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FEDERAL AGENCY ACTION SUBJECT TO SECTION 7(A)(2) OF
THE ENDANGERED SPECIES ACT

Steven G. Davison*

I. INTRODUCTION

The recent decision, Defenders of Wildlife v. U.S. Environmental Protection Agency ("Defenders of Wildlife II")\(^1\) has renewed focus on the issue of which actions are subject to the procedural and substantive requirements of section 7(a)(2) of the Endangered Species Act ("ESA"). The 2-1 split panel of the Ninth Circuit Court of Appeals held that the United States Environmental Protection Agency’s ("EPA") transfer of authority to issue National Pollution Discharge Elimination System ("NPDES") permits under section 402\(^2\) of the Clean Water Act to the state of Arizona is a federal agency action subject to section 7(a)(2)\(^3\) of the Endangered Species Act ("ESA").\(^4\) This decision raises the issues of whether section 7(a)(2) of the ESA\(^5\) (1) applies only to actions of federal administrative agencies over which federal agencies retain "discretionary Federal involvement or control" and (2) how "discretionary Federal involvement or control" should be interpreted if the answer to the

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\(^1\) 420 F.3d 946 (9th Cir. 2005), reh'g and reh'g en banc denied, 450 F.3d 394 (9th Cir. 2006), petitions for cert. filed sub nom. EPA v. Defenders of Wildlife (No. 06-549 Oct. 23, 2006) and Nat'l Ass'n of Home Builders v. Defenders of Wildlife (No. 06-340 Sept. 6, 2006) [hereinafter Defenders of Wildlife II].


\(^3\) 16 U.S.C. § 1536(a)(2).


\(^5\) Section 7(a)(2) provides:

Each Federal agency shall, in consultation with and with the assistance of the [Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS)], insure that any action authorized, funded or carried by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or modification of habitat of such species which is determined by [the FWS or NMFS] to be critical, unless such agency has been granted an exemption for such action . . . .
preceding question is affirmative. These questions are raised not only when a federal agency is delegating permit issuing or enforcement authority to a state, but also in many varying factual situations involving actions of federal agencies under federal contracts, permits and licenses that authorize actions of private businesses, individuals and state and local governments.

This article analyzes the issue of which federal administrative agency actions are subject to the substantive and procedural requirements of section 7(a)(2) of the ESA. Part II analyzes the substantive requirements of section 7(a)(2) of the ESA, and compares section 7(a)(2)'s substantive requirements to the ESA's provisions that make it unlawful for any person to "take" any animal that is a member of a fish or wildlife species that is listed under the ESA as an endangered or threatened species. The procedural requirements of section 7(a)(2) of the ESA, that may include a biological assessment, consultation with the Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS"), a biological opinion from one of these services, and an incidental take statement from one of these services, are analyzed in Part III. Part IV's principal focus is on the issue of whether the substantive and procedural requirements of section 7(a)(2) of the ESA apply only to an action of a federal administrative agency over which the agency has "discretionary Federal involvement or control," with analysis including a focus on how "discretionary" should be interpreted for this purpose. Part IV analyzes judicial interpretation of the joint regulation that the FWS and NMFS issued under the ESA that limits the application of section 7 of the ESA to agency action for which a federal agency retains "discretionary Federal involvement or control." In part IV, this article concludes that the procedural and substantive requirements of section 7(a)(2) of the ESA should apply only to an action of a federal administrative agency for which the agency has discretion to act in manner that can protect ESA-listed species from the types of harm proscribed by section 7(a)(2) of the ESA. This approach is essentially the test used by the Ninth Circuit Court

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6 A regulation issued jointly by the FWS and NMFS limits section 7 of the ESA to federal agency "actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03 (2005). This regulation is analyzed in part IV of this article.

7 Id.
of Appeals, except for the majority in the *Defenders of Wildlife II* case, in determining whether a particular action of a federal agency is subject to the requirements of section 7(a)(2) of the ESA. Under this approach, the *Defenders of Wildlife II* decision should be reversed and the EPA should not be required to comply with the requirements of section 7(a)(2) of the ESA before transferring CWA section 402 permit-issuing authority to a state. Section 7(a)(2) of the ESA should not apply to a nondiscretionary, ministerial action of a federal agency under another statute that directs that the agency "shall" take a particular action when specified criteria and conditions are present, which do not include protection of ESA-listed species from the types of harm proscribed by section 7(a)(2) of the ESA, therefore precluding the agency from acting to protect species listed under the ESA from the types of harm proscribed by section 7(a)(2)).

## II. Section 7(a)(2) of the Endangered Species Act

Section 7(a)(2)\(^8\) of the ESA "contains *both* substantive and procedural requirements."\(^9\) Section 7(a)(2) states that each Federal agency\(^10\)

shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary [of the Interior or Commerce] . . . to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.\(^11\)

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\(^8\) 16 U.S.C. § 1536(a)(2).

\(^9\) *Defenders of Wildlife II*, 420 F.3d 946, 957 (9th Cir. 2005).

\(^10\) The term "Federal agency" is defined by section 3(7) of the ESA to mean "any department, agency or instrumentality of the United States." 16 U.S.C. § 1532(7).

\(^11\) 16 U.S.C. §1536(a). Section 7(a)(2) further provides that "each agency shall use the best scientific and commercial data available" in fulfilling the section's requirements. *Id.*
Section 7 of the ESA, as originally enacted in 1973, provided in part that "All . . . Federal . . . agencies [other than the Departments of Interior and Commerce] shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this [chapter] . . . by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical." Pub. L. No. 93-205, 87 Stat. 884 (1976) (codified at 16 U.S.C. § 1536 (1976)). Section 7 of the ESA was amended to its present form in 1979, to change the phrase "do not jeopardize" to "is not likely to jeopardize," adding the word "adverse" before the phrase "modification of habitat," and recodifying the provision as section 7(a)(2) of the ESA. Pub. L. 96-159, 93 Stat. 1225, 1226 (1979).

The Secretary of Interior's authority and responsibilities under the ESA with respect to protected terrestrial (land-based and freshwater) species has been delegated to the Fish and Wildlife Service (FWS), while the Secretary of Commerce's authority and responsibilities under the ESA with respect to marine species has been delegated to the National Marine Fisheries Service (NMFS). See Reorganization Plan Numbered 4 of 1970 and 16 U.S.C. § 1532(15).

The exemption under 16 U.S.C. § 1536(h) to which section 7(a)(2) refers is issued by the Endangered Species Committee, which was established in 1978 by the enactment of 16 U.S.C. § 1536(e). Pub. L. No. 95-632, 92 Stat. 3751 (1978). Section 7(g) of the ESA specifies the process for applying for such an exemption, and section 7(h) of the ESA specifies the standards the Committee is to apply in deciding whether to grant an exemption.

Sections 7(g) and (h) focus on practical concerns, not legal constraints on agency power to protect species. To obtain an exemption, an agency must show that "there are no reasonable and prudent alternatives to the agency action," the benefits of the action "clearly outweigh the benefits of alternative course of action consistent with conserving the species or its critical habitat, and such action is in the public interest," and the "action has regional or national significance." Thus, at the time consultation occurs, all parties must operate under the assumption that all of section 7(a)(2)'s substantive requirements apply to the agency action. The net effect of the section 7(g) and (h) exemption, then, is to leave the consultation requirement in effect as it was previously; to leave in place the kinds of "agency actions" to which the section 7(a)(2) requirement applies; but to provide a set of procedures and substantive standards for limiting in some circumstances the mandate that agencies "insure" that their actions are not likely to jeopardize listed species.

Defenders of Wildlife II, 420 F.3d at 966 (citations omitted).
In the 1978 *Snail Darter* case, a majority of the United States Supreme Court held "[t]he plain intent of Congress in enacting the [1973 Endangered Species Act] was to halt and reverse the trend toward species extinction" and that the original version of section 7(a)(2) of the ESA that was enacted in 1973, which substantively is essentially the same as the present version of section 7(a)(2), reflects "an explicit congressional decision to require [federal] agencies to afford first priority to the declared national policy of saving endangered species." The majority further stated in the *Snail Darter* decision that "[s]ection 7 . . . compels [federal] agencies not only to consider the effect of their projects on endangered species, but to take such actions as are necessary to insure that species are not extirpated as a result of federal activities." The Court also held in the *Snail Darter* decision that "[t]he pointed omission of the type of qualifying language previously included in endangered species legislation [such as the phrase "insofar as is practicable and consistent with [their] primary purposes" that was in the 1966 Endangered Species Act] reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." Consequently, a federal "agency cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute that has consistent, complementary objectives."
Section 7(a)(2) of the ESA protects listed endangered and threatened species of fish, wildlife and plants, because the ESA defines "species" to "include[] any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Section (7)(a)(2), however, only protects habitats of a species listed as endangered or threatened under the ESA when the FWS or NMFS has designated that habitat as a "critical habitat" under the ESA.

ongoing regulation of pesticides registered under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

20 16 U.S.C. § 1532(16) (2000). The ESA defines "fish or wildlife" to mean[] any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

Id. § 1532(8).

Section 7(a)(2), however, does not apply either to species that have been proposed for listing as endangered or threatened under the ESA or to habitat that has been proposed for designation as critical habitat under the ESA. However, section 7(a)(4) of the ESA requires federal agencies to confer with the relevant Service on any action which is likely to jeopardize the continued existence of any species proposed for listing or result in the destruction or modification of proposed critical habitat, but does not impose any substantive requirements or conditions upon such agency actions. 16 U.S.C. § 1536(a)(4). The Services' regulation governing these conferences is found at 50 C.F.R. § 402.10 (2005).

The ESA makes it unlawful for any "person" (which is defined by the ESA to include a Federal agent or department as well as a private individual, corporation and state and local governments and their agents and departments) to "take" any animal that either is a member of a listed endangered species of fish or wildlife, or that is a member of a listed threatened species of fish or wildlife. 16 U.S.C. §§ 1532(13) & (19); 16 U.S.C. §§ 1538(a)(1)(B)-(C); 50 C.F.R. § 17.31(a). The ESA prohibits the removal and reduction to possession of a plant, or malicious damage or destruction of a plant that is a member of an endangered and threatened species only either if the plant is growing on federal land or any other area under Federal jurisdiction or if the removal, cutting, digging up, damaging or destroying of any such species is "in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law." 16 U.S.C. § 1538(a)(2)(B).

21 The designation of critical habitat under the ESA is governed by §§ 1533(a)(3), (b)(1) & (b)(2). An area may not be excluded from a species' designated critical habitat if "the
In order for a federal agency action to violate section 7(a)(2) of the ESA by jeopardizing the continued existence of a species, the agency action must pose a threat both to the survival of the species and to the recovery of the species to the point that the species no longer needs to be listed and protected under the ESA. This conclusion follows from a joint regulation\(^2\) issued by the FWS and the NMFS under section 7 of the ESA that defines the phrase "jeopardize the continued existence of" to mean "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."\(^2\) Under this regulation, a determination under section 7(a)(2) of the ESA that an action is likely to jeopardize a species' continued existence is warranted only if both the survival and recovery of a listed species is threatened; a threat to a species' recovery alone does not warrant issuance of a "jeopardy" Biological Opinion.\(^2\) However, this regulation requires a Biological Opinion's jeopardy analysis to consider separately "whether an action may jeopardize a species by appreciably reducing the species' prospects of recovery as well as survival."\(^2\)

An agency action may, however, result in the "adverse modification" of a species' habitat in violation of section 7(a)(2) of the}\(^1\) failure to designate such area as critical habitat will result in the extinction of the species." 16 U.S.C. § 1533(b)(2). However, in deciding whether to designate a particular area to be "critical habitat" of a species listed under the ESA, the FWS and NMFS can take into account the economic impact of specifying the area to be a species' "critical habitat." \(^1\) As of October 21, 2006, critical habitat had been designated under the ESA for only 476 of the 1,074 domestic species (476 U.S. animal species and 598 U.S. plant species) listed under the ESA as endangered and threatened. U.S. FWS, http://ecos.fws.gov/tess_public/SummaryStatistics.do (last visited October 21, 2006).

\(^{22}\) 50 C.F.R. § 402.02.  
\(^{23}\) Id. This definition has been held to be valid under the ESA by Sierra Club v. U.S. Fish and Wildlife Serv., 245 F.3d 434, 443 n.61 (5th Cir. 2001) and Forest Guardians v. Veneman, 392 F. Supp. 2d 1082, 1085-86 (D. Ariz. 2005).  
\(^{24}\) Forest Guardians, 392 F. Supp. 2d at 1086-87.  
\(^{25}\) Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2005 U.S. Dist. LEXIS 16345, *56 (D. Ore. 2005). This court reasoned that "[r]ecovery must be considered separately. The likelihood that recovery and survival will occur is reduced when the likelihood of either is reduced. In smaller populations, the likelihood of survival is even more dramatically affected by the likelihood of recovery." Id. at *57.
ESA either by threatening a species' survival or by threatening a species' recovery by adversely modifying a species' designated critical habitat.²⁶ Although another joint regulation issued by the FWS and NMFS defines the term "destruction or adverse modification" to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species . . . including, but . . . not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical,"²⁷ several courts have held that this regulation violates the ESA because it does not protect critical habitat necessary for a species' recovery.²⁸ These holdings are based upon the ESA's definitions of "critical habitat" and "conservation."²⁹

The ESA defines "critical habitat" to mean "the specific areas within the geographical area occupied by the species" at the time the species is listed under the ESA "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and . . . specific areas outside the geographical area occupied by the species at the time it is listed . . . , upon a determination by the [FWS or NMFS] that such areas are essential for the conservation of the species."³⁰ The ESA defines "conservation" to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."³¹ Consequently, a listed species' designated critical habitat should include not only those areas that are necessary for the species' survival, but also those areas that are necessary for the species' recovery to a point such that the species no longer needs to be listed as either endangered or threatened under the ESA.³²

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²⁶ 50 C.F.R. § 402.02.
²⁷ Id.
²⁸ Sierra Club, 245 F.3d at 441-43, 443 n.61; Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1069-71 (9th Cir. 2004).
²⁹ Sierra Club, 245 F.3d at 441-43; Gifford Pinchot, 378 F.3d at 1069-71.
³¹ Id. § 1532(3).
³² Gifford Pinchot, 378 F.3d at 1069-70. Section 4(f) of the ESA directs the Services "to develop and implement recovery plans . . . for the conservation and survival" of each
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Courts have held that the Services' regulatory definition of "destruction or adverse modification" violates the ESA by requiring that an action adversely affect both the survival and recovery of a listed species in order for an action to be found to violate section 7(a)(2) by adversely modifying a species' designated critical habitat.33 The courts' reasoned that because this regulatory definition eliminates the ESA's recovery goal from the destruction/adverse modification inquiry, the definition violates the ESA.34 Based on the courts' holdings, section 7(a)(2) of the ESA requires federal agencies both "to determine separately whether the proposed action would destroy or adversely modify critical habitat necessary for the recovery, as well as the survival, of listed species"35 and whether the proposed action is likely to jeopardize the continued existence of the species by appreciably reducing the likelihood of either the species' survival or recovery.36

However, by its explicit terms, section 7(a)(2) of the ESA does not require any protected animal or plant to be killed, injured or otherwise be the victim of a "taking" in violation of the ESA,37 although modification of the habitat of an animal or plant that is a member of an endangered or threatened species listed under the ESA can be a "taking" in violation of the ESA only if the habitat modification kills or injures one or more species listed as endangered and threatened under the ESA, unless a Service "finds that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1).

33 Sierra Club, 245 F.3d at 441-43, 443 n.61; Gifford Pinchot, 378 F.3d at 1069. The court in Gifford Pinchot held that designated critical habitat for a listed species must include both habitat that is necessary to insure the recovery of the species and habitat necessary for the survival of the species, and that designated critical habitat under the ESA should not be limited only to the habitat necessary for survival of the species. Gifford Pinchot, 378 F.3d at 1069.

34 Gifford Pinchot, 378 F.3d at 1069; Sierra Club, 245 F.3d at 441-43, 443 n.61.


36 Id. at *57.

37 The ESA makes it unlawful for any "person" (which includes an agent or department of the Federal Government) to "take" any animal that is a member of a listed endangered species of fish or wildlife or that is a member of a listed threatened species of fish or wildlife. 16 U.S.C. § 1532(13); 16 U.S.C. § 1538(a)(1)(B)-(C); 50 C.F.R. § 17.31(a) (2005). The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).
animals that are members of a species listed under the ESA as either an endangered or threatened species.\textsuperscript{38}

A federal agency's obligation under section 7(a)(2) to "insure" that any agency action is not likely either to jeopardize a listed species' existence or to destroy or adversely modify critical habitat of a listed species requires an agency to take action to make certain these proscribed effects do not occur.\textsuperscript{39} Under section 7(a)(2), there are two critical factors triggering this obligation [:] \ldots (1) that the "action" be one for which the agency can fairly be ascribed responsibility, namely, an action "authorized, funded or carried out" by the agency; and (2) that there is the requisite nexus to an impact on listed species, namely, a direct or indirect effect "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat]."\textsuperscript{40}

Section 7(a)(2) applies to a federal agency "action" only when the "action" is the type subject to section 7(a)(2)'s terms and the action has the requisite causal connection to one of the effects proscribed by section 7(a)(2).\textsuperscript{41} "[A] negative impact on listed species is the likely direct result

\textsuperscript{38} The FWS and NMFS have issued regulations that define "harm" for purposes of the ESA's "take" prohibitions to "include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3; 50 C.F.R. § 222.102. A prohibited "take" under these regulations can occur as a result of significant modification or degradation of a protected animal's habitat even if that habitat has not been designated as "critical habitat" under the ESA, but a "take" can occur under this regulation only if the significant habitat modification or degradation actually kills or injures a protected animal. A protected animal may be "injured" within the meaning of this regulation not only by physical injury to a protected animal, but also by interference with a protected animal's breeding, feeding or sheltering. These aspects of the "harm" regulation are analyzed in Steven G. Davison, The Aftermath of Sweet Home Chapter: Modification of Wildlife Habitat as a Prohibited Taking in Violation of the Endangered Species Act, 27 WM. & MARY L. & POL'Y REV. 541 (2003).

\textsuperscript{39} Defenders of Wildlife II, 420 F.3d 946, 963-64 (9th Cir. 2005).

\textsuperscript{40} Id. at 962.

\textsuperscript{41} 50 C.F.R. § 402.02.
or indirect effect of an agency's action only if the agency has some control over that result. Otherwise the requisite nexus is absent.\textsuperscript{42} "[W]here an agency has no \textit{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."\textsuperscript{43}

"By its terms, section 7(a)(2) applies only to 'federal agencies,' not to state governmental bodies,"\textsuperscript{44} private business corporations or private persons.\textsuperscript{45} Section 7(a)(2) applies "to federal relationships with private entities only when the federal agency acts to authorize, fund, or carry out the relevant activity."\textsuperscript{46} Section 7(a)(2) only applies to an action of a state or local governmental body, private business corporation or private person that is "authorized" by a federal agency, for example, by means of a license, permit, or contract,\textsuperscript{47} or funded by a federal agency.\textsuperscript{48}

A federal agency has an obligation under section 7(a)(2) of the ESA to act to mitigate harm to a listed species if the FWS or NMFS "determines that the agency action is 'likely to jeopardize' [a] listed species or 'adversely modify' the designated critical habitat of a listed species."\textsuperscript{49} Unlike section 7(a)(1)\textsuperscript{50} of the ESA, which requires each federal agency to use existing statutory authority to promote conservation\textsuperscript{51} of

\textsuperscript{42} Defenders of Wildlife II, 420 F.3d at 962.
\textsuperscript{43} Id. at 963 (quoting Dep’t of Transp. v. Public Citizen, 541 U.S. 752, 770 (2004)).
\textsuperscript{44} Id. at 951.
\textsuperscript{45} Tex. Indep. Producers & Royalty Ass’n v. EPA, 410 F.3d 964, 979 (7th Cir. 2005) (consultation requirements of section 7(a)(2) of the ESA held not to be triggered by actions of a private person not requiring any federal action).
\textsuperscript{46} Sierra Club v. Babbitt, 65 F.3d 1502, 1508 (9th Cir. 1995).
\textsuperscript{47} Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998).
\textsuperscript{48} Id. "[W]hen a wholly private action threatens imminent harm to a listed species the appropriate safeguard is through section 9, and not section 7. The ESA’s citizen suit provision allows private plaintiffs . . . to enjoin private activities that are reasonably certain to harm protected species." Babbitt, 65 F.3d at 1512 (citations omitted).
\textsuperscript{49} Defenders of Wildlife II, 420 F.3d at 961 n.10 (quoting 50 C.F.R. § 402.14(h) (2005)).
\textsuperscript{51} Section 3(3) of the ESA defines "conservation" to mean

To use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as
listed species, section 7(a)(2) of the ESA imposes on each federal agency "an additional, do-no-harm obligation-- and reciprocal authority--applicable when the agency's own actions could cause harm to endangered [or threatened] species."52 "[T]he authority conferred on [federal] agencies [by section 7(a)(2) of the ESA] to protect listed species goes beyond that conferred by agencies' own governing statutes."53 A federal agency's obligation under section 7(a)(2) of the ESA to protect the existence of listed species and the critical habitat of listed species is not limited only to those actions that are practicable and consistent with the agency's primary purpose.54 "The 'pointed omission' of such qualifications amount[s] to an 'explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species.'"55

Federal courts have interpreted the Supreme Court's *Snail Darter* decision to mean that when there is a substantive violation of section 7(a)(2) of the ESA a court should issue an injunction without the court engaging in a traditional balancing of the equities.56 The Supreme Court in *Snail Darter* enjoined operation of the Tellico Dam, which the Court found would violate the substantive requirements of section 7(a)(2), even though construction of the dam had almost been completed, regardless of the cost and without otherwise balancing equities.57 The Court held that "Congress has spoken in the plainest of words [in section 7(a)(2) of the ESA], making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'"58 Courts have interpreted *Snail Darter* as modifying the traditional standard for issuing a

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research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

52 *Defenders of Wildlife II*, 420 F.3d at 965.
53 *Id.* at 964.
54 *Id.* at 964-65 (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 181, 181 n.26 (1978)).
55 *Id.* at 965 (quoting *Hill*, 437 U.S. at 185).
56 Sierra Club v. Marsh, 816 F.2d 1376, 1383-84 (9th Cir. 1987).
57 *Hill*, 437 U.S. at 172-73.
58 *Id.* at 194.
permanent injunction when the substantive requirements of section 7(a)(2) of the ESA are violated.\textsuperscript{59}

Generally, in order to be entitled to a permanent injunction, a plaintiff must show: (1) success on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the plaintiff will outweigh any threatened harm the injunction may do to defendant; and (4) granting the permanent injunction will not disserve the public interest. However, in cases involving the ESA, the standard is different. Specifically, the third and fourth prongs of the injunction analysis have been foreclosed by Congress.\textsuperscript{60}

Federal courts also have held that "absent 'unusual circumstances'" an injunction is the appropriate remedy for a substantial procedural violation of section 7(a)(2) of the ESA.\textsuperscript{61}

Although neither section 7(a)(2) nor any other provision of the ESA defines the term "action" for purposes of section 7(a)(2) of the ESA, a regulation adopted by the FWS and NMFS defines "action" to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas,"\textsuperscript{62} and offers as examples:

(a) actions intended to conserve listed species or their habitat;
(b) the promulgation of regulations;

\textsuperscript{60} Id. at 1284 (citations omitted). This court noted that several courts "have concluded that violations of the ESA are per se irreparable [harm]," and that "[p]resuming irreparable harm is also consistent with the language and intent of the ESA." Id. at 1287 n.6. The court also held that "jeopardizing the existence of an endangered or threatened species through destruction of suitable habitat clearly constitutes irreparable harm." Id. at 1287 (citation omitted).
\textsuperscript{61} Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985). The proper remedy for a violation of a procedural requirement of section 7(a)(2) is discussed in more detail infra in Part III(E) of this article.
\textsuperscript{62} 50 C.F.R. § 402.02 (2005).
(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
(d) actions directly or indirectly causing modifications to the land, water, or air.\textsuperscript{63}

However, section 7(a)(2) and its consultation requirements apply only to affirmative agency action; section 7(a)(2) does not apply to agency inaction or failure to act.\textsuperscript{64}

Another regulation issued by the Services provides that "[s]ection 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."\textsuperscript{65} This regulation does not

\textsuperscript{63} Id. The Forest Service’s review of a private mining entity’s Notice of Intent ("NOI") to conduct prospecting and mining operations using suction dredging in streams and rivers on national forest lands that might cause disturbance of surface resources, under rights granted by the General Mining Law of 1872, and the Forest Service’s determination that the prospecting and mining operations that are the subject of the NOI are not likely to cause a significant disturbance of surface resources, have been held not to be an agency "action" "authorizing" these private mining activities within the meaning of section 7(a)(2) of the ESA, because in such a situation the Forest Service does not “authorize” or "permit" the private mining activities that are the subject of the NOI. Karuk Tribe v. U.S. Forest Serv., 379 F. Supp. 2d 1071, 1100-02 (N.D. Cal. 2005). This holding was based upon "the fact that, pursuant to the General Mining Law and 36 C.F.R. § 228, the Forest Service may not interfere with mining that is not likely to result in a significant disturbance of surface resources.” Id. at 1093-94. However, the Forest Service’s review and approval of a private mining entity’s proposed plan of operations, for mining activities under the General Mining Law of 1872 that were the subject of an NOI and that a Forest Service District Ranger has determined will likely cause significant disturbance of surface resources, may be an agency “action” authorizing these private mining activities that is subject to section 7(a)(2) of the ESA. Id. at 1102 (dictum).

\textsuperscript{64} See W. Watersheds Project v. Matejko, 2006 U.S. App. LEXIS 27,092 (9th Cir. 2006) (Bureau of Land Management’s failure to regulate certain vested rights-of-way held by private landowners to divert water for irrigation purposes held not to constitute agency "action" subject to section 7(a)(2)'s consultation requirements).

\textsuperscript{65} 50 C.F.R. § 402.03. This regulation and the other Endangered Species Act regulations in chapter 4 of title 50 of the Code of Federal Regulations were jointly adopted by the FWS, Department of the Interior, NMFS, National Oceanic and Atmospheric Administration, and the Department of Commerce. Defenders of Wildlife II, 420 F.3d 946, 951 n.1 (9th Cir. 2005).

Jan Hasselman argues that this regulation violates section 7(a)(2) of the ESA because “Congress intended [section] 7 to apply uniformly to any action authorized, funded, or carried out by a federal agency, not just so-called ‘discretionary’ ones.” Jan
define "discretionary" and does not provide any guidance as to how the term should be interpreted for purposes of this regulation. This regulation and court decisions defining this term and applying it to varying factual situations are analyzed infra in Part IV.

For purposes of section 7(a)(2), 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. Significant examples of such agency actions include a BLM multi-year strategy for logging of timber on federal lands under its jurisdiction in several states that establishes total annual allowable timber harvests, but does not designate

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E.g., Nat'l Wildlife Fed'n v. FEMA, 345 F. Supp. 2d 1151, 1169 (W.D. Wash. 2004) (FEMA's implementation of the National Flood Insurance Program ("NFIP") held to be a federal agency action subject to the requirements of section 7(a)(2) of the ESA); Fla. Key Deer v. Stickney, 864 F. Supp. 1222 (S.D. Fla. 1994) (FEMA required to consult with FWS under section 7(a)(2) of the ESA with regard to FEMA's implementation and management of the NFIP in Monroe County, Florida, by issuing flood insurance in the county, and the effect of the Program on the continued existence of the endangered Florida key deer where the remaining habitat of this deer is located, as a result of facilitating and encouraging new development in undeveloped areas of the county), motion for permanent injunction granted, 386 F. Supp. 2d 1281 (S.D. Fla. 2005); Nat'l Wildlife Fed'n v. Brownlee, 402 F. Supp. 2d 11, 11 (D.D.C. 2005) (Corps of Engineers held to be required to comply with the consultation requirements of section 7(a)(2) of the ESA for the Corps' issuance of General Nationwide Permits ("NWPs") under section 404 of the Clean Water Act, with consultation focusing upon the cumulative impacts of the NWPs program as a whole); Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv., 397 F. Supp. 2d 1241, 1256 (D. Mont. 2005) (Forest Service's authorization, funding and use of chemical fire retardants to fight fires in national forests held to be federal agency "action" subject to the requirements of section 7(a)(2) of the ESA).
any particular areas where timber harvest will occur, and Forest Service multi-year Long Range Management Plans ("LRMPs") for particular national forests. In addition, each individual agency action, such as an individual timber sale on a particular parcel of land, must comply with the requirements of section 7(a)(2) of the ESA.

In *Snail Darter*, the Supreme Court held that the 1973 version of section 7(a)(2) of the ESA applied to Federal agency projects for which construction began prior to the enactment of the ESA in 1973. Specifically, the Supreme Court held that the ESA would be violated by closing the gates of the Tellico Dam on the Little Tennessee River and by operation of the dam because the impoundment of water in the reservoir and the dam’s operation would destroy designated critical habitat of the snail darter fish (a species listed as endangered species under the ESA) and would jeopardize the continued existence of the only known population of the snail darter species. The Court reached this holding even though the construction of the dam began in 1967 before the enactment of the ESA in 1973 and the dam's construction was approximately 70% to 80% complete at the time that the snail darter was listed as an endangered species under the ESA. The Court concluded that

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67 *See* Lane County Audubon Soc'y v. Jamison, 958 F.2d 290 (9th Cir. 1992).

68 Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994). The *Pacific Rivers Council* decision also held, as discussed *infra* notes 97-104 and accompanying text, that an LMRP is an ongoing continuing agency action throughout its duration that remains subject to the requirements of section 7(a)(2) of the ESA for the duration of the LRMP.

69 *Lane County Audubon Soc'y*, 958 F.2d at 293.

70 The 1973 version of section 7(a)(2), which is discussed *supra* note 11, was in substance essentially the same as the present version of section 7(a)(2), except that the 1973 version required federal agencies to insure that their actions “do not jeopardize” protected listed species or modify their designated critical habitat, while the present version of section 7(a)(2) requires Federal agencies to insure that any agency action “is not likely to jeopardize” a protected listed species or adversely modify their designated critical habitat.

71 Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978). At the time of this decision, the FWS and NMFA had not yet issued the regulations under 50 C.F.R. Part 402 that define “action” and other terms under section 7 of the ESA and limit section 7 of the ESA to “discretionary” federal agency action.

72 *Hill*, 437 U.S. at 165-66, 171-72.

73 *Id.* at 165.
the 1973 version of section 7(a)(2) "admits of no exception,"\textsuperscript{74} and that its "plain language" applied to the Tellico Dam project even though it was "well underway" when the ESA was enacted in 1973. The Court based this latter conclusion upon its finding that "[i]t has not been shown . . . how TVA can close the gates of the Tellico Dam without 'carrying out' an action that has been 'authorized' and 'funded' by a federal agency [] [n]or . . . how such action will 'insure' that the snail darter's habitat is not disrupted . . . and will [not] have . . . the opposite effect, namely the eradication of an endangered species."\textsuperscript{75} The majority rejected Justice Powell's argument that section 7 was limited to future prospective "actions that [a federal] agency is deciding whether to authorize, to fund or to carry out," concluding that section 7 was not limited only to prospective federal agency actions or to projects in the planning stage,\textsuperscript{76} and noting that "it is clear Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act."\textsuperscript{77} In rejecting Justice Powell's argument that the majority was retroactively applying the Endangered Species Act, the majority stated its holding

\textsuperscript{74} \textit{Id.} at 173.
\textsuperscript{75} \textit{Id.} at 173-74. Although the Endangered Species Act of 1973 contained some "hardship exemptions" from some of its provisions, none of them "would even remotely apply to the Tellico [Dam]." \textit{Id.} at 188. After the Supreme Court's \textit{Snail Darter} decision, Congress in 1978 enacted the provisions in 16 U.S.C. §§ 1536(e) and (h) that created an Endangered Species Committee that in certain circumstances can grant a federal agency an exemption from section 7(a)(2)'s requirements. This exemption is discussed \textit{supra} note 11.
\textsuperscript{76} \textit{Id.} at 173 n.18.
\textsuperscript{77} \textit{Id.} at 186. The majority specifically referred to Congressman's Dingell's reference to Air Force practice bombing, which the majority stated "obviously pinpoints a particular activity – intimately related to the national defense – which a major federal department would be obliged to alter in deference to the strictures of § 7." \textit{Id.} at 186-87. The majority also discussed the House Committee's report reference to section 7 requiring the Director of the National Park Service "to conform the practices of his agency to the need for protecting the rapidly dwindling stock of grizzly bears within Yellowstone Park . . . at least . . . by supplying them with carcasses from excess elk within the park, by curtailing the destruction of habitat by clearcutting National Forests surrounding the Park, and by preventing hunting until their numbers have recovered sufficiently to withstand these pressures." \textit{Id.} at 187 (quoting H.R. REP. NO. 93-412, at 14 (1973)).
merely gives effect to the plain words of the statute, namely, that § 7 affects all projects which remain to be authorized, funded, or carried out. Indeed, under the Act there could be no “retroactive” application since, by definition, any prior action of a federal agency which would have come under the scope of the Act must have already resulted in the destruction of an endangered species or its critical habitat. In that circumstance the species would have already been extirpated or its habitat destroyed; the Act would then have no subject matter to which it might apply.\textsuperscript{78}

The Supreme Court concluded that its interpretation was mandated by Congress’ intention that “endangered species . . . be afforded the highest of priorities” even though “this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds.”\textsuperscript{79}

The Court also found that Congress’ continued appropriations for construction of the Tellico Dam after the enactment of the ESA in 1973 did not implicitly repeal or amend the substantive requirements of the 1973 version of section 7(a)(2) of the ESA as applied to the Tellico Dam.\textsuperscript{80} The majority based this holding in part upon the doctrine that repealing legislation by implication (particularly implicit repeals by appropriation measures) is disfavored,\textsuperscript{81} and the rules of Congress that

\begin{itemize}
  \item \textsuperscript{78} Id. at 187 n.32.
  \item \textsuperscript{79} Id. at 174.
  \item \textsuperscript{80} Id. at 189-193. The Endangered Species Committee, created in 1978 when Congress enacted amendments to the ESA in response to the Supreme Court’s \textit{Snail Darter} decision, denied an exemption under 16 U.S.C. §§ 1536(e) and (h), to the Tellico Dam, but “Congress then passed a bill mandating completion of the dam.” Daniel A. Farber, Jody Freeman, Ann E. Carlson, and Roger W. Findley, \textit{CASES AND MATERIALS ON ENVIRONMENTAL LAW} 209 n.1 (7th ed. 2006). However, the operation of the Tellico Dam did not result in the extinction of the snail darter species because some members of the species successfully were transplanted to two other locations and small populations of the species also have been found in several locations downstream from the Tellico Dam. Zymunt J.B. Plater \textit{et al.}, \textit{ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY} 802 (3d ed. 2004).
  \item \textsuperscript{81} Hill, 437 U.S. at 189-91.
\end{itemize}
ENDANGERED SPECIES ACT & SECTION 7(a)(2)

prohibit appropriation measures from amending existing substantive legislation.\(^\text{82}\) The majority refused to establish "an exception to the rule against implied repealers in a circumstance where, as here, Appropriations Committees have expressly stated their 'understanding' that the earlier legislation [the ESA] would not prohibit the proposed expenditure [for the completion of the Tellico Dam]."\(^\text{83}\) The majority "would . . . be unable to find that in this case" that the ESA and the later appropriations for the Tellico Dam are irreconcilable, because "here it is entirely possible 'to regard each as effective'" because the 1977 appropriations for the Tellico Dam occurred after "TVA confidently reported to the Appropriations Committees that efforts to transplant the snail darter appeared to be successful; this surely gave those Committees some basis for the impression that there was no direct conflict between the Tellico Project and the Endangered Species Act."\(^\text{84}\)

If Snail Darter had interpreted section 7(a)(2) as either modifying or overriding any contradictory directives to a federal agency in another statute, such as the agency's enabling legislation or appropriation

\(^{82}\) Id. at 190-91. The majority also declined to find an implicit repeal of the ESA as applied to the Tellico Dam from statements by the Appropriations Committees in charge of appropriations for the Tellico Dam, because the committees had no jurisdiction over the subject of endangered species. Congress as a whole was not aware that the committees had accepted the position of the TVA that the ESA did not prevent the completion and operation of the Tellico Dam and that the TVA had reported to the Appropriations Committees that operation of the Tellico Dam would not violate section 7 of the ESA because the snail darter population had been successfully transplanted to another location, when the TVA had not in fact convinced the Department of Interior that transplantation of the snail darter population to another location would be successful. Id. at 191-93. See id. at 162-63.

\(^{83}\) Id. at 191. The majority reasoned that Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress, particularly not in the circumstances presented by this case. First, the Appropriations Committees had no jurisdiction over the subject of endangered species. Second, there is no indication that Congress as a whole was aware of TVA's position [that the continuing appropriations for Tellico Dam constituted an implied repeal of the 1973 {ESA}, at least insofar as it applied to the Tellico Dam], although the Appropriations Committees apparently agreed with [the TVA's] views.

\(^{84}\) Id. at 192.
legislation, that directs the agency to undertake a specified action such as construction or operation of a facility, the majority would have simply held that the requirements of section 7(a)(2) apply to any action a federal agency carries out, authorizes or funds under another statute, regardless of whether the other statute mandated that the agency perform the action in conformity with section 7(a)(2). This part of the opinion, addressing the issue of whether appropriations for the Tellico Dam after the enactment of section 7 amended or partially repealed that section of the ESA, suggests that section 7(a)(2) does not apply to an agency action that is mandated under another statute when compliance with section 7(a)(2)'s requirements would present an "irreconcilable conflict" with an agency's mandate under another statute to perform a ministerial duty when specified criteria or conditions are present, without taking action to protect species listed under the ESA.85

Consistent with the Snail Darter majority's statement that "§ 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act,"86 the Bureau of Reclamation ("BOR") has been held subject to the requirements of the ESA in allocations and diversions of water from a dam owned and managed by the BOR, where BOR "controls the dam" and "the United States retains overall authority over decisions on use of [the dam's] water,"87 even though the dam was constructed and began to operate well before the enactment of the ESA.88 This holding was based upon the fact that the BOR "retains authority to manage the Dam and . . . remains the owner in fee simple of the Dam."89 BOR has "responsibilities under the ESA as a federal agency . . . [and] the authority to direct Dam operations to comply with the ESA"90 "that

85 The inapplicability of section 7(a)(2) of the ESA to an action that another statute mandates an agency to undertake is discussed infra notes 194-299 and accompanying text.
86 Hill, 437 U.S. at 186. Several examples of such situations noted by the Snail Darter majority are noted supra note 77.
87 Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 1999). In 1905 the United States had appropriated all available waters rights in the river on which the dam was located, although the court did not reference this fact in support of its holdings in the case. Id. at 1209.
88 Id. at 1213.
89 Id.
90 Id.
override the water rights”91 of irrigators (who are not third party contract beneficiaries of the contract between BOR and a power company that operates and maintains the dam under the contract).92 The court stated that even though the “ESA was passed well after the agreement, the legislation still applies as long as the federal agency retains some measure of control over the activity. Therefore, when an agency, such as [BOR], decide[d] to take action, the ESA generally applies to the contract.”93 It is worth noting, however, that the allocation and diversion of water by a federal agency from a federally-owned dam under provisions of a contract in some cases may not be subject to the requirements of section 7 of the Endangered Species Act if the contract was executed prior to the enactment of the Act and does not contain a provision authorizing the federal government to modify allocations and diversions of water under the contract to comply with subsequently enacted federal legislation.94

A federal agency’s ongoing regulatory supervision of the actions and operations of a licensee or permittee can be “agency action” subject to the requirements of section 7(a)(2), including the consultation requirement, when the federal agency has continuing authority to require the permittee or licensee to act to prevent the types of harm to ESA-listed species that are proscribed by section 7(a)(2).95 Other continuing, ongoing

91 Id.
92 Id. at 1210-12.
93 Id. at 1213 (citations omitted).
94 This issue is discussed infra notes 160-168 and accompanying text.
95 Wash. Toxics Coal. v. EPA, 413 F.3d 1024 (9th Cir. 2005) (EPA’s ongoing, continuing regulatory authority over pesticides registered by EPA under FIFRA, held subject to the consultation requirements of section 7(a)(2) of the ESA because EPA retains discretion under FIFRA to alter the registration of pesticides to protect ESA-listed species); Waterwatch v. U.S. Army Corps of Eng’rs, 2000 WL 1100059, *9 (D. Ore. 2000) (Corps of Engineers retained ongoing, discretionary involvement or control within meaning of 50 C.F.R. § 402.03 over water diversions by privately-operated water pumps to protect fish and wildlife, under permits issued to a private corporation in 1971 and 1978 under the Rivers and Harbors Act, authorizing construction of the pumps and regulating the ongoing operation of these pump stations in federal navigable waters); Sierra Club v. U.S. Dep’t of Energy, 255 F. Supp. 2d 1177, 1189 (D. Colo. 2002) (Department of Energy’s discretionary control over construction and operation of a road easement on federal lands for 99 years and over mining activities to which the road connects held to be continuing agency action that is subject to the consultation requirements of section 7(a)(2) of the ESA). Although recognizing this principle, W. Watersheds Project v.
actions of a federal agency have been held subject to the requirements of section 7(a)(2) when the agency while performing the actions has authority to protect ESA-listed species from the types of harm proscribed by section 7(a) of the ESA.\textsuperscript{96} \textit{Pacific Rivers Council v. Thomas}, relying upon the \textit{Snail Darter}'s holding that section 7 of the ESA "may require agencies to alter ongoing projects."\textsuperscript{97} held that the Forest Service's Land and Resource Management Plans ("LRMP")\textsuperscript{98} for particular national

\textit{Matejko} held that the Bureau of Land Management ("BLM") did not engage in ongoing agency action that was subject to section 7(a)(2) of the ESA when BLM failed to regulate certain vested rights-of-way held by private landowners to divert water for irrigation purposes, when BLM only has authority to regulate these rights-of-way if a user substantially deviates from the location or authorized use of a vested use, because BLM retains no power under the rights-of-way to inure to the benefit of species protected under the ESA. \textit{W. Watersheds Project v. Matejko}, 2006 U.S. App. LEXIS 27092 (9th Cir. 2006).

\textsuperscript{96} \textit{Pac. Rivers Council v. Thomas}, 30 F.3d 1050, 1053-56 (9th Cir. 1994); \textit{Nat. Wildlife Fed'n v. FEMA}, 345 F. Supp. 2d 1151, 1168-74 (W.D. Wash. 2004) (FEMA's actions in implementing, monitoring, and enforcing the NFIP through the minimum eligibility criteria, the mapping of flood plains, and the Community Rating system, held to be continuing agency action subject to the consultation requirements of section 7(a)(2) of the ESA because FEMA has discretion in administering these parts of the NFIP to protect ESA-listed species from the types of harm proscribed by section 7(a)(2) of the ESA).


\textsuperscript{98} Land and Resource Management Plans "are important programmatic documents that set out guidelines for resource management" in particular national forests. \textit{Id.} at 1051. "The LRMPs are comprehensive management plans governing a multitude of individual projects. Indeed, every individual project planned in . . . national forests . . . is implemented according to the LRMPs." \textit{Id.} at 1053.

These LRMPs establish forest-wide and area-specific standards and guidelines to which all projects must adhere for up to 15 years. The LRMPs identify lands suitable for timber production and other uses, and establish an allowable sale quantity of timber and production targets and schedules for forage, road construction, and other economic commodities. The LRMPs also seek to provide adequate fish and wildlife habitat to maintain viable populations of existing native species, and "include measures for preventing the destruction or adverse modification of critical habitat for threatened and endangered species." Every resource plan, permit, contract, or any other document pertaining to the use of the forest must be consistent with the LRMP.

\textit{Id.} at 1052 (citations omitted).
forests constitute continuing agency action throughout their duration.\textsuperscript{99} Furthermore, \textit{Pacific Rivers Council} held that when a new species is listed as endangered or threatened after the adoption of an LRMP, the Forest Service is required to reinitiate consultation under section 7(a)(2) for the entire LRMP and for ongoing and new timber sales, range activities and road building projects in a national forest pursuant to an LRMP\textsuperscript{100} "because the LRMPs have an ongoing and long-lasting effect even after adoption."\textsuperscript{101} Consequently, \textit{Pacific Rivers Council} held that the Forest Service may be required to reinitiate consultation under section 7(a)(2) for an entire LRMP and for ongoing and new timber sales, range activities and road building projects in a particular national forest under an LRMP for a species that was listed as endangered or threatened under the ESA after the LRMP was adopted.\textsuperscript{102}

As discussed in Part III of this article, section 7(a)(2) ESA has procedural requirements that are designed to ensure federal agency compliance with section 7(a)(2)'s substantive requirements.\textsuperscript{103} "The ESA's procedural requirements call for a systematic determination of the effects of a federal project [or other action] on endangered [and threatened] species. If a project [or other action] is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible."\textsuperscript{104}

\textsuperscript{99}\textit{Id.} at 1053-56.

\textsuperscript{100}\textit{Id.} at 1051-52, 1056 n.12.

\textsuperscript{101}\textit{Id.} at 1053. The court in this case rejected the Forest Service's arguments that LRMPs "are agency actions only at the time they are adopted, revised, or amended," and that "only the specific activities authorized by the LRMPs are agency actions within the meaning of the ESA" by stating "that forest management plans can be actions even after their implementation." \textit{Id.} at 1055.

\textsuperscript{102}\textit{Id.} at 1056.

\textsuperscript{103}Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985).

\textsuperscript{104}\textit{Id.} at 764.
III. PROCEDURAL REQUIREMENTS OF SECTION 7 OF THE ENDANGERED SPECIES ACT

Section 7 ESA has a number of procedural requirements with which a federal agency must comply, which seek to prevent substantive violations of section 7(a)(2). These procedural requirements include, in the sequential order in which they occur for a particular federal agency "action," an inquiry, a biological assessment, consultation, and a biological opinion.

Section 7(a)(2) makes no legal distinction between the trigger for its requirement that agencies consult with FWS and the trigger for its requirement that agencies shape their actions so as not to jeopardize endangered [and threatened] species. . . . An agency's obligation to consult is . . . in aid of its obligation to shape its own actions so as not to jeopardize listed species, not independent of it. Both the consultation obligation and the obligation to "insure" against jeopardizing listed species are triggered by "any action authorized, funded, or carried out by such agency," and both apply if such an "action" is under consideration.

A. Inquiry and Biological Assessment

A federal agency proposing to take an "action" subject to section 7(a)(2) of the ESA first may be required to inquire of the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) whether any members of any species listed under the ESA as threatened or endangered "may be present" in the area of the proposed action. Section 7(c)(1) requires each federal agency, "with respect to any [proposed] . . . action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978," to request the FWS and NMFS to provide the requesting agency with information as to "whether any species which is listed, or proposed to be

105 Defenders of Wildlife II, 420 F.3d 946, 961 (9th Cir. 2005).
listed, [as endangered or threatened under the ESA] may be present in the area of such proposed action."

If the FWS or NMFS, on the basis of the best scientific and commercial data available, advises the requesting agency that members of any species listed as threatened or endangered may be present in the action area or that any designated critical habitat of an ESA-listed species may be present in the action area, 50 C.F.R. § 402.12(b) requires the action agency to prepare a biological assessment for the action if it is a "major construction activity" when the contract had not been entered into and construction had not begun prior to November 10, 1978. A biological assessment is required to "evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action . . . ."  

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107 50 C.F.R. § 402.12(b) (2005). "Major construction activity" is defined as "a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment" as referred to in [section 102(2)(C) of] the National Environmental Policy Act."  
108 50 C.F.R. § 402.12(a). A biological assessment may be part of an environmental impact statement or environmental assessment under NEPA. Thomas, 753 F.2d at 763.

Section 7(c)(1) of the ESA further provides that

Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action.

16 U.S.C. § 1536(c)(1). "Any person who may wish to apply for an exemption under [16 U.S.C. § 1536(g)] for that action may conduct a biological assessment to identify any endangered or threatened species which is likely to be affected by such action," but "[a]ny such biological assessment must . . . be conducted in cooperation with the [FWS or NMFS] and under the supervision of the appropriate Federal agency."  

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B. Consultation

If a federal agency determines, on the basis of a biological assessment or otherwise, that a proposed action of the agency “may affect” a species listed under the ESA as endangered or threatened or designated critical habitat of an ESA-listed species, the agency [referred to as the Federal action agency] must formally consult with the relevant service, FWS or NMFS, to obtain the Service's opinion as to how the proposed agency action will affect the species or its critical habitat. Although the

109 50 C.F.R. § 402.14(a). Formal consultations are governed by Services regulations at 50 C.F.R. § 402.14. Pursuant to 50 C.F.R. § 402.04, the Services have adopted counterpart regulations for Fire Plan Projects under the National Fire Plan, and for EPA actions in regulating pesticides under the FIFRA. 50 C.F.R. §§ 402.40-.48. Portions of the FIFRA counterpart regulations have been invalidated on the grounds that they fail to comply with the consultation and “is not likely to jeopardize” requirements of section 7(a)(2) of the ESA. Wash. Toxics Coal. v. U.S. Dep't. of Interior, No. C04-1998C, 2006 U.S. Dist. LEXIS 60138, *53, *79, *84, *92, *94-95, *102-103 (W.D. Wash. 2006). The Services' promulgation of the FIFRA counterpart regulations also has been held to be an “agency action” that is subject to the requirements of section 7(a)(2) of the ESA. Id. at *58. These counterpart regulations supercede the Services' consultation procedures in 50 C.F.R. § 402.14. 50 C.F.R. § 402.04. A Services' regulation also provides for “expedited consultation in emergency situations.” See Strahan v. Linnon, 967 F. Supp. 581, 623 (D. Mass. 1995), aff'd per curiam, 187 F.3d 623 (1st Cir. 1998) (designated as not for publication); 50 C.F.R. § 402.05. The Services’ regulation also provides:

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be effected by the identified action.

50 C.F.R. § 402.16.

Reinitiation of the consultation that occurred when the FWS issued an Incidental Take Permit under section 10 of the ESA, authorizing specified incidental takes of
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FWS or NMFS will, in an appropriate situation, request the federal action agency to engage in consultation with it under section 7(a)(2), the FWS and NMFS “lack[] the authority to require the initiation of consultation. The determination of possible effects is the Federal action agency's responsibility.”\(^{110}\) “Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.”\(^{111}\)

A ‘may affect’ determination does not provide statutory authority to regulate . . . private activity. To the contrary, a ‘may affect’ finding is only a preliminary step in a procedural process that is designed to identify federal actions that in fact are likely to jeopardize the continued existence of a protected species [or adversely modify designated critical habitat of a protected species], and to offer reasonable and prudent alternatives to a federal activity that is determined to violate section 7[(a)(2)]’s substantive prohibition . . . .\(^{112}\)

However, no formal consultation is required if, either as a result of the preparation of a biological assessment or informal consultation with the relevant Service under 50 C.F.R. § 402.13,\(^{113}\) the action agency members of a particular listed species, is not required when a new species that was listed subsequent to the issuance of the ITP may be affected by the permittee’s activities authorized by the ITP, when the ITP does not authorize the FWS to amend the ITP to require the permittee to undertake additional measures to protect a newly listed species. Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001).

Reinitiation of consultation requires the relevant Service to issue a new Biological Opinion before the agency may continue with its action. Id. at 1076.

\(^{110}\) Defenders of Wildlife v. Flowers, 414 F.3d 1066, 1070 (9th Cir. 2005).
\(^{112}\) Sierra Club v. Babbitt, 65 F.3d 1502, 1509 n.10 (9th Cir. 1995) (citations omitted).
\(^{113}\) Informal consultation under this section “is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required.” 50 C.F.R. § 402.13(a).
determines, with the written concurrence of the relevant Service, that the proposed agency action “is not likely to adversely affect” a protected listed species or its designated critical habitat.114 Such formal consultation therefore is excused only when “(1) an action agency determines that its action is unlikely to . . . affect the protected species or critical habitat and (2) the relevant Service (FWS or NMFS) conurs with that determination.”115

If no such concurrence is reached between the agency and the relevant Service, the agency must undertake formal consultation with the relevant Service if the agency determines that its action may affect a listed species or designated critical habitat of a listed species.116 An agency cannot avoid its duty to consult under section 7(a)(2) simply by determining on its own, without performing a biological assessment, that its action in question will have no effect on any endangered or threatened species.117 However, if an agency concludes from its studies that the risk of harm to a listed species or critical habitat from an agency action is “remote, and indeed, the calculated risk is infinitesimal,” it is not arbitrary and capricious for the agency to conclude, without performing a biological assessment, that it is not required to consult about the agency action with one of the Services under section 7(a)(2).118

Section 7(d) of the ESA provides that after the initiation of required consultation under section 7(a)(2), the federal agency and the permit or license applicant (if any) “shall not make any irreversible or
irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate section 7(a)(2)." The ESA also prohibits a federal agency from making any "irreversible and irretrievable commitment of resources" before it initiates formal consultation. Section 7(d)'s restriction "continues until [an] agency conforms its [action] to the requirements of section 7(a)(2)" of the ESA.

Section 7(d) does not amend section 7(a) to read that a comprehensive biological opinion is not required before the initiation of agency biological action so long as there is no irreversible or irretrievable commitment of resources. Rather, section 7(d) clarifies the requirements of section 7(a), ensuring that the status quo will be maintained during the consultation process. Section 7(d) is not an independent authorization for "incremental-step" consultation.

As a result, a court may order the rescission of contracts entered into by a federal agency in violation of section 7(d) of the ESA prior to completing the formal consultation process.

C. Biological Opinion

After the formal consultation is completed, section 7(b) requires the relevant Service (FWS or NMFS) to issue a Biological Opinion evaluating the nature and extent of the effects of the proposed action of the

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119 16 U.S.C. § 1536(d) (2000). "This provision does not apply to the conference requirement for proposed species or proposed critical habitat under section 7(a)(4) of the Act." 50 C.F.R. § 402.09.
120 Houston, 146 F.3d at 1128 n.6.
121 Sierra Club v. Marsh, 816 F.2d 1376, 1389 (9th Cir. 1987).
122 Conner v. Burford, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988) (citations omitted).
123 Houston, 146 F.3d at 1128.
federal agency and the cumulative effects\textsuperscript{125} the action will have on listed endangered or threatened species protected by the ESA and on critical habitat of such species, and to provide the relevant "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."\textsuperscript{126} A Biological Opinions requires evaluation of the "effects of the action" that are "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline."\textsuperscript{127}

"Indirect effects" are defined by the Services' regulations as "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur."\textsuperscript{128} Consequently, a Biological Opinion "should address both the jeopardy and critical habitat prongs of Section 7[(a)(2)] by considering the current status of the species, the environmental baseline, the effects of the proposed action, and the cumulative effects of the proposed action."\textsuperscript{129} "[B]ecause the ESA requires the biological opinion to analyze the effect of the entire agency action,"\textsuperscript{130} a Biological Opinion for an oil and gas lease for federal public lands must

\textsuperscript{125} A Services regulation defines "cumulative effects" as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02. "Action area" is defined to mean "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." \textit{Id.}

\textsuperscript{126} 50 C.F.R. § 402.14(h).

\textsuperscript{127} \textit{Id.} § 402.02. "Interrelated actions" are "those that are part of a larger action and depend on the larger action for their justification" and "interdependent actions" are "those that have no independent utility apart from the action under consideration." \textit{Id.}

The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

\textit{Id.}

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1063 (9th Cir. 2004).

\textsuperscript{130} Conner v. Burford, 848 F.2d 1441, 1453 (9th Cir. 1988) (emphasis omitted).
comprehensively analyze the impact of post-leasing activities (exploration, production and development) when Congress has not statutorily segmented each of these activities into separate stages, even though there will be Biological Opinions for each of these subsequent post-leasing activities before they are authorized by the federal agency selling the lease.  

If the Biological Opinion concludes the proposed action is likely to violate section 7(a)(2), which can occur if the action either is likely to jeopardize the continued existence of a proposed species or destroy or adversely modify designated critical habitat of such a protected species by threatening critical habitat that is necessary either for a species’ survival or a species’ recovery, the requesting agency either must modify its proposal so that a substantive violation of section 7(a)(2) will not occur or obtain a section 7(h) exemption from section 7(a)(2).

If the relevant Service issuing the Biological Opinion finds that such jeopardy or critical habitat destruction or adverse modification will occur, the relevant Service is required to suggest to the requesting Federal agency “those reasonable and prudent alternatives” which the Service believes the federal agency or

131 Id. at 1453, 1454-58; North Slope Borough v. Andrus, 642 F.2d 589, 609 (D.C. Cir. 1980) (“agency action” for an oil and gas lease sale under the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. §§ 1331 et seq., is “the lease sale and all subsequent activities, but satisfaction of the ESA mandate that no endangered [species] life be jeopardized must be measured in view of the full contingent of OCSLA checks and balances and all mitigating measures adopted in pursuance thereof.”). The lack of knowledge as to the precise location and extent of future oil and gas exploration, production and development activities within the leased lands does not excuse an agency’s failure to prepare such a comprehensive biological opinion, which should identify particular areas where oil and gas activities would be incompatible with the continued existence and conservation of protected species. Conner, 848 F.2d at 1454.

One court has held, however, that because Congress, under OCSLA, has statutorily segmented the oil and gas activities under an OCSLA into three stages (lease sales, exploration, and development and production), the Biological Opinions for the lease stage can be limited to the effects of just the lease and exploration stages of an OCSLA lease. Village of False Pass v. Clark, 733 F.2d 605, 609-12 (9th Cir. 1984).


133 Id. at *36.
permit or license applicant can take and which would not violate section 7(a)(2).\textsuperscript{134}

Although the relevant Service cannot veto a proposed agency action that it believes will violate section 7(a)(2),\textsuperscript{135} a Biological Opinion "typically [has] a 'virtually determinative effect' on the ultimate agency action,"\textsuperscript{136} and "in reality . . . has a powerful coercive effect on the action agency' with the potential to 'alter[] the legal regime to which the agency action is subject.'"\textsuperscript{137}

A Biological Opinion often is accompanied by an Incidental Take Statement issued under section 7(b)(4).\textsuperscript{138}

\textbf{D. Incidental Take Statement}

Under section 7(b)(4), the relevant Service is required to issue to the requesting federal agency and the permit or license applicant, if any, an Incidental Take Statement that will make any take of a protected species, that is incidental to the agency action and that is in compliance with the terms and conditions specified in the written statement, lawful under the ESA.\textsuperscript{139} An Incidental Taking Statement must be issued if the relevant Service determines:

\begin{itemize}
  \item \textsuperscript{134} 16 U.S.C. § 1536(b)(3)(A) (2000).
  \item \textsuperscript{135} Nat’l Wildlife Fed’n v. Coleman, 529 F.2d 359, 371 (5th Cir. 1976); Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987).
  \item \textsuperscript{136} Defenders of Wildlife II, 420 F.3d 946, 955 (9th Cir. 2005) (quoting Bennett v. Spear, 520 U.S. 154, 170 (1997)).
  \item \textsuperscript{137} Id. (quoting Bennett, 520 U.S. at 169).
  \item \textsuperscript{138} 16 U.S.C. § 1536(b)(4). An Incidental Take Statement does not have to be issued whenever a Biological Opinion is issued because “an Incidental Take Statement must be predicated on a finding of an incidental take” by a federal agency action subject to section 7(a)(2) of the ESA. Arizona Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv., 273 F.3d 1233, 1242 (9th Cir. 2001).
  \item \textsuperscript{139} "[A]bsent rare circumstances such as those involving migratory species, it is arbitrary and capricious [for the Fish and Wildlife Service] to issue an Incidental Take Statement when the . . . Service has no rational basis to conclude that a take will occur incident to the otherwise lawful activity." Arizona Cattle Growers’ Ass’n, 273 F.3d at 1242. The definition of “take” and “taking” in sections 7 and 9 of the ESA “are identical in meaning and application.” Id. at 1237.
\end{itemize}
(1) the agency action will not violate [section 7(a)(2)], or offers reasonable and prudent alternatives which the [Service] believes would not violate such [provision]; (2) the taking of an endangered [or threatened] species incidental to the agency action will not violate [section 7(a)(2)]; and (3) if an endangered[] or threatened species of a marine mammal is involved, the taking is authorized pursuant to [16 U.S.C. § 1371(a)(5)].140

The Incidental Taking Statement must specify: “(1) those reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize [the] impact[s]” of such incidental takings, (2) the measures necessary to comply with 16 U.S.C. § 1371(a)(5) in the case of marine mammals, and (3) “the terms and conditions . . . that must be complied with by the Federal agency or [permit or license] applicant (if any), or both, to implement [such] measures . . .”141

E. Remedy When ESA’s Procedural Requirements Are Violated

“Procedural violations [of section 7] of the ESA are not necessarily mooted by a finding . . . that a substantive violation of the ESA ha[s] not occurred.”142 A court, in the absence of “unusual circumstances,”143 will issue an injunction to halt an agency action when there is a substantial procedural violation of the ESA (such as failure to perform a biological assessment, failure to engage in consultation, or preparation of an inadequate Biological Opinion).144 A court also may order the rescission

140 Id.
141 Id.
142 Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1128 (9th Cir. 1998).
143 Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985).
144 Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988) (failure to prepare adequate Biological Opinion); Sierra Club v. Marsh, 816 F.2d 1376, 1389 (9th Cir. 1987) (failure to consult); Thomas, 753 F.2d at 764 (failure to prepare biological assessment). Another panel of the 9th Circuit recently stated that “[t]he remedy for a substantial procedural violation of the ESA – a violation that is not technical or de minimis – must . . . be an injunction of the project pending compliance with the ESA,” but that a court, however, may allow “non-jeopardizing agency actions to continue during the consultation process . . . [with] the burden . . . on the agency [to show that the action
of a contract that was entered into by a federal agency in substantial procedural violation of section 7 of the ESA.  

IV. DISCRETIONARY FEDERAL AGENCY ACTIONS SUBJECT TO § 7(a)(2) OF THE ESA

Although 50 C.F.R. § 402.03 (issued jointly by the FWS and the NMFS) states that “[s]ection 7 [of the ESA] and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control,” section 7(a)(2) only refers to an “action authorized, funded, or carried out” by a federal agency and has no reference to “discretionary involvement or control.” This regulation does not define the term “discretionary,” however.

One court has concluded that because the reference in section 7(a)(2) to an action “authorized, funded, or carried out” by a federal agency “is the only possible source for the regulation's ‘discretionary' qualification of ‘all actions,'” the regulation's phrase “actions in which there is discretionary Federal involvement or control” should be interpreted “to be coterminous with the statutory phrase limiting section 7(a)(2)'s application to those [actions] ‘authorized, funded or carried out’ by a federal agency.”

The term “discretionary” also should be interpreted to include a requirement that an action for which an agency has responsibility (an action “authorized, funded or carried out” by the agency) must have the requisite causal connection to the specified impact on a protected species (a direct or indirect effect “likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical habitat].”) “[W]here an agency has no

is non-jeopardizing].” Wash. Toxics Coal. v. EPA, 413 F.3d 1024, 1034, 1035 (9th Cir. 2006) (citations omitted).

145 Houston, 146 F.3d at 1129.

146 50 C.F.R. § 402.03 (2005).


148 Defenders of Wildlife II, 420 F.3d 946, 967 (9th Cir. 2005).

149 Id. at 967, 969.

150 Section 7(a)(2)'s requirement for a requisite causal nexus between an agency action and a prohibited impact on a protected species is discussed supra notes 41-43.
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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,”151 and the agency actions therefore should not be considered “discretionary” actions subject to the requirements of section 7(a)(2). Although the source of an agency’s “discretionary involvement or control” may be in the agency’s enabling statute that give the agency discretionary power to implement measures that inure to the benefit of the protected listed species in question in taking the action at issue,152 such “an environmental purpose need not be expressed in the enabling statute to trigger Section 7(a)(2) of the ESA; . . . a stated environmental purpose is not necessary if the action agency otherwise has discretion to act in such a way that could benefit the endangered and threatened species.”153

151 Defenders of Wildlife II, 420 F.3d at 963 (quoting Dep’t. of Transp. v. Public Citizen, 541 U.S. 752, 770 (2004)).
153 Id. The court added:

Indeed, most federal agency actions would not be subject to the formal consultation process under Section 7(a)(2) if the ESA only applied to agency actions where the agency was already compelled by statute to protect listed species. Furthermore, a narrow interpretation of the term “agency action” that only applies Section 7(a)(2) to actions carried out under environmental statutes would conflict with the broad reading of the term given by the United States Supreme Court and the Ninth Circuit.

Id. Under this approach, the court in National Wildlife Federation held that FEMA has the discretion under the NFIP, in mapping floodplains, in developing and promulgating minimum eligibility criteria, and in implementing the Community Rating System, to act for the benefit of the Puget Sound Chinook salmon (which is listed under the ESA as a threatened species), except with regard to FEMA’s actual sale of flood insurance (which “FEMA has no discretion to deny to a person in a NFIP-eligible community”). Id. at 1173-74. The court therefore held that FEMA had a duty under section 7(a)(2) of the ESA to consult with the NMFS on the impacts of the NFIP on the Puget Sound chinook salmon. Id. at 1173. In Florida Key Deer v. Brown, the court agreed that “FEMA has sufficient discretion within the framework of the NFIP to implement the NFIP in a manner consistent with the requirements of the ESA.” Fla. Key Deer v. Brown, 386 F. Supp. 2d 1281, 1291 (S.D. Fla. 2005).

Another court held that the “advisory activity” of the FWS in providing advice to a private timber company as to how the company would have to act, in cutting and removing dead, dying and decayed trees on the company’s private lands, to avoid
The regulatory history of § 402.03 demonstrates a consistent intention that section 7 applies when some meaningful discretionary control or involvement is retained by an action agency. NOAA and the FWS promulgated the final regulation § 402.03 in 1978 after resolution of concerns about issues of retroactivity. They stated the position that “as long as some Federal discretionary control or involvement remained that could avoid jeopardizing the listed species or adversely modifying or destroying its critical habitat, the degree of completion of a project was irrelevant.” In 1983, there were minor alterations to § 402.03 not dealing with “discretion.” In the final regulation published in 1986, § 402.03 was modified to include the word “discretionary”: “Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.” The commentary says only that the provision, “which explains the applicability of section 7, implicitly covers Federal activities within the territorial jurisdiction of the United States and upon the high seas as a result of the definition of action’ in § 402.02.” There was no comment about the added term “discretionary.”

Consequently, when a federal agency’s operation of a facility (such as a dam) includes both nondiscretionary and discretionary elements, operation of the facility is not insulated from required compliance with section 7(a)(2) because of the nondiscretionary aspects of the agency action, and consultation and the Biological Opinion under section 7(a)(2) therefore must analyze the entire effects of operation of the facility.

committing a prohibited “take” in violation of the ESA, was not an action involving “discretionary involvement or control” that was subject to the requirements of section 7(a)(2) of the ESA. Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1074-75 (9th Cir. 1996).


155 Id. at *25-*39. Another court similarly held the Corps of Engineers’ operation of the Missouri River main stem reservoir system is subject to the requirements of section
One federal district court has concluded that the preamble to the Services section 7 regulations, which states that "[t]his section, which explains the applicability of [S]ection 7, implicitly covers Federal activities within the territorial jurisdiction of the United States and upon the high seas as a result of the definition of 'action' in § 402.02,"156 "indicates that the language on 'discretionary Federal involvement or control' contained in 50 C.F.R. § 402.03 pertains to geographical limitations, rather than discretion to administer the federal activity."157

Another court, however, has criticized this interpretation of "discretionary," stating that "[f]ar from supporting the . . . court's understanding of the definition of 'discretionary,' this excerpt from the Preamble, on its face, indicates that it is the term 'action' that is geographically limited, not the term 'discretionary.'"158 This court further stated:

In addition, the discussion of the amended regulations in the Final Rule appears to assume that the "action" involved is discretionary because it repeatedly uses the phrase "proposed action" interchangeably with the term "action." This is understandable given that the purpose of the consultation process is to inform the federal agency of the consequences of its actions. In particular, the agency should be told of "reasonable and prudent alternatives" that "can

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7(a)(2) of the ESA, "because compliance with the ESA does not prevent the Corps from meeting its statutory duty under the [Flood Control Act of 1944] to support downstream navigation." In re Operation of the Mo. River Sys. Litig., 421 F.3d 618, 631 (8th Cir. 2005). The court added that "the FCA does not mandate a particular level of river flow or length of navigation season, but rather allows the Corps to decide how best to support the primary interest of navigation in balance with other interests." Id. However, the court noted that "if future circumstances should arise in which ESA compliance would force the Corps to abandon the dominant FCA purposes of flood control or downstream navigation, the ESA would not apply." Id. at 631 n.9.


be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction” and would “avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.” If the federal agency has no discretion to modify the activity at issue to accommodate the mandate of the ESA, then the consultation process would be pointless.  

A. Federal Agency Action Under a Federal Contract

In an approach that follows this latter court’s approach and section 7(a)(2)’s implicit requirement that an agency action must have a requisite causal connection to the impacts proscribed by section 7(a)(2), federal courts have held that in certain circumstances section 7(a)(2) can apply to a federal agency action occurring after the enactment of the ESA that is undertaken pursuant to a contract that was executed prior to the enactment of the ESA. In order for this to be the case, the federal agency action pursuant to a provision of a contract (entered into by the United States or the federal agency prior to the enactment of the ESA) must allow the agency to take actions under the contract in a manner that can protect members of a listed species from the types of harm prohibited by section 7(a)(2). In order for this principle to apply, a pre-ESA contract does not have to explicitly reserve to the United States the power to modify its duties under the contract to comply with duties under subsequently enacted federal statutes because the doctrine of unmistakable terms provides that a contract to which the federal government is a party remains subject to the requirements of a subsequently enacted federal statute unless

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159 Id. at 620-21 (citations omitted) (quoting 50 C.F.R. § 402.01 (2005)).
160 See O’Neill v. United States, 50 F.3d 677 (9th Cir. 1995); Natural Res. Def. Council v. Houston, 146 F.3d 1118 (9th Cir. 1998); Klamath Water Users Protective Ass’n v. Patterson, 204 F.3d 1206 (9th Cir. 2000); Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003), vacated as moot, 355 F.3d 1215 (10th Cir. 2004). The Klamath Water Users decision is discussed supra notes 87-93 and accompanying text.
161 Id.
the contract expressly provides in unmistakable terms that subsequently-enacted statutes will not affect it.162

Under these principles, the Bureau of Reclamation ("BOR") has been held to have the discretion, under long-term contracts to supply water from federal government reclamation dams and reservoirs which were executed prior to the enactment of section 7(a)(2), to make annual allocations of water and to divert water to protect fish and wildlife to the extent necessary to comply with section 7(a)(2) of the ESA.163 Such discretion was held to be available under a provision in the contracts that provides that the United States is not liable for any damage, direct or indirect, arising from a shortage of delivered water on account of errors in operation, drought, or other causes, because this provision gives the BOR the authority to allocate and divert water to protect fish and wildlife to the extent necessary to comply with section 7(a)(2) of the ESA.164 The BOR

162 O'Neill, 50 F.3d at 686; Rio Grande Silvery Minnow, 333 F.3d at 1139 (Seymour, J., concurring).
163 Rio Grande Silvery Minnow, 333 F.3d at 1113-14, 1130-31, 1138, 1139, 1141; O'Neill, 50 F.3d at 677.
164 O'Neill, 50 F.3d at 677; Rio Grande Silvery Minnow, 333 F.3d at 1109. O'Neill held "that the contract's liability limitation is unambiguous and that an unavailability of water resulting from the mandates of valid legislation constitutes a shortage by reason of 'any other causes.'" O'Neill, 50 F.3d at 684. The majority in Rio Grande Silvery Minnow followed the holding in O'Neill and held that several clauses in the contracts, including the limitation of liability clause and another clause that authorized the federal government to provide water for fish and wildlife as a beneficial use, establish that the Federal Bureau of Reclamation ("BOR") "retained the discretion [under the contracts] to determine the 'available water' from which allocations would be made, allotments which, in times of scarcity, might be altered for 'other causes,' the prevention of jeopardy to an endangered species." Rio Grande Silvery Minnow, 333 F.3d at 1129. The majority in Rio Grande Silvery Minnow held that the fact "[t]hat BOR neither owns nor holds rights to native waters . . . is not determinative of BOR's obligation to consult with FWS and comply with the ESA. BOR's retaining authority to manage [water diversion and storage] works triggers its ESA obligations." Id. at 1136 (citing Klamath Water Users, 204 F.3d at 1213). Judge Kelly dissented in Rio Grande Silvery Minnow, arguing that the BOR did not have discretion under the pre-ESA water supply contracts to reduce deliveries of available water in order to comply with section 7(a)(2) of the ESA. Id. at 1142-1153 (Kelly, J., dissenting).

In the O'Neill and Rio Grande Silvery Minnow cases, the federal agency actions that were subject to section 7(a)(2) of the ESA were the BOR's annual allocations and deliveries of water under the contracts subsequent to the enactment of the ESA, not the
also has discretion to include a provision in a new water supply contract that requires allocation and diversion of water to fish and wildlife to the extent necessary to comply with section 7(a)(2) when the new contract is a renewal of a pre-ESA long term water supply contract that contains a provision stating that renewal of the contract shall be under stated terms and conditions mutually agreed upon by the parties.165

That said, because Congress did not intend to apply section 7 retroactively, section 7(a)(2) does not apply to federal agency action under a contract with a private party that was entered into prior to the effective date of section 7(a)(2) and under which the federal agency does not retain any authority, after the effective date of section 7(a)(2), to act under the contract to protect members of a listed species or designated critical habitat of a listed species from the types of harm proscribed by section 7(a)(2).166 In such a situation, the actions of the private party that

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165 Natural Res. Def. Council v. Houston, 146 F.3d 1118 (9th Cir. 1998). The court in Houston based this holding upon its conclusion that the BOR had discretion “to reduce the amount of water available for sale [under the renewal contract] if necessary to comply with the ESA.” Id. at 1126. Okanogan County v. Nat’l Marine Fisheries Serv. similarly held that the Forest Service’s renewal and modification of a contract (a special use permit conveying a right-of-way for a ditch on federal land) “(as expressly anticipated by the terms of the previous contract) qualifies as an ‘action’ that triggers [ESA] section 7 review. With the expiration of the prior permit, the Forest Service begins anew to negotiate the renewal permit, and is not bound by any language of the prior permit.” Okanogan County v. Nat’l Marine Fisheries Serv., 2002 U.S. Dist. LEXIS 13,625, *17-18 (E.D. Wash. 2002).

166 Sierra Club v. Babbitt, 65 F.3d 1502, 1511-12 (9th Cir. 1995). Thus, the federal agency may not modify a private project or action undertaken pursuant to the contract by the other private party to the contract in order to prevent the types of harm proscribed by section 7(a)(2) of the ESA. Id. Envtl. Prot. Info. Ctr. v. Simpson Timber Co. similarly held that the FWS was not required to reinitiate consultation with itself under section 7(a)(2) of the ESA about the effect that an ESA incidental take permit for the northern spotted owl might have on two other species that were listed as threatened under the ESA after the permit was issued, when neither the permit nor the accompanying habitat conservation plan and implementation agreement authorized the FWS to modify the permit to require the permittee to take steps that would benefit the two newly-listed species. Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1080 (9th Cir. 2001).
jeopardize a protected species or its critical habitat should be considered to have been caused by the original contract that pre-dates the enactment of the ESA, not by any action of a federal agency pursuant to that contract after the enactment of the ESA that could not have prevented the harm to the protected species or its critical habitat.167 Furthermore, when a federal contract does not give a federal agency discretionary involvement or control to protect ESA-listed species and their designated critical habitat from the types of harm proscribed by section 7(a)(2), the ESA does not give the federal agency "continuing discretion to amend [the contract] at any time to address the needs of endangered or threatened species."168

In Sierra Club v. Babbitt,169 a panel of the Ninth Circuit Court of Appeals applied these principles to hold that section 7(a)(2) did not apply to the approval by the Bureau of Land Management ("BLM"), under a 1962 right-of-way agreement, of construction of a logging road by a private logging company on a right-of-way crossing on forest land owned by the federal government and managed by the BLM.170 The right-of-way had been established in 1962 by means of an agreement between the BLM and Woolley Logging Company, a private logging company.171 The BLM entered into this agreement prior to the enactment of section 7 under federal statutory authority enacted by Congress in 1895.172 The agreement permitted Woolley to construct new roads on specified federal lands managed by BLM, subject to the approval of the BLM.173 Under the agreement, BLM was permitted to object to and prevent the proposed construction of a new road by Woolley

"only if (1) it does not constitute the most reasonably direct route for the removal of forest products from the lands of the road builder, taking into account the topography of the area, the cost of road construction and the safety of use of

167 As discussed infra note 188, this principle is an implicit holding of Sierra Club v. Babbitt, which is discussed infra notes 169-190 and accompanying text.
168 Simpson Timber Co., 255 F.3d at 1082.
169 Babbitt, 65 F.3d at 1502.
170 Id.
171 Id. at 1505.
172 Id.
173 Id.
such road, (2) the proposed road will substantially interfere with existing or planned facilities or improvements on the lands of the landowner, or (3) would result in excessive erosion to lands of the landowner."  

In 1991, after the enactment of section 7(a)(2), the BLM approved an assignment by Woolley to Seneca Sawmill Company, another private logging company, of Woolley’s rights and duties under the right-of-way agreement after Seneca agreed to conduct its operations so as to comply with all water quality standards, all pesticide use standards, and “all other applicable State and Federal environmental laws, regulations and standards.” Seneca also agreed that if it failed to conform to this environmental stipulation, the BLM was allowed to “discontinue all construction or other operations under [the] permit upon written notice from the Authorized Officer that such operations or any part thereof are in violation of this provision.”

In 1990, Seneca sought approval by the BLM under the right-of-way agreement of its plan to construct a new logging road in order to conduct logging on privately owned forest land. A BLM biologist determined that the logging on this private land “may affect” Northern spotted owls (a species listed in 1990 as threatened under the ESA) as well as critical habitat of that species. The BLM approved Seneca's proposed road construction, after a BLM Regional Solicitor concluded that the BLM did not have authority, under either the right-of-way agreement or the environmental stipulation with Seneca, to control the location or design of the new road for the benefit of threatened spotted owls.

\[174\] Id. at 1506. “[A]lthough the Bureau of Land Management initially had the power to condition the construction on any terms consistent with its statutory mission, once it entered into the contract, it limited its power to object to the three specifically listed conditions.” Okanogan County v. Nat’l Marine Fisheries Serv., 2002 U.S. Dist. LEXIS 13,625, *17 (E.D. Wash. 2002). In other words, BLM “relinquished this power through contract.” Id. at *15.

\[175\] Sierra Club v. Babbitt, 65 F.3d, 1502, 1506 (9th Cir. 1995).

\[176\] Id.

\[177\] Id.

\[178\] Id.

\[179\] Id.
A majority of the three-judge panel in *Sierra Club v. Babbitt* held that the BLM did not have a duty under section 7(a)(2) to consult with the FWS prior to the BLM’s approval of Seneca’s construction of the new logging road. The majority based this holding upon the grounds that the BLM lacked the authority, under either the pre-existing right-of-way agreement or the environmental stipulation that was required by BLM as a condition for its approval of assignment of the agreement to Seneca, to regulate the new road construction for the benefit of the threatened spotted owl. The majority concluded (1) under the right-of-way agreement “[t]he BLM’s ability to influence the road’s location is limited to notifying Seneca that the chosen route is not the most direct, that it would interfere with a BLM facility, or that it would cause excessive erosion,” (2) “[n]one of these factors are relevant to the protection of the threatened spotted owl,” and (3) “[t]he environmental stipulation does not . . . broaden the BLM’s power to disapprove of Seneca’s right-of-way construction.”

In effect, the majority implicitly held that the federal agency “action” subject to section 7(a)(2) was the BLM’s approval of the construction of the new road after the enactment of the ESA, and that any harm that would be indirectly caused to threatened spotted owls by the construction of the new road would be legally caused by the right-of-way agreement (that was not subject to section 7 because it was entered into by the BLM prior to the enactment of the ESA) and not by the BLM’s approval of the construction of the new road (because the BLM had no

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180 *Id.* at 1507-08.
181 *See id.* at 1507-12.
182 *Id.* at 1508 n.7.
183 *Id.*
184 *Id.* at 1511. The majority added that “[t]he stipulation provides the BLM with a remedial contract right to discontinue Seneca’s operations if, and when, there is an environmental infraction; but the BLM does not need to consult with the FWS for Seneca to meet its obligation under the stipulation.” *Id.* “Even without the environmental stipulation, Seneca’s operations are subject to all applicable environmental regulations and laws. The apparent purpose of the stipulation was to allow the BLM to terminate Seneca’s contractual right to complete a project if during the project’s implementation Seneca violated an environmental standard.” *Id.* at 1511 n.14 (citations omitted).
authority to withhold its approval or to require modification of the road construction project for the benefit of the threatened spotted owl).\footnote{Id. at 1508-10.}

In dissent, Judge Pregerson argued the BLM would be engaged in "discretionary action" for purposes of section 7(a)(2) when it exercised its authority under the right-of-way agreement to review and approve the location of the road project to determine if it was the most direct and reasonable route and if it exercised its authority under the environmental stipulation in its agreement with Seneca to determine if Seneca's construction would "take" threatened spotted owls in violation of the ESA.\footnote{Id. at 1514.} Judge Pregerson argued that the BLM should have engaged in consultation with the FWS "to assess whether a 'taking' will occur and to discontinue Seneca's construction if such is the case, or pursue any viable alternative which can be worked out given the terms of the contract."\footnote{Id. at 1514 (Pregerson, J., dissenting).} Judge Pregerson, however, failed to recognize, as did the majority,\footnote{Id. at 1514 (Pregerson, J., dissenting).} that section 7 does not require consultation with the FWS to address whether a prohibited "taking" of a member of a protected species will occur; rather, consultation under section 7 is for the purpose of determining if the Federal agency action at issue is likely either to jeopardize the continued existence of a protected species or to destroy or modify designated critical habitat of a protected species.

Because the plaintiff in \textit{Sierra Club v. Babbitt} did not allege or argue that the BLM was required to comply with section 7(a)(2) in

\footnote{"[W]hile we agree with the dissent that section 9 of the ESA allows the government to halt a private activity that is reasonably certain to result in a 'taking,' we are unable to discern the relevance of the section 7(a)(2) consultation procedures to the enforcement of the substantive proscriptions contained in section 9." Id. at 1509 n.10 ( citaions omitted). The majority further stated

The section 7 consultation procedures are not relevant to the enforcement of section 9. If Seneca violates section 9, or any other environmental standard, the BLM need not consult with the FWS before exercising its right under the environmental stipulation to terminate the offending project. Indeed, section 7(a)(1) would appear to require the BLM to utilize its authority under the stipulation to suspend an activity that would result in a taking.\textit{Id.} at 1511 n.15 (citations omitted).}
approving the right-of-way assignment to Seneca, the majority did not address that issue\textsuperscript{189} and Judge Pregerson did not address that issue in his dissent. The majority rejected, as a "remarkable proposition . . . unsupported by legal authority," the plaintiff's argument "that the BLM's failure to include language in [its] agreement [with Seneca] allowing for section 7(a)(2) compliance requires this court to read the environmental stipulation as if it did provide for consultation."\textsuperscript{190}

However, if either the right-of-way agreement, federal statutory law, or BLM regulations pre-dating the enactment of the ESA gave the BLM discretion as to whether to approve the assignment of the right-of-way agreement to Seneca and whether to require Seneca to agree to environmental stipulations to protect the threatened spotted owl as a condition for BLM's approval of the assignment of the right-of-way agreement, the BLM's approval of the assignment should have been held to be a "discretionary action" of a federal agency that was subject to section 7(a)(2) of the ESA. If such circumstances had been present, the BLM's failure to include an environmental stipulation to protect the threatened spotted owl in the agreement with Seneca should have been held to be in violation of section 7(a)(2), requiring the court to order rescission of both BLM's approval of the assignment and the agreement between the BLM and Seneca containing environmental stipulations.

Furthermore, a federal agency must presently comply with the substantive and procedural requirements of section 7(a)(2) in executing a new contract after the enactment of that section both when it enters into a new contract with a private entity after the effective date of the ESA,\textsuperscript{191} and when it exercises discretion after the effective date of the ESA to renew a contract that was entered into before the effective date of the ESA.\textsuperscript{192} When a Federal agency, after the effective date of the ESA, enters into a new contract with a private entity or exercises discretion to renew a pre-existing contract with a private entity without complying with the substantive and procedural requirements of section 7, a federal court may

\textsuperscript{189} Id. at 1511 n.12.
\textsuperscript{190} Id.
\textsuperscript{191} Conservation Law Found. v. Andrus, 623 F.2d 712, 715 (1st Cir. 1979).
\textsuperscript{192} Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1126-28 (9th Cir. 1998).
order the rescission of the contract, requiring the federal agency to comply with section 7(a)(2) before re-executing the contract.193

B. Federal Agency Action Carrying Out a Directive of the President, a Court Order, or Congress

A federal agency action that carries out a decision or directive of the President of the United States is not an agency action over which the agency has “discretionary involvement or control” and the agency action carrying out a Presidential decision or directive is therefore not subject to the requirements of section 7(a)(2).194 For example, the U.S. Navy was not required to engage in consultation under section 7(a)(2) on the potential impact on two species of salmon listed as threatened species under the ESA, due to an accidental explosion of propellant fuel in a Trident II missile at the Bangor, Washington, Trident submarine base.195 The court reasoned that because the President ordered the Trident II submarines and missiles to be located at this base, “the Navy lacks the discretion to cease Trident II operations at Bangor for the protection of the listed species . . . [and] any consultation by the Navy with NMFS regarding the risks of accidental Trident II explosion on the threatened salmon species, if such risks arise solely from the President's siting decision, would be an exercise in futility.”196 In such a situation, any resulting harm to a listed species or its critical habitat is proximately caused by the President, not by the agency action carrying out the President's directive, so as a matter of law the agency action should not be considered to jeopardize the existence of a listed species or to adversely modify designated critical habitat in violation of section 7(a)(2).197

193 Id. at 1129.
194 Ground Zero Ctr. for Non-Violent Action v. Dep't. of the Navy, 383 F.3d 1082, 1087-88 (9th Cir. 2004).
195 Id.
196 Id. at 1092.
197 This causation analysis is similar to the approach applied by the United States Supreme Court in Dep't. of Transp. v. Public Citizen in interpreting section 102(2)(C) of NEPA. In Public Citizen, the Supreme Court held that the FMSCA (an agency within the Department of Transportation), in deciding whether to prepare an environmental impact statement under section 102(2)(C) of NEPA with respect to proposed FMSCA regulations that would establish safety and financial responsibility standards for Mexican
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A federal agency action mandated by a court decision, an international treaty, or a federal statute enacted by Congress also is not an action over which a federal agency has "discretionary Federal involvement or control" and therefore is not subject to the requirements of section 7(a)(2). As a result, the Secretary of Interior was not required to engage in consultation under section 7(a)(2) with regard to the impact on protected listed species in the Colorado River Delta in Mexico as a result of the operation by the Bureau of Reclamation (BOR) of dams and reservoirs on the Colorado River and its allocation and diversion of water in the Colorado River. The court found the Secretary has no discretion as to the allocation of Colorado River water because of "a Supreme Court injunction, an international treaty, federal statutes, and contracts between the government and water users that account for every acre foot of lower Colorado River water." In this situation, the proximate cause of any harm to listed species in Mexico was a result of the combined effects of the Supreme Court injunction, the treaty, the statutes, and the contracts that legally allocated all available Colorado River water, rather than the actions of the Interior Department and BOR in implementing these legal allocations of water.

In addition, federal courts have uniformly held that a federal agency's issuance of a permit or license, under a statute (other than the ESA) that states that the agency "shall" issue a permit or license to a person when the agency finds that specific listed criteria and conditions are present, is not an agency action subject to section 7(a)(2) because the action is not one for which the agency has "discretionary Federal involvement or control" within the meaning of 50 C.F.R. § 402.03 when

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trucks operating within the United States, did not have to consider the environmental impacts from increased air pollution resulting from increased cross-border operations of Mexican trucks within the United States, because the increased presence of Mexican trucks within the United States was the result of an action of the President of the United States which the FMSCA has no ability to countermand or alter. Dep't of Transp. v. Public Citizen, 541 U.S. 752, 770 (2004). In support of this holding, the Supreme Court stated "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." Id.

199 Id. at 69.
200 Id.
the listed criteria and conditions do not allow the agency to condition the permit or license upon requirements that prohibit the types of harms proscribed by section 7(a)(2). In such a situation, any harm to an ESA-listed species or designated critical habitat of a listed species, resulting from a federal agency’s ministerial task of issuing such a permit or license, is proximately caused by Congress, not by the agency action that is simply following a congressional mandate. As a matter of law the

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201 Strahan v. Linnon, 967 F. Supp. 581, 620-22 (D. Mass. 1995), aff’d per curiam, 187 F.3d 623 (1st Cir. 1998) (designated as not for publication). In Strahan v. Linnon, the Coast Guard’s issuance of Certificates of Documentation and Inspection to vessels, “which allow numerous private vessels to operate in the [United State’s] coastal waters,” and which vessels “cannot legally operate within 200 miles of the U.S. coastline without a certificate from the Coast Guard (or from the state government),” were held to be nondiscretionary action not subject to section 7 of the ESA, because “[t]he Coast Guard is required to issue Certificates of Documentation and Inspection if the specific statutory and regulatory criteria, which make no reference to environmental concerns, are met.” Id. at 621, 611.

Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm’n, held that the FERC’s issuance of an annual Federal Power Act (“FPA”) license to a hydroelectric facility whose expired original license did not include any express reservation of modification authority that would authorize the FERC to add environmentally protective conditions to the annual license that could protect species listed under the ESA, is not subject to the requirements of section 7(a)(2) of the ESA. Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm’n, 962 F.2d 27 (D.C. Cir. 1992). This holding in Platte River was based on the fact that the FERC is required to issue an annual license under the terms and conditions of the original license and therefore does not have statutory authority in such a situation to impose conditions in an annual license to protect species listed under the ESA. Id. at 32-33. The court in Platte River based this holding upon the “limitations on FERC’s authority contained in the FPA,” rather than upon the lack of “discretionary Federal involvement or control” by the FERC within the meaning of 50 C.F.R. § 402.03. Id. at 34. Apparently referring to section 7(a)(1) of the ESA, the court in Platte River stated that the ESA “directs agencies to ‘utilize their authorities’ to carry out the ESA’s objectives; it does not expand the powers conferred on an agency by its enabling act.” Id. Although the court’s reliance upon section 7(a)(1) to interpret section 7(a)(2) is an erroneous approach, because section 7(a)(2) imposes requirements upon a federal agency that are separate and distinct from the duties imposed by section 7(a)(1), the holding in Platte River can be supported under 50 C.F.R. § 402.03 on the grounds that the FERC had no “discretionary Federal involvement or control” over the issuance of an annual license without conditions to protect species listed under the ESA when the original license did not contain such conditions. Id.
agency action should not be considered to violate section 7(a)(2) by jeopardizing the existence of a listed species or adversely modifying designated critical habitat.

On the other hand, a federal agency is required to comply with section 7(a)(2), including its consultation requirements, prior to the issuance of a license or permit under a statute, including the ESA, when the federal agency has discretionary authority under a federal statute in issuing a license or permit, and in imposing conditions in a license or permit, to act for the protection and conservation of protected species listed under the ESA.

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202 The FWS's issuance of an incidental take permit under section 10 of the ESA is an agency action that is subject to the requirements of section 7(a)(2) of the ESA. Env'tl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1075 (9th Cir. 2001).

203 Wash. Toxics Coal. v. EPA, 413 F.3d 1024 (9th Cir. 2005) (EPA registration of pesticides under FIFRA held to be an action involving “discretionary Federal involvement or control” because EPA has “discretion ‘to inure to the benefit’ of listed species” in its registration of pesticides, alteration of pesticide registrations and cancellation of pesticide registrations under FIFRA, so EPA is required to comply with the consultation requirements of section 7(a)(2) of the ESA before registering a pesticide under FIFRA); Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969 (9th Cir. 2003). Turtle Island held that the issuance of fishing permits by the NMFS to U.S. flag-flying fishing vessels (which use longlines that may have thousands of hooks while fishing on the high seas, in which members of sea turtle and albatross species listed as endangered under the ESA can become entangled and injured or killed), pursuant to the High Seas Fishing Compliance Act, is subject to the consultation requirements of section 7(a)(2) of the ESA because “the plain language of the Compliance Act does contain ample discretion to allow the conditioning of permits for the benefit of protected species . . .” listed under the ESA. Id. at 970-71. The court based this holding, that “the statutory language of the Compliance Act confers sufficient discretion to the [NMFS] so that the agency could condition permits to benefit listed species,” upon a provision in the Compliance Act which states that “[t]he Secretary shall establish such conditions and restrictions on each permit issued under this section as are necessary and appropriate to carry out the obligations of the United States under the Agreement [to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas], including but not limited to “the markings of vessels and reporting requirements,” and upon a provision of the Agreement that requires each nation party to “take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.” Id. at 973, 975-76. The court held that the language of these provisions of the Compliance Act provides the NMFS “with ample discretion to protect listed species.” Id. at 975.
C. Federal Agency Delegation of Permit-Issuing Authority to a State

Federal courts at present are in disagreement as to whether the requirements of section 7(a)(2), including its consultation requirements, apply to a federal agency's action in delegating authority to a state to issue federal permits or licenses under another federal statute that specifies that the federal agency "shall" delegate that authority to a state when specified criteria are satisfied, when the criteria for delegating permit or license-issuing authority under the other statute do not permit the federal agency to require the state to condition permits issued under that delegated authority upon compliance with the procedural and substantive requirements of section 7(a)(2).

In 1998, in American Forest and Paper Assoc. v. U.S. Environmental Protection Agency,204 a panel of the Fifth Circuit Court of Appeals held that the EPA's authority under section 402(b) of the Clean Water Act (CWA),205 to delegate authority to a state to issue permits under section 402 to point source dischargers of water pollutants, was not action subject to the requirements of section 7(a)(2).206 The court held that EPA therefore violated the CWA in requiring the state of Louisiana to consult with federal agencies concerning the impact on ESA-protected species of a point source discharger's pollutant discharges before issuing a section 402 permit to the discharger, and in providing for EPA veto of any state-issued section 402 permit to which FWS or NMFS objected because the proposed permit was likely to jeopardize the continued existence of a species protected under the ESA or destroy designated critical habitat.207

Conversely, in 2005 a majority of a panel of the Ninth Circuit Court of Appeals held, in Defenders of Wildlife v. U.S. Environmental Protection Agency (Defenders of Wildlife II),208 that the EPA was required to comply with the requirements of section 7(a)(2), including its consultation requirements, before delegating authority to a state to issue section 402 CWA permits to point source dischargers of pollutants and

204 137 F.3d 291 (5th Cir. 1998).
206 Am. Forest, 137 F.3d at 299.
207 Id. at 293-94, 297-98.
208 420 F.3d 946 (9th Cir. 2005), reh'g and reh'g en banc denied, 450 F.3d 394 (9th Cir. 2006).
that in order to comply with section 7(a)(2), the EPA would have to require the state to comply with the substantive "no jeopardize" requirements of section 7(a)(2) before issuing section 402 permits.209 The Defenders of Wildlife II majority, however, found that the EPA in the case "makes no argument that its transfer decision was not a ‘discretionary’ one within the meaning of 50 C.F.R. §402.03."210 Also, the majority found that EPA had taken the position in the litigation that the court did not have before it the question of whether the EPA has “sufficient discretion, applying 50 C.F.R. § 402.03, under the Endangered Species Act” in deciding whether to delegate CWA section permitting authority to a state, to make the requirements of section 7(a)(2) of the ESA applicable to such an EPA decision.211 The Defenders of Wildlife II majority did not address the question whether the EPA has sufficient discretion in making such a decision to “trigger” consultation under section 7(a)(2) regarding the transfer of section 402 permitting authority to a state.212

In American Forest and Paper Assoc., a unanimous panel of the Fifth Circuit held the EPA violated section 402(b) of the Clean Water Act in conditioning EPA's approval of delegation to the state of Louisiana, of the authority to issue CWA section 402 permits, upon a requirement that the state consult either with the FWS or NMFS before the state issued any section 402 permit or have the EPA veto the state-issued permit.213 Section 402(b) of the Clean Water Act provides that the EPA “shall” approve delegation of section 402 permitting authority to a state which has applied for such authority and submitted a proposed state program to the EPA unless the state's program fails to meet one or more of the nine requirements listed in section 402(b) of the CWA American Forest held that the EPA has a non-discretionary duty under section 402(b) to approve a state's program unless the EPA determines that a proposed state permit program does not meet these nine requirements.214 The court held that no provision of the Clean Water Act authorizes EPA either to condition

209 Id. at 971-78.
210 Defenders of Wildlife II, 420 F.3d at 968.
211 Id. at 969 n.19.
212 Id.
213 Am. Forest, 137 F.3d at 297-98.
214 Id. at 297. None of the nine requirements listed in section 402(b) refer to complying with the ESA or even protecting fish, wildlife, or the environment. Id.
approval of permit-issuing authority delegation to a state upon protection of endangered species or to veto a state's issuance of a section 402 permit to protect endangered species. The court also found that under the Endangered Species Act section 7(a)(2) does not confer authority upon the EPA to condition delegation of CWA section 402 permit-issuing authority upon the state consulting with the FWS or NMFS before issuing a section 402 permit or otherwise acting to protect ESA-listed species when issuing such a permit, because "if EPA lacks the power [under the CWA] to add additional criteria to CWA § 402(b), nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers." The court in American Forest also relied upon the holding in Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC that section 7(a)(2) "does not expand the powers conferred on an agency by its enabling act," with the Fifth Circuit panel noting that Platte River stated that the ESA instead "directs the agencies to 'utilize' their existing powers to protect endangered species." The court in American Forest also relied upon Platte River's holding that section 7 does not mandate a federal agency to do whatever it takes to protect listed endangered and threatened species and section 7 does not "implicitly supersede[]" any limitations on an agency's authority in its enabling statute. The court concluded by stating that "[w]e agree that the ESA 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. The upshot is the EPA cannot invoke the ESA as a means of

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215 Id. at 298.
216 Id. The court additionally stated that
   Whether EPA's approval of Louisiana's permitting program constitutes
   "agency action" for ESA purposes is largely beside the point. Even if
   EPA were required to consult with the agencies before approving
   Louisiana's program, EPA lacks authority to modify the plain language
   of the CWA by adding to the list of enumerated requirements.

Id. at 298 n.6.
218 Am. Forest, 137 F.3d at 299 (quoting Platte River Whooping Crane Critical Habitat
219 Id.
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creating and imposing requirements that are not authorized by the CWA."\(^20\)

Although the court's statement in *American Forest* that "section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action" mistakenly fails to refer to section 7(a)(2)'s other procedural requirements (biological assessment, biological opinion and incidental take statement) and section 7(a)(2)'s substantive "no jeopardize" standards, the court correctly held in *American Forest* that section 7(a)(2) does not expand the scope of a federal agency's powers and duties under an agency's enabling statute. The Fifth Circuit's holding in *American Forest* is a correct interpretation of section 7(a)(2) even though the court failed to state that its holding could be based alternatively upon a finding that EPA has no "discretionary Federal involvement or control" under CWA section 402(b) within the meaning of 50 C.F.R. § 402.03 in deciding whether to delegate section 402 permitting authority to a state.\(^21\)

When the EPA decides whether to approve a state program for delegation of section 402 permitting authority, the EPA is performing a non-discretionary ministerial duty and cannot take any action that would benefit any species listed as endangered or threatened under the ESA. This alternative basis in support of the *American Forest* holding is similar to the rationale used by courts holding that section 7(a)(2) does not apply to a federal agency's non-discretionary, ministerial action of issuing a permit or license under an enabling statute that states the agency "shall" issue the permit or license when specified criteria are present that do not permit the agency to act in a manner that can benefit species listed as endangered or threatened under the ESA.\(^22\)

As in the cases when a federal agency performs a non-discretionary ministerial action issuing a permit or license under an enabling statute, when the EPA's delegation of permit-issuing authority to a state under section 402(b) results in harm to species listed as endangered

\(^{20}\) *Id.* (emphasis omitted).

\(^{21}\) This assertion is based upon the fact, noted by the Fifth Circuit in *American Forest*, that section 402(b) of the CWA states that EPA "shall" approve a state's application to be delegated CWA section 402 permit-issuing authority if EPA finds that the state satisfies nine requirements listed in section 402(b) (none of which refer to complying with the ESA or even protecting fish, wildlife or the environment).

\(^{22}\) These court decisions are discussed *infra* notes 201-203 and accompanying text.
or threatened under the ESA, the proximate cause of harm is the enactment by Congress of the statutory provision directing EPA to delegate authority to a state when statutorily-specified criteria are present. In such situations, the proximate cause of harm to protected listed species is not the non-discretionary ministerial act of a federal agency in following a mandate of Congress to issue a permit or license or to delegate to a state the authority to issue federal permits or licenses.

In contrast to the Fifth Circuit holding in American Forest and Paper Ass'n, a majority panel of the Ninth Circuit Court of Appeals in Defenders of Wildlife II, held that the EPA violated section 7(a)(2) by delegating to the State of Arizona permit-issuing authority under section 402(b) of the Clean Water Act without insuring that issuance of CWA permits by Arizona was not likely to jeopardize the continued existence of listed species protected under the ESA or to destroy or adversely modify designated critical habitat of such species. As noted earlier, the majority in Defenders of Wildlife reached this decision after finding that the EPA was not arguing that the EPA did not have sufficient "discretionary Federal involvement or control," for purposes of 50 C.F.R. § 402.03, in deciding whether to delegate CWA section 402 permit-issuing authority to Arizona. The Defenders of Wildlife majority vacated the EPA's decision approving Arizona's pollution-permitting application and the EPA's delegation of CWA permitting authority to Arizona, raising questions about whether the EPA's delegation of permit-issuing authority to states other than Arizona within the 9th Circuit's jurisdiction may also be vacated for not complying with section 7(a)(2) of the ESA.

The EPA consulted with FWS under section 7 before approving the delegation of permit-issuing authority to Arizona and was informed by FWS staff during consultation that listed species protected by the ESA and the designated critical habitat of species could be harmed by Arizona's issuance of section 402 permits that do not require the types of mitigating measures meant to protect listed species that the EPA requires in EPA-

223 Defenders of Wildlife II, 420 F.3d at 961-62, 971-78.
224 Id. at 968, 970 n.19. If the EPA did not have such discretionary involvement or control over its decision as to whether to delegate section 402 permit-issuing authority to Arizona, 50 C.F.R. § 402.03 would make section 7(a)(2) inapplicable to EPA's decision as to whether to delegate section 402 permit-issuing authority to Arizona.
225 Id. at 979.
issued permits.\textsuperscript{226} Nevertheless, FWS "issued a Biological Opinion recommending approval of the transfer of permitting authority to Arizona."\textsuperscript{227} In the Biological Opinion, FWS concluded that the EPA's transfer of permitting authority to Arizona would not have indirect effects upon species protected by the ESA.\textsuperscript{228} FWS' Biological Opinion and the EPA both determined that the EPA could not base its decision whether to approve delegation of section 402 permit-issuing authority to Arizona upon adverse effects upon listed species protected by the ESA.\textsuperscript{229} The EPA therefore delegated CWA section 402 permit-issuing authority to Arizona in 2002,\textsuperscript{230} without the conditions that had been imposed upon the state of Louisiana when it had received permit-issuing authority.\textsuperscript{231}

The \textit{Defenders of Wildlife II} court claimed subject matter jurisdiction under section 509(b)(1)\textsuperscript{232} of the Clean Water Act to address the claim that the EPA violated section 7(a)(2) in delegating section 402 permit-issuing authority to Arizona and held that the court could review the adequacy of both the EPA's consultation with FWS and the FWS' Biological Opinion.\textsuperscript{233}

Turning to the merits, the \textit{Defenders of Wildlife II} majority found that during the administrative proceedings, the EPA acted with the contradictory beliefs that the EPA had to consult with FWS before delegating permit-issuing authority to Arizona,\textsuperscript{234} but could not base its decision as to whether to approve delegation of permit-issuing authority to Arizona upon the substantive "no jeopardize/adversely modify" requirements of section 7(a)(2).\textsuperscript{235} The majority found that "[s]ection 7(a)(2) makes no legal distinction between the trigger for its requirement that agencies consult with FWS and the trigger for its requirement that agencies shape their actions so as not to jeopardize endangered

\footnotesize{\textsuperscript{226} Id. at 952.  
\textsuperscript{227} Id. at 953.  
\textsuperscript{228} Id.  
\textsuperscript{229} Id.  
\textsuperscript{230} Id. at 954.  
\textsuperscript{231} Id. at 953-54.  
\textsuperscript{233} \textit{Defenders of Wildlife II}, 420 F.3d at 955-56.  
\textsuperscript{234} Id. at 960-61.  
\textsuperscript{235} Id. at 961.}
The majority held that the EPA’s “ultimate decision was not the result of reasoned decisionmaking” because it was based “on contradictory views of the same words in the same statutory provision,” and held that “the obligation to consult — which, under the regulations, applies only to federal agency actions that ‘may affect’ listed species — and the reasons given in the Biological Opinion for concluding that the transfer decision would not have an indirect effect on endangered species cannot coexist under section 7(a)(2).” The majority explained:

The Biological Opinion reasoned that there could be no such [indirect] effect, because (1) the EPA had no authority to disapprove transfer applications because of an impact on listed species, section 7(a)(2) of the Endangered Species Act notwithstanding; (2) any impact on the post-transfer protection of listed species was the result of Congress’ determination that states have no consultation or mitigation obligations, not of the transfer decision; and (3) the potential future impact on listed species would be caused entirely by new private development, and the transfer decision would not cause such development. By relying on this line of reasoning after determining that it did have a consultation obligation, the EPA decided that it had to consult but had no authority to do anything concerning the matter about which it had to consult. One would not expect that Congress would set up such a nonsensical regime. Not surprisingly, it did not.

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236 Id.
237 Id.
238 Id. at 960 (citations omitted).
239 Id. at 960-61. The majority added that

Additionally, the third prong of the Biological Opinion's reasoning — that it is private development, not the EPA’s transfer decision, that would cause any impact on listed species — suffers from independent lack of plausibility . . . . Events can be caused by several actions in a “but for” causal chain . . . . Obviously, without private decisions to construct new developments, there will be no Clean Water Act construction permits and no impact from the issuance of such permits on listed species or their habitats. Just as obviously, without the transfer
The majority therefore held the EPA's decision to delegate CWA section 402 permit-issuing authority to Arizona "cannot stand," and remanded to the EPA "for a plausible explanation of its decision, based on a single, coherent interpretation of the statute." \(^{240}\)

The *Defenders of Wildlife* majority, however, did not state that the EPA could not legally have relied upon this line of reasoning to decide that it had no duty to consult under section 7(a)(2) in acting under CWA section 402(b) to decide whether to delegate CWA permit-issuing authority to a state. As discussed *supra* in parts IV(A) and IV(B) of this article, this reasoning has been relied upon by a number of courts to hold that a federal agency does not have "discretionary involvement or control" within the meaning of 50 C.F.R. § 402.03, over an action that another statute mandates the agency to undertake when specified criteria are present that do not include protection of species listed under the ESA from the types of harm proscribed by section 7(a)(2).

The *Defenders of Wildlife II* majority did not indicate whether the EPA, on remand, could change its position with respect to the duty to consult under section 7(a)(2) with respect to its decision as to whether to transfer CWA permit-issuing authority to the state of Arizona and take the position that none of the requirements of section 7(a)(2) apply to the EPA's decision as to whether to transfer section 402 permit-issuing authority. Because "an agency is not locked into a particular position forever . . . [and] is entitled to change its view over time," \(^{241}\) the EPA on

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\(^{240}\) Id. at 961-62.

remand in *Defenders of Wildlife II* should be permitted to change its position and to adopt the position of the FWS in its biological opinion that the EPA's transfer decision is not subject to the requirements of section 7(a)(2).

In dissent, Judge Thompson argued in *Defenders of Wildlife II* that section 7(a)(2) does not apply to the EPA's decision as to whether to transfer CWA section 402 permit-issuing authority to a state because the EPA does not have "discretionary Federal involvement or control" under section 402(b) of the CWA, within the meaning of 50 C.F.R. § 402.03, "to consider the impact on endangered and threatened species in making its decision to transfer administration of the [CWA section 402] permitting system to the State of Arizona." Judge Thompson argued that the *Defenders of Wildlife II* majority incorrectly held that "any action which comes within a federal agency's decisionmaking authority falls within the scope of section 7(a)(2) of the Endangered Species Act," when 9th Circuit cases "recognize[] that an agency may have decisionmaking authority and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered or threatened species." Judge Thompson argued, in agreement with the Fifth Circuit's *American Forest* decision, that the EPA's decision as to whether to approve a state's application for delegation of CWA section 402 permit-issuing authority must be based exclusively upon the nine factors enumerated in section 402(b) of the CWA. Judge Thompson also argued that the court should deny the petition for review of the EPA's transfer decision, despite the EPA's position that it had a duty to consult under section 7(a)(2) before making this transfer decision, on the ground that the issue of whether section 7(a)(2) applies to the EPA's transfer decision involves a federal agency's mandate under a statute that is an issue of statutory interpretation reviewed de novo by a court, without the court being bound by EPA's interpretation of its consultation duty under section 7(a)(2) of the ESA.

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242 *Defenders of Wildlife II*, 420 F.3d. at 979 (Thompson, J., dissenting).
243 *Id.* at 979 (citing Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1074-75 (9th Cir. 1996); Sierra Club v. Babbitt, 65 F.3d 1502, 1508-10 (9th Cir. 1995); Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 975 (9th Cir. 2003)).
244 *Id.* at 980.
245 *Id.* at 981, 981 n.1.
Although the Defenders of Wildlife II majority stated that it was remanding to the EPA to reconsider what the majority considered to be contradictory positions, the majority proceeded to "conclude[] the very analysis that [the] EPA should have had an opportunity to conduct for itself"246 on remand, and concluded that the EPA was required to comply with the substantive no jeopardize/harm requirements of section 7(a)(2) when transferring permit-issuing authority to the state of Arizona.247 The majority based this conclusion in part upon its determination that the loss of federal agency consultation under section 7(a)(2) is an indirect effect of the EPA’s transfer of CWA section 402 permit-issuing authority to Arizona.248 The majority reached this conclusion despite stating that under section 7(a)(2), "a negative impact on listed species is the likely direct or indirect effect of an agency’s action only if the agency has some control over that result,"249 and "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."250

The majority essentially ignored these principles that would have otherwise led the majority to follow the reasoning in Judge Thompson’s dissent, and held that the EPA, which did not argue that its transfer decision was exempt from section 7(a)(2) because it involved “discretionary Federal involvement or control” within the meaning of 50 C.F.R. § 402.03,251 can consider and act upon the loss of section 7 consultation benefits in deciding whether to transfer CWA section 402 permit-issuing authority to Arizona.252 The Defenders of Wildlife II majority also found that the EPA’s transfer decision can be considered a cause of the loss of section 7 consultation benefits – a loss that the majority held should have been included in the Biological Opinion as an

246 Defenders of Wildlife III, 450 F.3d at 397 (Kozinski, J., dissenting).
247 Defenders of Wildlife II, 420 F.3d at 971.
248 Id.
249 Id. at 962.
250 Id. at 963 (quoting Dep’t of Transp. v. Public Citizen, 541 U.S. 752, 770 (2004)) (interpreting section 102(2)(C) of the NEPA). This holding in Public Citizen is discussed supra note 197.
251 Id. at 968.
252 Id. at 963.
indirect effect of the potential transfer decision and that should have been considered and acted upon by the EPA in complying with section 7(a)(2) of the ESA. The majority interpreted section 7(a)(2) as “conferring an additional, do-no-harm obligation – and reciprocal authority – applicable when the agency’s own actions . . . cause harm to endangered species” and as “specifying] that agencies must when acting affirmatively refrain from jeopardizing listed species, even if the agency’s governing statute does not so provide.” The majority also stated that section 7(a)(2) “confers authority and responsibility on [federal] agencies to protect listed species when the agency engages in affirmative action that is both within its decisionmaking authority and unconstrained by earlier agency commitments,” and held that “[t]he decision to approve a state’s pollution permitting application meets these criteria and is thus the sort of decision to which section 7(a)(2) applies.” The majority held that “[t]he Biological Opinion’s reasoning that the EPA had no choice but to disregard the impact of the transfer on listed species in Arizona was therefore inconsistent with the statute.”

The Defenders of Wildlife II majority found that an “action[] in which there is discretionary Federal involvement or control” under 50 C.F.R. § 402.03 should be interpreted “to be coterminous with the statutory phrase limiting section 7(a)(2)’s application to those [actions] ‘authorized, funded, or carried out’ by a federal agency.” According to the majority, section 7(a)(2) applies “where the agency in question had continuing decisionmaking authority over the challenged action” but is “inapplicable if the agency in question had ‘no ongoing regulatory authority’ and thus was not an entity responsible for decisionmaking with respect to the particular action in question.”

253 Id.
254 Id. at 965.
255 Id. at 967.
256 Id.
257 Id.
258 Id.
259 Id. at 967, 969.
260 Id. at 968.
261 Id. (quoting Wash. Toxics Coal. v. EPA, 413 F.3d 1024, 1033 (9th Cir. 2005)).
The Defenders of Wildlife II majority panel indicated that its holding is supported by the First Circuit's decision in Conservation Law Foundation v. Andrus, in which the court stated that the Department of Interior had to comply with section 7(a)(2) for each stage of oil and gas development under the Outer Continental Shelf Lands Act (OCSLA). However, the Andrus case does not support the Defender of Wildlife majority decision, because the Andrus decision accepted the position of the Secretary of Interior that the standards of OCSLA and section 7(a)(2) "are complementary, and [that] the ESA will continue to apply of its own force to major action taken by the Secretary after the [OCSLA] lease sale is held." Furthermore, the Andrus decision was issued prior to the promulgation of 50 C.F.R § 402.03 and did not consider the issue of whether section 7(a)(2) is inapplicable to OCSLA oil and gas leasing, exploration, and production because of the lack of discretion by the Interior Department to protect species listed under the ESA. The Defenders of Wildlife II majority decision also relied upon the Eighth Circuit decision in Defenders of Wildlife v. Administrator, EPA, in which the Eighth Circuit stated that a federal agency must comply with the ESA when acting under another federal statute – but the only issue under the ESA that the Eighth Circuit addressed was whether the EPA's registration of a pesticide violated the ESA's "take" prohibitions.

The majority supported its position by criticizing the holding in Platte River on the ground that the court in Platte River incorrectly relied upon section 7(a)(1). Even though Platte River incorrectly relied upon section 7(a)(1) in support of its holding, the Platte River decision correctly held that section 7(a)(2) does not apply to a federal agency's

262 623 F.2d 712 (1st Cir. 1979).
263 Id.
264 Id. at 715.
265 The OCSLA in fact does give the Interior Department sufficient discretion in approving OCSLA oil and gas leases, exploration and production to act in a manner to protect species listed under the ESA to avoid the harms proscribed by section 7(a)(2) of the ESA. North Slope Borough v. Andrus, 642 F.2d 589, 608-09 (D.C. Cir. 1980).
266 882 F.2d 1294 (8th Cir. 1989).
267 Id. at 1300. The court quoted section 7(a)(2) of the ESA, but the court did not analyze that section or its applicability to the facts of the case. Id. at 1299-1300.
268 The Platte River decision is discussed supra note 201.
269 Defenders of Wildlife II, 420 F.3d 946, 970-71 (9th Cir. 2005).
license issuance under an enabling statute that gives the agency no discretion to act in a manner to protect species listed under the ESA.\textsuperscript{270} Finally, the Defenders of Wildlife II majority criticized the holding in American Forest on the ground that the Fifth Circuit panel incorrectly stated that "the consultation and assurance aspects" of section 7(a)(2) are "independent,"\textsuperscript{271} but the Defenders of Wildlife majority did not criticize American Forest's determination that EPA does not have "discretionary involvement or control" under section 402(b) of the Clean Water Act in deciding whether to transfer CWA section 402 permit-issuing authority.

The majority then concluded that the EPA erred by relying on a Biological Opinion that was deficient for failing to consider, as an indirect effect of EPA's transfer decision, the harm that EPA's transfer decision will cause "from the loss of section 7 consultation on the many projects subject to a water pollution permit."\textsuperscript{272} The majority found that the EPA had not insured that section 7(a)(2)'s substantive requirements would be not be violated by its action of entering into a non-binding memorandum of agreement\textsuperscript{273} with the FWS and NMFS that does not give "the federal government any authority to require Arizona to engage in the kind of consultation and mitigation measures EPA had conducted before the transfer."\textsuperscript{274} This finding was based on the facts that this non-binding agreement, EPA's oversight under section 402(c)\textsuperscript{275} of the Clean Water Act of state-issued CWA section 402 permits, the ESA's "take" prohibitions and Arizona state laws are not "sufficient substitutes for section 7's consultation and mitigation mandates."\textsuperscript{276}

\textsuperscript{270} This ground for finding that Platte River was correctly decided is presented supra notes 201-203 and accompanying text.
\textsuperscript{271} Defenders of Wildlife II, 420 F.3d at 971.
\textsuperscript{272} Id.
\textsuperscript{274} Defenders of Wildlife II, 420 F.3d at 973.
\textsuperscript{275} 33 U.S.C. § 1342(c) (2000).
\textsuperscript{276} Defenders of Wildlife II, 420 F.3d at 973. The majority also stated that EPA had not established that the state of Arizona was bound by a letter from an official of the Arizona Game and Fish Department assuring that species protected by the ESA would not be adversely impacted by the lack of section 7 consultation by Arizona when issuing CWA section 402 permits, because that state department does not issue the state's CWA section 402 permits and the state of Arizona is not legally required to follow this letter. Id. at 977. The majority stated that
The Defenders of Wildlife II majority concluded:

It is possible that some combination of state and federal protections for listed species and state agency cooperation with the federal Memorandum of Agreement might sufficiently replace the benefits of section 7 consultation so that no harm to listed species would be “reasonably likely to occur” as a result of losing section 7 consultation. But the EPA could not so conclude without specifically analyzing each listed species within Arizona and without more certain assurances of voluntary state cooperation from officials at all relevant Arizona agencies, as well as a more careful consideration of the actual protection accorded by other federal and state statutory provisions and the Memorandum of Agreement.277

The majority in Defenders of Wildlife II vacated the EPA’s decision to approve Arizona’s application for delegation of CWA section 402 permit-issuing authority,278 but did not reverse the section 402 permits that Arizona had issued under that delegated authority.279 The majority, however, declined to exercise equitable discretion to allow Arizona to maintain its permit-issuing authority while the EPA complies with the majority’s decision on remand, because it had “no strong assurances that these permits [issued in the future by Arizona] will not allow development

[I]n the abstract, voluntary compliance by state agencies willing to follow FWS recommendations to the same extent as would the EPA might substitute for section 7 coverage. The EPA, however, could not so conclude without first analyzing the likelihood that all relevant Arizona agencies can and would live up to the Game and Fish Department’s promises, as well as considering the effectiveness of federal oversight if Arizona agencies fail to live up to any such promises.

Id. at 977.
277 Id. (citations omitted).
278 Id. at 979.
279 Id. at 978.
projects that are likely to jeopardize listed species or adversely modify their [critical] habitat.”

In an opinion dissenting from the denial by the full court of the Ninth Circuit of rehearing en banc of the *Defenders of Wildlife II* case, Judge Kozinski, joined by five other judges of the Ninth Circuit, identified the misinterpretations of the Endangered Species Act by the *Defenders of Wildlife* majority and the serious adverse impacts that may result from the *Defenders of Wildlife* majority opinion. Judge Kozinski first correctly noted that the *Defenders of Wildlife* “majority fail[ed] to give appropriate deference to FWS’s interpretation (in its Biological Opinion) of the ESA” as not being applicable to EPA’s transfer decision. Judge Kozinski correctly argued that this FWS interpretation is entitled to *Chevron* deference and that the *Defenders of Wildlife II* majority did not give the required substantial deference to FWS’s interpretation of 50 C.F.R. § 402.03. Judge Kozinski stressed that “[h]ere, FWS determined—after careful study at the local and national levels—that the ESA was inapplicable to EPA’s decision, and it issued a [Biological Opinion] relaying its conclusion to the EPA.” He asserted that “[t]he majority cannot overturn FWS’s statutory interpretation simply because it disagrees with it.” Judge Kozinski also noted that the EPA’s decision to consult under section 7(a)(2) with respect to its transfer decision was simply the result of the national office in Washington, D.C., overruling the EPA regional office. He also noted that even though the EPA may have consulted under section 7(a)(2) before transferring CWA permit-issuing authority to six other states besides Arizona, there is no evidence that the EPA’s national office had made those decisions to consult under the

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280 *Id.*
281 See *Defenders of Wildlife III*, 450 F.3d 394, 395-402 (9th Cir. 2006) (Kozinski, J., dissenting).
282 *Id.* at 396.
284 *Id.* at 398 n.1.
285 *Id.* at 397.
286 *Id.*
287 *Id.* at 396.
ENDANGERED SPECIES ACT & SECTION 7(a)(2)

He also noted that an agency "is not locked into a particular position forever; it is entitled to change its view over time." Judge Kozinski additionally criticized the Defenders of Wildlife majority for incorrectly interpreting section 7(a)(2) as providing that "once EPA expressed concern that its action might affect endangered species [and requested formal consultation with FWS], it had already conclusively determined that its decision was covered by the ESA . . . [and] once FWS is consulted for guidance, it is precluded from ever determining that the ESA is inapplicable." Judge Kozinski stated that instead, under section 7(a)(2) "if the [action] agency thinks endangered species might be affected, it must [consult and] ask FWS whether its supposition is correct—whether its action would, in fact, affect endangered species—and, if so, what the impact on endangered species will be." Judge Kozinski asserted that the Defenders of Wildlife II majority's holding "is nonsensical, undermining the entire consultative process that the ESA establishes and striking down FWS's perfectly reasonable interpretation of the ESA," which is entitled to Chevron deference.

Even more significantly, Judge Kozinski noted that the Defenders of Wildlife II majority wrongly "concludes that section 7 of the ESA required EPA to take endangered species into account when making the transfer decision, notwithstanding the plain contrary language of the CWA . . . [and] thus transformed the ESA into an overriding mandate that trumps an agency's obligations under its own governing statute." He pointed out that the "majority simply finds that the word 'discretionary' in [50 C.F.R. § 402.03] is meaningless . . . [and] that [section 7(a)(2) of the] ESA applies to anything 'authorized, funded or carried out' by a federal agency, whether discretionary or not," without giving FWS's

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288 Id.
289 Id. (citing Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers, 861 F.2d 1124, 1130 (9th Cir. 1988)).
290 Id. at 397.
291 Id.
292 Id.
293 Id. at 398.
294 Id. (citations omitted).
interpretation of the regulation in its Biological Opinion the substantial deference it is due.\textsuperscript{295}

Judge Kozinski stressed that Judge Thompson, in his dissent of the \textit{Defenders of Wildlife II} decision, correctly found that “EPA had no authority under the CWA to consider endangered species when making the transfer decision . . . [and that] [o]nce the nine criteria [of section 402(b) of the Clean Water Act] were met, . . . the CWA mandated the transfer; nothing in ESA section 7 allows—let alone requires—the EPA to ignore the clear language of the CWA.”\textsuperscript{296} He added:

\begin{quote}
[w]e cannot presume that Congress repealed the CWA’s categorical mandate sub silentio, simply by passing the ESA . . . [and] even if we were inclined to believe, as the panel majority does, that the CWA and ESA need to be reconciled, FWS’s regulation is a perfectly plausible way to do so: By limiting the ESA’s applicability to “discretionary” agency actions, 50 C.F.R. \$ 402.03, the regulation avoids the supposed conflict the majority has created between the ESA and governing statutes—like the CWA—that mandate agency action.\textsuperscript{297}
\end{quote}

\textsuperscript{295} \textit{Id.} at 398 n.1.

\textsuperscript{296} \textit{Id.} at 398.

\textsuperscript{297} \textit{Id.} Judge Kozinski also argued that the decision of the \textit{Defenders of Wildlife II} majority also “flies in the face of” the Supreme Court’s causation test in \textit{Public Citizen}, which provides 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.” \textit{Id.} at 398-99 (quoting Dep’t of Transp. v. Public Citizen, 541 U.S. 752, 770 (2004)). Judge Kozinski correctly stated that under this holding of \textit{Public Citizen}, “[b]ecause EPA had no discretion under the CWA to prevent the transfer of the permitting authority to Arizona, it did not need to consider the transfer’s effects on endangered species.” \textit{Id.} at 399. \textit{Public Citizen}’s causation test is discussed \textit{supra} note 197.

Judge Kozinski also asserted that the approach that he and Judge Thompson advocated follows the holdings in \textit{Am. Forest} and \textit{Platter River}; and that \textit{Conservation Law Found.} and the Eighth Circuit’s \textit{Defenders of Wildlife} decision do not support the majority’s position because “[b]oth cases addressed situations where the governing statute and the ESA were complementary, not where the governing statute precluded consideration of endangered species as the CWA does.” \textit{Id.} at 400-01, 401 n.5.
ENDANGERED SPECIES ACT & SECTION 7(a)(2)

V. CONCLUSION

Judge Kozinski noted in his dissent to the denial of rehearing en banc in Defenders of Wildlife II that "[i]f the ESA were as powerful as the majority contends, it would modify not only EPA’s obligation under the CWA, but every categorical mandate applicable to every federal agency,"298 including agency issuance of permits and licenses under statutes stating that an agency “shall” issue a license or permit when specified criteria are present that do not allow the agency to act to protect species listed under the ESA from the types of harm proscribed by section 7(a)(2) of the ESA. As Judge Kozinski stated, “[w]e should be particularly chary of holding that the ESA made such sweeping changes when the agency charged with implementing the statute has adopted a regulation allowing the ESA to coexist peacefully with all categorical mandates . . . . There is no justification for nullifying countless congressional directives by casting aside the agency’s authoritative interpretation of the ESA . . . .”299

Consequently, courts should continue to interpret 50 C.F.R. § 402.03 as limiting the application of section 7(a)(2) of the ESA to affirmative agency actions for which the agency has the discretionary authority to act in a manner to protect species listed under the ESA from the types of harm proscribed by section 7(a)(2) of the ESA. Section 7(a)(2) of the ESA should be held to be inapplicable to the ministerial actions of an agency under another statute that states the agency “shall” perform when specified criteria are present that do not permit the agency to act in a manner that can protect species listed under the ESA from the types of harm proscribed by section 7(a)(2) of the ESA. Furthermore, the specific holding of the Defenders of Wildlife II majority, that section 7(a)(2) of the ESA applies to an EPA decision to transfer CWA section 402 permit-issuing authority to a state, should be reversed, so that EPA is not required to comply with any of the requirements of section 7(a)(2) of the ESA when the EPA is deciding whether to transfer CWA section 402

298 Id. at 399 n.4.
299 Id.
permit-issuing authority to a state.