to review EPA’s substantive construction of the statutes at issue and held that the ESA granted the EPA both the power and duty to determine whether its transfer decision would jeopardize threatened or endangered species.” The panel majority ruled in favor of plaintiffs, Defenders, “dismiss[ing] the argument that the EPA’s approval of the transfer application was not subject to § 7(a)(2) because it was not a ‘discretionary action’ within the meaning of 50 CFR § 402.03....”<sup>28</sup> The Ninth Circuit granted Defenders’ petition and “vacated the EPA’s transfer decision.”<sup>29</sup>

The Supreme Court of the United States reversed and remanded the Ninth Circuit’s decision<sup>30</sup> and held the EPA’s action was not arbitrary and capricious.<sup>31</sup> The EPA’s decision -- that it only had to consult with other federal agencies to determine the impact of agency action of endangered species when the federal action was “discretionary” -- deserved deference because it is the agency’s reasonable interpretation of its own regulations.<sup>32</sup> Finally, the EPA’s transfer of permitting authority to Arizona was not a “discretionary” action within the meaning of Title 50,

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<sup>24</sup> Defenders I, 420 F.3d at 955.

<sup>25</sup> Defenders II, 127 S. Ct. at 2528 (citing Defenders I, 420 F.3d at 962).

<sup>26</sup> Defenders II, 127 S. Ct. at 2528.

<sup>27</sup> *Id.* (citing Defenders I, 420 F.3d at 962).

<sup>28</sup> *Id.* (citing Defenders I, 420 F.3d at 967-969).

<sup>29</sup> Defenders II, 127 S. Ct. at 2528.

<sup>30</sup> *Id.* at 2525.

<sup>31</sup> *Id.* at 2529.

<sup>32</sup> *Id.* at 2537-38.

section 402.03 of the Code of Federal Regulations, so EPA did not have to meet the consultation or no-jeopardy requirements of the ESA.<sup>33</sup>

### III. LEGAL BACKGROUND

As Justice Alito stated in the introduction to the majority's opinion in *Defenders II*, "these cases concern the interplay between two federal environmental statutes."<sup>34</sup> This statutory interpretation issue required the Supreme Court "to mediate a clash of seemingly categorical-and, at first glance, irreconcilable legislative commands:" the Clean Water Act of 1972<sup>35</sup> ("CWA") and the Endangered Species Act of 1973<sup>36</sup> ("ESA").<sup>37</sup> The Supreme Court characterized the issue as whether section 7(a)(2) of the ESA added a tenth criterion to the CWA's nine-pronged test for granting a state permitting authority.<sup>38</sup> Even before the issue reached the Ninth Circuit in *Defenders I*, the Fifth and District of Columbia circuits had considered interplay between the CWA and the ESA. In *Defenders II*, the Supreme Court also considered whether the Ninth Circuit's ruling in *Defenders I* -- that the EPA's reliance on "legally contradictory positions regarding [their] section 7 obligations" -- had been arbitrary and capricious.<sup>39</sup>

#### A. The Clean Water Act of 1972.

After analyzing whether the EPA's action had been arbitrary and capricious, the Supreme Court in *Defenders II* began its statutory analysis by turning first to the language of the CWA. The CWA created a National Pollution Discharge Elimination System ("NPDES"),<sup>40</sup> which was designed to prohibit the "discharge of pollutants into the navigable waters"

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<sup>33</sup> *Id.* at 2538.

<sup>34</sup> *Id.* at 2524.

<sup>35</sup> 33 U.S.C. §§ 1251-1387 (1972).

<sup>36</sup> Codified at <sup>36</sup> 16 U.S.C. §§ 1531-44 (2000).

<sup>37</sup> *Defenders II*, 127 S. Ct. at 2531.

<sup>38</sup> *See id.* at 2525.

<sup>39</sup> *Id.* at 2529.

<sup>40</sup> Codified at 33 U.S.C. § 1342 (2000).

through the issuance of regulating permits.<sup>41</sup> The Environmental Protection Agency (“EPA”) administers the NPDES permitting system and is responsible for “reviewing and approving” discharge permits.<sup>42</sup> A state may apply for a transfer of permitting authority from the EPA, but even after a state assumes permitting authority, the EPA could still deny permits that the state proposes to issue.<sup>43</sup> Pursuant to section 402(b) of the CWA, a state requesting permitting authority must submit to the EPA a description of the state’s proposed program and a certification that the state’s laws “provide adequate authority to carry out the described program.”<sup>44</sup> The EPA then makes a determination whether a state has adequate authority to satisfy nine specified criteria.<sup>45</sup> If a state meets the nine criteria, the EPA “shall” approve the transfer pursuant to section 1432(b).<sup>46</sup>

### *B. The Endangered Species Act of 1973*

The Endangered Species Act of 1973 (“ESA”) is designed “to protect and conserve endangered and threatened species and their habitats.”<sup>47</sup> Under the jurisdiction of the Secretaries of Commerce and the Interior respectively, the Fish and Wildlife Services (“FWS”) and the National Marine Fisheries Service (“NMFS”) administer the ESA.<sup>48</sup> The section of the ESA at issue in *Defenders II*, 7(a)(2), directs federal agencies to consult with the Secretary of Commerce or the Interior to “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.”<sup>49</sup>

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<sup>41</sup> 33 U.S.C. § 1251(a)(1) (2000).

<sup>42</sup> *Defenders II*, 127 S. Ct. at 2525; see also 33 U.S.C. § 1342(a)(1).

<sup>43</sup> 33 U.S.C. § 1342. The State must advise the EPA of each permit it proposes to issue, and the EPA may object to any permit. *Id.* § 1342(d)(1), (2); see also 40 C.F.R. § 123.44(c) (2006). If the state cannot address the EPA’s concerns, permitting authority reverts to the EPA. 33 U.S.C. § 1342(d)(4).

<sup>44</sup> 33 U.S.C. § 1342(b).

<sup>45</sup> See 33 U.S.C. § 1342(b).

<sup>46</sup> *Id.*

<sup>47</sup> *Defenders II*, 127 S. Ct. at 2526 (citing 16 U.S.C. § 1536(a)(2) (2000)).

<sup>48</sup> *Defenders II*, 127 S. Ct. at 2526; see 50 C.F.R. § 17.11 (2006).

<sup>49</sup> *Defenders II*, 127 S. Ct. at 2526 (citing 16 U.S.C. § 1536(a)(2)).



After completion of the section 7(a)(2) consultation process, “the Secretary is required to give the agency a written biological opinion ‘setting forth the Secretary’s opinion and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.’”<sup>50</sup> If proposed agency action could “place a listed species in jeopardy or adversely modify its critical habitat, ‘the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate [§ 7(a)(2)]...in implementing the agency action.’”<sup>51</sup> Those reasonable and prudent alternatives the Secretary suggests are the “jeopardy opinion.”<sup>52</sup> After the Secretary issues the jeopardy opinion, “the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet level Endangered Species Committee pursuant to 16 U.S.C. § 1536(e).”<sup>53</sup>

### C. *The Debate over the ESA’s Conflict with Federal Statutes*

Petitioner, National Homebuilders Association of America (“NAHB”), disagreed with respondent, Defenders, whether the Ninth Circuit’s decision in *Defenders I* had created an inter-circuit conflict in how to treat the interplay between section 402(b) of the CWA and section 7 of the ESA. In its petition for certiorari in *Defenders II*, Petitioner NAHB contended the Ninth Circuit’s decision in *Defenders I* had created a conflict<sup>54</sup>, while respondents Defenders of Wildlife contended it had not.<sup>55</sup> In support of an inter-circuit conflict, the NAHB pointed to decisions from the Fifth and District of Columbia Circuits respectively: *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy*

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<sup>50</sup> Defenders II 2526 (citing 16 U.S.C. § 1536(b)(3)(a)).

<sup>51</sup> *Id.*

<sup>52</sup> Defenders II, 127 S. Ct. at 2526.

<sup>53</sup> *Id.*

<sup>54</sup> Petition for Writ of Certiorari at 12, Defenders II, 127 S. Ct. 2518 (No. 06-340) [hereinafter Petition for Writ of Certiorari].

<sup>55</sup> Brief of Defenders of Wildlife, et al. in Opposition to Petitions for a Writ of Certiorari at 18, Defenders II, 127 S. Ct. 2518 (Nos. 06-340, 06-549) 2007 WL 3419815 [hereinafter Brief Opposing Writ of Certiorari].

*Regulation Commission*<sup>56</sup> (“*Platte River*”) and *American Forest & Paper Association v. EPA*<sup>57</sup> (“*AFPA*”).<sup>58</sup> Defenders contended these decisions “do not directly conflict with [the Ninth Circuit’s decision in *Defenders I*], let alone support EPA’s new position that Section 7(a)(2) has no bearing on NPDEA transfer decisions.”<sup>59</sup>

The D.C. Circuit case, *Platte River*, discussed the “need for wildlife protective conditions in the annual licenses issued to two hydroelectric power projects on the Platte River.”<sup>60</sup> The Federal Energy Regulatory Commission consulted with the Fisheries and Wildlife Service (“FWS”) and “largely did adopt FWS’ recommendations.”<sup>61</sup> Because FERC had already consulted with the FWS, the court “was not called on to decide whether section 7(a)(2) could be avoided entirely; in particular, the court did not address any contention that FERC was authorizing actions that would, in violation of Section 7(a)(2), jeopardize the continued existence of any listed species or destroy any critical habitat.”<sup>62</sup> The D.C. Circuit “focused its analysis not on Section 7(a)(2) but, rather, on...Section 7(a)(1).”<sup>63</sup> Section 7(a)(1) “imposes a separate obligation on federal agencies to take affirmative steps to ‘utilize their authorities in furtherance of the purposes [of the ESA]’ by carrying out ‘programs for the conservation’ of species.”<sup>64</sup>

A Fifth Circuit decision, *American Forest and Paper Ass’n v. EPA* (“*AFPA*”), considered the EPA’s grant of permitting authority under the NPDES to Louisiana.<sup>65</sup> This case considered the issue whether the EPA and the FWS could condition the transfer of permitting authority on “Louisiana’s agreement to enter binding consultations with the FWS on all

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<sup>56</sup> *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*,<sup>56</sup> 962 F.2d 27 (D.C. Cir. 1992) [hereinafter *Platte River*].

<sup>57</sup> *Am. Forest & Paper Ass’n v. EPA*,<sup>57</sup> 137 F.3d 291 (5th Cir. 1998) [hereinafter *AFPA*].

<sup>58</sup> Petition for Writ of Certiorari, *supra* note 54, at 11. While the Ninth Circuit interpreted section 7 of the ESA as a discretionary action in *Defenders I*, the NAHB contended other circuits interpreted section 7 as mandatory and non-discretionary. *Id.*

<sup>59</sup> Brief Opposing Writ of Certiorari, *supra* note 55, at 18.

<sup>60</sup> *Platte River*, 962 F.2d at 30.

<sup>61</sup> *Id.* at 33 n.2.

<sup>62</sup> Brief Opposing Writ of Certiorari, *supra* note 55, at 18-19.

<sup>63</sup> *Id.* at 19.

<sup>64</sup> *Id.* at 19-20 (citing 16 U.S.C. § 1536(a)(1)).

<sup>65</sup> *AFPA*, 137 F.3d 291 (5<sup>th</sup> Cir. 1998).

State issued permits after the transfer.”<sup>66</sup> The Fifth Circuit rejected the EPA’s argument “that it could impose a condition on Louisiana that the court believed was not authorized by the CWA or the ESA.”<sup>67</sup> The Fifth Circuit stated, “whether the EPA’s approval of Louisiana’s permitting program constitutes ‘agency’ action is largely beside the point.”<sup>68</sup> The Fifth Circuit concluded that the EPA must consult with the FWS<sup>69</sup>, and if the FWS says that an endangered species will be in jeopardy as a result of a transfer of permitting authority, the EPA would need to resort to the Endangered Species Committee.<sup>70</sup>

#### IV. INSTANT DECISION

##### *A. The Majority*

The United States Supreme Court considered whether the EPA’s grant of transfer authority had been arbitrary and capricious because the EPA had not followed the ESA’s mandate in considering impact on listed species, but rather only established that the state receiving permitting authority had satisfied the CWA’s nine criteria.<sup>71</sup> If the EPA’s decision was arbitrary and capricious, the Supreme Court noted the Ninth Circuit should have remanded the decision to the EPA for the agency’s explanation of its decision.<sup>72</sup> However, because the Supreme Court found the Ninth Circuit’s determination that the EPA had been arbitrary and capricious was not supported by the record, it passed on analyzing the Ninth Circuit’s decision not to remand the case back to the EPA for clarification.<sup>73</sup>

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<sup>66</sup> Brief Opposing Writ of Certiorari, *supra* note 55, at 20. (citing AFPA, 137 F.3d at 293-94).

<sup>67</sup> *Id.* at 21.

<sup>68</sup> AFPA, 137 F.3d at 298 n. 6.

<sup>69</sup> *Id.* at 298.

<sup>70</sup> 16 U.S.C. § 1536(e).

<sup>71</sup> *Defenders II*, 127 S.Ct. 2518, 2529 (2007).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

Courts should give deferential review to reasonable agency interpretations of their regulations.<sup>74</sup> Courts should not give deference to an agency interpretation if an agency relies on factors it is not supposed to consider pursuant to Congress' intent, completely ignores a significant facet of the issue, issues a decision in defiance of available evidence, or "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."<sup>75</sup> Even though the EPA relied on inconsistent legal grounds during its consideration of the grant of permitting authority, federal courts typically review only an agency's final decision and not an interim decision.<sup>76</sup> The Supreme Court disagreed with Defenders' contention that the EPA's later position that a grant of permitting authority did not activate section 7's consultation requirement and that this constituted inconsistency within the EPA's decision-making.<sup>77</sup>

In considering the apparent clash between section 7 of the ESA and section 402(b) of the CWA, the Supreme Court noted that section 402(b) uses the language "shall approve," implying the EPA must grant the transfer of permitting authority unless the nine criteria are not satisfied.<sup>78</sup> This, the Supreme Court concluded, meant the EPA did not have the discretion to deny a transfer if the nine criteria were fulfilled.<sup>79</sup> However, the language of section 7 of the ESA is likewise mandatory.<sup>80</sup> It instructs federal agencies to consult with the Secretary to "insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize endangered or threatened species or their habitats."<sup>81</sup> Under this construction, section 7 of the ESA would add the consultation requirement to the nine criteria of section 402(b) of the CWA.

While the two statutes seem at odds, construing one to impliedly repeal the other is not favored in law.<sup>82</sup> Only if the "intention of the

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2530.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 2531.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2532.

<sup>81</sup> *Id.* (citing 16 U.S.C. § 1536(a)(2)).

<sup>82</sup> Defenders II, 127 S. Ct. at 2532.

legislature to repeal is clear and manifest” will a court presume one statute to repeal another.<sup>83</sup> The Supreme Court characterizes the Ninth Circuit’s treatment of section 7 of the ESA as an unfavorable repealing of portions of the statutory mandates within section 402(b) of the CWA.<sup>84</sup> Under the Ninth Circuit’s construction, section 7 of the ESA would implicitly “partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species.”<sup>85</sup> The Supreme Court adopted the view that section 7 of the ESA should only apply to “actions in which there is discretionary Federal involvement or control.”<sup>86</sup> Under this interpretation, section 7 of the ESA would still require agencies to consider impact on endangered species in its discretionary action and section 7 of the ESA would not repeal statutory mandates.<sup>87</sup>

### *B. The Dissent*

The dissent began by emphasizing the holding of *TVA v. Hill* (“Hill”)<sup>88</sup> which prioritized the protection of endangered species “over the ‘primary missions’ of federal agencies.”<sup>89</sup> The dissent discussed various ways to reconcile the Endangered Species Act and the Clean Water Act without an erroneous reliance on federal regulation. The dissent criticized the majority for relying on title 50, section 402.03 of the Code of Federal Regulations “as limiting the reach of section 7(a)(2) to *only* discretionary federal actions....”<sup>90</sup> The dissent characterized this interpretation as “inconsistent with the text and history of section 402.03” and “fundamentally inconsistent with the ESA itself.”<sup>91</sup> The dissent ultimately

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 2533.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 2534.

<sup>87</sup> *Id.*

<sup>88</sup> *TVA v. Hill*, 437 U.S. 153 (1978) [hereinafter *Hill*].

<sup>89</sup> *Id.* at 185.

<sup>90</sup> *Defenders II*, 127 S. Ct. at 2538 (Stevens, J., dissenting) (emphasis in original).

<sup>91</sup> *Id.*

concluded the Supreme Court should have “remanded [the case] to the EPA for further proceedings.”<sup>92</sup>

The dissent’s reexamination of *Hill* considered two questions: “(1) whether the ESA required a court to enjoin the operation of the nearly completed Tellico Dam and Reservoir Project because the Secretary of the Interior had determined that its operation would eradicate a small endangered fish...and (2) whether post-1973 congressional appropriations for the completion of the Tellico Dam constituted an implied repeal of the ESA....”<sup>93</sup> In answering the first question, the *Hill* court said “the language, history, and structure of the [ESA] indicates beyond doubt that Congress intended Endangered Species to be afforded the highest of priorities.”<sup>94</sup> Section 7 of the ESA “admits of no exception.”<sup>95</sup> The *Defenders II* dissent opines whether “the agency action [in *Hill*] was mandatory or discretionary” was of no concern.<sup>96</sup> Rather, the relevant holding from *Hill* was that “section 7 of the ESA reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species.”<sup>97</sup>

In answering the second question posed in *Hill* concerning whether “post-1973 congressional appropriations for the completion of the Tellico Dam Project constituted an implied repeal of the ESA,”<sup>98</sup> the *Defenders II* dissent noted “the fact that we also concluded that the post-1973 congressional appropriations did not impliedly repeal the ESA provides no support for the majority’s contention that the obligations imposed by section 7(a)(2) may be limited to discretionary acts.”<sup>99</sup> Although it seemed a strange result to halt “a virtually completed dam for which Congress [had] expended more than \$100 million” in favor of “protecting the survival of a relatively small number of 3-inch fish,” the *Hill* court found “the explicit provisions of the Endangered Species Act require

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<sup>92</sup> *Id.* at 2539.

<sup>93</sup> *Hill*, 437 U.S. at 156.

<sup>94</sup> *Id.* at 174.

<sup>95</sup> *Id.* at 173.

<sup>96</sup> *Defenders II*, 127 S. Ct. at 2540 (Stevens, J., dissenting).

<sup>97</sup> *Hill*, 437 U.S. at 185.

<sup>98</sup> *Defenders II*, 127 S. Ct. at 2539 (Stevens, J., dissenting) (citing *Hill*, 437 U.S. at 156)..

<sup>99</sup> *Defenders II*, 127 S. Ct. at 2540 (Stevens, J., dissenting).

precisely that result.”<sup>100</sup> The language of section 7 of the ESA is clear and explicit in its command to 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 the habitat of such species....’”<sup>101</sup>

The *Defenders II* dissent reviewed the ESA’s history to see what legislators had purposefully removed from earlier drafts of the act in order to narrow and specify the act.<sup>102</sup> The dissent found that earlier drafts “‘qualified the obligation of federal agencies,’ but the 1973 Act purposefully omitted ‘all phrases which might have qualified an agency’s responsibilities.’”<sup>103</sup> The dissent criticized the majority for reading an exception into the ESA where it seemed clear that Congress did not intend for there to be any exceptions for federal agencies.

The dissent reasoned Congress’ intent was clear in that the ESA should override any competing statute, so the CWA should yield to the ESA.<sup>104</sup> However, if two statutes can coexist, then neither statute should yield.<sup>105</sup> However, reconciling the ESA and CWA by relying on title 50, section 402.03 of the Code of Federal Regulations is erroneous.<sup>106</sup> Section 402.03 reads “section 7 and the requirements of this part apply to all actions in which there is federal involvement or control.”<sup>107</sup> While the *Defenders II* majority interpreted this regulation to mean that section 7 applies *only* to discretionary federal action, the dissent interpreted this regulation to mean that “section 7(a)(2) applies to discretionary federal action, but not *only* to discretionary action.”<sup>108</sup>

To support its interpretation of section 402.03, the dissent looked to “the definition of ‘action’ in § 402.02 and the ‘explanation for the scope

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<sup>100</sup> Hill, 437 U.S. at 172-73.

<sup>101</sup> Hill, 437 U.S. at 173 (citing 16 U.S.C. § 1536) (emphasis in original).

<sup>102</sup> *Defenders II*, 127 S. Ct. at 2540-41 (Stevens, J., dissenting).

<sup>103</sup> *Defenders II*, 127 S. Ct. at 2541 (Stevens, J., dissenting) (citing *Hill*, 437 U.S. at 181-82)..

<sup>104</sup> *Defenders II*, 127 S. Ct. at 2541.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 50 C.F.R. § 402.03 (2007).

<sup>108</sup> *Defenders II*, 127 S. Ct. at 2542 (Stevens, J., dissenting)..

of the term ‘action’ in section 402.01.”<sup>109</sup> Within these sources, the dissent found “there was no intent to draw a distinction between discretionary and non-discretionary actions.”<sup>110</sup> These regulations indicate section 7 applies to all federal actions, not just discretionary actions.

In considering the conflict between the ESA and the CWA, the dissent noted that “there are at least two ways in which the CWA and the ESA can be given full effect without privileging one statute over the other.”<sup>111</sup> The first way to harmonize the statutes is through the statutory consultation process. The second way to harmonize the statutes is through the EPA’s regulations.

Under the first approach to harmonizing the ESA and the CWA, the dissent suggested looking to the text of section 7(a)(2), which provides that federal agencies will insure their actions do not adversely impact endangered species and their habitats “in consultation with and with the assistance of the Secretary...unless such agency has been granted an exemption for such action by the Committee pursuant to subsection h....”<sup>112</sup> When an agency proposes a transfer of NPDES authority, the Secretary of the Interior will indicate whether the grant of permitting authority will adversely affect any endangered species.<sup>113</sup> If the grant of permitting authority may affect an endangered species, “the agency must formally consult with the Secretary.”<sup>114</sup> This consultation concludes with a biological opinion, which indicates how the grant of permitting authority might affect the endangered species and its habitat.<sup>115</sup> If the conclusion of the biological opinion is “that the agency action would put a listed species in jeopardy,” the “Secretary shall suggest those reasonable and prudent alternatives which would not violate subsection (a)(2).”<sup>116</sup> Under this approach, “the consultation process would generate an alternative course of action whereby the transfer could still take place-as required by section

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<sup>109</sup> *Id.* at 2543.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 2544.

<sup>112</sup> 16 U.S.C. § 1536(a)(2) (2000).

<sup>113</sup> 16 U.S.C. § 1536(c).

<sup>114</sup> *Defenders II*, 127 S. Ct. at 2545.

<sup>115</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>116</sup> *Defenders II*, 127 S. Ct. at 2545 (citing 16 U.S.C. § 1536(b)(3)(A)).



402(b) of the CWA-but in such a way that would honor the mandatory requirements of section 7(a)(2) of the ESA.”<sup>117</sup> Even if no reasonable and prudent alternative surfaces, the Endangered Species Committee can grant agencies an exemption to proceed with the action despite the action’s potential to eradicate an endangered species.<sup>118</sup> Congress created the God Committee to “[serve] as the final mechanism for harmonizing [the ESA] and other federal statutes.”<sup>119</sup> “In short, when all else has failed, and two federal statutes are incapable of resolution, Congress left the choice to the Committee-not to this court; it did not limit the ESA in the way the majority does today.”<sup>120</sup>

The second approach to reconciling the ESA and the CWA involves the EPA’s regulations. After a transfer of permitting authority, “[the EPA] continues to oversee the state’s discharge permitting system.”<sup>121</sup> In order to decide when the EPA may object to a state’s proposed permit, the EPA and the state enter a “Memorandum of Agreement (“MOA”) that sets forth the particulars of the [EPA’s] oversight duties.”<sup>122</sup> The EPA “can use-and...has used—the MOA process to structure its later oversight in a way that will allow it to protect endangered species in accordance with section 7(a)(2) of the ESA.”<sup>123</sup> The MOA allows the ESA operate unobstructed “without restricting section 7(a)(2) in the way the court does.”<sup>124</sup>

In its fourth point, the dissent hypothesized that even if section 7(a)(2) is limited to discretionary federal actions, “it is clear that EPA’s authority to transfer permitting authority under section 402(b) is discretionary.”<sup>125</sup> “Mandatory” or non-discretionary actions are those actions which a statute requires an agency “to undertake once certain

<sup>117</sup> *Defenders II*, 127 S. Ct. at 2546.

<sup>118</sup> 16 U.S.C. § 1536(e). “Because of its authority to approve the extinction of an endangered species, the Endangered Species Committee is colloquially described as the “God Squad” or “God Committee.” *Defenders II*, 127 S. Ct. at 2546.

<sup>119</sup> *Defenders II*, 127 S. Ct. at 2546-47.

<sup>120</sup> *Id.* at 2547.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* See 40 C.F.R. § 123.24(a) (2006).

<sup>123</sup> *Defenders II*, 127 S. Ct. at 2547. <sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 2548.

<sup>125</sup> *Id.*

specified triggering events have occurred.”<sup>126</sup> A statute’s use of the word “shall” does not automatically make action under the statute non-discretionary.<sup>127</sup> The dissent noted even the majority “acknowledges that the EPA must exercise ‘some judgment in determining whether a State has demonstrated that it has the authority to carry out § 402(b)’s enumerated statutory criteria.”<sup>128</sup> Despite the majority’s recognition that a transfer of permitting authority requires some discretion, “in the very same breath, the Court states that the dispositive fact is that ‘the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list.’”<sup>129</sup> According to the dissent, this waffling is a logical inconsistency in the majority opinion.

The dissent concluded by discussing Chief Justice Burger’s majority opinion in *Hill*, which noted that “once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.”<sup>130</sup> The Supreme Court had already interpreted the ESA 30 years ago in *Hill*, but it “turn[ed] its back on the decision in *Hill* and places a great number of species in jeopardy.”<sup>131</sup> The dissent concludes the idea that “the requirements of § 7(a)(2) of the ESA do not apply to its decision to transfer permitting authority under § 402(b) of the CWA” is “contrary to the text of § 7(a)(2), [their] decision in the *TVA v. Hill*, and the regulation on which the agency has since relied and upon which the Court relies today.”<sup>132</sup> Therefore, the EPA was “arbitrary and capricious under the Administrative Procedure Act...and [the dissent] would remand to the agency for further proceedings consistent with this opinion.”<sup>133</sup>

### C. COMMENT

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<sup>126</sup> *Id.* at 2536.

<sup>127</sup> *Id.* at 2548.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 2548-49.

<sup>130</sup> *TVA v. Hill*, 437 U.S. 153, 194 (1978).

<sup>131</sup> *Defenders II*, 127 S. Ct. at 2550.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 2550-51.

The Supreme Court has traditionally attempted to give full effect to apparently conflicting, but the *Defenders II* majority abandoned that approach. The majority erroneously decided it could not reconcile the Endangered Species Act and the Clean Water Act. Instead, the *Defenders II* majority misplaced its reliance on federal regulations for assistance in interpreting the statutes. This approach led the Supreme Court to render the Endangered Species Act's mandate ineffective against the Clean Water Act, weakening Congress' protection of endangered species. While the Supreme Court had previously held in *Hill v. TVA* that "endangered species are supposed to take priority over the 'primary missions' of federal agencies,"<sup>134</sup> the *Defenders II* majority ignored this imperative. The *Defenders II* majority also criticized the Ninth Circuit for not remanding the decision to the Environmental Protection Agency for the agency's construction, but the majority failed to follow its own suggestion.

While there were many established alternatives the Supreme Court could have taken to reconcile the ESA and the CWA, it chose the most detrimental one: weakening the ESA's mandate that government agencies consider how their actions might negatively impact endangered species and their critical habitats. Despite Congress' express intent and the Supreme Court's precedent in *Hill* that protecting endangered species is one of the government's highest priorities, the *Defenders II* court weakened the EPA's ability to protect endangered species.

There were several statutory opportunities in place that allowed the EPA to oversee states' permit issuing systems. The first opportunity was the ESA's consultation requirement in which a state would consult with the Fisheries and Wildlife Commission to make sure that proposed permits would not adversely affect endangered species. In this situation, the EPA could have approved a transfer of permitting authority to the state, but when a proposed permit arises that the EPA thinks might affect an endangered species, the EPA could object to it.

*Defenders II* also could have relied on the Memorandum of Agreement (MOA). This allowed the EPA and a state to decide the criteria for permit granting. The EPA had used the MOA in the past to force states to consider an issued permit's impact on an endangered species or its habitat. Finally, the ESA created the Endangered Species

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<sup>134</sup> *Hill*, 437 U.S. at 185.

Committee, intended to have the power to grant exemptions for action that has the potential to harm an endangered species or its critical habitat. The language of the ESA shows that Congress intended this committee to decide whether to prioritize agency action or the protection of endangered species. The *Defenders II* majority ignored the more favorable alternatives to harmonizing the ESA and CWA, and instead weakened the ESA against precedent and Congress' intent.

The policy implications of weakening the ESA are substantial. First, Congress realized that diversity of life (biodiversity) contributed "enormous ecological, economic, scientific, aesthetic, cultural, and health benefits" to people. To halt the government activity destroying biodiversity, Congress enacted the ESA to force federal agencies to consider their action's impact on endangered species. After the *Defenders II* decision, federal agencies can ignore the negative impact their non-discretionary action will have on endangered species when granting permitting authority to states under the CWA.

#### D. CONCLUSION

While the reasoning behind the chosen statutory constructions methods of the *Defenders II* Majority is hazy, Congress' intent with the ESA was clear: the ESA is supposed to override other statutory mandates. Congress and the courts never intended for the category of "non-discretionary" agency actions to have an exemption to the ESA. The Supreme Court previously reaffirmed these ideas in *TVA v. Hill* stating "the language, history, and structure of the ESA indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities"<sup>135</sup> and section 7 of the ESA "admits of no exception."<sup>136</sup> The *Hill* court "held that the ESA 'reveals a conscious decision by Congress to give endangered species priority over the primary missions of federal agencies.'"<sup>137</sup> If there were to be any exemption to the ESA, the Endangered Species Committee was the high level authority capable of giving that exemption. Five members of the Supreme Court have ignored

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<sup>135</sup> *Hill*, 437 U.S. at 180.

<sup>136</sup> *Id.* at 174.173.

<sup>137</sup> *Defenders II*, 127 S. Ct. at 2538 (citing *Hill*, 437 U.S. at 185).

the economic, ecological, scientific, aesthetic, cultural and health value that biodiversity adds to human life and have improvidently weakened the ESA's broad mandate that preserves the organisms generating those benefits.

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