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National Association of Home Builders v. Defenders of Wildlife: Supreme Court's Endangered Species Act Decision Should Have Limited Impacts

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In *National Association of Home Builders v. Defenders of Wildlife* (*NAHB*), a sharply divided United States Supreme Court upheld a regulatory exemption from section 7 of the Endangered Species Act (ESA),[1] often heralded as the law's most significant protection for imperiled plants and animals. Justice Alito's five to four majority opinion, with the Court split on familiar lines, upheld a regulatory interpretation that section 7 only

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

applies to federal agency actions over which the agency had "discretionary involvement or control."[2] The majority reversed the Ninth Circuit's decision that the Environmental Protection Agency's (EPA) delegation of Clean Water Act (CWA) authority to Arizona was subject to section 7's prohibition against jeopardizing listed species or adversely modifying their habitat, even if such a delegation was required under the terms of the CWA.[3] Justice Stevens' sharp dissent explained that Congress intended ESA's section 7 provisions to apply to all agency actions, even so-called nondiscretionary ones, and that in any event, the EPA had substantial discretion to evaluate whether or not a state should be delegated CWA-permitting authority.[4]

For the last decade, opponents of the ESA have failed in their efforts to weaken the law legislatively, even with a conservative majority in both houses of Congress and a highly receptive administration. With the U.S. House and Senate now in friendlier hands—and leading ESA foes like California Representative Richard Pombo sent home by the voters in 2006—significant legislative weakening of the ESA seems unlikely in the near future. Administrative efforts to undercut the law through changes to or reinterpretations of ESA regulations have either failed in the courts[5] or triggered heavy political backlash.[6] Given this context, proponents of a more limited ESA can take some heart in having finally won a round, and in the highest court in the land. However, while the question of agency discretion and ESA applicability has been a regular source of controversy and confusion in recent years,[7] the *NAHB* decision should do little to change the

[2] *Id.* at 2550.

[3] Defenders of Wildlife v. U.S. Envtl. Prot. Agency (*Defenders I*), 420 F.3d 946 (9th Cir. 2005), *rev'd and remanded sub nom.*, 127 S. Ct. 2518 (2007).

[4] *NAHB*, 127 S. Ct. at 2539-41 (Stevens, J., dissenting).

[5] *See, e.g.*, Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224, 1233 (9th Cir. 2007) (holding that agency's use of hypothetical "reference operation" in biological opinion violated the ESA); Wash. Toxics Coal. v. U.S. Dep't of Interior, 457 F. Supp. 2d 1158, 1200 (W.D. Wash. 2006) (setting aside ESA regulations relating to pesticide consultations).

[6] *See, e.g.*, Rebecca Clarren, *Inside the Secretive Plan To Gut the Endangered Species Act*, SALON, Mar. 27, 2007, http://www.salon.com/news/feature/2007/03/27/endangered_species/; Editorial, *A Law Not to Be Trifled With*, N.Y. TIMES, Apr. 2, 2007, at A22; Felicity Barringer, *Proposed Changes Would Shift Duties in Protecting Species*, N.Y. TIMES, Mar. 28, 2007, at A16.

[7] *See, e.g.*, Jan Hasselman, *Holes in the Endangered Species Act Safety Net: The Role of Agency "Discretion" in Section 7 Consultation*, 25 STAN. ENVTL. L.J. 125 (2006).

judicial and administrative status quo that has prevailed for over a decade. The unique circumstance presented in *NAHB*, where a federal agency was explicitly commanded to authorize a non-federal party to take action based on criteria that the Court viewed as undisputed,[8] rarely appear in the federal statutes that implicate most ESA section 7 controversies. So, whether one agrees or disagrees with the majority's view that section 7 consultation is not triggered by certain kinds of federal agency actions, the implications of the decision should not prove significant. Indeed, given the narrowness of the ruling, one possible outcome of the *NAHB* decision is that it will cabin in some of the more over-reaching attempts by federal agencies to sweep many kinds of agency actions into the "discretion" exemption of section 7.

This Article offers a brief background of the decision, describes the majority decision and the dissent, and then turns to the question of how *NAHB* is likely to play out in cases in the future. The Article seeks to identify the kinds of agency actions that may be exempt from section 7 and the kinds that will not, concluding that *NAHB* should not significantly change the existing status quo with respect to section 7's applicability.

I

Background

A succinct description of the context leading up to the Court's decision is difficult because of a series of dramatic shifts in the government's position throughout the history of the *NAHB* litigation, with one of the most significant reversals occurring during the briefing before the Supreme Court.[9] The CWA prohibits discharges of water pollutants without a permit issued under the National Pollutant Discharge Elimination System (NPDES).[10] NPDES permits set technological and water quality-based limits on water pollution discharges and are initially issued by the EPA. A state may apply to administer the NPDES program, in whole or in part, within its borders.[11] The CWA states that the EPA

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[8] *NAHB*, 127 S. Ct. at 2524-25.

[9] For a more complete description of the underlying statutes and the history of the litigation, see *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946, 955, 962-967 (9th Cir. 2005), *rev'd and remanded sub nom.*, *NAHB*, 127 S. Ct. 2518 (2007), and Hasselman, *supra* note 7, at 150-75.

[10] *See* 33 U.S.C. § 1342 (2006).

[11] *Id.* § 1342(b).

"shall" grant a state's petition to administer the program unless it determines that "adequate authority does not exist" to ensure that nine specified criteria are satisfied.[12] Most states received their delegation many years ago. Arizona, which applied in 2002, was one of a remaining handful that had not previously sought NPDES authority.[13]

Historically, the EPA consulted with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (collectively, the Services) pursuant to ESA section 7 to ensure that CWA delegation decisions did not result in jeopardy to any listed species or destruction of critical habitat.[14] In 2001, after a period of public notice and comment, the three agencies entered into a national Memorandum of Agreement, emphasizing that the objectives of the CWA are "compatible and complementary" with those of the ESA.[15] The agreement acknowledged that the EPA has ongoing authority under the CWA to object to individual permits that may harm aquatic-dependent species and that it would exercise that authority where any permit threatened jeopardy to a listed species.[16] The agreement confirmed the agencies' practice of consulting on delegation decisions, and its principles were successfully applied in consultations that occurred at that time.

This state of statutory and administrative harmony was disrupted partway through the process of delegating NPDES authority to Arizona, which had applied to administer the program in 2002. At the outset, the EPA and the FWS understood the ESA to apply to the federal action of delegating NPDES authority, and the agencies began consulting pursuant to section 7.[17] The EPA prepared a biological assessment that identified sixty

[12] *Id.*

[13] *See NAHB*, 127 S. Ct. at 2527 n.2.

[14] Although the number of consultations that actually occurred was small, most delegations occurred early in the implementation of the ESA, prior to most species listings. *See* Discharges of Pollutants to Navigable Waters, 39 Fed. Reg. 26,061 (July 16, 1974) (delegating NPDES authority to fifteen states). A consultation would not have been required where no listed species would be affected. 50 C.F.R. § 402.14(a) (2007).

[15] Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11,202, 11,208 (Feb. 22, 2001) [hereinafter Coordination Agreement].

[16] *Id.* at 11,216.

[17] *Defenders I*, 420 F.3d at 952.

separate listed species that might be affected.[18] However, a dispute arose among staff level biologists about the environmental implications of the transfer decision, with some evidence in the record suggesting that losing federal oversight over certain permits could contribute to the extinction of some species.[19] The dispute was elevated to political appointees, who resolved it by abandoning the consensus approach that the agencies had followed in the past.[20] In spite of the evidence about impacts, the final biological opinion reflected this new policy approach and concluded that there would be *no* effects to listed species from the transfer.[21] This conclusion was not based on a biological analysis showing an absence of effects. Rather, the conclusion rested on a legal analysis that the EPA lacked authority to disapprove the transfer and hence did not cause any of the harm that resulted.[22] Environmental groups in the Ninth Circuit commenced a challenge to the biological opinion and to the transfer decision.

Notably, in that litigation the EPA and FWS did *not* argue that section 7 was inapplicable to the delegation decision in the first instance. Indeed, the agencies had already concluded that the law applied and had formally consulted on the impacts of EPA's action.[23] Instead, the biological opinion reasoned that there could be no legally relevant effects of the decision because the EPA found the nine CWA criteria to be satisfied and therefore lacked the authority to deny the transfer.[24] In its decision in that case, the Ninth Circuit found this conclusion "nonsensical," reasoning that if the EPA had a duty to consult, then it necessarily had authority to shape the action in a way that protects listed species.[25] The EPA could not, in the court's view, simultaneously argue that it was required to consult on the impacts of transfer decisions but was not permitted to take into account the impact of that decision on listed species.[26]

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18 Brief for Respondents Defenders of Wildlife, et al., at 13, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) (Nos. 06-340, 06-549).

19 *Id.*; *Defenders I*, 420 F.3d at 952-53.

20 *Id.* at 953.

21 *Id.* at 960-61.

22 *Id.*

23 *Id.* at 960.

24 *See id.*

25 *Id.* at 961.

26 *See id.*

Had the Ninth Circuit stopped there and remanded the biological opinion to the agencies, the case might never have reached the Supreme Court. However, the Ninth Circuit went further, scrutinizing the legislative history of the ESA and the Supreme Court's seminal decision in *Tennessee Valley Authority v. Hill*[27] (*TVA*) to conclude that the EPA had the duty to ensure against jeopardy even in situations where doing so would conflict with some other statutory authority.[28] The court also rejected arguments made by Arizona and industry intervenors who took a position the government did not take: that section 7 simply did not apply to the delegation decision because the decision is nondiscretionary.[29] In rejecting that view, the court observed that the EPA had not made such an argument and that, in any event, section 7 of the ESA itself explicitly applies to any action "authorized, funded or carried out" by a federal agency.[30] The court read 50 C.F.R. § 402.03, the ESA regulation stating that section 7 applies to situations in which there is "discretionary [f]ederal involvement or control," narrowly to be coterminous with the plain language of section 7.[31]

Judge Thompson authored a short dissent, asserting that delegation was not "agency action" under section 7 because the EPA lacked discretion to deny the application.[32]

A majority of judges voted to deny petitions for rehearing en banc.[33] However, in an unusual exchange, six judges heatedly dissented from that denial.[34] The dissenters pointedly drew attention to inconsistent decisions in both the Ninth Circuit and other circuits.[35] The dissenters accused the majority of being "tone deaf" to the Supreme Court's recent decision in *Department of Transportation v. Public Citizen*,[36] a case addressing the question of when an agency is a sufficient legal cause of environmental effects requiring consideration under the National Envi-

27 Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

28 *Defenders I*, 420 F.3d at 963-67.

29 *Id.* at 967.

30 *Id.* at 968 (quoting 16 U.S.C. § 1536(a)(2) (2006)).

31 *Id.* at 967 (quoting 50 C.F.R. § 402.03 (2006)).

32 *Id.* at 980 (Thompson, J., dissenting).

33 Defenders of Wildlife v. U.S. Envtl. Prot. Agency, 450 F.3d 394, 395 (9th Cir. 2006).

34 *See id.* at 395-401.

35 *See id.* at 400-01.

36 Dep't of Transp. v. Pub. Citizen, 541 U.S. 752 (2004).

ronmental Policy Act (NEPA).[37] Judge Berzon, the author of the original panel's decision, authored a concurring opinion in the denial of rehearing en banc, accusing the dissenters of offering something that "read more like [a] petition[ ] for [a] writ of certiorari than [a] judicial opinion[ ] of any stripe."[38] NAHB, Arizona, and the EPA all sought Supreme Court review shortly thereafter.

II

Majority Decision and Dissent

The first question taken up by the majority was whether the Ninth Circuit was correct that EPA's logically incoherent view of the interplay of the CWA and ESA, by itself, required reversal and remand.[39] Indeed, in an unusual move, when the Court granted certiorari, it specifically requested briefing on that question.[40] Answering this question in the negative, the majority first pointed out that, even if the Ninth Circuit had been correct that EPA's incoherent rationale justified judicial intervention, the proper remedy would have been to remand the decision back to the agency without going any further into the merits of those rationales.[41] Nonetheless, the majority concluded that EPA's inconsistency had little importance under the Administrative Procedure Act's (APA) deferential standard of review:

> [T]he only 'inconsistency' respondents can point to is the fact that the agencies changed their minds—something that, as long as the proper procedures were followed, they were fully entitled to do. The federal courts ordinarily are empowered to review only an agency's final [agency] action . . . and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.[42]

Turning to the substance, the majority framed the context as one in which there was a "clash of seemingly categorical—and at first glance, irreconcilable—legislative commands."[43] The major-

37 *Defenders of Wildlife*, 450 F.3d at 395.
38 *Id.* at 402.
39 Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2529 (2007).
40 Envtl. Prot. Agency v. Defenders of Wildlife, 127 S. Ct. 853 (2007).
41 *NAHB*, 127 S. Ct. at 2529.
42 *Id.* at 2530.
43 *Id.* at 2531.

ity described CWA's list of nine criteria as legally exclusive and, as a factual matter, unambiguously satisfied in this instance.[44] Seeking to impose section 7's no-jeopardy requirement on top of these criteria would, in the majority's view, add a tenth criteria that would "effectively repeal the mandatory and exclusive list" of nine criteria included in the CWA.[45] Resolving the purported clash of irreconcilable statutory commands, the majority turned to the doctrine of implied repeal, observing that "'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'"[46] Since the CWA was enacted before the ESA, they reasoned, allowing the ESA's no-jeopardy mandate to trump the CWA's requirement to delegate authority where the nine criteria were met would act as an implied repeal of the CWA.[47] This consideration applied not just in the context of the CWA but everywhere, the majority continued.[48] Reading section 7 as the Ninth Circuit did "would thus partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy" to listed species.[49]

The majority resolved the tension it perceived between the statutes by reference to the discretion regulation, 50 C.F.R. § 402.03, pursuant to which section 7 would not be read as impliedly repealing nondiscretionary statutory mandates, "even when they might result in some agency action."[50] In other words, reading section 7(a)(2) broadly, as the Ninth Circuit did, created an ambiguity as to whether it applied in a way that would impliedly repeal other statutes, and that ambiguity gave the agencies implementing the ESA substantial authority to promulgate

[44] *Id.* at 2531-32.

[45] *Id.* at 2532.

[46] *Id.* (quoting Watt v. Alaska, 451 U.S. 259, 267 (1981)).

[47] *Id.*

[48] *Id.* at 2533.

[49] *Id.* (citing Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n, 962 F.2d 27, 33-34 (D.C. Cir. 1992)). This of course is a near-perfect description of what Congress *was* trying to do in enacting the ESA. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185 (1978) (stating that the ESA gives protection of species "priority" over the "primary missions" of federal agencies).

[50] *NAHB*, 127 S. Ct. at 2533. The majority's assertion that the agencies "attempted to resolve this tension" through enactment of the discretion regulation finds no support in the extensive regulatory history of § 402.03. There is no evidence in that process that the agencies were deliberately seeking to carve out an exemption from section 7 for nondiscretionary agency actions. *See* Hasselman, *supra* note 7, at 132.

regulations resolving it. Applying the familiar two-step analysis from *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[51] the Court concluded that the interpretation limiting section 7 to discretionary federal actions was "reasonable" in light of the overall statutory scheme.[52]

The Court additionally found that this conclusion was supported by its decision in *Department of Transportation v. Public Citizen*.[53] In that case, the Court held that a federal agency has no duty to consider and disclose the clean air impacts of allowing trucks from Mexico into the United States under NEPA.[54] The Court reasoned that the agency had no authority to prevent the entrance of the Mexican trucks as the trucks' entry was otherwise required and thus, the agency could neither prevent their entry nor was the agency the legal cause of their entry.[55] While disavowing the suggestion that *Public Citizen* controlled the outcome in *NAHB*, the Court repeated that the basic principle of that case—"that an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion *not* to take"—supported the "reasonableness" finding of the § 402.03 regulation.[56]

The majority went on to specifically address arguments raised by respondents and the dissent. It observed that there was no collision between its holding and the decision in *TVA v. Hill*, in which the Supreme Court explicitly stated that section 7 contained no exemptions.[57] Despite the fact that the collision seems evident on its face, the majority asserted that since *TVA* both predated the enactment of the discretion regulation and addressed a "discretionary" rather than nondiscretionary action, *TVA* did not address the question presented in *NAHB*.[58] Additionally, it rejected the argument that the application of the nine criteria of the CWA to a transfer decision provided the EPA with enough discretion to trigger section 7.[59] In the first place, there was, in the majority's view, no dispute that the nine criteria had

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[51] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
[52] *NAHB*, 127 S. Ct. at 2534.
[53] Dep't of Transp. v. Pub. Citizen, 541 U.S. 752 (2004).
[54] *Id.* at 756.
[55] *NAHB*, 127 S. Ct. at 2535.
[56] *Id.* (citing California v. United States, 438 U.S. 645, 668 n.21 (1978)) (emphasis in original).
[57] *Id.* at 2536; *see also* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 188 (1978).
[58] *NAHB*, 127 S. Ct. at 2536-37.
[59] *Id.* at 2537.

been satisfied; hence, the point was moot.[60] In any event, the judgment that the EPA exercises under the CWA's nine criteria "does not grant it the discretion to add another entirely separate prerequisite to [the] list."[61] For example, the majority dismissed the idea that the EPA was authorized to inquire into the *substance* of the state's water quality standards, noting that its role was limited to simply inquiring whether the state had the *authority* to issue permits consistent with those standards.[62]

In dissent, Justice Stevens attacked both the concept that the CWA and ESA are irreconcilable as well as the concept that the ESA does not apply to all federal agency actions. The dissent started with a forceful recitation of the relevant facts and holding of *TVA*, in which the Court concluded that the ESA applied to all actions of federal agencies.[63] The dissent noted that *TVA* dealt with an action that was in no sense "discretionary" and, had the ESA not applied, "there is no doubt that the TVA would have finished the project that Congress had funded" and repeatedly directed the agency to complete.[64] Indeed, in *TVA*, the Court specifically rejected the argument that the ESA only applied when the agency had "reasonable decision making alternatives before it."[65] The dissent then traced the regulatory history of § 402.03, finding no support for the argument that it was intended to create an exemption from section 7 for nondiscretionary agency actions.[66] The dissent further emphasized that the ESA's "God Squad" provisions are the appropriate vehicle to address statutory conflicts that could not be resolved through consultation, terming these provisions a legislatively mandated process for resolving any statutory conflict between the ESA and other laws.[67] In short, the dissent argued that there was no basis

[60] *Id.* The majority's presumption in this regard was not well founded. Plaintiffs had never conceded that the nine criteria were satisfied. Rather, since the case began as a challenge to the biological opinion that EPA had initially perceived as being required, *see id.* at 2528, whether or not the nine criteria were satisfied simply was not a relevant consideration at the outset of the case.

[61] *Id.* at 2537.

[62] *Id.* at 2537 & n.10.

[63] *Id.* at 2538-39 (Stevens, J., dissenting).

[64] *Id.* at 2540 & n.2.

[65] *Id.* at 2540 n.3.

[66] *Id.* at 2541-43.

[67] *Id.* at 2546. Pursuant to section 7 of the ESA, under certain circumstances a cabinet-level committee can authorize actions that jeopardize listed species or adversely modify their critical habitat. *See* 16 U.S.C. § 1536(e)-(h) (2006).

in the ESA for finding an exemption from section 7 for purportedly nondiscretionary agency actions.

Moreover, noting that if two statutes are at all capable of coexistence then they should be read as such, the dissent explained how the CWA and the ESA have long been reconciled through various mechanisms and that, hence, there was no conflict in the first place.[68] For example, under the terms of the CWA itself, the EPA had sufficient discretion to evaluate a state's water permitting program and to object to the program if it insufficiently protected listed species.[69] The EPA also had discretion over the terms of the agreement, like setting the parameters of its ongoing oversight of a state NPDES program.[70] Thus, in the dissent's view, even if there was an exemption for nondiscretionary agency actions (which there was not), it would not apply to EPA's exercise of judgment over whether a state had met CWA's nine criteria, and section 7 should still apply.[71]

Justice Breyer joined Justice Stevens' dissent but wrote separately reserving judgment whether the ESA covered "every possible agency action" no matter how far removed from environmental considerations.[72] Justice Breyer further pointed out that virtually all grants of authority to agencies come with some limits attached, noting that the ESA "changed the regulatory landscape" of such authorizations by adding species-protection criteria to an agency's limited discretion and requiring compliance with both the ESA and other agency authorities.[73]

III

NAHB's Likely Effects on the Legal Landscape

As explained in previous articles as well as in the dissent, there are ample grounds to believe that the *NAHB* majority decision is inconsistent with the structure, history and purposes of the ESA, its implementing regulations, and *TVA v. Hill*, which the majority declined to overrule or even criticize.[74] The purpose of this

68 *See id.* at 2544-48.
69 *See id.* at 2548-49.
70 *Id.* at 2547-48.
71 *Id.* at 2550.
72 *Id.* at 2552 (Breyer, J., dissenting).
73 *See id.* at 2553.
74 *See, e.g.*, Hasselman, *supra* note 7.

Article is not to reargue that point, which failed to carry the day by a single vote. Rather, the point here is to observe the ways in which *NAHB* may or may not apply to other kinds of agency actions potentially subject to section 7. While the lower courts will have the ultimate responsibility for determining how to apply *NAHB* to other ESA section 7 controversies, the opinion itself is written in a way that strongly suggests a narrow application consistent with existing interpretations of the ESA.

A. **NAHB** ***Is Limited to Truly "Mandatory" Agency Actions Where Compliance with the ESA Is Impossible***

The first and most significant limitation on *NAHB*'s holding is that it only applies where an agency is "required" by statute to take a specific action in such a way that ESA consultation on the action would result in a violation of that statute. The majority relied on ESA's applicability regulation, § 402.03, to hold that section 7's protections do not apply to this kind of "nondiscretionary" agency action.[75] Accordingly, the key to deciding whether an agency action triggers the requirements of section 7 in future cases will turn in significant part on whether any given agency action falls on the discretionary side of the line or the nondiscretionary side.

The first observation about this line-drawing exercise is how little it does to alter the existing judicial and administrative status quo. In fact, considering the expansive way in which some federal agencies and regulated entities have sought to apply § 402.03, the *NAHB* decision may have narrowed the potential reach of the regulation. With the exception of the Ninth Circuit's opinion in *Defenders I*[76] which the Supreme Court reversed, and one or two other isolated district court cases,[77] the courts have generally agreed that nondiscretionary agency actions are exempt from section 7. For example, issuance of federal flood insurance by the Federal Emergency Management Agency (FEMA) pursuant to the National Flood Insurance Act,[78] issuance of whale watching certificates by the Coast Guard pursuant

[75] *NAHB*, 127 S. Ct. at 2538.

[76] Defenders of Wildlife v. U.S. Envtl. Prot. Agency, 420 F.3d 946 (9th Cir. 2005), *rev'd and remanded sub nom.*, *NAHB*, 127 S. Ct. 2518 (2007).

[77] *See, e.g.*, Fla. Key Deer v. Stickney, 864 F. Supp. 1222, 1238 (S.D. Fla. 1994).

[78] *See* Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency, 345 F. Supp. 2d 1151, 1174 (W.D. Wash. 2004).

to its authorizing legislation,[79] and operation of the Colorado River by the Bureau of Reclamation (as it affected species outside of the United States)[80] were all deemed nondiscretionary and exempt from the ESA by the courts.[81] Even if one thinks that those lower court decisions got it wrong,[82] the Supreme Court in *NAHB* appears to have confirmed the status quo more than it has changed it.

It has been much more common for courts to find sufficient discretion to trigger section 7 in statutes that were ambiguous. For example, in *Natural Resources Defense Council v. Houston*, the Ninth Circuit found that renewal of water service contracts under the Reclamation Act was discretionary because, even though renewal was mandatory, it was to be based on "mutually agreeable" terms and dealt with available project water.[83] In *Rio Grande Silvery Minnow v. Keys*, the Tenth Circuit noted that similar water service contracts did not specify precise amounts of water and thus left the agency with discretion to provide less water if necessary to protect listed species.[84] In *Turtle Island Restoration Network v. National Marine Fisheries Service*, the Ninth Circuit read an otherwise very narrow statute which authorized the agency regulating fishing to be discretionary by relying on the use of the term "including but not limited to" in its authorizing conditions.[85] In other words, while the courts have generally agreed that section 7 is not triggered by genuinely nondiscretionary agency actions, they have usually concluded that there is sufficient discretion under most statutes, and hence, the exemption has been viewed as a very narrow one. That body of case law is undisturbed by the Supreme Court's decision and, consequently, life after *NAHB* should look a lot like life before

[79] Strahan v. Linnon, 967 F. Supp. 581, 620 (D. Mass. 1997) (interim order of May 19, 1995 published as appendix II).

[80] Defenders of Wildlife v. Norton, 257 F. Supp. 2d 53, 67-69 (D.D.C. 2003).

[81] In the FEMA case, the district court found that implementation of FEMA's flood insurance program was, on a whole, discretionary and subject to section 7. *Nat'l Wildlife Fed'n*, 345 F. Supp. 2d at 1173. However, breaking it down into its constituent parts, the court found that one of the four elements of the program—the actual issuance of flood insurance policies—was nondiscretionary and hence exempt from section 7. *Id.* at 1174.

[82] *See* Hasselman, *supra* note 7, at 167-68.

[83] Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125-26 (9th Cir. 1998).

[84] Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109, 1113-14 (10th Cir. 2003), *vacated*, 355 F.3d 1215 (10th Cir. 2004).

[85] Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 975 (9th Cir. 2003) (quoting 16 U.S.C. § 5503(d) (2000)).

NAHB, with parties and courts focusing on whether the agencies have discretion under a particular statutory scheme, and mostly concluding that they do.

The second observation is that, in *NAHB*, the Court gave some important guidance about how much discretion is enough to trigger section 7. In an effort to distinguish *TVA v. Hill*, the majority concluded that the dam construction in that situation was not required by Congress and thus was a discretionary action subject to section 7.[86] Of course, the majority was correct that there was no clear statutory directive saying "TVA *shall* build this dam." However, as the dissent pointed out, the agency was hardly at liberty to simply ignore the congressional directive and use the money for some other purpose.[87] Indeed, there was abundant evidence in the legislative history that congressional appropriators viewed their actions as requiring completion of the dam.[88]

Thus, the conclusion of the *NAHB* majority that dam construction in *TVA* was a discretionary agency action, and thus subject to section 7, has potentially significant implications. It suggests that in the absence of an unambiguous mandate—a clear "shall" command from Congress where compliance with the ESA would invariably result in a violation of the authorizing statute—an action will fall on the *TVA* side of the line rather than the *NAHB* side. In fact, the majority limited the impact of its decision even in the context of CWA delegation by indicating that the EPA could, and did, take other actions with respect to state delegated programs (specifically, funding and oversight) that might be discretionary and subject to section 7.[89] Thus, it is possible that, even in the wake of *NAHB*, the EPA will still be required to ensure, through section 7 consultation, that state-delegated NPDES programs do not contribute to species jeopardy.

The inclusion of the word "shall" in a statute, of course, is only the beginning of the inquiry into whether agency discretion is limited in a way that would conflict with section 7. In *NAHB*,

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

[87] *Id.* at 2540 & n.2 (Stevens, J., dissenting).

[88] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 163-64 (1978).

[89] *NAHB*, 127 S. Ct. at 2538 n.11 ("But the fact that the EPA may exercise discretionary oversight authority—which may trigger [section] 7(a)(2)'s consultation and no-jeopardy obligations—*after* the transfer does not mean that the decision authorizing the transfer is itself discretionary." (emphasis in original)).

the agency action in question was an authorization by the EPA to a non-federal entity (an Arizona state agency) to take particular actions. The EPA was simply making a "yes" or "no" decision based on the presence or absence of enumerated criteria, and the Court focused heavily on the fact that saying "no" under the facts of that case would have violated the Agency's statutory duties under the CWA.[90] It is worth pointing out that this kind of situation arises fairly rarely, and as noted above, the courts mostly have applied § 402.03 to exempt these kinds of actions from section 7. Moreover, unlike in *NAHB*, in most cases where statutes direct agencies to take some mandatory action, even by using the word "shall," there are usually many different ways to carry out that action. In these cases, the question of *how* an agency carries out a mandatory duty involves the exercise of discretion, and that discretion should be informed by consultation under section 7.

For example, a statute might direct an agency to develop and maintain a river navigation system, or build and operate a dam to generate electric power. While the action may be mandatory and the underlying statute may use the word "shall," these statutes virtually never direct the agency to carry out these duties in a specific way, for example, by maintaining a navigation system of an exact depth for precise times, or by generating a specific number of megawatts. So, while these duties are not "discretionary" in the sense that the agency is free to ignore them altogether, the question of how the agency should carry them out is "discretionary" in the sense that there are likely many different ways to do so. In these circumstances, the agency can use the section 7 consultation process to identify a way to meet its statutory responsibilities that is consistent with both its duty to ensure against jeopardy and its duty to maintain navigation, generate power, or fulfill whatever other statutory requirement has been imposed.[91]

In short, the limitation of *NAHB* to clearly mandatory action simply confirms the existing status quo of agency and court interpretations of the scope of section 7, and if anything, gives addi-

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[90] *Id.* at 2534 ("An agency cannot simultaneously obey the differing mandates set forth in [section] 7(a)(2) of the ESA and [section] 402(b) of the CWA.").

[91] *See, e.g.*, *In re* Operation of Mo. River Sys. Litig., 421 F.3d 618 (8th Cir. 2005). In *Missouri River System*, the Eighth Circuit agreed in principle with the idea that section 7 does not apply when its application would cause an agency to violate its statutory authority, but the court held that the Corps of Engineers' governing statutes were sufficiently flexible so that it could comply with the ESA and its other duties. *Id.* at 630-31.

tional guidance that the exemption for nondiscretionary actions is a particularly narrow one. The "exemption" exists only where there is no way, at the outset, to comply with both the ESA and some other duty. If there is any flexibility on whether or how to carry out the action so that both duties can be met, the exemption does not apply. While a comprehensive survey of which federal statutes might be deemed nondiscretionary has not been performed, a survey of the case law and experience litigating section 7 issues confirms that the statutes triggering the most ESA scrutiny and controversy—statutes governing water management, dams, timber, grazing and the like—provide agencies with far more discretion than the EPA had in *NAHB*. Little should change in the section 7 context for such activities.

B. Mandatory Actions Matched with Flexible "Triggering" Criteria

The *NAHB* majority deferred to the Services' interpretation that section 7's consultation duty did not attach to actions "that an agency is *required* by statute to undertake once certain specified triggering events have occurred."[92] An additional consideration in applying this holding in future contexts, then, is whether endangered species considerations are potentially encompassed within those "triggering events." Both Defenders of Wildlife and *amici* argued that EPA's inquiry into whether or not Arizona had satisfied the CWA's nine criteria left them with ample room to implement measures to protect listed species consistent with section 7.[93] For example, since the EPA was required to ensure that the state had adequate authority to issue permits that met state water quality standards,[94] they argued, the EPA had sufficient discretion to deny a transfer application that failed to protect water quality standards because listed species would be harmed.[95] Thus, the parties argued, even if the ESA exempted

[92] *NAHB*, 127 S. Ct. at 2536 (emphasis in original).

[93] *See id.* at 2537.

[94] *See id.* at 2537 n.10.

[95] *See id.* at 2548 (Stevens, J., dissenting). States protect ESA-listed species in a variety of ways through water quality standards. For example, some states include ESA-listed species among their designated uses. *See, e.g.*, WASH. ADMIN. CODE 173-201A-200 (2007) (designated uses include "salmonid spawning, rearing, and migration"); IDAHO ADMIN. CODE r. 58.01.02.100 (2006) (designated uses include salmonid spawning). Other states design water quality criteria to meet the needs of ESA-listed species. *See, e.g.*, OR. ADMIN. R. 340-041-0028 (2007) ("The purpose of the temperature criteria . . . is to protect designated temperature-sensitive, beneficial

nondiscretionary agency actions, the CWA provided the EPA with discretion to deny a transfer application where species would be harmed, and that discretion was sufficient to trigger the section 7 duties. This is the very approach that the EPA and the Services had previously acknowledged in the national Memorandum of Agreement and utilized in prior consultations.[96]

While the majority disagreed with this view, its reasoning for rejecting it was narrow.[97] As noted above, the majority appeared to focus chiefly on the fact that there was "no dispute" at that stage in the litigation that the nine criteria had been satisfied.[98] The majority also emphasized that CWA's criteria were limited to EPA's scrutiny of the state's authority, not the substance of any standards themselves.[99] Thus, it seems fair to say that the majority largely viewed the factual context as one where the agency faced both: (a) a mandatory statutory duty triggered upon the satisfaction of some criteria; and (b) the *actual*, rather than potential, satisfaction of those criteria. This situation left no room for evaluating whether the criteria depended in some measure on the impact of the action on listed species.

So where does that leave courts faced with situations with mandatory duties based on criteria that have *not* been unambigu-

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uses, including specific salmonid life cycle stages in waters of the State."); 314 MASS. CODE REGS. 4.02, 4.05 (2007) (standards designed to protect aquatic life, which is defined to include "endangered species"); 15A N.C. ADMIN. CODE 2B.0110 (2006) (requiring special water quality plans for waters that listed species inhabit). Others protect fish and wildlife generally among their designated beneficial uses. *See, e.g.*, 30 TEX. ADMIN. CODE § 307.7(b) (2007); FLA. ADMIN. CODE ANN. r. 62-302.400 (2007); MD. CODE REGS. 26.08.02.01 (2005) (designated uses include "[p]ropagation of fish, other aquatic life, and wildlife"); OR. ADMIN. R. 340-041-0004 (2007) (anti-degradation policy specifically incorporates endangered species); *see also* 40 C.F.R. § 131.12(a) (2006) (anti-degradation standards require protection of "existing uses," which can include habitat for endangered species); 40 C.F.R. pt. 132, app. F, Procedure 2.A.2 (prohibiting variances from water quality criteria that would harm listed species). In Arizona, fish and wildlife are among the designated uses protected by the state's water quality criteria, ARIZ. ADMIN. CODE § 18-11-104(B) (2007), and the standards include special provisions for designating additional water quality standard limits to protect threatened or endangered species. *Id.* § 18-11-112(D)(4)(b); *see also id.* R18-11-108 (narrative water quality criteria require water quality that protects aquatic life and is non-toxic to "humans, animals, plants, or other organisms").

[96] Coordination Agreement, 66 Fed. Reg. 11,202, 11,215 (Feb. 22, 2001) (EPA will exercise its existing CWA authority to prevent state-issued permits that may jeopardize listed species).

[97] *NAHB*, 127 S. Ct. at 2534.

[98] *Id.* at 2537.

[99] *Id.* at 2537 n.10.

ously satisfied? The Court appeared to leave the lower courts a fair amount of room for different interpretations, and much will depend on which approach prevails over time. It seems reasonable to conclude that a mandatory duty matched with triggering criteria that omit any consideration of environmental or wildlife-related concerns would fall on the "nondiscretionary" side of the line, as there is simply no room in the statutory scheme to consider the action's impacts on wildlife.

For example, imagine a statute that requires an agency to issue a permit to a company to do something potentially harmful to a listed species as long as the company is financially solvent or has adequate insurance. Even though the agency is required to conduct some investigation into the company's solvency or insurance and has some "discretion" to apply legal standards to the facts, it would be difficult to argue that such discretion leaves the agency room to evaluate impacts of the permit to listed species. Issuance of the permit would be nondiscretionary once the agency determined that the permit applicant met the applicable, non-environmental criteria.

In contrast, imagine a statute that requires the agency to issue the same permit to the company if it concludes that the permit is consistent with the "public interest." In that situation, issuance of a permit that might harm endangered species, which the Supreme Court in *TVA* declared to be a public interest of the highest order,[100] would be inconsistent with the statute. The agency would have the ability under its underlying statutory authority to deny the permit if it harmed species and that level of discretion should be sufficient to trigger section 7. Again, this distinction points towards the limited impact of *NAHB*, as most statutes usually contain sufficient discretion of this sort.

C. The Role of "Implied Repeal" in Determining Section 7's Reach

At the heart of the majority's holding in *NAHB* lies the concept of implied repeal.[101] The Court held that it was impossible for the EPA to comply with both the CWA and the ESA at the same time.[102] Compliance with the ESA's no-jeopardy duty, the Court concluded, would force the EPA to take action inconsis-

100 *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174 (1978).
101 *NAHB*, 127 S. Ct. at 2532-34.
102 *See id.* at 2534.

tent with its CWA duties, for example, by considering additional criteria outside of the nine CWA delegation factors, or denying delegation to a state that met those criteria.[103] As such, the Court reasoned that the application of the ESA, which was enacted shortly *after* the CWA, would act as an implied repeal of CWA's delegation provision.[104] Noting that repeals of specific statutes by later-enacted, more-general duties are highly disfavored, the Court concluded that this clash of statutes generated an ambiguity "as to which command must give way."[105] To resolve this perceived ambiguity, the Court applied the two-step *Chevron* analysis to ultimately defer to the Services' interpretation, adopted in § 402.03, that the ESA does not apply to nondiscretionary agency actions.[106]

Whatever one thinks of the legal analysis, there are a few significant implications of relying so squarely on the doctrine of implied repeal. First, as a threshold matter, it should be observed that the majority did not make any *definitive* interpretations of section 7 and its meaning. Instead, it perceived a statutory ambiguity in that provision and deferred to the Agency's regulation which suggested that such an exemption existed. This suggests that, at a minimum, the entire issue could be resolved through administrative rulemaking to clarify the applicability of section 7 in situations of no or limited agency discretion.

Second, the Court's implied repeal analysis should have no application when the ESA *predates* the statute in question. Congress legislates against the background of existing law and presumably enacts new agency obligations with the knowledge that those agencies cannot take action that jeopardizes listed species.[107] Congress also has demonstrated repeatedly that it knows how to exempt particular actions from the ESA where it so desires.[108] The "ambiguity" perceived by the Court that led it to apply the *Chevron* step-two analysis and defer to § 402.03 should not exist when the perceived conflict is between the ESA and a

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[103] *Id.* at 2532-33.

[104] *Id.* at 2532.

[105] *Id.* at 2534.

[106] *Id.* at 2534-35.

[107] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 94 (2000).

[108] *See, e.g.*, Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1451 (9th Cir. 1992) (Congress passed statute stating "the requirements of section 7 of the [ESA] shall be deemed satisfied as to the issuance of a Special Use Authorization" to build telescopes in habitat of a squirrel protected by ESA).

statute enacted after ESA's passage date in 1973. In fact, to impute an exemption from section 7 for statutory duties enacted after 1973 would violate the holding of *NAHB*, as that later-enacted duty would be acting as an implied repeal of ESA's no-jeopardy mandate.[109]

Third, the doctrine also has no application in another major area of litigation under § 402.03: where the agency's discretion is constrained not by statute, but by contract. Particularly in the context of the Bureau of Reclamation's (Bureau) delivery of water from federal water storage and irrigation projects, private parties and the Bureau have often argued that they lack discretion to *not* deliver water that they had previously contracted to deliver.[110] The *NAHB* decision, predicated on the clash of statutes and the doctrine of implied repeal, simply does not address that question. Nor is there any reason to think that *NAHB* upset well-settled law that ESA's no-jeopardy duties supersede both state law obligations (for example water rights) and agency contract duties.[111] Thus, even when an agency's discretion is constrained by a contract, the duties imposed by section 7 still apply. Again, *NAHB* does little to disrupt settled law on this issue.

Fourth, the doctrine is inapplicable in yet another area where § 402.03 has been invoked: where the purported lack of discretion arises from regulation rather than statute. In some instances, agencies respond to broad grants of authority under statute with regulations that restrict their flexibility. Often, they invoke those regulations to assert that they lack sufficient discretion over an action and hence it should be considered exempt from section 7. Under the reasoning of *NAHB*, however, this argument should not carry the day. Where regulations clash with section 7's requirement to avoid jeopardy, it is the regulation that must give way.

Finally, because *NAHB* dealt solely with the question of whether section 7 applied in the first instance to some categories of federal actions, it should provide little support for creative

[109] *See NAHB*, 127 S. Ct. at 2532.

[110] *See, e.g.*, Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228, 1250 n.20, 1251 (N.D. Cal. 2001).

[111] *See* Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 2000) ("It is well settled that contractual arrangements can be altered by subsequent [C]ongressional legislation."); O'Neill v. United States, 50 F.3d 677, 680-81 (9th Cir. 1995) ("the contract is not immune from subsequently enacted statutes").

uses of the discretion concept in biological analyses. In *National Wildlife Federation v. National Marine Fisheries Service*, for example, the Ninth Circuit upheld a district court's invalidation of an ESA biological opinion for the Columbia River hydrosystem.[112] While all parties had agreed that section 7 applied to the operation of the hydrosystem—i.e., both that consultation was required and that hydropower operations could not jeopardize listed species—NMFS sought to build in limits on the action agency's discretion into its biological analysis.[113] NMFS did so by comparing a "reference operation" that represented the most fish-friendly operation it could achieve within its discretion to the proposed action, and looking only at the increment of difference between those two actions.[114] The Ninth Circuit held that the agencies could not segregate the nondiscretionary components of their operation of the dams into the baseline, finding that it "ignore[d] potential jeopardy risks."[115] While some parties to that litigation (but not the federal government) have sought rehearing of that decision based on *NAHB*, there is simply no support for revisiting *National Wildlife Federation*. *NAHB* dealt with the question of "trigger": whether section 7 even applies to an action in the first instance.[116] *National Wildlife Federation* dealt with the separate question of "scope": how to evaluate the biological impacts of actions when section 7 does apply.[117]

D. Other Considerations Supporting a Narrow Interpretation of **NAHB**

A number of additional factors appeared to motivate the Court to rule as it did. It is difficult to identify with any precision how these factors played into the result or how the next case might turn out as those factors change, but they are worth considering as one contemplates how future cases will be decided in the wake of *NAHB*.

First, it appears from both the decision and oral argument that the Court struggled to understand how species would be im-

[112] Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224, 1243 (9th Cir. 2007).

[113] *See id.* at 1233.

[114] *See id.* at 1233-34.

[115] *Id.* at 1233.

[116] *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2536 (2007).

[117] *See Nat'l Wildlife Fed'n*, 481 F.3d at 1241.

pacted by EPA's transfer decision. The context made that confusion somewhat understandable. The EPA was simply transferring administrative authority to issue permits from one agency (EPA) to another (Arizona's Department of Environmental Quality).[118] Under the CWA, state permits would still have to meet federal minimum standards, and the majority appeared unconvinced by evidence in the record suggesting that the permits would be different once Arizona assumed permitting authority.[119] Moreover, the EPA in its briefing to the Court emphasized that other provisions of the ESA, specifically, the prohibition on "take" (i.e. killing, injuring, or harming a listed species) contained in section 9 "will remain applicable to private development" in Arizona, notwithstanding delegation of permitting authority.[120] During oral argument, Chief Justice Roberts and others extensively probed the question of how species would be impacted by the simple act of transfer, particularly in light of ESA's other protections. Chief Justice Roberts and Justice Scalia emphasized that the FWS and the EPA would still have a role in overseeing the state permits, and perhaps even believed that ESA consultation would still occur on the issuance of individual permits in light of EPA's objection authority.[121] Further, the majority's opinion is filled with references that appear to discount

[118] Transcript of Oral Argument at 43, *NAHB*, 127 S. Ct. 2518 (Nos. 06-340, 06-549) (Justice Scalia: "[Y]ou have to show some reason why we don't trust Arizona to do what the Federal government is doing . . . ."; "[T]he mere fact that you're giving it to a state which Congress has been willing to trust with implementing this law is not enough to show that there's jeopardy.").

[119] *See, e.g.*, *id.* at 42 (Justice Breyer: "I read through this record, not completely but pretty well, and I couldn't find a single thing that would suggest that Arizona presents any risk to you. And so, what is the risk to an endangered species that you're actually worried about there?"). Actually, Defenders had pointed to evidence in the record showing that the transfer of NPDES authority to Arizona could result not just in jeopardy but in extinction of two particular species, a fact observed by the dissent. *NAHB*, 127 S. Ct. at 2538 (Stevens, J., dissenting).

[120] Brief for Petitioner Environmental Protection Agency at 22, *NAHB*, 127 S. Ct. 2518 (Nos. 06-340, 06-549).

[121] *See* Transcript of Oral Argument, *supra* note 118, at 27 (Justice Roberts: "No, what he's suggesting is that there isn't going to be any impact on any endangered species until a particular permit is issued by the State agency, and that those permits are submitted to the Fish and Wildlife Service for their review."); *id.* at 45-46 ("issuance of the permit would be subject to objection and review by EPA and the Fish and Wildlife Service").

the impact of the transfer decision on listed species and that emphasize the protections that remain.[122]

Would the result have been the same if an agency was taking an equally nondiscretionary—but much more direct—action that would seriously threaten species, by operating a dam that was wiping out endangered salmon, or awarding timber sales that clear-cut habitat for imperiled owls?[123] Strictly speaking, there is no reason that the legal analysis would be different. Even so, an argument that an agency can go forward with an action that would push a species up to, or even over, the brink of extinction would highlight the conflict with ESA's clear statutory provisions and the Supreme Court's previous decision in *TVA* that prevention of extinction is a national priority of the highest order. Such context may give courts significant pause and encourage a different result.

Another background consideration at issue in *NAHB* was the sensitive interplay of state and federal authorities. The CWA is predicated in significant measure on principles of federalism, in that states should be able to implement the CWA as long as they meet various minimum federal standards.[124] Similarly, the ESA is sensitive to federalism concerns, insofar as it imposes procedural and substantive duties (consultation and no-jeopardy) on federal agencies but not state or private actors.[125] Arizona was one of the parties seeking review of the Ninth Circuit's decision, complaining about the interference with its ability to manage state water resources. The EPA highlighted the issue in its brief, noting that the case arose in a "context where federalism concerns and an interest in respecting the state applicants loom large."[126] It is reasonable to think that the idea of appearing to impose a

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[122] *See, e.g.*, *NAHB*, 127 S. Ct. at 2525 (state authorities "will exercise [CWA] authority under continuing federal oversight to ensure compliance with relevant mandates of the [ESA] and other federal environmental protection statutes"); *id.* at 2527 ("the FWS opinion that EPA's continuing oversight of Arizona's permitting program, along with other statutory protections, would adequately protect listed species and their habitats following the transfer").

[123] Of course, the point is only a hypothetical one, as the federal statutes authorizing the operations of dams or the approval of timber sales in reality are highly discretionary.

[124] 33 U.S.C. § 1342(b) (2006).

[125] 16 U.S.C. § 1536 (2006) (jeopardy standard for actions authorized, funded or carried out by federal agencies); *id.* § 1538 ("take" standard for all parties).

[126] Brief for Petitioner, *supra* note 120, at 20; *see id.* at 23 (arguing that Defenders' arguments would "frustrate Congress's federalism-sensitive judgments" to have states implement parts of the CWA).

separate federal mandate, to take precedence over the delicate balance of state and federal authorities embodied in both statutes, raised concerns of federalism with the majority.[127] Again, it is impossible to tell how the result may have come out had the context been different, for example, with more direct federal actions often implicated in ESA controversies.

E. Issues Left Unresolved by **NAHB**

What are the implications of the Court's heavily-qualified invocation of *Department of Transportation v. Public Citizen*?[128] As noted above, the Court in that case held NEPA does not require disclosure of impacts that are not "caused" by the agency action under review.[129] The EPA and other petitioners argued vociferously that *Public Citizen* controlled the outcome in *NAHB* as well, claiming that the EPA could not "cause" any impacts arising from the transfer of delegation because it lacked authority to deny the transfer when the CWA criteria are met.[130] The Court rejected that argument: "We do not suggest that *Public Citizen* controls the outcome here; [section] 7(a)(2), unlike NEPA, imposes a substantive (and not just a procedural) statutory requirement, and these cases involve agency action more directly related to environmental concerns than the [Federal Motor Carrier Safety Administration]'s truck safety regulations."[131] Even so, the Court noted, the basic principle of *Public Citizen*—that an agency is not the legal "cause" of an action if it has no statutory discretion not to take that action—supports the reasonableness of the Services' interpretation limiting the scope of section 7 to actions over which it has discretion.

This dictum leaves unresolved the question of whether other provisions of the ESA—including section 9, which prohibits anyone (including states and private parties) from taking listed species—could be subject to the same causation-based limits.[132] Notably, there is no regulation, nor any other administrative in-

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[127] *See, e.g.*, Transcript of Oral Argument, *supra* note 118, at 43-44 (Justice Scalia emphasizing that Congress entrusted Arizona "to do the right thing" on CWA permits).

[128] Dep't of Transp. v. Pub. Citizen, 541 U.S. 752 (2004).

[129] *Id.* at 769.

[130] Brief for Petitioner, *supra* note 120, at 24-25.

[131] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2535 (2007).

[132] *See* 17 U.S.C. § 1538 (2006).

terpretation or case law, which limits section 9's applicability to discretionary actions. Thus, an agency could take an action that was exempt from section 7 pursuant to 50 C.F.R. § 402.03, but still face liability under section 9 if that action results in a take of listed species.[133] However, the dictum in *NAHB* invoking *Public Citizen* at least suggests that the Court may some day hold that nondiscretionary action cannot be the cause of a take. Such a decision would significantly weaken the reach of ESA's "backup" protections for activities otherwise exempt from the no jeopardy and consultation duties.

Moreover, the dictum may provide ammunition for agencies seeking to narrow the effects analysis as happened in the Columbia hydrosystem litigation described above. While the context in which that case arose is quite distinguishable from that of *NAHB*, there has been a vigorous behind-the-scenes debate about the proper interpretation of § 402.03 for many years in many agencies. It is possible that the Court's dictum regarding causation will strengthen advocates of narrow, segmented biological analyses.

IV

Conclusion

ESA regulations and the majority of cases have concluded for some time that section 7 does not apply to truly nondiscretionary agency actions. While many have disputed the existence or appropriateness of such an exemption, the issue was relatively settled prior to the Ninth Circuit's opinion in *Defenders I*. In many ways, by deferring to the regulation and the federal agency position, *NAHB* simply restored the status quo that existed on this point prior to the Ninth Circuit's opinion. In fact, by addressing a situation in which simultaneous compliance with both ESA section 7 and the CWA's delegation requirement, in the Court's view, would have been impossible, and by using the dam building in *TVA v. Hill* to contrast discretionary and nondiscretionary agency actions, the Court may have cabined the "discretion" exemption narrowly. Situations in which the federal agency's dis-

133 Indeed, this may be one of many reasons why the impact of *NAHB* will be limited, as agencies may well opt not to invoke the exemption for nondiscretionary actions, and choose to consult anyway because consultation can provide insulation from take liability through an incidental take statement that accompanies a section 7 biological opinion.

cretion is as constrained as the Court viewed EPA's authority in *NAHB* arise rarely, particularly in the contexts that trigger most ESA controversies. Indeed, to the extent that *NAHB* clarifies the line between discretionary and nondiscretionary agency duties, it is possible that the reach of § 402.03 will be narrower than it was before. Of course, much will depend on how the agencies and others seek to interpret the regulation and how the lower courts will respond to those arguments. If agencies seek to dramatically roll back their ESA responsibilities in light of *NAHB*, or if the lower courts read *NAHB* expansively as creating a significant new loophole in ESA's applicability, it is likely that the dispute will shift out of the courts. For example, to the extent that the Court's decision in *NAHB* relies on a perceived ambiguity in section 7, that ambiguity could be resolved through new rulemaking. Additionally, if agency and court interpretations of *NAHB* significantly undercut the national priority of protecting endangered species, resolution of the issue may require action in Congress.