

---

---

## NOTE

### **CWA AND ESA: NINE IS A PARTY, TEN IS A CROWD NATIONAL ASSOCIATION OF HOME BUILDERS V. DEFENDERS OF WILDLIFE, 127 S. CT. 2518 (2007).**

*Malori Dahmen\**

I. Introduction.....	703
II. Overview of Statutory Provisions - Dueling Statutes.....	704
III. Just the Facts – A Case of Misinterpretation .....	705
IV. The Supreme Court Decision – The Path to Irreconcilable Legislative Commands .....	707
A. The Ninth Circuit’s Analysis.....	707
B. The Supreme Court’s Decision.....	708
V. Lack of Discretion.....	711
VI. Conclusion .....	712

#### I. INTRODUCTION

In *National Association of Home Builders v. Defenders of Wildlife*<sup>1</sup> the United States Supreme Court ruled on the compatibility of two statutory sections, section 402(b) of the Clean Water Act (CWA)<sup>2</sup> and section 7(a)(2) of the Endangered Species Act (ESA).<sup>3</sup> This case was appealed from the United States Court of Appeals for the Ninth Circuit following a suit by the Defenders of Wildlife against the Environmental Protection Agency (EPA). The Defenders of Wildlife sought a review of the EPA’s decision to transfer pollution permitting authority to Arizona.<sup>4</sup> The Supreme Court granted certiorari to determine whether an outside regulation can serve to harmonize two statutes that are seemingly incompatible. To provide a thorough analysis of the issues involved, an overview of the applicable statutes is provided followed by a summary of the facts of the case.

---

\* JD/MBA Candidate, December 2009, University of Tulsa College of Law. The author expresses appreciation to her family for their unwavering support.

1. *Defenders of Wildlife v. United States Environmental Protection Agency*, 420 F.3d 946 (9th Cir. 2005), *rev’d sub nom.* *National Assoc. of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007).

2. Federal Water Pollution Control Act Amendments of 1972 § 402(b), *amended by*, 33 U.S.C. § 1342(b) (2000). For clarification, this statutory section will be referred to as section 402(b) in the text, but the U.S.C. section number will be cited in the footnotes.

3. Endangered Species Act of 1973 § 7(a)(2), *amended by*, 16 U.S.C. § 1536(a)(2) (2000). For clarification, this statutory section will be referred to as section 7(a)(2) in the text, but the U.S.C. section number will be cited in the footnotes.

4. *Defenders of Wildlife v. U.S. Env’tl Protection Agency*, 420 F.3d 946 (9th Cir. 2005).

---

---

## II. OVERVIEW OF STATUTORY PROVISIONS - DUELING STATUTES

The CWA established the National Pollution Discharge Elimination System (NPDES)<sup>5</sup> which gives the EPA authority to issue pollution permits. The statute also provides the opportunity for states to take over administration of federal pollution permitting programs regarding waters within their borders.<sup>6</sup> For this transfer of power to occur, the governor of each state must submit a “full and complete description of the program it proposes to establish and administer.”<sup>7</sup> The statute provides that “the Administrator shall approve each submitted program unless he determines that adequate authority does not exist.”<sup>8</sup> States demonstrate adequate authority by showing the ability:

1. to issue fixed-term permits that apply and ensure compliance with the CWA’s substantive requirements and which are revocable for cause;
2. to inspect, monitor, and enter facilities and to require reports to the extent required by the CWA;
3. to provide for public notice and public hearings;
4. to ensure that the EPA receives notice of each permit application;
5. to ensure that any other State whose waters may be affected by the issuance of a permit may submit written recommendations and that written reasons be provided if such recommendations are not accepted;
6. to ensure that no permit is issued if the Army Corps of Engineers concludes that it would substantially impair the anchoring and navigation of navigable waters;
7. to abate violations of permits or the permit program, including through civil and criminal penalties;
8. to ensure that any permit for a discharge from a publicly owned treatment works includes conditions requiring the identification of the type and volume of certain pollutants; and
9. to ensure that any industrial user of any publicly owned treatment works will comply with certain of the CWA’s substantive provisions.<sup>9</sup>

One year into existence of the CWA, Congress passed the ESA.<sup>10</sup> Section 7(a)(2) of the ESA provides that “each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species.”<sup>11</sup> In practice, the United States Fish and Wildlife Service (FWS), as part of the United States

---

5. 33 U.S.C. § 1342(b) (2000).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Defenders of Wildlife*, 420 F.3d at 950; 33 U.S.C. § 1342(b) (2000).

10. 16 U.S.C. §§ 1531-1544 (2000).

11. 16 U.S.C. 1536(a)(2) (2000). The Secretary mentioned in the statutory section refers to either the Secretary of Commerce or the Interior. *National Assoc. of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007).

Department of the Interior, consults with the EPA regarding NPDES permits where “listed species and/or critical habitat are likely to be adversely affected.”<sup>12</sup>

Looking at the CWA and ESA statutory sections together, an appearance of inconsistency emerges. Section 402(b) of the CWA provides that the EPA “shall approve” a transfer program upon a state meeting the nine listed requirements.<sup>13</sup> This language implies mandatory action with the only possibility of discretion being the EPA’s determination that a state meets the nine requirements. In contrast, section 7(a)(2) of the ESA mandates that Federal agencies “insure” their actions do “not jeopardize” endangered or threatened species through the practice of consultation with the appropriate agency.<sup>14</sup> The issue becomes how to reconcile a state transfer proposal that meets the nine requirements of the CWA but seemingly fails to meet the requirement established in the ESA. Arizona’s transfer request presented this dilemma to the courts.

### III. JUST THE FACTS – A CASE OF MISINTERPRETATION

In January 2002, Arizona applied for a transfer of pollution permitting authority under CWA section 1342(a).<sup>15</sup> The EPA evaluated the proposal finding that the transfer could affect both the species, and habitat, of the Pima pineapple cactus and the pygmy-owl.<sup>16</sup> Recognizing the consultation obligations under ESA section 7(a)(2), the EPA initiated formal consultation procedures with the FWS.<sup>17</sup> The FWS analyzed the direct and indirect effects of transferring the permit authority to Arizona, noting concern at the possible loss of “consultation-related conservation benefits.”<sup>18</sup> After considering the definition of indirect effects in the FWS Consultation Handbook, the FWS determined that approval of Arizona’s transfer request was not an agency action that would cause the loss of consultation benefits for listed species or critical habitats.<sup>19</sup> The FWS concluded that the congressional decision allowing states to apply for transfer of permit authority was the indirect cause of the loss of consultation benefits, meaning that the EPA’s approval of Arizona’s transfer request would not “jeopardize the continued existence” of listed species or habitats.<sup>20</sup>

While the FWS was making its determination, the EPA reached a conclusion of its own. The EPA reevaluated its interpretation of CWA section

12. Biological Opinion No. 02-21-02-F-0268, December 3, 2002, available at: [http://www.fws.gov/southwest/es/arizona/Documents/Biol\\_Opin/020268\\_EPA\\_approval\\_of\\_AZ\\_AZPDES.pdf](http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/020268_EPA_approval_of_AZ_AZPDES.pdf). [hereinafter *Biological Opinion*].

13. 33 U.S.C. 1342(b) (2000).

14. 16 U.S.C. 1536(a)(2) (2000).

15. State Program Requirements; Application To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Arizona, 67 Fed. Reg. 49,916, 49,917 (Aug. 1, 2002). Arizona was the 45th state to apply for transfer. *National Assoc. of Home Builders*, 127 S. Ct. at 2527.

16. *Defenders of Wildlife*, 420 F.3d at 952.

17. *Id.*; 67 Fed. Reg. 49,917, 49,919 (Aug. 1, 2002).

18. *Biological Opinion*, *supra* note 12.

19. *Id.*

20. *Id.* at 21.; Reply Brief for Petitioner, *National Assoc. of Home Builders*, 127 S. Ct. 2518 (2007) (Nos. 06-340, 06-549), 2007 WL 1074097. [hereinafter *Petitioner Reply Brief*].

402(b), noting the mandatory action required by the statute.<sup>21</sup> The EPA concluded that its criteria, in deciding whether to transfer permitting authority, were limited to the nine specified conditions in the statute.<sup>22</sup> While the ESA consultation requirements were applicable in other circumstances, the EPA determined that consultation was unnecessary regarding listed species or habitats when dealing with issues under CWA section 402(b).<sup>23</sup> The Biological Opinion issued by the FWS reflected its agreement with the EPA's interpretation of section 402(b).<sup>24</sup> Subsequently, the EPA approved Arizona's request for transfer of permitting authority, noting the biological opinion issued by the FWS and its compliance with consultation procedures.<sup>25</sup>

At this point, various petitioners, including Defenders of Wildlife, filed petitions for review of the EPA's transfer decision, citing the EPA's failure to adequately follow consultation proceedings in violation of ESA Section 7(a)(2) and the Administrative Procedures Act (APA).<sup>26</sup> Petitioners asserted in separate actions that the biological opinion relied upon by the EPA did not meet ESA standards and that EPA decision making was arbitrary and capricious, such that the decision should be remanded for further administrative proceedings.<sup>27</sup> The EPA maintained that the mandatory language of the CWA required its transfer of permit authority to Arizona without binding consideration of the ESA provision.<sup>28</sup> The EPA also cited regulations controlling consultation under the ESA, stating that "[s]ection 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control."<sup>29</sup>

Questioning the timing of this argument, petitioners contended that the EPA did not rely on this regulation when it approved Arizona's transfer request.<sup>30</sup> Petitioners argued that the EPA recognized its consultation obligations by obtaining and relying on a biological opinion from the FWS in its approval of the transfer request.<sup>31</sup> Petitioners asserted that it is only after the fact that the EPA shifted its position disclaiming a consultation obligation.<sup>32</sup> The petitioners argued that this illustrated the lack of reasoned decision making, resulting in arbitrary and capricious decision-making.<sup>33</sup>

---

21. Reply Brief by State of Arizona in Support of Petitioners, *National Assoc. of Home Builders*, 127 S. Ct. 2518 (2007) (Nos. 06-340, 06-549), 2007 WL 1074685.

22. *Petitioner Reply Brief*, *supra* note 20.

23. *Id.*

24. *Biological Opinion*, *supra* note 12. Subsequent to this biological opinion, the interpretation was affirmed by the FWS as part of Alaska's application process for transfer of NPDES permitting authority. *National Assoc. of Home Builders*, 127 S. Ct. at 2530.

25. State Program Requirements; Approval of Application by Arizona To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Arizona 67 Fed. Reg. 79,629, 79,630 (Dec. 30, 2002).

26. *Defenders of Wildlife*, 420 F.3d at 955.

27. *Id.* Separate actions were consolidated and transferred to the Ninth Circuit.

28. *Petitioner Reply Brief*, *supra* note 20, at 4.

29. *Id.* at 7.; 50 C.F.R. § 402.03 (2006).

30. Brief for Respondents, *National Assoc. of Home Builders*, 127 S. Ct. 2518 (2007) (No. 06-340, 06-549), 2007 WL 951129 at 45.

31. *Id.* at 12.

32. *Id.* at 18.

33. *Id.* at 36.

IV. THE SUPREME COURT DECISION – THE PATH TO IRRECONCILABLE  
LEGISLATIVE COMMANDS

A. *The Ninth Circuit's Analysis*

The Ninth Circuit began its analysis of the parties' arguments noting the standard of review for arbitrary and capricious decision-making. As long as the agency can show a decision based on well-reasoned, relevant factors, that the agency is statutorily authorized to consider, the decision will not be overturned as arbitrary and capricious.<sup>34</sup> Under this standard, the Ninth Circuit found the EPA's decision arbitrary and capricious. Because the EPA made note of its compliance with consultation procedures under section 7(a)(2) of the ESA, the EPA contradicted itself by claiming such consultation was unnecessary.<sup>35</sup> The Ninth Circuit rejected the argument of the EPA that the mandatory language of section 402(b) of the CWA prohibited compliance with any other statutes.<sup>36</sup>

The EPA's remaining argument, regarding the discretionary language of 50 C.F.R. section 402.03, met a similar fate. Because the EPA did not assert the discretionary language argument during its original agency decision-making process, the argument could not be employed at the appellate level.<sup>37</sup> Also, the Ninth Circuit noted its history of interpreting section 7(a)(2) of the ESA and 50 C.F.R. section 402.03 as "coterminous," concluding that both are complementary with section 402(b) of the CWA.<sup>38</sup> Under this reasoning, the Ninth Circuit determined that the biological opinion issued by the FWS was flawed for ignoring the loss of consultation benefits that would result from the EPA's approval of Arizona's transfer request. As such, the EPA's reliance on the opinion contributed to a final decision that was arbitrary and capricious.

Judge Thompson dissented concluding that the tension between the ESA and CWA could be easily resolved by examining the statutes in terms of 50 C.F.R. section 402.03.<sup>39</sup> Judge Thompson agreed with the EPA, reading the "shall approve" language of CWA section 402(b) as mandatory.<sup>40</sup> When analyzed with the "discretionary Federal involvement" language of 50 C.F.R. section 402.03, Judge Thompson concluded that the EPA had no authority or discretion to consider endangered or threatened species, and therefore the EPA's action in approving the transfer request was not subject to the consultation requirements of the ESA.<sup>41</sup>

34. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

35. *State Program Requirements; Application To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Arizona*, 67 Fed. Reg. 49,916, 49,919 (Aug. 1, 2002). *Defenders of Wildlife v. Env'tl Protection Agency*, 420 F.3d 946, 960 (9th Cir. 2005).

36. *Defenders of Wildlife*, 420 F.3d at 960.

37. *SEC v. Chenery Corp.*, 63 S.Ct. 454, 459 (1943).

38. *Defenders of Wildlife*, 420 F.3d 946, 969, 971 (9th Cir. 2005). Seven Ninth Circuit decisions were referenced.

39. *Id.* at 979, (Thompson, J., dissenting).

40. *Id.* at 979-80. *referencing* *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998); *Ground Zero Ctr. For Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995).

41. *Defenders of Wildlife*, 420 F.3d at 979-80, (Thompson, J., dissenting).

### B. *The Supreme Court's Decision*

The Supreme Court's challenge in this case was to resolve the tension between the conflicting statutes of the CWA and the ESA and determine whether these sections functioned separately or whether section 7(a)(2) of the ESA effectively adds a tenth criterion which must be considered by the EPA in order to transfer permitting authority.<sup>42</sup> The Ninth Circuit's holding was reversed as illogical given the wording of the statutes in question.<sup>43</sup> The Court found the ESA regulation supportive in limiting section 7(a)(2) of the ESA to only those actions involving agency discretion.<sup>44</sup> Concluding that the wording of CWA section 402(b) did not allow for agency discretion, the Court upheld the EPA's approval of Arizona's transfer request.<sup>45</sup>

The Court initially addressed the Ninth Circuit's holding that the EPA's transfer decision was arbitrary and capricious, noting that the appropriate procedure is to remand to the agency for clarification.<sup>46</sup> However, in its review of agency decisions challenged as arbitrary and capricious, the Supreme Court employed a deferential standard that would uphold decisions the agency can show were arrived at through reasoned decision-making.<sup>47</sup> The Supreme Court determined that statements made by the EPA at various stages of the transfer application process were not inconsistent, but rather examples of an agency changing its mind.<sup>48</sup> Exchanging an initial decision with a correct final decision does not show inconsistency.<sup>49</sup> With regards to the facts of this case, while the EPA initially pursued consultation with the FWS, its later determination that consultation was not required under CWA section 402(b) did not result in an arbitrary and capricious decision upon its approval of Arizona's transfer request.

The Supreme Court cut to the heart of the matter deciding that two contradictory statutes could be harmonized with the assistance of a regulation. Under the principles of *Chevron*, the Court defers to the express intent of Congress.<sup>50</sup> However, where ambiguity exists, the Court must determine whether the agency's interpretation is permissible.<sup>51</sup> Statutory words or phrases are reviewed in context. The Court relied on this principle to evaluate the competing statutory provisions. Noting the definitive nature of the wording in section 402(b) of the CWA, the Court determined that "the statutory language is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application."<sup>52</sup> The mandatory language alluded to is the use of the term "shall" in section 402(b) of

42. *National Assoc. of Home Builders*, 127 S. Ct. 2518. *referencing* 33 U.S.C. 1342(b) (2000).

43. *Id.* at 2530.

44. *Id.* at 2533.

45. *Id.* at 2538.

46. *Id.* at 2529. *See generally* *Gonzales v. Thomas*, 547 U.S. 183 (2006).

47. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *Bowman Transp., Inc. v. Arkansas-Best Fright System, Inc.*, 419 U.S. 281, 286 (1974).

48. *National Assoc. of Home Builders*, 127 S. Ct. 2518, 2530 (2007).

49. *Id.*

50. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

51. *National Assoc. of Home Builders*, 127 S. Ct. at 2534 *referencing* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

52. *Id.* at 2531.

the CWA. The Court in this case is not developing a new idea, but rather following a common statutory scheme. Congress' use of the word shall "creates an obligation impervious to judicial discretion."<sup>53</sup>

While CWA section 402(b) contains a mandatory directive, the Court notes that section 7(a)(2) of the ESA also utilizes the mandatory word "shall."<sup>54</sup> A literal reading of this section would effectively repeal section 402(b) of the CWA, replacing the list of nine requirements with an extended list of ten criteria to include section 7(a)(2)'s "no-jeopardy requirement."<sup>55</sup> Citing *Watt v. Alaska*, implied repeals should be avoided unless it is shown that congress intended such action.<sup>56</sup> And, as other case law has held, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."<sup>57</sup>

Because the two statutes in question cannot be simultaneously obeyed, the Court looked to the "implementing agency's expert interpretation."<sup>58</sup> Much of the tension between these two statutes can be resolved by a regulation of the FWS, one of the agencies that gives effect to the ESA.<sup>59</sup> The provisions of 50 C.F.R. section 402.03 provide that "section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."<sup>60</sup> Similar to Judge Thompson's dissent, the Court used this regulation to harmonize the otherwise incompatible statutes, holding that section 7(a)(2) of the ESA only applies when an agency is acting with discretion.<sup>61</sup> Alternately, the requirements of section 7(a)(2) are not applicable when an agency is not free to act with discretion, as is the case when working under provisions of CWA section 402(b).<sup>62</sup>

Although section 7(a)(2) has language that states agencies "shall...insure" that actions "are not likely to jeopardize listed species or their habitats,"<sup>63</sup> this seemingly mandatory language is overcome by a regulation that limits the ESA's requirement to discretionary actions. This focus allows the "commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species."<sup>64</sup>

*Department of Transportation v. Public Citizen*,<sup>65</sup> supports the Court's analysis. This case, involving safety regulations mandated by the Federal Motor Carrier Safety Administration (FMCSA) and the requirements of the National

53. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

54. *National Assoc. of Home Builders*, 127 S. Ct. at 2532.

55. *Id.*

56. *Id.* *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

57. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1989).

58. *National Assoc. of Home Builders*, 127 S. Ct. at 2534.

59. *Id.*

60. 50 C.F.R. § 402.03 (2006).

61. *National Assoc. of Home Builders*, 127 S. Ct. at 2533-34 quoting 16 U.S.C. 1536(a)(2) (2000).

62. *Id.*

63. *Id.* at 2534.

64. *Id.* at 2534-35.

65. *Department of Trans. v. Public Citizen*, 541 U.S. 752 (2004).

Environmental Policy Act (NEPA), resulted in the Court's conclusion that an agency action cannot be considered as causal when the agency is statutorily prohibited from exercising authority.<sup>66</sup>

Following this same basic principle, support can be found for the EPA's argument that the congressional decision allowing states to apply for transfer of permit authority, rather than the EPA's approval of a transfer application, was the indirect cause of the loss of consultation benefits.<sup>67</sup> As applied to this case, 50 C.F.R. section 402.03 is interpreted as limiting section 7(a)(2) of the ESA to discretionary federal actions. Because the wording of CWA section 402(b) is mandatory in nature, thereby not allowing for the exercise of discretion, the EPA's approval of Arizona's transfer application is not the type of agency action which must comply with the consultation requirements of section 7(a)(2) of the ESA.

The Court concluded that the Ninth Circuit had no basis for a holding that the two statutes could be read compatibly.<sup>68</sup> The Court held that 50 C.F.R. section 402.03 must be read in concurrence with ESA section 7(a)(2) because any other interpretation of the regulation would strip it of having any effect, essentially requiring that all federal agencies operate within the constraints of section 7(a)(2) of the ESA.<sup>69</sup> The legislative history of the regulation was held supportive. The term "discretionary" did not appear in the proposed version of the regulation but was later adopted in the Final Rule.<sup>70</sup> Such a deliberate addition indicates that the term's meaning was not to be ignored.<sup>71</sup> The Court summarized its opinion when it stated, "we read [section] 402.03 to mean what it says: that [section] 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that an agency is *required* by statute to undertake once certain specified triggering events have occurred."<sup>72</sup>

The respondents had argued that *TVA v. Hill*<sup>73</sup> determined that ESA section 7(a)(2) reflected congressional intent to place the preservation of endangered species at the forefront of national policy initiatives.<sup>74</sup> But, the Court held that because there was no congressional mandate of the TVA dam, it could not be argued that the no-jeopardy provision of the ESA served to repeal any other congressional directive, thus interpreting *TVA v. Hill* to support the position that the ESA's no-jeopardy mandate applies to all discretionary agency actions.<sup>75</sup> At the same time the Court also limited *TVA v. Hill*, noting that it did not address

---

66. *Id.* at 770.

67. *National Assoc. of Home Builders*, 127 S. Ct. at 2535.

68. *Id.*

69. *Id.* referencing 50 C.F.R. § 402.03 (2006).

70. 48 Fed. Reg. 29,999 (1983); 51 Fed. Reg. 19,958 (1986).

71. *National Assoc. of Home Builders*, 127 S. Ct. at 2536.

72. *Id.*

73. *TVA v. Hill*, 437 U.S. 153 (1978). (This case involved a discretionary construction project that was halted because continuing the project would have endangered the habitat of the snail darter).

74. Brief for Respondents, *National Assoc. of Home Builders*, 127 S. Ct. 2518 (2007) (Nos. 06-340, 06-549), 2007 WL 951129, at 40 referencing *TVA v. Hill*, 437 U.S. 153, 173, 185, 188 (1978).

75. *National Assoc. of Home Builders*, 127 S. Ct. at 2537; *TVA v. Hill*, 437 U.S. 153, 189-93 (1978).

the issue of non-discretionary actions.<sup>76</sup> Based on the history of the statutory sections and regulations, as well as case precedent, 50 C.F.R. section 402.03 effectively addresses the question of non-discretionary actions.<sup>77</sup> The Court relied on the common interpretation of that regulation in determining that it controls the action in this case.

#### V. LACK OF DISCRETION

The reversal of the Ninth Circuit's decision was not unanimous. Justice Stevens' lengthy dissent asserts that the Majority was "mistaken" in adding the word "only" in its evaluation, thereby suggesting that the absence of such limiting language is indicative of the regulation's broader scope.<sup>78</sup> However, the Majority appeared to have read the regulation as written. The Majority concluded that the regulation's existence demonstrates section 7(a)(2)'s applicability to *only* discretionary actions. Were ESA section 7(a)(2) meant to control both discretionary and mandatory actions, there would be no logical need for the regulation.

An issue yet remains as to whether the EPA's decision-making under 402(b) is an exercise of discretion.<sup>79</sup> It seems arguable that discretion exists in section 402(b) determinations because there is some inquiry and examination involved in deciding whether a State has met the nine requirements.<sup>80</sup> But the Majority characterized that analysis as too attenuated to extend to the EPA's consideration of the protection of threatened or endangered species.<sup>81</sup> It remains problematic as to what type of decision-making would constitute discretion.

The Court held that section 402(b) was not an exercise in discretion, but rather was a mandatory action triggered by certain events.<sup>82</sup> Once the EPA determined that a State met the nine specified criteria in section 402(b), the mandatory word "shall" triggered the EPA's approval of the State's transfer request. Justice Stevens' dissent would have ruled that the statute is triggered, not by meeting the nine requirements, but rather when a State files a description of its proposed program.<sup>83</sup> His interpretation requires the EPA to then use its discretion to determine if the nine requirements of 402(b) are satisfied. Under his interpretation, the nine requirements serve only as possible objections to approval of the transfer application.<sup>84</sup> Though certainly not consistent with the Majority's interpretation, the Majority may not have fully addressed this issue, leaving it open for possible future litigation.

---

76. *Id.*

77. *Id.*

78. *National Assoc. of Home Builders*, 127 S. Ct. at 2538-52 (2007) (Stevens, J., dissenting).

79. Brief for Respondents, *National Assoc. of Home Builders*, 127 S. Ct. 2518 (2007) (Nos. 06-340, 06-549), 2007 WL 951129, at 46.

80. *National Assoc. of Home Builders*, 127 S. Ct. at 2537.

81. *Id.*

82. *Id.* see generally *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

83. *Id.*

84. *Id.*

## VI. CONCLUSION

The analysis of the Supreme Court in *National Association of Home Builders v. Defenders of Wildlife* reveals much about the principles of statutory interpretation and application. Based on the Court's opinion, where two statutes are seemingly at odds with each other, an outside agency regulation may form the basis for harmonization. In this case, the evidence showed that the non-discretionary nature of the action required by the CWA allowed the EPA to ignore an ostensibly mandatory provision of the ESA. Although the Majority's analysis seems sound, the issues raised in the dissent may provide the basis for future litigation involving this statutory battleground.