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MAKING THE WATERS A LITTLE MURKIER: BROADENING THE ENDANGERED SPECIES ACT AT THE EXPENSE OF THE CLEAN WATER ACT

*Defenders of Wildlife v. United States Environmental Protection Agency*¹

I. INTRODUCTION

In *Defenders*, the Ninth Circuit adopted an overly broad reading of section 7 of the Endangered Species Act (“ESA”) and expanded its effects on the Environmental Protection Agency’s (“EPA”) statutorily mandated duty to transfer control of pollution permitting programs to the various states. This broad reading not only creates an unnecessary conflict between the ESA and the Clean Water Act (“CWA”), it fails to follow the basic legal principle of *stare decisis* and ignores the clear intent of Congress in enacting the pollution permitting programs and the CWA. Despite the apparent attempt to protect endangered species, the court in actuality provides no greater protection and creates an unnecessary statutory conflict.

II. FACTS AND HOLDING

The CWA of 1972² established the National Pollution Discharge Elimination (“pollution permitting”) System.³ This law gave the EPA the authority to issue permits allowing for the discharge of pollutants into navigable waters.⁴ A state may apply to the EPA to administer the pollution permitting program for waters within the state’s borders.⁵ The EPA is required to grant the transfer if it finds that the state satisfies nine criteria outlined in the statute.⁶

¹ 420 F.3d 946 (9th Cir. 2005) [hereinafter “*Defenders*”].

² Codified as 33 U.S.C. §§ 1251-1387 (1972).

³ *Defenders*, 420 F.3d at 950. (citing 33 U.S.C. § 1342(a)).

⁴ *Id.*

⁵ *Id.* (citing 33 U.S.C. § 1342(b)).

⁶ *See* 33 U.S.C. § 1342(b) (1974).

Shortly after the enactment of the CWA, Congress passed the ESA.⁷ Section 7 of the ESA places requirements on all federal agencies regarding any “action authorized, funded or carried out by such agency.”⁸ Section 7 of the ESA requires agencies to consult with the Fish and Wildlife Service and other agencies to insure that their actions are not likely to jeopardize a protected species.⁹ *Defenders* involves Arizona’s application to the EPA for a transfer of the pollution permitting program and the EPA’s subsequent approval of that program in light of the requirements outlined in the CWA and ESA.

On January 14, 2002, the state of Arizona applied to the EPA for transfer of pollution permitting authority for the waterways of Arizona.¹⁰ The application stated that the Arizona Department of Environmental Quality (“ADEQ”) would be responsible for administering the program.¹¹ Upon review of Arizona’s application, the San Francisco EPA office determined that the transfer could affect species on the Endangered Species List and accordingly initiated a formal consultation with the FWS.¹² The EPA noted that the language of section 7(a)(2) of the ESA, “to insure that any action authorized, funded or carried out [by the EPA] is unlikely to jeopardize listed species or adversely modify their critical habitat,” required the EPA to enter into consultation with the FWS.¹³ During the consultation, FWS field office staff conveyed reservations about the transfer because they feared Arizona would issue permits without requiring applicants to take mitigating measures required by previous section 7 consultations.¹⁴ The FWS staff also stated that the loss of protections provided for under section 7 consultations must be considered in the Biological Opinion regarding the transfer.¹⁵ In response

⁷ Codified as 16 U.S.C. §§ 1531-44 (2000).

⁸ 16 U.S.C. § 1536(a)(2).

⁹ See *Defenders*, 420 F.3d at 951.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 952.

¹³ *Id.*

¹⁴ *Id.* Other pollution permits in Arizona had been the subject of previous section 7 consultations. As a result of these consultations, steps were taken to mitigate the effects of pollution on the protected species’ critical habitat. *Id.*

¹⁵ *Id.*

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to the concerns of FWS staff, EPA staff stated that they believed the EPA could not base a transfer of the pollution permitting program on FWS concerns because the agency did not have the authority to regulate impacts unrelated to water quality.¹⁶

The FWS and EPA then developed an Interagency Elevation Document which transferred authority over the Biological Opinion to the directors of the National Marine Fisheries Service, FWS and the EPA's Deputy Assistant Administrator of Water.¹⁷ A consultation occurred at the national level between the EPA, FWS and the Field Supervisor of FWS's Arizona Ecologic Services field office.¹⁸ Subsequently, FWS released a Biological Opinion that noted the loss of section 7 consultation and recommended the approval of transfer to Arizona.¹⁹ Two days after the issuance of the Biological Opinion, the EPA approved the transfer and indicated that the Biological Opinion "appropriately considered all relevant information regarding the effects of the approval."²⁰

The Defenders of Wildlife, the Center for Biological Diversity and a resident of Pima County, Arizona (collectively, "Defenders") filed two separate lawsuits challenging the transfer of the pollution permitting program.²¹ The first suit was a petition for review of the EPA's decision granting the transfer.²² In their petition, Defenders alleged the EPA's transfer decision did not adequately take into account the effect of transfer on the endangered species and their habitats in Arizona.²³ Defenders also alleged the EPA violated the ESA by relying on the Biological Opinion and that it was arbitrary and capricious under the Administrative Procedure Act ("APA").²⁴ Defenders' second action was an ESA and APA

¹⁶ *Id.* at 953.

¹⁷ *Id.* A Biological Opinion is an opinion that FWS is required to issue during the section 7 consultation which analyzes to what extent an action is likely to harm a listed species or its habitat. 50 C.F.R. § 402.03 (2005).

¹⁸ *Defenders*, 420 F.3d at 953.

¹⁹ *Id.*

²⁰ *Id.* at 954.

²¹ *Id.* The court held that Defenders' members met the three part standing test under *Allen v. Wright*, 468 U.S. 737, 751 (1984); the court accordingly recognized Defenders organizational standing to assert the rights of its members. *Id.* at 956.

²² *Id.* at 955.

²³ *Id.*

²⁴ *Id.*

suit alleging *inter alia* that the FWS Biological Opinion violated the standards established by the ESA.²⁵ The two actions were combined by the Ninth Circuit in this case.²⁶

In *Defenders*, the Ninth Circuit held that the EPA erred in deciding it lacked authority to consider the effects of transfer on listed species.²⁷ The court also held that the Biological Opinion the EPA relied on was legally flawed and it was error for the EPA to rely on it.²⁸ The case was remanded to the EPA for further proceedings consistent with the court's judgment.²⁹

III. LEGAL BACKGROUND

The interplay between the CWA and the ESA is at the heart of the decision in *Defenders*.³⁰ Since its enactment, the CWA has undergone several changes.³¹ In *Defenders*, the court focuses on 33 U.S.C. § 1342.³² Section 1342(b) allows the governor of a state to apply to the EPA for control of the permitting program that regulates the discharge of pollutants into the waters within the state's borders.³³ As previously noted, section 1342(b) states that the EPA Administrator "shall approve" applications by the state provided that the state's program satisfies the nine standards contained in sections 1342(b)(1)-(b)(9).³⁴ The nine requirements outlined

²⁵ *Id.*

²⁶ *Id.* at 954-55.

²⁷ *Id.* at 977.

²⁸ *Id.* at 971-72.

²⁹ *Id.* at 979.

³⁰ *See id.* at 950.

³¹ The first amendment occurred in 1977, and then subsequently in 1987, 1992, 1995, and 2000. 33 U.S.C. §§ 1251-1387.

³² *Defenders*, 420 F.3d at 950.

³³ 33 U.S.C. § 1342(b). The statute refers to water as the "navigable waters" within a state. *Id.* There is currently legislation pending in Congress to change this language to "waters of the United States." H.R. 1356, 109th Cong. (1st Sess. 2005).

³⁴ The nine standards that a state's program must satisfy are as follows:

- (1) To issue permits which (A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317 and 1343 of this title; (B) are for fixed terms not exceeding five years; [that] (C) can be terminated or modified for cause including, but not limited to, the following: (i) violation of any condition of the permit; (ii) obtaining

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a permit by misrepresentation, or failure to disclose fully all relevant facts; (iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; (D) control the disposal of pollutants into wells; (2) (A) To issue permits which apply, and insure compliance with all applicable requirements of section 1318 of this title; or (B) [t]o inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title; (3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application; (4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit; (5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reason for so doing; (6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby; (7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement; (8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the

in section 1342(b) make reference to several other sections within the CWA.³⁵ Many of these sections contain provisions which require the programs to guard against harm to wildlife and/or habitats.³⁶

Section 1342 of the CWA requires any state permitting program issued under section 1342 to be in compliance with the requirements of section 1342 and 1314(i)(2)³⁷ at all times.³⁸ This section of 1342 allows the EPA Administrator to withdraw prior approval of a state's permitting program if it is determined that the program is not operated in accordance with all provisions of section 1342.³⁹

In *Defenders*, the court examined section 7 of the ESA.⁴⁰ Section 7 requires every federal agency to have a formal consultation with FWS to insure that its actions are not likely to further endanger a listed species.⁴¹ This consultation should result in the creation of a biological assessment containing information about species that may be present in the area affected by an agency's actions.⁴² The biological assessment should

quantity or quality of effluent to be discharged from such publicly owned treatment works; and (9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

³³ U.S.C. § 1342(b).

³⁵ *Id.*

³⁶ See 33 U.S.C. § 1311(h)(2) (requiring the "discharge of pollutants" not to interfere with the protection and maintenance of native marine life or wildlife); 33 U.S.C. § 1312(a) (requiring the establishment of "effluent limitations" or "alternative effluent control strategies" for "point source" polluters that discharges pollutants that would interfere with the protection of marine life and wildlife); and 33 U.S.C. § 1343 (requiring the Administrator to "promulgate guidelines for determining the degradation of the waters" which shall include the effect of discharging pollutants on human, marine life and wildlife).

³⁷ Section 1314(i)(2) deals with the guidelines for monitoring, enforcing, reporting, funding and personnel qualifications that the state programs must satisfy.

³⁸ 33 U.S.C. § 1342(c)(2).

³⁹ *Id.* § 1342(c)(3).

⁴⁰ 16 U.S.C. § 1536(a)(2) (The designations "Section 7" and "Section 1536" occur interchangeably in both the instant decision and this note. This is required to point out specific language contained in the statute and allows for the provisions of the Act contained in section 7 to be discussed as a unit.)

⁴¹ See *id.* This consultation takes place with the Secretary or their designee, the Department of Fisheries and Wildlife. *Id.*

⁴² *Id.* § 1536(b)(3)(A).

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further indicate the likely effect the action will have on the species.⁴³ Similar to the CWA, the ESA has been through several changes since its original enactment.⁴⁴ Unlike the provisions of the CWA at issue in this case, section 7 of the ESA generally does not cross reference other sections of the Act, but instead contains all applicable requirements in one subsection.⁴⁵

While the interplay between the ESA and other statutory provisions such as the CWA received little examination by the Ninth Circuit prior to *Defenders*, other circuits have examined the issue since the 1970's. One of the first cases examining this issue is *Conservation Law Foundation of New England, Inc. v. Andrus*.⁴⁶ In *Conservation Law*, the Conservation Law Foundation sought a preliminary injunction against the Secretary of the Interior to cease the leasing of tracts for oil and gas exploration.⁴⁷ The First Circuit declared that the contracts entered into by the Secretary would require future action on his part and, as such, contained an implied condition that his actions did not violate the ESA.⁴⁸ The court noted that by its terms, the ESA applied to all of the Secretary's actions.⁴⁹ *Conservation Law* is also instructive when considering how the ESA applies when a federal actor is operating under powers conveyed by another statute.⁵⁰ In *Conservation Law* both the district court and the First Circuit rejected the appellants' argument that the leases caused

⁴³ *Id.* § 1536(c)(1).

⁴⁴ 16 U.S.C. § 1536. Section 7 of the ESA was amended in 1978, 1979, 1982, 1986, and 1988. *Id.* There is currently legislation in Congress to amend Section 7. This amendment would alter much of the language in section 1536(a)(2) and would add the wording that, “[a]ny Federal agency or the Secretary, in conducting any analysis pursuant to paragraph (2), shall consider only the effects of any agency action that are distinct from a baseline of all effects upon the relevant species that have occurred or are occurring prior to the action.” H.R. 3824, 109th Cong. (1st Sess. 2005).

⁴⁵ *See* 16 U.S.C. § 1536. Section 1536(a) does make reference to section 1533, which is the section of the ESA that governs the selection of a species endangered or threatened. *See id.* § 1533.

⁴⁶ 623 F.2d 712 (1st Cir. 1979).

⁴⁷ *Id.* at 714. The leases were made pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-56 (2000). *Id.* at 714-15.

⁴⁸ *Id.* at 715.

⁴⁹ *Id.*

⁵⁰ *See id.* at 714.

“irreversible or irretrievable commitment of resources,” which was prohibited by the ESA.⁵¹ The appellants’ argument was based on the idea that the leases could only be cancelled in accordance with the Outer Continental Shelf Lands Act (“OCSLA”) and the standards of OCSLA were not as rigorous as those contained in the ESA.⁵² The reasoning applied by the district court, and affirmed by the First Circuit, stated that any difference that may have existed between the two statutes was taken care of by stipulations that conditioned an applicant’s rights under the lease and granted the Secretary authority to regulate post-sale.⁵³ A similar issue arose in *Defenders*, where the allegation is that the loss of section 7 protections is an indirect effect. In *Defenders*, statutory provisions outside of section 7 would require Arizona to meet certain standards.⁵⁴ These provisions also give the EPA Administrator the ability to intercede post-transfer.⁵⁵

A Fifth Circuit case, *Save the Bay, Inc. v. Administrator of the Environmental Protection Agency*, deals more directly with the permitting programs.⁵⁶ The issues in *Save the Bay* revolved around a decision by the Mississippi Air and Water Pollution Control Commission to issue a permit to DuPont for a titanium dioxide plant. The EPA acquiesced to the Commission’s decision to issue the permit, and the suit alleged that the EPA should have revoked the Commission’s authority to grant such permits.⁵⁷ The court concluded that judicial review of the EPA’s discretion fell into two narrow categories.⁵⁸ The first category is applicable when the proposed permit contains “a violation of the applicable federal guidelines that the agency failed to consider.”⁵⁹ The second category is implicated in

⁵¹ *Id.*

⁵² *Id.* at 714-15.

⁵³ *Id.* at 715.

⁵⁴ *Defenders*, 420 F.3d 946, 950 (9th Cir. 2005); *see also* 33 U.S.C. § 1342(a)(1) (2000).

⁵⁵ *See* 33 U.S.C. § 1342(b).

⁵⁶ 556 F.2d 1282 (5th Cir. 1977).

⁵⁷ *Id.* at 1284. While the case does not expressly examine the relationship between the CWA and the ESA, the court examines the CWA and its provisions regarding the permitting programs and notes that *Save the Bay* is an environmental protection group basing its claims on alleged defects in the permitting process which will negatively affect the bay. *See id.* at 1287-90.

⁵⁸ *Id.* at 1295-96.

⁵⁹ *Id.*

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cases where the agency has considered improper factors and thus “tainted the agency’s exercise of discretion.”⁶⁰ *Save the Bay* bears on the Ninth Circuit’s examination of the issues in *Defenders* because the Ninth Circuit previously adopted the two category standard announced by the Fifth Circuit.⁶¹ The Ninth Circuit has not rescinded its adoption of this standard and the court made no mention of an intention to overrule its prior decision on this issue.

The Ninth Circuit does have a line of cases which state that the EPA Administrator must transfer permitting programs to a state if the state has met the requirements of Section 1342(b).⁶² The leading case in this chain of case law, *Shell Oil Co. v. Train*,⁶³ also recognized Congress’s intent to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.”⁶⁴ The court in *Shell Oil* went on to hold that Congress’s clear intent was for the states to assume the majority of the operation of the National Pollution Discharge Elimination System (“NPDES”) programs.⁶⁵

IV. INSTANT DECISION

In the instant decision, the court examined whether the EPA’s transfer decision violated the requirements of the ESA and whether the decision was arbitrary and capricious in violation of the APA.⁶⁶ The court emphasized that each agency “has an obligation to ‘insure’ that any action it takes is ‘not likely to jeopardize’ listed species or their critical habitats,”⁶⁷ and thus had to examine the “consistency of the EPA’s

⁶⁰ *Id.* at 1296.

⁶¹ See *Methow Valley Citizens Council v. Reg’l Forester*, 833 F.2d 810, 814 (9th Cir. 1987), *overruled by* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (overruled in part on different grounds).

⁶² See *Boise Cascade Corp. v. U.S. EPA*, 942 F.2d 1427, 1430 (9th Cir. 1991); *Aminoil U.S.A., Inc., v. Cal. State Water Res. Control Bd.*, 674 F.2d 1227, 1229 (9th Cir. 1982); *Shell Oil v. Train*, 585 F.2d 408 (9th Cir. 1978).

⁶³ 585 F.2d 408 (9th Cir. 1978).

⁶⁴ *Id.* at 410.

⁶⁵ *Id.*

⁶⁶ See *Defenders*, 420 F.3d 946, 958 (9th Cir. 2005).

⁶⁷ *Id.* (citing 16 U.S.C. 1536(a)(2) (2000)). The court then outlined the test for arbitrary and capricious review stating that an agency decision will survive review if the decision

reasoning,” the legal conclusions reached in the Biological Opinion, and other information the EPA relied on in making its decision.⁶⁸

First, the court found the EPA’s analysis to be unreasonable, primarily because it relied on contradictory views of the same statutory language.⁶⁹ The court held that the propositions which formed the bases of the EPA’s actions cannot both be accurate statements of the agencies’ obligations.⁷⁰ Section 7(a)(2) of the ESA does not make a distinction between “the trigger” for the requirements that would compel an agency’s consultation and those that compel agencies to make sure their actions do not jeopardize species.⁷¹ The court held that the EPA’s transfer decision was error and remanded to the agency for a “plausible explanation of its decision, based on a single, coherent interpretation of the statute.”⁷²

Next, the court examined whether the loss of section 7 consultation should have been included in the FWS’s Biological Opinion as an indirect effect of the transfer.⁷³ As a starting point for this analysis the court indicated, “a negative impact on listed species is the likely direct or indirect effect of the agency’s action only if the agency has some control over the result.”⁷⁴ If this control aspect is absent from the equation, the requisite nexus is not present.⁷⁵ The court then adopted a test created by the United States Supreme Court in *Department of Transportation v.*

is rational, founded in relevant factors and if it is within the scope of an agency’s statutory authority. *Id.* at 959.

⁶⁸ *Id.*

⁶⁹ *Id.* at 961. The statutory language the court is referring to is the language of section 7 of the ESA.

⁷⁰ *Id.* The bases underlying the EPA’s actions were that “(1) it must, under the Endangered Species Act, consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision.” *Id.*

⁷¹ *Id.*

⁷² *Id.* at 962.

⁷³ *Id.* at 962-63.

⁷⁴ *Id.* at 962 (using the control test utilized in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004)).

⁷⁵ *See id.*

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*Public Citizen*⁷⁶ to determine the likely effects of agency action under the ESA.⁷⁷

Public Citizen involved application of the National Environmental Policy Act to a Department of Transportation regulation regarding Mexican trucks traveling on American roads under the North American Free Trade Agreement.⁷⁸ The Court in *Public Citizen* held “that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”⁷⁹ The Ninth Circuit found that the statute implicated in *Public Citizen* was sufficiently analogous to the provisions of the ESA under examination in the instant decision and applied the holding in *Public Citizen* to this case.⁸⁰

The court in *Defenders* focused on the language of section 7(a)(2), which required an agency to insure against jeopardizing listed species.⁸¹ The court determined the definition of “insure” was “to make certain.”⁸² The court held the language of section 7(a)(2) was unambiguous and conveyed a duty to federal agencies containing no exceptions.⁸³ In reaching this conclusion the court examined the legislative history of the ESA and determined that Congress intended for the ESA to create

⁷⁶ 541 U.S. 752 (2004) (The question specifically before the Court was whether NEPA required the Federal Motor Carrier Safety Administration to prepare an environmental impact statement with regard to the pollution Mexican trucks caused while on American roads.).

⁷⁷ *Defenders*, 420 F.3d at 963.

⁷⁸ *Id.* at 962.

⁷⁹ *Id.* at 963.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 963-64. The court also cites *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), to support this interpretation of the statutory language. *Id.*

⁸³ *Id.* at 964. Since the language of the statute did not provide for any exceptions that none exist and that this lack of provision that would allow for agency to escape the requirements of Section 7 creates a duty on the part of the agency to meet the requirements of Section 7. *See id.* at 964-66. The court does note that in 1978 Congress created a narrow exception in sections 7(g) and (h) by creating a process through which agencies could seek exemptions from an Endangered Species Committee. However, these exceptions do not apply because the EPA did not avail itself of the process. *Id.* at 966.

obligations on agencies when they were acting affirmatively.⁸⁴ The court also held that Congress, through the ESA, created additional obligations and authority outside of these obligations bestowed by the agency's governing statutes.⁸⁵ Additionally, the EPA's actions were considered the sort that triggered the obligation to consult and insure there are no adverse effects on listed species or their habitats.⁸⁶ Further, those obligations were not in conflict with the EPA's obligations under the CWA.⁸⁷ The court found the FWS Biological Opinion was flawed because it ignored effects that may flow from the transfer decision and therefore, the EPA erred in relying on the Biological Opinion.⁸⁸

The court noted a split of authority on the issue of whether the ESA actually confers additional authority to agencies outside the authority conveyed in the governing statutes.⁸⁹ The court briefly analyzed decisions from the First, Fifth, Eighth and D.C. Circuits and was not persuaded by the argument that the ESA does not convey additional power and authority to agencies.⁹⁰

In making the decision, the EPA relied on sources other than the Biological Opinion.⁹¹ The final issue the court examined was whether any of the other sources the EPA based its transfer decision on could save the decision.⁹² The court did not find the EPA's reliance on the Memorandum of Agreement, Arizona state law, or other legal protections for endangered species to be suitable replacements for the section 7 consultation benefits

⁸⁴ See *id.* at 966-67.

⁸⁵ See *id.*

⁸⁶ *Id.* at 967.

⁸⁷ *Id.* at 968-70.

⁸⁸ *Id.* at 971.

⁸⁹ *Id.* at 970.

⁹⁰ *Id.* (specifically pointing to perceived deficiencies in the D.C. Circuit's interpretation of section 7 in *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992)).

⁹¹ See *id.* at 978. These sources included the Memorandum of Agreement between the agencies involved, Arizona state law and other legal protections of endangered species. *Id.*

⁹² See *id.* at 978-79.

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that would be lost as a result of transfer.⁹³ The court held that the petition for review should be granted and remanded to the EPA.⁹⁴

In the dissent, Chief Judge Thompson discussed two general points: (1) the presence of precedent that the ESA does not apply to situations where an agency has no discretion over their actions; and (2) the fact that the overly expansive majority interpretation of the statutory language and circuit precedent does not support such an expansive interpretation.⁹⁵ Judge Thompson stated that the EPA was statutorily required to evaluate Arizona's application against nine exclusive specifications.⁹⁶ The statute mandates that if the Administrator of the EPA finds that the state has met the statutory requirements, he must approve the application. Therefore, the EPA did not have discretion to deny Arizona's application for transfer of the pollution permitting program.⁹⁷ Judge Thompson concluded that the petition for review should be denied since the EPA's authority over the administration of the pollution permitting program was non-discretionary.⁹⁸

V. COMMENT

The Ninth Circuit's holding in *Defenders* unduly expanded the effect of the ESA obligations Congress placed on federal agencies. In doing so, the Ninth Circuit failed to fully consider the precedent of the Ninth Circuit and that of its sister circuits. The Ninth Circuit's analysis creates an unnecessary conflict between the language of two statutes.

The case law and the intent of Congress regarding the pollution permitting programs of the National Pollution Discharge Elimination System are clear. The EPA's transfer of the pollution permitting program was not a discretionary function. Prior to making the transfer, the EPA entered into consultation with the FWS as required by section 7 of the ESA. By holding that the EPA's actions were erroneous, the Ninth Circuit effectively struck obligatory language from the CWA and supplanted it

⁹³ See *id.* at 978.

⁹⁴ *Id.* at 979.

⁹⁵ *Id.* (Thompson, J., dissenting).

⁹⁶ *Id.* at 980.

⁹⁷ *Id.*

⁹⁸ *Id.* at 981.

with an overly broad interpretation of the ESA. This decision not only infringes on a statutory “right” conveyed by Congress to the states, it fails to provide any additional protection to the endangered species caught in the middle of this controversy.

When the EPA entered into consultation it was following the requirements set forth in section 7 of the ESA. In examining the legitimacy of the EPA’s actions, the court engages in an analysis to determine if the EPA’s reasoning in seeking section 7 consultations and its subsequent transfer decision were coherent.⁹⁹ During this analysis the court states that the line of reasoning in the Biological Opinion, which the EPA followed, was faulty.¹⁰⁰ The court found the EPA’s determination that it must enter section 7 consultation and the assertion that the EPA cannot consider the effects of transfer on endangered species to be mutually exclusive.¹⁰¹ While there is some truth in this holding, because both of these contentions are born of statutes applicable to the EPA, the aforementioned determinations cannot be considered improper factors that would “taint” the decision.¹⁰² The court also ignored some of the most crucial language in the Biological Opinion. The Biological Opinion notes that the transfer does not create a substantive change in the permit program.¹⁰³ The Biological Opinion also mentions that other federal and state laws would protect any endangered species in the area.¹⁰⁴

These facts bear directly on the conclusion reached by the Biological Opinion that the transfer of the permitting program would not have an indirect effect.¹⁰⁵ While the reported opinion does not go into detail on which laws the Biological Opinion refers to, the court notes that section 9 of the ESA¹⁰⁶ was included on the list. The court makes note that FWS staff had mentioned section 9 of the ESA does not generally apply to

⁹⁹ *Id.* at 959-62 (majority opinion).

¹⁰⁰ *Id.* at 961.

¹⁰¹ *See id.*

¹⁰² *See Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1296 (5th Cir. 1977); *see also Methow Valley Citizens Council v. Reg’l Forester*, 833 F.2d 810, 814 (9th Cir. 1987).

¹⁰³ *Defenders*, 420 F.3d at 953-54.

¹⁰⁴ *Id.* at 954.

¹⁰⁵ *Id.* at 953-54.

¹⁰⁶ 16 U.S.C § 1538 (2000).

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endangered species of plants.¹⁰⁷ While the accuracy of this assertion is not addressed directly, the opinion does nothing to dispel it and the court included the information in the section of the opinion that finds the EPA's opinion and the Biological Opinion faulty. Even a cursory look at both section 9 of the ESA and Arizona law show that there are indeed significant protections built into the system such that section 7 protections are almost superfluous.¹⁰⁸ As previously noted there is also support from other circuits holding that when a discrepancy in standards is nullified by other factors it is not grounds for reversal of the agency action in question.¹⁰⁹

Section 1538 of Title 16, section 9 of the ESA, is divided into seven primary subsections.¹¹⁰ Subsection (a) expressly states what a person cannot do to an endangered species.¹¹¹ While section (a)(1) does not deal with endangered plant life, section (a)(2) expressly deals with endangered species of plants and identifies unlawful treatment of such plants.¹¹² While this fact on its own may not be indicative that endangered species are receiving additional protections, this statute, in conjunction with other federal law and the law of Arizona, create multiple layers of protection for the species.

In order to consider the transfer of the program regulating permits for pollution to the state of Arizona, Arizona must satisfy nine requirements outlined in 33 U.S.C. § 1342.¹¹³ The first of these provisions is to insure compliance with "any applicable requirements of sections 1311, 1312, 1316, 1317 and 1343."¹¹⁴ To truly appreciate the requirements of this provision, an examination of the sections listed in the statute is necessary. Section 1343 likely carries the most weight in determining the

¹⁰⁷ *Defenders*, 420 F.3d at 953-54.

¹⁰⁸ The court does briefly mention one Arizona law mentioned in the Biological Opinion, ARIZ. REV. STAT. § 3-904, and concludes that its prohibition on the taking of native plants is not a sufficient substitute for section 7 even though the Biological Opinion notes that this includes endangered and threatened species of plants. *Defenders*, 420 F.3d, at 975-76.

¹⁰⁹ See *Conservation Law Found.*, 623 F.2d 712, 715(5th Cir. 1979).

¹¹⁰ See 16 U.S.C. § 1538.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 33 U.S.C. § 1342(b).

¹¹⁴ *Id.* § 1342(b)(1)(A).

level of protection the state is required to afford the protected species. Section 1343 requires all permits to be issued in compliance with the guidelines set out in Section 1343(c).¹¹⁵ Section 1343(c) not only provides that the EPA Administrator is the party that promulgates the guidelines, it also requires the EPA Administrator to include the effects of disposal pollutants on the “wildlife, plankton, fish, shellfish, shorelines and beaches” when promulgating these guidelines.¹¹⁶ This subsection also provides the EPA Administrator leeway to consider the effects of disposal pollutants on other things in the area as the list provided in the statute is not exhaustive.¹¹⁷ This section is significant in two ways. First, it shows the level of protection a state is required to maintain and identifies that the EPA Administrator is responsible for setting the guidelines for implementing the protection. Second, the statute does not make any mention of a duty of the EPA Administrator to consult with other federal or state agencies.

Like section 1343, section 1316 imposes a duty on states to insure that their programs require the same degree of application and enforcement regarding standards of performance as the Administrator requires.¹¹⁸

The laws of Arizona insure protection, as many of Arizona’s statutes either reference, incorporate, or insure compliance with provisions of the ESA.¹¹⁹ The court’s failure to analyze the layers of protection is

¹¹⁵ 33 U.S.C. § 1343(a).

¹¹⁶ *Id.* § 1343(c)(1)(A).

¹¹⁷ *Id.*

¹¹⁸ See 33 U.S.C. § 1316(c). Section 1316(a) defines standards of performance as standards “for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, [and] a standard permitting no discharge of pollutants.” *Id.* § 1316(a).

¹¹⁹ See ARIZ. REV. STAT. § 3-903(B) (requiring that species listed category 1 species or those listed as endangered or threatened under the ESA must be included on Arizona’s highly safeguarded list.); ARIZ. REV. STAT. § 17-236(B) (requiring that the issuance of licenses for transporting sport raptors be consistent with the requirements of the ESA); and ARIZ. REV. STAT. § 49-255.01(K) (requiring that any conditions on permits concerning endangered species be limited to those required by the ESA.) (This statute is the Arizona Pollutant Discharge Elimination System Program at issue in *Defenders*).

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central in this case because it makes the limited amount of changes that occur, mainly procedural changes. As the Biological Opinion points out, this reduces the number of mechanisms available to agencies in their efforts to protect endangered species. It does not result in a substantive change in the amount of protection afforded to protected species.¹²⁰ The importance of this distinction becomes clear when it is combined with an examination of the operative language in Section 7.

Section 402.02 of the Code of Federal Regulations defines what “indirect effect” means for the purposes of Section 7 of the ESA.¹²¹ Section 402.02 provides that an indirect effect is “an effect of the agency action that occurs later in time but is reasonably certain to occur.”¹²² This language precludes the consideration of effects that are the result of conjecture. Since there has been no change in the substantive protections afforded to the species, and the transfer of the program only removed one of the available enforcement mechanisms, any effect that may occur is conjecture. Those effects are not indirect and thus not binding on the decision making process of either the EPA or the FWS. As such, the court incorrectly categorized the FWS’s Biological Opinion as flawed and the EPA was justified in relying on the Biological Opinion in making the transfer decision.

As previously noted, the Ninth Circuit’s decision in *Defenders* created a statutory conflict where one does not actually exist. Section 1342(b) mandates that the EPA Administrator transfer control of the pollution permitting system to a state upon request after a determination that the state has met all of the requirements of section 1342(b). Section 7 of the ESA requires a federal agency to consult with the FWS regarding any negative effects their actions might have on endangered species. Once the FWS issues a Biological Opinion stating that the agency action is not the source of a negative effect on endangered species, any perceived conflict between the statutes evaporates. Here, once the EPA received the FWS’s Biological Opinion, the mandatory language of Section 1342(b) required the EPA Administrator to turn control of the pollution permitting program over to the state of Arizona.

¹²⁰ *Defenders*, 420 F.3d 946, 953 (9th Cir. 2005).

¹²¹ 50 C.F.R. § 402.02 (2005).

¹²² *Id.*

The Ninth Circuit also failed to follow its own precedent and the precedent of other circuits on similar matters. While the court properly adopted the position that an agency cannot escape the section 7 requirements when it is required to act under a complimentary statute, the court failed to give proper weight to the fact that the EPA in this case is mandated by Congress to examine the state permitting programs under the nine exclusive criteria.¹²³ As previously noted, the Ninth Circuit has previously recognized that the EPA Administrator must approve the transfer of a pollution permitting program to a state unless the Administrator can determine that the state's program does not meet the requirements of section 1342(b).¹²⁴ As the Ninth Circuit's case law notes, Congress's intent in this area is clear.¹²⁵ In creating the NPDES programs Congress wanted its intent to be unmistakable and to that end Congress included its intent in unambiguous terms in section 1251(b). Section 1251(b) states that Congress intends for the states to control the NPDES programs.¹²⁶

VI. CONCLUSION

By holding that the EPA Administrator's decision to transfer the pollution permitting program for Arizona was erroneous, the Ninth Circuit overrules prior circuit precedent and expands the reach and effect of section 7 of the ESA by leaps and bounds. This decision also flies in the face of clear Congressional intent and essentially deletes the mandatory transfer requirement of section 1342(b) by holding that the loss of section 7 protections is an indirect effect of transfer.

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¹²³ 33 U.S.C. § 1342(b); *see also Defenders*, 420 F.3d at 980 (Thompson, J., dissenting).

¹²⁴ *See Boise Cascade Corp. v. U.S. EPA*, 942 F.2d 1427 (9th Cir. 1991); *Aminoil U.S.A., Inc. v. Cal. State Water Res. Control Bd.*, 674 F.2d 1227, 1229 (9th Cir. 1982); *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978).

¹²⁵ *Shell Oil*, 585 F.2d 408, 410.

¹²⁶ 33 U.S.C. § 1251(b). "It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 . . . of this Act." *Id.*