CHAPTERS

DEFENDERS OF WILDLIFE V. EPA: TESTING THE BOUNDARIES OF FEDERAL AGENCY POWER UNDER THE ESA

BY

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In August 2005, the Ninth Circuit reversed an Environmental Protection Agency (EPA) decision to delegate National Pollution Discharge Elimination System (NPDES) permitting authority to the state of Arizona under the Clean Water Act (CWA) in Defenders of Wildlife v. EPA*. The lead plaintiff, Defenders of Wildlife, alleged EPA's approval of the Arizona permitting program violated the Endangered Species Act (ESA). The Ninth Circuit agreed, holding that the ESA grants agencies additional power to protect species, above any authority found in their governing statutes, in agency actions subject to section 7 consultation.*

This Note examines the Ninth Circuit's analysis of section 7 and explores how the court arrived at its expansive holding. The Ninth Circuit not only found extensive agency power under the ESA, it also invoked an expansive interpretation of agency discretion. To reach its conclusion that the ESA granted additional authority to agencies, the Ninth Circuit first had to find sufficient discretion in EPA's decision to transfer NPDES permitting authority to a state. This Chapter discusses the implications of the court's broad interpretation of agency authority under the ESA, and criticizes the problematic reasoning which led to this conclusion. It then explores whether there are any limits to this additional power conferred to agencies by the ESA. The final section of

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this Chapter proposes that if, contrary to the Ninth Circuit's conclusion, EPA's decision to transfer NPDES permitting authority to a state does not include sufficient consultation under the ESA, EPA oversight of individual state NPDES permits may provide a better avenue for federal species protection.

I. INTRODUCTION

As booming Arizona cities sprawl ever-further into the surrounding, fragile desert, the Endangered Species Act (ESA)[1] has played a key role in preserving habitat for several endangered and threatened species in the face of burgeoning development. Federal law has held sway in the state-dominated arena of land use planning because, until recently, Arizona was

[1] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

one of a handful of states in which the Environmental Protection Agency (EPA) continued to issue water pollution permits under the National Pollution Discharge Elimination System (NPDES), a delegable program under the federal Clean Water Act (CWA).[2] When a developer breaks ground for a new subdivision among the cacti, construction stormwater permits are required, even in the desert. In states without authorized NPDES programs, EPA issues those permits.[3] If a federal agency undertakes an action which may affect endangered or threatened species,[4] such as when EPA issues a construction stormwater permit affecting the habitat of a listed species, section 7 of the ESA requires it to undertake a consultation with an "expert" agency[5] to evaluate the potential impacts the activity will have on species.[6] In Arizona, ESA consultations for NPDES permits related to real estate development have resulted in the preservation of thousands of acres of habitat for the endangered cactus ferruginous pygmy owl (*Glaucidium brazilianum cactorum*) in northwest Tucson, as well as measures providing protection for other listed species, including Pima pineapple cactus (*Coryphantha scheeri var robustispina*), razorback sucker (*Xyrauchen texanus*), Gila topminnow (*Poeciliopsis occidentalis*), and southwestern willow flycatcher (*Empidonax traillii extimus*).[7]

When a state administers a water pollution permitting program under the CWA, NPDES permits in the state are no longer subject to ESA consultation because it has been EPA's position that state-issued NPDES permits are not federal actions.[8] State NPDES programs are administered as

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2 Federal Water Pollution Control Act, 33 U.S.C. § 1342 (2000).

3 Construction site stormwater discharges can seriously affect water quality, as well as fish and wildlife, from increased sediment, debris, and chemical runoff. U.S. Envtl. Prot. Agency, *Stormwater Discharges for Construction Activities*, http://cfpub1.epa.gov/npdes/stormwater/const.cfm?program–id=6 (last visited July 16, 2006). In Arizona, nearly 20,000 construction stormwater discharge NPDES permits are granted each year. Defenders of Wildlife v. U.S. Envtl. Prot. Agency, 420 F.3d 946, 972 (9th Cir. 2005), *reh'g en banc denied*, 450 F.3d 394 (9th Cir. 2006).

4 A species is endangered under the ESA if it "is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6) (2000). A species is considered to be threatened if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). Because section 7 applies to actions which may affect both endangered or threatened species, this Comment refers to both endangered and threatened species with the phrase "listed species."

5 United States Fish and Wildlife Service (FWS) provides consultations for terrestrial and freshwater species; National Marine Fisheries Service (NMFS) is the expert agency for marine species. 50 C.F.R. § 402.01 (2002); *see also infra* note 32.

6 16 U.S.C. § 1536(a)(2) (2000).

7 U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION FOR EPA APPROVAL OF ARIZONA'S ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM 19 (Dec. 3, 2002), *available at* http://www.fws.gov/arizonaes/Documents/Biol_Opin/020268_EPA_approval_of_AZ_AZPDES.pdf [hereinafter Arizona BiOp].

8 *See id.* at 12 (stating, "EPA's approval of State authority to administer a NPDES program is not a delegation of Federal permitting authority; the State operates its program wholly under State law"); *see also* Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced

a matter of state law,[9] although EPA retains a significant oversight role.[10] Because the duty to consult under section 7 only applies to federal actions,[11] a state which issues a NPDES permit has no obligation under the ESA to consult to determine whether its action could result in jeopardy to protected species. Arizona applied for authorization to administer its NPDES program in 2002.[12] During the approval process, Uunited States Fish and Wildlife Service (FWS) regional biologists expressed concern over the potential detrimental impact to listed species that would likely result from the loss of future ESA consultations and subsequent mitigation measures, for NPDES permits in the state.[13] Following a national-level consultation between the agencies to address these concerns, the final Biological Opinion (BiOp) concluded that the transfer decision would not cause jeopardy to listed species, and EPA approved Arizona's National Pollution Discharge Elimination System program (AZPDES).[14] Environmental group Defenders of Wildlife (Defenders) filed suit to challenge EPA's approval of the AZPDES program.

In *Defenders of Wildlife v. United States Environmental Protection Agency*,[15] the Ninth Circuit invalidated the BiOp EPA used to approve the AZPDES program, and vacated EPA's decision to transfer NPDES permitting authority to Arizona on the grounds that it was arbitrary and capricious under the Administrative Procedure Act (APA)[16] because the agency failed to fulfill its obligation under the ESA to give credence to species considerations

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Coordination Under the Clean Water Act and Endangered Species Act, 66 Fed. Reg. 11,202, 11,215–17 (Feb. 22, 2001) [hereinafter National MOA] (describing how EPA intends to coordinate with FWS and NMFS to meet its section 7 obligations in NPDES permitting programs; EPA will consult when it considers issuing NPDES permits which may affect species, as well as procedures for identifying proposed state permits which may raise species concerns, which will only require consultation if EPA formally objects to the permit and decides to assume authority to administer the permit itself).

9 33 U.S.C. § 1342(b) (2000).

10 *Id.* § 1342(d). States must supply EPA with a copy of all NPDES permit applications and proposed permits, and EPA has authority to object to proposed state permits within 90 days. *Id. See also* 40 C.F.R. § 122.44 (2005) (regulating EPA review of and objections to state-issued NPDES permits). In addition, EPA retains full enforcement authority over state-issued NPDES permits. 33 U.S.C. § 1342(i) (2000).

11 16 U.S.C. §1536(a) (2000).

12 State Program Requirements; Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Arizona, 67 Fed. Reg. 49,916 (Aug. 1, 2002).

13 Arizona BiOp, *supra* note 7, at 2. The BiOp noted that regional FWS "did not believe" the state's voluntary agreement to provide FWS with notice of future construction stormwater permits in sensitive areas "would provide the species conservation equivalent to that required of Federal agencies under section 7 of the ESA since it does not provide sufficient guidance for a landowner to determine if listed species may be adversely affected, will not protect plant species, and does not protect habitat essential for species recovery." *Id.*

14 In the final BiOp, FWS concluded that "development in Arizona is reasonably certain to occur in the future, but the transfer of the permit authority will not cause the continued real estate development. Therefore, we are not considering continued development absent EPA's administration of the program to be an indirect effect of the proposed action." *Id.*

15 420 F.3d 946 (9th Cir. 2005).

16 5 U.S.C. § 706(2)(A) (2000).

in its decision.[17] The Ninth Circuit ultimately held that section 7(a)(2) of the ESA granted agencies additional power, beyond their governing statutes, to protect species from the impacts of their actions.[18] The court reached its conclusion only after determining that the decision to transfer NPDES permitting authority included sufficient discretion to trigger section 7. The holding marked a continuation of a split in the circuits regarding the scope of agency authority under section 7. While both the Fifth Circuit and the D.C. Circuit have held that the ESA does not expand an agency's authority to take species considerations into account,[19] the Ninth Circuit joined what it considered to be the better-reasoned line of analysis in the First and Eighth Circuits, which concluded that section 7 confers additional authority to account for species impacts in all discretionary federal agency actions.[20] The Ninth Circuit's sweeping holding that the ESA grants federal agencies additional power to consider protected species has implications extending far beyond the context of decisions to transfer NPDES permitting authority. The decision in *Defenders* raises serious questions regarding the amount of discretion in a decision necessary to trigger section 7, as well as what limitations exist, if any, in the scope of this apparently unfettered authority derived from the ESA for agencies to consider species in actions taken under other statutes.

This Chapter explores the Ninth Circuit's analytic approach to evaluating relative agency authority under the ESA and looks at how the court arrived at its sweeping conclusion that the ESA provides federal agencies with broad powers to protect species. It examines the shortcomings in the analytic approach invoked by the Ninth Circuit in evaluating relative agency discretion in an action to determine if it is subject to section 7 and discusses some of the implications of this expanded authority derived from the ESA.

Part II provides background information about the role of the ESA in EPA decisions to transfer NPDES permitting programs to states and the

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17 *Defenders*, 420 F.3d at 978.

18 *Id.* at 970.

19 *See* Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n, 962 F.2d 27, 34 (D.C. Cir. 1992) (holding that the ESA does not expand an agency's powers beyond its own enabling act); Am. Forest & Paper Ass'n v. U.S. EPA, 137 F.3d 291, 294, 298–99 (5th Cir. 1998) (holding that the ESA does not permit EPA to require a state to undergo a section 7 consultation prior to issuing a NPDES permit).

20 *See* Conservation Law Found. of New England v. Andrus, 623 F.2d 712, 715 (1st Cir. 1979) (holding that agencies must consider the impacts to species from actions even when acting under a statute which includes a lesser standard for species protection); Defenders of Wildlife v. Adm'r., Envtl. Prot. Agency, 882 F.2d 1294, 1299 (8th Cir. 1999) (holding that agencies must comply with the ESA when regulating pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136–136y (2000)). Similarly, the Ninth Circuit recently held that EPA is not absolved from complying with the ESA when registering pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act, which includes a less-stringent standard for species protections. Wash. Toxics Coal. v. Envtl. Prot. Agency, 413 F.3d 1024, 1032 (9th Cir. 2005).

unique issues which arose when Arizona applied to assume NPDES permitting authority from EPA. Part III addresses the Ninth Circuit's analytic approach to defining relative agency discretion in actions subject to the ESA, the ability of EPA to consider species in NPDES permit transfer decisions, and whether the Ninth Circuit was correct to conclude that the decision to transfer NPDES permitting to a state is a discretionary action.

Part IV discusses the split in the circuits over whether the ESA grants agencies any additional authority to consider species, and the circumstances under which this additional authority may apply. It compares the analytic approach to the question of relative agency authority under the ESA taken by those courts which have found that the ESA provides agencies with sufficient authority to shift species to the highest priority in a decision, and those which have reached the conclusion that the ESA cannot provide authority to protect species in actions without discretion. It then addresses the implications of the Ninth Circuit's expansive interpretation of both what constitutes a discretionary action for the purposes of triggering consultation under the ESA and the degree of additional authority the ESA grants agencies.

Part V poses the following question: If the ESA provides agencies with additional authority to consider species in actions extending beyond the scope of discretion conferred by agencies' governing statutes, what is the extent of this additional power? It pushes the boundaries of this additional authority to consider species when acting under other statutes with a case study applying the Ninth Circuit's analytic approach to an agency action for which the species considerations would invalidate the action altogether and require the agency to take affirmative steps outside its statutory authority. The Ninth Circuit's reasoning in *Defenders* was problematic, and its characterization of the NPDES permit transfer decision as discretionary was based on tenuous logic. This Chapter concludes by proposing that if EPA were to undertake ESA consultation in its oversight role of state-issued permits, the constraints from EPA's limited discretion in the permit transfer decision would be avoided, and better species protections would result.

II. BACKGROUND

A. The Role of the ESA in EPA Decisions to Authorize State NPDES Programs

1. The Endangered Species Act

Congress passed the ESA in 1973, establishing a national policy "that all Federal departments and agencies shall seek to conserve endangered species and threatened species."[21] In the late 1970s, the Supreme Court famously described the ESA to be "the most comprehensive legislation for

[21] Endangered Species Act of 1973, 16 U.S.C. § 1531(c)(1) (2000).

the preservation of endangered species ever enacted by any nation,"[22] under which endangered species garnered the "highest of priorities" in agency decision making.[23] The ESA addresses the role of endangered species in agency decision making in section 7, which sets forth a consultation procedure federal agencies must follow if their actions may result in jeopardy to listed species.[24] Section 9 of the ESA prohibits, and criminalizes, the "take" of a species protected under the ESA.[25] Section 10 ameliorates the potentially harsh effects of section 9 by creating an "incidental take" permit program to grant permits excepting any take of species which may nonetheless result from activities that, after implementing appropriate mitigation measures, will not jeopardize the species but may result in the "incidental" take of a species.[26] While section 7 applies exclusively to federal agencies, the section 9 prohibition on take, and the corresponding ability to obtain an "incidental take" permit under section 10, applies to everyone.[27]

Section 7(a)(1) mandates that federal agencies "shall . . . utilize their authorities . . . by carrying out programs for the conservation of endangered species and threatened species."[28] Despite its empowering language, section 7(a)(1) has not been a prominent source of species protection, in part because it has been interpreted to provide wide latitude for agency discretion in its implementation.[29] In contrast, section 7(a)(2) of the ESA has had a far greater impact on both federal agencies and species. It requires a federal agency to "insure" that any action "authorized, funded, or carried out" by the agency will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."[30] To fulfill its

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22 Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

23 *Id.* at 174.

24 16 U.S.C. § 1536 (2000).

25 *Id.* § 1538(a). The ESA defines "take" to include any act which will "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19).

26 *Id.* § 1539.

27 *Id.* § 1538(a)(1).

28 *Id.* § 1536(a)(1). The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." *Id.* § 1532(3).

29 For a discussion of the role of section 7(a)(1) in agency decision-making and historical interpretations of the provision, see DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 92–100 (1989). While not without bounds, agencies have a wide degree of discretion in fulfilling their responsibilities under this section. *See* Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy, 898 F.2d 1410, 1418 (9th Cir. 1990) (holding that agencies have discretion in carrying out the mandate to conserve, and do not have to select an action alternative that has the most stringent conservation requirements). *But see* Sierra Club v. Glickman, 156 F.3d 606, 616 (5th Cir. 1998) (holding that although agencies have a wide degree of discretion in interpreting section 7(a)(1), an agency cannot ignore this section altogether, noting that section 7(a)(1) "impose[s] an affirmative duty on each federal agency to conserve").

30 16 U.S.C. § 1536(a)(2) (2000). The ESA implementation regulations further specify that an

obligations under section 7(a)(2), an agency must first determine whether a listed species, or species which is proposed to be listed, is present in the area in which a proposed action will occur, and whether the action may affect the species, by conducting a Biological Assessment (BA).[31] If the BA reveals listed species are likely to be affected by the proposed action, the agency must then consult with an "expert agency"[32] to determine whether a proposed agency action will result in jeopardy to listed species or the destruction or adverse modification of critical habitat.[33] Before the consultation is complete, an agency cannot "make any irreversible or irretrievable commitment of resources" that would prevent the agency from avoiding jeopardy to species.[34] At the end of the consultation, the "expert agency" will issue a Biological Opinion (BiOp) stating whether the action will cause jeopardy to the species and suggesting "reasonable and prudent alternatives" to the action that the agency should undertake to avoid jeopardy.[35] If the BiOp concludes that the action may result in the "taking of an endangered species or a threatened species incidental to the agency action" but will not result in jeopardy to the species, a no-jeopardy BiOp may be issued with an "incidental take statement" to protect the agency from being held liable for a "take" of a protected species under section 9.[36] After the expert agency issues the BiOp, the action agency will use it to make its ultimate decision of how to proceed in light of the recommendations in the BiOp.[37]

"action" includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States." 50 C.F.R. § 402.02 (2005).

[31] 16 U.S.C. § 1536(c) (2000). To fulfill this requirement, agencies are instructed to inquire with the appropriate Secretary whether listed species may be present in the proposed action area, and whether, based on the "best scientific and commercial data available," the action is likely to affect those species. *Id.*

[32] Federal agencies fulfill their duty to "insure" actions will not result in jeopardy to species "in consultation with and with the assistance of the Secretary." *Id.* § 1536(a)(2). FWS, acting for the Secretary of Interior, is responsible for consultations related to terrestrial and freshwater species; NMFS, acting through the Secretary of Commerce, is responsible for marine species. *Id.* § 1532(15).

[33] *Id.* § 1536(a)(2). Regulations define "[j]eopardize the continued existence of" species to mean "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (2005). The ESA defines "critical habitat" to mean "the specific areas within the geographical area occupied by the species" that is "essential to the conservation of the species" and "may require special management considerations or protection" and "areas outside the geographical area . . . essential for the conservation of the species." 16 U.S.C. § 1532(5)(A) (2000).

[34] 16 U.S.C. § 1536(d).

[35] *Id.* § 1536(b).

[36] *Id.* § 1536(b)(4)(B). Incidental take statements must indicate "the impact of such incidental taking," as well as "reasonable and prudent measures . . . to minimize such impact." *Id.* §§ 1536(b)(4)(C)(i)–(ii). This provision was added by Congress in its 1982 amendments to the ESA to ameliorate the potential problem of an agency being in compliance with section 7 but still held liable for a "take" of a species as a violation of section 9. ROHLF, *supra* note 29, at 32.

[37] 50 C.F.R. § 402.15(a) (2000). An agency will generally have a difficult time surviving arbitrary and capricious review if it acts contrary to the recommendations in a BiOp. Thus, although advisory, BiOps have been described as having a "virtually determinative effect" on an

If an agency decides to proceed with an action, despite a jeopardy determination in a section 7 consultation, it may apply for an exemption.[38] Congress amended the ESA in 1978 to create the exemption process in the wake of *Tenneessee Valley Authority v. Hill* (*TVA*),[39] which infamously halted the completion of a massive federal dam to prevent jeopardy to the diminutive, but endangered, snail darter.[40] The 1978 amendments created an Endangered Species Committee (ESC),[41] colloquially dubbed the "god squad,"[42] to review any application for an exemption. Exemptions from the section 7(a)(2) requirement that agencies avoid jeopardy to protected species may be granted if the ESC decides that there are "no reasonable and prudent alternatives" to the action, the benefits of the action outweigh the benefits of alternatives which would not cause jeopardy to species, "the action is of regional or national significance," and it finds the agency had not yet made any "irreversible or irretrievable" commitments of resources prohibited by section 7.[43] In nearly thirty years, the exemption process has been invoked on rare occasions, and very few exemptions have been granted.[44]

The requirement that federal agencies consult under section 7(a)(2) applies to "any action authorized, funded, or carried out" by the agency that may affect species.[45] The ESA regulations further refine the category of agency action described in the statute to require consultation on any agency action "in which there is discretionary Federal involvement or control."[46] The regulations do not provide additional guidance for what constitutes a "discretionary" agency action, and it has been left to the courts to determine

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agency's course of action. Bennett v. Spear, 520 U.S. 154, 170 (1997).

38 16 U.S.C. § 1536(g) (2000); 50 C.F.R. § 402.15(c) (2002).

39 Tenneessee Valley Authority v. Hill (*TVA*), 437 U.S. 153 (1978); Endangered Species Act Amendments of 1978, 92 Stat. 3751 (1978).

40 437 U.S. at 180.

41 The seven-member ESC includes the Secretary of Agriculture, the Secretary of the Army, the Chair of the Council of Economic Advisors, the Administrator of EPA, the Secretary of Interior, the Administrator of the National Oceanic and Atmospheric Administration, and a representative of each affected state appointed by the President. 16 U.S.C. § 1536(e) (2000).

42 Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1536 (9th Cir. 1993).

43 16 U.S.C. § 1536(h) (2000).

44 The exemption process has been initiated six times, and half of those applications were withdrawn from consideration. Of the three exemptions considered by the ESC, only one has resulted in a project moving forward despite a jeopardy determination. John W. Steiger, *The Consultation Provision of Section 7(a)(2) of the Endangered Species Act and Its Application to Delegable Federal Programs*, 21 ECOLOGY L.Q. 243, 258 n.83 (1994). The first application, to exempt the Tellico Dam—at issue in *TVA v. Hill*—was not granted an exemption, although the dam was later completed as the result of a congressional rider. *Id.* The next exemption was granted for the Grayrocks Dam in Wyoming, and included substantial mitigation measures. *Id.* The third application, to permit old growth timber harvests which would cause jeopardy to the endangered spotted owl (*Strix occidentalis*) in the Pacific Northwest was granted, but the exemption request was ultimately withdrawn by the Clinton Administration. *Id.*

45 16 U.S.C. § 1536(a)(2) (2000).

46 50 C.F.R. § 402.03 (2002).

the requisite degree of discretion in an agency action necessary to require consultation under the ESA. If the agency retains ongoing regulatory authority over the action's capacity to affect species, courts have considered the action to be discretionary for the purposes of the ESA.[47] However, an action is not discretionary if the agency is acting in a ministerial capacity, or if it is carrying out a predetermined action in which the agency lacks decisionmaking authority.[48] Likewise, there is insufficient discretion if the action is the consequence of an earlier decision,[49] or if the agency is acting in an advisory capacity.[50] If a federal agency does not exercise discretion, the action is not subject to ESA consultation.[51]

2. The Clean Water Act

The Clean Water Act (CWA) prohibits the discharge of pollutants into the waters of the United States without a permit.[52] Among the goals articulated in the CWA is the achievement of national "water quality which provides for the protection and propagation of fish, shellfish, and wildlife."[53] The CWA goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[54] is reflected in the ESA purpose of providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" for aquatic species.[55] The CWA established the National Pollution Discharge Elimination System (NPDES), which provides a mechanism for EPA to issue permits for the discharge of pollutants into the nation's waters.[56] States play a central role in the administration of the CWA, which articulated a congressional

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47 *See* Wash. Toxics Coal. v. Envtl. Prot. Agency, 413 F.3d 1024, 1033 (9th Cir. 2005) (holding EPA must comply with ESA requirements when regulating pesticides under FIFRA because such registrations are "ongoing and have a long-lasting effect").

48 *See* Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy, 383 F.3d 1082, 1092 (9th Cir. 2004) (deciding the Navy did not have discretion to consider species when storing weapons pursuant to a presidential order).

49 *See* Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995) (holding the BLM decision to grant a right-of-way for an access road pursuant to an already existing easement "lack[ed] the discretion to influence the private action").

50 *See* Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1075 (9th Cir. 1996) (holding FWS advice to a timber company regarding the company's compliance with other ESA provisions was insufficient to demonstrate discretionary federal control over the company's logging operations).

51 *Ground Zero*, 383 F.3d at 1092.

52 Federal Water Pollution Control Act, 33 U.S.C. §1311(a) (2000). This delegable permit program for continued pollution may seem at odds with the "national goal" Congress declared in the CWA that "the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* § 1251(a)(1). Twenty years after the deadline, the United States has robust permitting programs, but remains far from achieving the statute's lofty goal.

53 *Id.* § 1251(a)(2). The CWA further requires states to consider the "propagation of fish and wildlife" when adopting water quality standards. *Id.* § 1313(c)(2)(A).

54 *Id.* § 1251(a).

55 Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (2000). *See* Arizona BiOp, *supra* note 7, at 5 (noting the goal of the CWA "is consistent with" the purpose of the ESA).

56 33 U.S.C. § 1342(a) (2000).

policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[57] While Congress delegated to EPA the initial responsibility to issue NPDES permits, it included in the CWA a process for states to apply for NPDES permitting authority,[58] which requires that the EPA Administrator "shall approve" any state application fulfilling the statutory criteria.[59] After a state NPDES permit program has been approved, EPA retains authority to review and veto individual NPDES permits issued by the state,[60] the ability to revoke approval from a state NPDES program that fails to continue to meet the federal standards,[61] and full enforcement authority over individual permit violations.[62] Arizona's (AZPDES) was the forty-fifth state program to receive NPDES approval from EPA.[63]

A procedural difference between an EPA decision to issue a NPDES permit and a state decision to issue an identical permit is that the state permitting decision does not involve federal ESA consultation. When EPA issues an NPDES permit, its decision is a discretionary action subject to section 7 consultation.[64] While state NPDES programs must meet federal CWA standards, it has been EPA's position that the state permits themselves are not federal actions, and thus are not subject to the ESA consultation requirements.[65] However, because the decision to transfer NPDES permitting authority is itself a federal action which could affect species through the loss of future section 7 consultations, EPA has undertaken a section 7 consultation as part of its decision-making process in every state NPDES permit transfer decision since 1993.[66]

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57 *Id.* § 1251(b).

58 *Id.* § 1342. Authorized states receive federal funds to administer their NPDES programs. *Id.* § 1256.

59 EPA must ensure that a proposed state NPDES program meets nine statutory conditions. The criteria address water quality concerns and enforcement capabilities. *Id.* § 1342(b).

60 *Id.* § 1342(d)(2). EPA has 90 days to object to the issuance of any permit after it receives notice of the permit application. *Id.; see also* 40 C.F.R. § 123.44 (2005) (establishing the procedure EPA must follow when objecting to state-issued NPDES permits).

61 33 U.S.C. § 1342(c)(3) (2000). The regulatory procedure for withdrawing a state's authorization to administer its NPDES program is codified at 40 C.F.R. § 123.61 (2005).

62 33 U.S.C. §§ 1319, 1342(i) (2000).

63 The remaining states without EPA approval to administer their own NPDES programs are Massachusetts, New Hampshire, New Mexico, Alaska, and Idaho. *See* State NPDES Program Authority (Map), http://www.epa.gov/npdes/images/State_NPDES_Prog_Auth.pdf (last visited July 15, 2006).

64 *See* 33 U.S.C. § 1342(a)(1) (2000) (providing that the "Administrator may" issue a NPDES permit which meets the statutory requirements as well as "such conditions as the Administrator determines are necessary"). EPA undergoes consultation regarding any NPDES permit it issues which may affect species, including state NPDES permits EPA has objected to and decides to issue itself. National MOA, *supra* note 8, at 11,216.

65 National MOA, *supra* note 8, at 11,216.

66 Defenders of Wildlife v. U.S. EPA, 420 F.3d 946, 952 (9th Cir. 2005). EPA did not consult regarding state NPDES programs it approved prior to the early 1990s. A 1991 lawsuit filed against EPA related to its administration of the CWA in Alabama led to a settlement with terms which included the agency's agreement to consult regarding the state's water quality standards.

B. The Arizona NPDES Permit Transfer Application

The series of exchanges which transpired between FWS and EPA during the approval process for Arizona's NPDES program underscore EPA's vacillating position over whether its decision to approve a state NPDES permitting program includes sufficient discretion to require section 7 consultation. When Arizona applied to administer its own NPDES program in January 2002, EPA initiated an informal ESA consultation with FWS.[67] From the results of this informal consultation, EPA produced a Biological Evaluation determining that the transfer decision might affect listed species.[68] EPA subsequently began a formal section 7 consultation with FWS.[69] During consultation, the FWS Arizona field office was concerned that the permit transfer decision would adversely affect species because the NPDES permits issued by the state would not require mitigation measures to protect species similar to those which had resulted from section 7 consultations when EPA issued NPDES permits in Arizona.[70] After EPA and

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Although the settlement did not address EPA's obligation to consult when it decided to transfer NPDES permitting authority to a state, the agency began to undertake section 7 consultations related to its approval of state permitting programs. Steiger, *supra* note 44, at 250–51 n.33 and accompanying text. The section 7 consultations that EPA has entered into over its decision to delegate NPDES permitting authority to a state since the early 1990s have all resulted in a no-jeopardy conclusion. *See* 66 Fed. Reg. 12,791, 12,793 (Feb. 28, 2001) (approving Maine's NPDES program based on a no-jeopardy BiOp arrived at with assurances that EPA's coordination agreement with Maine under the National MOA and its ability to use its oversight authority to assure state water quality standards would be met); 63 Fed. Reg. 51,164, 51,197 (Sept. 24, 1998) (concluding that EPA's delegation of permitting authority to Texas would not result in jeopardy to listed species and state compliance with water quality standards and EPA oversight of the state program would provide adequate protection); 61 Fed. Reg. 65,047, 65,051 (Dec. 10, 1996) (noting that EPA's decision to consult regarding the decision to delegate NPDES permitting authority to Oklahoma may be discretionary); 61 Fed. Reg. 47, 932, 47.934 (Sept. 11, 1996) (requiring Louisiana to enter into a consultation agreement as a condition of EPA approval of its NPDES program); 60 Fed. Reg. 25,718, 25,719 (May 12, 1995) (approving Florida's NPDES program after informal consultation concluding that the transfer of permitting authority was unlikely to affect species); 59 Fed. Reg. 1535, 1544 (Jan. 11, 1994) (approving South Dakota's NPDES program after informal ESA consultation).

67 Arizona BiOp, *supra* note 7, at 2.

68 The Biological Evaluation found the permit approval "may affect" but would not be likely to "adversely affect all Arizona listed species and their critical habitats." *Id.* at 3. Section 7 consultations conducted by EPA in issuing NPDES permits in Arizona include five Pima pineapple cactus formal consultations since 2000, resulting in 1,146 acres of protected habitat preserved through conservation measures designed to protect against the indirect effects from authorizing general construction stormwater permits. In addition, section 7 consultations for NPDES permits resulted in requirements that construction projects reduce the impacts of development on cactus ferruginous pygmy owl populations. *Id.* at 18–19.

69 In its notice of Arizona's application to assume administration of the NPDES program in the state, EPA stated that while the agency was "required" by the CWA to approve a state application meeting the statutory criteria for state programs, it was also "required" by the ESA under "a statutory requirement (separate and distinct from CWA section 402(b))" to determine whether its decision to transfer permitting authority to the state would result in jeopardy to species. Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Arizona, 67 Fed. Reg. 49,916, 49,917 (Aug. 1, 2002).

70 Arizona BiOp, *supra* note 7, at 2. In a September 2002 meeting between the FWS Arizona

FWS reached an impasse over measures to allow for the continued protection of listed species after approval of the AZPDES program, EPA stated that it lacked authority to base its transfer decision on non-water-quality concerns, including any impact its action may have on species.[71] To resolve the disagreement, the agencies initiated a national level consultation.[72]

On December 3, 2002, FWS issued a final BiOp which concluded that the permit transfer decision was unlikely to cause jeopardy to species or lead to the destruction or adverse modification of critical habitat.[73] Two days later, EPA approved Arizona's application to assume authority to issue NPDES permits in the state.[74] The no-jeopardy conclusion in the BiOp was contingent on the assumption that although real estate development in sensitive areas would continue to occur in Arizona, any impacts to species from future development could not be an "indirect effect" of EPA's decision to transfer NPDES permitting authority to the state.[75] The final BiOp did not include any additional measures to protect species than had been discussed, and rejected as inadequate, during the regional consultation. The BiOp relied on the same voluntary state programs, combined with protections derived from the section 9 prohibition against takes, which earlier had been rejected as insufficient, to conclude that it would be "speculative" to find the "loss of conservation benefit is a necessary result of EPA's approval of the NPDES

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field office, EPA, and ADEQ to discuss strategies for retaining species protection under the state NPDES program similar to section 7, Arizona Department of Environmental Quality (ADEQ) agreed to inform FWS of its intent to approve construction stormwater permits in northwest Tucson and other sensitive areas, and to notify permit applicants about ESA procedures and their potential liability under section 9 take violations. FWS did not consider these measures to be the functional equivalent of section 7 protections, however, because the process would not "provide sufficient guidance for a landowner to determine if listed species may be adversely affected, [would] not protect plant species and [did] not protect habitat essential for species recovery." *Id.*

71 *Defenders*, 420 F.3d at 953. A June 24, 2002 EPA letter to FWS requesting formal section 7 consultation stated that EPA had "determined that the proposed transfer of authority to ADEQ [was] simply an administrative action that [was] not likely to have adverse effects on water quality and therefore [was] not likely to adversely affect listed species or critical habitat." Arizona BiOp, *supra* note 7, at 1.

72 Arizona BiOp, *supra* note 7, at 3. The agencies followed the procedure for resolving such disagreements established in the National MOA, which required the disputing agencies to summarize their positions in an "Interagency Elevation Document," which transferred responsibility for the BiOp to the Director of FWS, Director of NMFS, and Deputy Assistant Administrator of Water at EPA. National MOA, *supra* note 8, at 11,209.

73 Arizona BiOp, *supra* note 7, at 22.

74 Approval of Application by Arizona To Administer the National Pollutant Discharge Elimination System (NPDES), 67 Fed. Reg. 79,629 (Dec. 30, 2002), *available at* http://www.epa.gov/region09/water/npdes/arizona.html.

75 During the national level consultation for the BiOp, FWS "reviewed the definition of 'indirect effect'." Arizona BiOp, *supra* note 7, at 2. The term "indirect effects" is defined in the regulations as the effects of an action which "are caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. § 402.02 (2005).

program" for Arizona.[76] Construction activities, the source of the regional FWS concern over EPA's decision to transfer NPDES authority to the state, would continue unmitigated after Arizona assumed permitting authority. Nonetheless, the final BiOp concluded that "development in Arizona [was] reasonably certain to occur in the future, but the transfer of the permit authority will not cause the continued real estate development."[77] Thus, according to the BiOp, the loss of section 7 consultation for future construction stormwater permits in the state could not be an indirect result of the decision to transfer permitting authority.[78]

The BiOp's no-jeopardy conclusion allowed EPA to approve the AZPDES program without addressing whether the CWA provided sufficient discretion for the agency to consider the effects of its permit transfer decision on species. The careful limitations on the reasoning followed in the BiOp to reach its conclusion are indicative of the shifting agency position regarding the degree of discretion involved when EPA approves a state NPDES program. FWS limited the BiOp's conclusion that impacts caused by future development should not be evaluated as indirect effects of the agency action to the specific facts of the Arizona permit transfer decision.[79] The BiOp further qualified its conclusion when it noted that it was EPA's position that it has limited authority under the CWA to consider species in decisions regarding an approved state NPDES program, without explaining how such limited authority to consider species could itself contribute to the action's impact on species.[80] In addition, the BiOp noted that the "loss of any conservation benefit [was] not caused by EPA's decision" to approve the Arizona program, but rather was a reflection of congressional intent for NPDES programs to be administered under state law.[81] Although the BiOp

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76 Arizona BiOp, *supra* note 7, at 21.

77 *Id.* at 2. The BiOp further noted that "[n]otwithstanding" that the loss of conservation benefits from section 7 consultations would "appreciably reduce the conservation status" of species, this loss was not the result of the transfer decision. *Id.* at 20.

78 FWS supported this circular logic with a "but for" causation analysis evaluating only those effects of the federal action which would have occurred "but for" the action itself in its impacts analysis. By applying this analytic framework to the issuance of construction stormwater permits in Arizona, FWS concluded that it was the development for which the permits would be issued which would potentially impact species, not the permits themselves. *Id.* at 21.

79 *Id.* at 2. There is some ambiguity in the BiOp over whether FWS intended its analysis to apply to NPDES permit program transfer decisions, or whether it intended to limit the analysis to the specific facts of the Arizona transfer decision. FWS noted that its interpretation of indirect effects excluding the effects caused by development "is dependent on the specific circumstances of the program approval action considered in this consultation and is not necessarily applicable to consultations on federally permitted actions or other Federal permit programs." *Id.*

80 *See id.* at 4 ("EPA notes that it does not have CWA authority to object to state NPDES permits to address non-water-quality-related concerns about listed species or critical habitat."); *see also id.* at 21 ("EPA Region 9 believes that its ability to address any FWS concerns arising in this consultation is limited by its CWA authorities.").

81 *Id.* The BiOp did not attempt to reconcile this statement of congressional intent for state-administered NPDES programs with the congressional intent in section 7 that federal actions not cause jeopardy to species. 16 U.S.C. § 1536(a)(2) (2000).

reached its no-jeopardy conclusion with a great deal of equivocation, evident in its copious qualifying language, it allowed EPA to avoid either acting on the results of the consultation or indicating that it did not have sufficient discretion in the permit approval decision to warrant consultation. EPA's decision to undertake a section 7 consultation while simultaneously searching for ways to nullify the grounds for consultation is symptomatic of the agency's shifting position regarding its discretion in a permit transfer decision.

III. NINTH CIRCUIT ANALYSIS OF AGENCY AUTHORITY UNDER THE ESA

In *Defenders*, the Ninth Circuit articulated a holding that the ESA granted federal agencies nearly unfettered authority to consider the impacts of an action on species in their decisions. While understandable policy reasons may underlie the court's conclusion, the reasoning applied in the analysis is critically flawed. The analysis articulating the grounds for invalidating the BiOp proceeded logically. However, the opinion's logic falters when the court considers whether the decision to transfer permitting authority to a state includes sufficient discretion to require consultation. Its analysis of this threshold question, a key element underpinning its ultimate conclusion that the ESA provides agencies with additional authority to protect species, suffers from several serious analytic missteps.

Defenders had challenged the EPA decision to approve the AZPDES program on the grounds that the BiOp failed to meet the standards set by the ESA, and that EPA's reliance on such a deficient BiOp was arbitrary and capricious under the APA.[82] The Ninth Circuit agreed, holding that the BiOp was invalid, thus rendering EPA's reliance on the deficient BiOp to authorize the Arizona NPDES program arbitrary and capricious.[83] The court rejected the BiOp's indirect effects analysis of the transfer decision, which had concluded that future impacts on species would result from private development, independent of the transfer decision. The court determined that such a bifurcated analytic approach "suffer[ed] from an independent lack of plausibility" because it failed to consider the effects of private development and the transfer decision together.[84] The causation analysis in the BiOp was fatally flawed because it did not account for the difference in the impact from private development depending on whether EPA issued a NPDES construction stormwater permit, which could require mitigation

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82 The claim challenging EPA's reliance on the BiOp was originally part of a separate suit filed in federal district court in Arizona, but was consolidated with the claim challenging the BiOp before the Ninth Circuit because the appellate court has exclusive jurisdiction over challenges to the BiOp under 33 U.S.C. § 1369(b)(1)(D) (2000). Defenders of Wildlife v. U.S. Envtl. Prot. Agency, 420 F.3d 946, 955 (9th Cir. 2005).

83 *Defenders*, 420 F.3d at 977.

84 *Id.* at 961.

against impacts to species, and whether Arizona issued the permit, which would not require consultation or any resulting mitigation measures.[85]

After holding the BiOp to be invalid, the Ninth Circuit next considered whether EPA had sufficient authority to base its NPDES permit transfer decision on the results of a section 7 consultation. EPA, which appeared to have switched its position as to whether section 7 applied to the permit transfer decision, failed to persuade the court with its "legally contradictory positions," and its reliance on the BiOp did not survive arbitrary and capricious review.[86] The Ninth Circuit interpreted section 7(a)(2)'s dual requirements that an agency both consult with an "expert agency" and "insure" that its actions will not jeopardize species to be inseparable: If an action requires consultation, it likewise requires the agency to "insure" against jeopardizing species.[87] The court found EPA's position that it must consult with FWS when it decides whether to transfer NPDES permitting authority to a state to be impossible to reconcile with the agency's argument that it did not have sufficient discretion under the CWA to take the results of the consultation into account in its final decision, leading the court to conclude that EPA's "ultimate decision was not the result of reasoned decisionmaking."[88] Thus, if EPA had sufficient discretion in the permit transfer decision to undertake a section 7 consultation, the agency necessarily had sufficient discretion, and an affirmative obligation, to take the results of the consultation into account in its ultimate decision.

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85 *Id.* at 962.

86 *Id.* at 959. EPA's consultation with FWS regarding Arizona's application to assume NPDES permitting authority demonstrates that the agency considered its permit transfer decision to trigger section 7. It was only after it reached an impasse with FWS in the course of the consultation over measures which might reduce the impact to species from NPDES permits issued by the state, absent section 7, that EPA indicated it did not have authority to consider non-species impacts in its decision. Arizona BiOp, *supra* note 7, at 2. During litigation, EPA declined to take a definitive position as to whether section 7 consultation was required when it decided to transfer NPDES permitting authority to a state. EPA had previously argued in the Fifth Circuit that section 7 was required in such transfer decisions, and that the CWA gave the agency authority to require measures to protect species as a condition of its approval of a state NPDES permit. Am. Forest & Paper Ass'n v. Envtl. Prot. Agency, 137 F.3d 291, 297 (5th Cir. 1998). The Fifth Circuit rejected EPA's argument, and in *Defenders*, EPA cited the case in its brief to support the proposition that the agency did not have authority to consider impacts to species when approving a state NPDES program. *Defenders*, 420 F.3d at 960. However, its brief noted that the court did not need to decide whether the permit transfer decision was a sufficiently discretionary action to trigger section 7 because the BiOp's no jeopardy conclusion was reached on other grounds. At oral argument, EPA refused to take a position as to whether the permit transfer decision triggered section 7. The Ninth Circuit noted that "EPA's post-decision equivocation cannot have any impact on [its] consideration of the validity of the transfer decision," and concluded that EPA had acted under the assumption that section 7 did apply to its action. *Id.*

87 "An agency's obligation to consult is thus *in aid of* its obligation to shape its own actions so as not to jeopardize listed species, not independent of it." *Defenders*, 420 F.3d at 961 (emphasis added).

88 *Id.*

A. EPA Authority to Consider Species Impacts in NPDES Program Transfer Decisions

The crux of the matter at stake in *Defenders* was whether EPA had sufficient discretion in approving Arizona's NPDES program to base its decision on species concerns derived from the ESA.[89] In *Defenders*, the Ninth Circuit's analysis inextricably, and incorrectly, linked the additional *authority* conferred on agencies to consider species to the *discretion* to consider species in a decision. The Ninth Circuit identified two threshold questions for determining whether section 7 applied to EPA's decision to transfer NPDES permitting authority: 1) Would a direct or indirect effect of the action cause jeopardy to protected species or result in the adverse modification of critical habitat? and 2) Did EPA have sufficient discretion for the action to be considered "one for which the agency can fairly be ascribed responsibility"?[90] The court then further broke down its analysis of section 7's scope into three "statutory concepts": 1) the nexus between an action and its impact on listed species, 2) the nature of the agency's obligation to "insure" against causing jeopardy to species, and 3) the range of actions to which section 7 applied.[91] The court resolved the "nexus" question by determining that a negative impact on species can be the direct or indirect effect of an agency action "only if the agency has some control over that result."[92] Similarly, it concluded that an agency's obligation to "insure" against jeopardy to species was "an obligation in addition to those created by the agencies' own governing statute," triggered only if the governing statute provided the agency with sufficient discretion to consider impacts to species.[93] All of the preceding analytic factors functioned as facets of the

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89 EPA maintained throughout the litigation that because the only issue before the court was the adequacy of the BiOp, the court did not need to reach the question of whether the agency had sufficient discretion in deciding to transfer NPDES permitting authority to a state to warrant a section 7 consultation, and to consider the results of the consultation in its decision. However, whether EPA had sufficient discretion to consider species in its decision was integral to the court's analysis of whether its reliance on the BiOp was arbitrary and capricious. *Id.* at 969 n.19.

90 *Id.* at 962.

91 *Id.*

92 *Id.*

93 *Id.* at 967. The Ninth Circuit distinguished the requirement in section 7(a)(1) that agencies "utilize their authorities in furtherance of the purposes" of the ESA from section 7(a)(2), which directs agencies to "insure" against jeopardy in "any action" without reference to any existing agency authority. 16 U.S.C. § 1536(a) (2000). The court found further evidence of its interpretation that the ESA grants agencies additional authority in the decision by Congress to create an exemption process, rather than amend the text of section 7(a), when it amended the ESA in 1978 in the wake of *TVA v. Hill*. *Defenders*, 420 F.3d at 965. *See* 16 U.S.C. § 1536(g)–(h) (2000) (establishing a statutory procedure for an agency to apply for and be granted an exemption from the requirements of section 7(a)(2)). Significantly, the amendments made the exemption process available only after an agency had completed consultation pursuant to the untouched language of section 7(a)(2). *Defenders*, 420 F.3d at 966.

central question of whether EPA's decision included sufficient discretion under the CWA to trigger section 7.

B. Is EPA's Permit Transfer Decision a Discretionary Agency Action?

The Ninth Circuit held that the EPA decision to transfer authority over a state's NPDES program to the state included sufficient discretion to trigger section 7. In arriving at this conclusion, the Ninth Circuit articulated in unqualified language a broad reading of the ESA, under which the statute "confers authority and responsibility on agencies to protect listed species when the agency engages in an affirmative action that is both within its decisionmaking authority and unconstrained by earlier agency commitments."[94] The court held that the permit transfer decision met both criteria. However, it arrived at this conclusion only after stumbling through a series of analytic missteps, circumscribing the threshold question of whether the CWA includes sufficient discretion in the permit transfer decision to trigger ESA consultation. The court failed to recognize the nature of EPA's discretion in the NPDES program transfer decision in reaching its conclusion. While EPA has discretion in its evaluation of whether a proposed state program has achieved the statutory requirements, this discretion is limited in scope to the CWA criteria. Thus, EPA's discretion in evaluating proposed state NPDES programs is limited to the statutory factors, none of which encompass species protection.[95] The Ninth Circuit did not resolve the limited nature of EPA's discretion with its conclusion, providing a shaky foundation for the court to rest its analysis and calling into question both the sweeping scope and the force of its holding.

1. The Ninth Circuit Interpretation of "Discretionary Action"

Under the ESA, the requirement that an agency "insure" it will not cause jeopardy to protected species is triggered by "any action authorized, funded, or carried out" by the agency.[96] The ESA implementation regulations at 50 C.F.R. § 402.03 further specify that section 7 applies "to all actions in which there is discretionary Federal involvement or control."[97] The Ninth Circuit interpreted "discretionary" in the context of section 7 to encompass all

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94 *Defenders*, 420 F.3d at 967.

95 The CWA provides that EPA "shall approve" a proposed state permitting program "unless [the Secretary] determines that adequate authority does not exist" for the state to 1) issue permits for fixed terms up to five years in compliance with other sections of the CWA which can be modified or terminated for cause, 2) issue permits that meet the CWA monitoring and reporting requirements, 3) provide public notice and an opportunity to comment on permit applications, 4) send EPA a copy of each permit application, 5) allow any state whose waters may be affected by a state NPDES permit to submit written recommendations, 6) insure permits will not be issued which will impair navigation, 7) enforce permit violations with civil and criminal penalties, 8) insure discharges from public treatment woks meet standards specified in the CWA, and 9) insure industrial users of public treatment works comply with the CWA. Federal Water Pollution Control Act, 33 U.S.C. § 1342(b) (2000).

96 Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2000).

97 50 C.F.R. § 402.03 (2005).

actions "authorized, funded, or carried out" by the agency.[98] According to the court's reasoning, *any* action authorized, funded, or carried out by an agency would be a discretionary action triggering consultation. This circular logic serves to eliminate any meaning from the regulatory qualification that the only actions "authorized, funded, or carried out" by an agency to which section 7 applies are those where the agency has discretion. The Ninth Circuit analysis is problematic because it reads § 402.03 not as a refinement on the statutory language to be used to identify whether an agency action falls within the scope of section 7, but instead as a restatement of the statute's terms, lacking independent meaning.

The Ninth Circuit supported its conclusion that the permit transfer decision was a discretionary action by construing other cases interpreting § 402.03 to be consistent with its determination that there is no distinction between the statutory language in section 7(a)(2) referencing actions "authorized, funded, or carried out" by an agency and the regulatory requirement of "discretionary . . . involvement."[99] However, neither the case law nor the Ninth Circuit's own analysis supports this assertion. The court compared the holdings from cases which considered § 402.03, but it did not discuss whether any of those cases actually construed § 402.03 to be synonymous with the language in section 7(a)(2). Instead, it compared different categories of actions which have been held not to provide sufficient discretion to trigger section 7 with actions in which there is sufficient discretion. The former included actions in which the agency lacked decision-making authority over the challenged action,[100] or when the action was the result of an earlier decision.[101] It contrasted these actions with agency actions which have been held to include sufficient discretion to warrant consultation, such as when the agency retains continuing regulatory authority following the action.[102] Finally, it analogized the permit transfer

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98 *Defenders*, 420 F.3d at 967.

99 *Id.* at 968.

100 *See* Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy, 383 F.3d 1082, 1092 (9th Cir. 2004) (holding the challenged action to be beyond the Navy's authority because the risk to species arose from a Presidential decision, not the Navy's obedience of the order); Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1074 (9th Cir. 1996) (holding that there was no obligation to consult if an agency provided advice to a timber company regarding ESA compliance, but the agency was not responsible for the ultimate private decision affecting species).

101 *See* Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1082 (9th Cir. 2001) (no section 7 obligation where an agency did not have the ability to amend an already-issued permit); Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995) (no section 7 requirement where the agency lacks the "ability to influence" a project).

102 *See* Wash. Toxics Coal. v. Envtl. Prot. Agency, 413 F.3d 1024, 1032 (9th Cir. 2005) (holding section 7 consultation is required in EPA pesticide registration because of ongoing agency oversight); Natural Res. Def. Council, Inc. v. Houston, 146 F.3d 1118, 1125–26 (9th Cir. 1998) (section 7 applies to "water renewal contracts" because the agency has the ability to change the contractual terms at renewal); Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1053 (9th Cir. 1994) (section 7 applied when an agency retained evaluative authority over future land use decisions).

decision to the categories of actions in which there was sufficient discretion for the ESA to apply on the grounds that EPA had "exclusive decisionmaking authority."[103] While the cases cited by the court may provide guidance for determining when an agency action is discretionary within the meaning of § 402.03, the discussion does not reach whether any of these prior holdings contain reasoning to support the Ninth Circuit's interpretation of the regulation to be "coterminous with the statutory phrase."[104] This curious absence is likely due to the fact that other cases construing § 402.03 do not invoke such an interpretation.

2. Previous Interpretations of "Discretionary Action"

Previous cases to consider § 402.03 have interpreted the regulation's requirement that an agency have "discretionary . . . involvement" in a decision to trigger section 7 to be a qualification limiting the scope of agency actions to which section 7(a)(2) applies. In *Sierra Club v. Babbitt* (*Sierra Club*),[105] the court addressed whether the ESA applied to a Bureau of Land Management (BLM) decision to approve a right-of-way to construct a road authorized by a prior agreement. The court concluded that the approval of the right-of-way was not a discretionary action within the scope of § 402.03 because any discretion that existed in BLM's decision did not allow for species protection.[106] The court based its conclusion not on whether BLM was undertaking an action within the scope of the language in section 7(a)(2) but instead on whether the action was discretionary within the meaning of § 402.03.[107] Similarly, in *Marbled Murrelet v. Babbitt*,[108] the court interpreted the § 402.03 requirement that an action be discretionary in order to qualify section 7 language to indicate that an agency is not required to consult when it acts in a purely advisory capacity.[109]

The court again relied on the § 402.03 requirement that an agency action involve *discretionary* federal control to be the determinative factor for whether an action fell within the scope of section 7 in *Turtle Island Restoration Network v. National Marine Fisheries Service* (*Turtle Island*).[110] In *Turtle Island,* the court found that an agency's discretionary control over an action must provide enough leeway for the agency to act to protect

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103 *Defenders*, 420 F.3d at 969. However, the Ninth Circuit failed to reconcile the absence of species from EPA's decisionmaking factors in its permit transfer decision with the line of cases finding sufficient discretion in an action to trigger consultation only when the ongoing regulatory authority allows the agency to consider species impacts.

104 *Id.* at 969.

105 65 F.3d 1502 (9th Cir. 1995).

106 *Id.* at 1509 n.10.

107 *Id.* at 1509.

108 83 F.3d 1068 (9th Cir. 1996).

109 *Id.* at 1073. In *Marbled Murrelet*, the Forest Service advised a timber company on ways it could avoid "takes" in its logging operation, and thus avoid possible infractions under section 9 of the ESA. The complete absence of any federal control over the action indicated the agency lacked discretionary involvement and thus had no duty to consult under the ESA. *Id.* at 1074.

110 340 F.3d 969 (9th Cir. 2003).

species before it will be required to consult under the ESA.[111] Accordingly, NMFS had sufficient discretion when it issued fishing permits under the High Seas Fishing Compliance Act (HSFCA)[112] to require section 7 consultation because the HSFCA contained the phrase "including but not limited to" when it described the circumstances under which the agency could condition permits.[113] Coupled with implementation legislation specifically referencing conservation measures, this language was sufficient to indicate NMFS had discretion to include conditions in permits that would protect species.[114] Similarly, in *Ground Zero Center for Non-Violent Action v. United States Department of Navy* (*Ground Zero*),[115] the court interpreted the regulatory definition in § 402.03 to narrow the scope of actions to which section 7 applied to a class of discretionary actions, differentiating between a discretionary action and any action "authorized, funded, or carried out" by the agency.[116] In *Ground Zero*, the court held that because the Navy lacked authority to override the President's decision to site missiles at its Puget Sound base, its missile storage activities did not include sufficient discretion to trigger ESA consultation.[117] The above cases, as well as others construing § 402.03,[118] did not interpret the regulatory requirement of "discretionary involvement" to be synonymous with any action "authorized, funded, or carried out" by an agency. Rather, they consistently found the regulation to indicate a requirement that an action must both fit within the types of actions enumerated in the statute *as well as* provide a degree of discretion to consider species.

The dissent in *Defenders* took the majority to task for its erroneous interpretation of § 402.03, arguing the majority's holding was inconsistent with prior case law which recognized that an agency could have decision-making authority but nonetheless lack sufficient discretion in an action to require an ESA consultation.[119] As a result, the dissent believed this misinterpretation of the scope of § 402.03 led the majority to incorrectly hold that EPA had sufficient discretion in approving a state application to transfer NPDES permitting authority to trigger consultation. In contrast, the dissent characterized the permit transfer decision as entirely administrative, limiting

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111 *Id.* at 974.

112 16 U.S.C. §§ 5501–5509 (2000).

113 *Turtle Island*, 340 F.3d at 975.

114 *Id.* at 976.

115 383 F.3d 1082 (9th Cir. 2004).

116 *Id.* at 1092.

117 *Id.*

118 *See* Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1053 (9th Cir. 1994) (finding ongoing regulatory authority when the agency retained the ability to authorize and carry out land use decisions); Natural Res. Def. Council, Inc. v. Houston, 146 F.3d 1118, 1125–26 (9th Cir. 1998) (holding section 7 applies when the agency retains the power to authorize new contractual terms in renewal water contracts).

119 Defenders of Wildlife v. U.S. Envtl. Prot. Agency, 420 F.3d 946, 979 (9th Cir. 2005) (Thompson, J., dissenting).

EPA to an evaluation of the nine statutory factors enumerated in the CWA,[120] and failing to include sufficient ongoing regulatory authority over state NPDES programs to "render its oversight discretionary."[121] The majority likewise noted that EPA's oversight of state programs "does not grant any additional continuing review authority that would permit meaningful section 7 consultation" because the oversight was related to continued compliance with the CWA, not to the impacts state-issued NPDES permits may have on species.[122]

When an agency acts in a purely ministerial capacity or carries out an act that was a consequence of an earlier action or decision, there is insufficient discretion to trigger section 7. If an agency has such limited discretion in a decision that its consideration is limited to specific factors which do not include species, there is likewise insufficient discretion to trigger section 7. In *Sierra Club*, BLM had sufficient discretion to deny a proposed right-of-way if it did not fulfill certain statutory requirements, but because these conditions were unrelated to species considerations and the statute did not leave room for the agency to consider unspecified factors, BLM was found not to have an obligation to consult.[123] The statute at issue in *Sierra Club* restricted BLM's authority to object to a proposed right-of-way to grounds that it was not the most direct route, it would interfere with other projects, or it would lead to excessive soil erosion.[124] Similarly, EPA has authority under the CWA to evaluate a state's application to administer its own NPDES program only to determine if the program has met nine statutory factors, none of which either include considerations related to species protection or provide EPA with sufficient discretion to consider other factors not specified in the criteria.[125] EPA does retain a degree of ongoing regulatory oversight in a state NPDES program after a state assumes administrative control of the program, including its authority to enforce permit violations,[126] and the ability to revoke approval of a state's permit program if it ceases to comply with the CWA.[127] The CWA fails to provide for sufficient ongoing regulatory authority over the potential impacts of the delegated program on species to trigger section 7

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120 *Id.* at 980.

121 *Id.* at 981.

122 *Id.* at 974. The majority held only that EPA oversight of approved state NPDES programs does not involve ongoing analysis of the effects the state programs on protected species, and thus "cannot substitute for section 7 coverage." *Id.*

123 Sierra Club v. Babbitt, 65 F.3d 1502, 1509 n.10 (9th Cir. 1995).

124 *Id.* at 1505.

125 Federal Water Pollution Control Act, 33 U.S.C. § 1342(b) (2000). For a listing of the statutory criteria EPA must follow to evaluate a proposed state NPDES program, *see supra* note 95.

126 33 U.S.C. § 1342(i) (2000).

127 *Id.* § 1342(c); 40 C.F.R. § 123.61 (2005). As the dissent in *Defenders* noted, EPA's ability to revoke a state's permit program is limited to the substantive standards of the CWA. *Defenders*, 420 F.3d at 981 (Thompson, J., dissenting). The majority agreed, finding EPA oversight of state NPDES programs fail to serve as a proxy for consultation, noting the "standards governing permitting decisions will not directly relate to protection of most—if any—listed species." *Id.* at 974.

consultation for the transfer decision. Despite the very limited discretion in the permit transfer decision, the Ninth Circuit's broad interpretation of discretion under § 402.03 allowed the court to eliminate the element of "discretion" from the requirements necessary to trigger consultation under the ESA, rendering a non-discretionary action discretionary.

IV. DOES SECTION 7 GRANT AGENCIES ADDITIONAL AUTHORITY TO ACT TO PROTECT SPECIES?

If an agency action includes sufficient discretion to require a section 7 consultation, a related threshold question is how much authority the ESA gives an agency to act on the results of that consultation. In *Defenders*, the Ninth Circuit concluded that if an agency has an obligation to consult under section 7, it has a corresponding obligation to insure the action will not cause jeopardy to species, with the implication that the ESA necessarily grants the agency any additional authority above its governing statute necessary to fulfill this obligation.[128] Other circuits, to address the question of an agency's ability to require a greater degree of species protection than provided by the agency's governing statute, have reached divergent conclusions. Both the First Circuit and the Eighth Circuit have interpreted section 7(a)(2) to confer on agencies additional authority to take species considerations into account, requiring an agency taking an action with sufficient discretion to consider species to shift those concerns to the highest priority if the decision may affect species.[129] In contrast, the Fifth Circuit and the Tenth Circuit have held that the ESA does not provide agencies any additional authority.[130] The Ninth Circuit may have been correct to note that it was following the "better reasoned out-of-circuit" authority.[131] However, while the reasoning may be sound, both cases considered statutes which provided the agency with discretion to consider species in the decision. The conclusion reached in *Defenders,* that the ESA can function to *create* additional authority for agencies to consider species in the context of an action with marginal discretion, which does not include room for an agency to consider extra-statutory factors, is outside the scope of the split.

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128 *Defenders*, 420 F.3d at 970.

129 *See* Conservation Law Found. of New England v. Andrus, 623 F.2d 712, 715 (1st Cir. 1979) (holding ESA compliance was an implied contractual condition when the Secretary of the Interior issues oil and gas leases); Defenders of Wildlife v. Adm'r, Envtl. Prot. Agency, 882 F.2d 1294, 1299 (8th Cir. 1999) (ruling that EPA was not exempt from ESA compliance when it registered pesticides).

130 *See* Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n, 962 F.2d 27, 34 (D.C. Cir. 1992) (determining ESA did not expand FERC's ability to amend annual licenses to operate hydroelectric dams); Am. Forest & Paper Ass'n v. Envtl. Prot. Agency, 137 F.3d 291, 294, 298–99 (5th Cir. 1998) (finding that the ESA did not give EPA authority to require a state to undertake section 7 consultations when issuing NPDES permits under state law).

131 *Defenders*, 420 F.3d at 971.

A. Circuits Finding Section 7 Grants Agencies Additional Authority

The First Circuit wrote its opinion in *Conservation Law Foundation of New England, Inc. v. Andrus* (*Conservation Law*)[132] during the year following the Supreme Court's decision in *Tennessee Valley Authority v. Hill*. *Conservation Law* arose out of a challenge to a federal oil and gas lease sale by the environmental group Conservation Law Foundation of New England (CLF). CLF argued that the lease sale would violate section 7(d) of the ESA, which prohibits an agency engaged in a section 7 consultation from making any "irreversible or irretrievable commitment of resources" during the course of the consultation that could preclude the agency from implementing alternatives to the proposed action necessary to avoid causing jeopardy to species.[133] Such an "irreversible or irretrievable commitment" of resources would result from the lease sale because, once approved, the leases could only be canceled pursuant to the terms of the Outer Continental Shelf Lands Act (OCSLA), which requires an exploration plan to be approved unless it would "probably cause serious harm or danger to life."[134] This set a lower standard for species protection than section 7's mandate that agencies "insure" their actions will not cause jeopardy to species or result in the destruction or adverse modification of critical habitat. The First Circuit found that the ESA and OCSLA were "complementary" statutes and that "the ESA [would] continue to apply of its own force to major actions" following the sale.[135] Therefore, the court determined that section 7(a)(2) imposed an obligation to protect species that was an implied condition of the lease sale contract, giving the Secretary of the Interior the ability to include measures to protect species based on the results of a section 7 consultation, although the OCSLA had a less-stringent standard for species considerations than the ESA. The First Circuit held that the Secretary could not contract away any obligation to protect species, and the ESA had the effect of shifting the priority species must be granted in the leases.[136] In addition, because the OCSLA provided some consideration for species, *Conservation Law* did not address whether the ESA provided additional authority to protect species when an agency acts under a statute that does not include space for the agency to consider the impacts of the action on species.

The Eighth Circuit also held that the ESA "impose[d] substantial and continuing obligations on federal agencies" in *Defenders of Wildlife v. Administrator, Environmental Protection Agency (Defenders II).*[137] Like *Conservation Law*, the opinion did not need to address the question of

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132 623 F.2d 712 (1st Cir. 1979).

133 *Id.* at 714 (citing Endangered Species Act of 1973, 16 U.S.C. § 1536(d) (2000)).

134 Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(a)(2)(A)(i) (2000); *see* 43 U.S.C. § 1340(c)(1) (2000) (setting forth requirements for plan approval).

135 *Conservation Law*, 623 F.2d at 714.

136 As this case preceded the regulations at 50 C.F.R. § 402.03 (1986) by nearly a decade, it did not discuss the discretionary nature of the action under the OCSLA, Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,957 (June 3, 1986).

137 882 F.2d 1294, 1299 (8th Cir. 1989).

whether the action included sufficient discretion to require consultation, or how far the agency power to act to comply with the ESA extended beyond the agency's action statute. In *Defenders II*, the Eighth Circuit held that EPA's compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[138] did not exempt the agency from its obligation to comply with the ESA.[139] The analysis in *Defenders II* focused on whether the agency had violated the ESA by failing to obtain an incidental take statement for its continued registration of a pesticide known to kill endangered species,[140] not whether the action required consultation. Indeed, EPA's obligation to consult was not an issue.[141] Instead, EPA argued only that it was not required to obtain an incidental take statement in relation to its decision under FIFRA to continue the pesticide's registration. The Eighth Circuit reasoned that although EPA had acted under FIFRA, the agency nonetheless had an obligation to obtain an incidental take statement under the ESA if the pesticide's continued use would result in harm to protected species.[142] The Eighth Circuit determined that EPA had an obligation under section 7(a)(2) to "insure" its actions would not harm protected species "even though [it] may be acting under a different statute . . . ."[143] This conclusion was premised in part on the characterization of FIFRA and the ESA as complementary statutes, under which compliance with the stricter standards in the latter did not conflict with, and indeed functioned to facilitate, compliance with the

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138 7 U.S.C. §§ 136–136y (2000).

139 *Defenders II*, 882 F.2d at 1299.

140 Section 9 of the ESA makes the "take" of listed species illegal without a permit issued by the Secretary of Interior. 16 U.S.C. § 1539 (2000). Taking is defined in the statute as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). Although the ESA prohibits the "take" of protected species, agencies can apply for and obtain an incidental take permit from the Secretary of Interior under section 10 of the ESA. *Id.* § 1539(a)(1)(B). If a section 7 consultation reveals that the agency action is not likely to cause jeopardy to the continued existence of species, and any incidental take of protected species that may result from the action is likewise unlikely to jeopardize the species' existence, the agency can obtain an incidental take statement in the course of the consultation. *Id.* § 1536(b)(4).

141 *Defenders II*, 882 F.2d at 1299. In 1983, EPA had issued a notice of its intent to cancel the use of the pesticide strychnine on certain rodents. The notice followed a 1979 BiOp issued by FWS, and several subsequent years of study, indicating that continued use of strychnine was likely to cause jeopardy to several endangered and threatened species, including the black-footed ferret. Both Wyoming and South Dakota requested an administrative hearing on EPA's intent to cancel the pesticide's use, and during the settlement discussions EPA entered into a second consultation with FWS over the effects of strychnine on black-footed ferrets (*Mustela nigripes*). This second BiOp determined jeopardy could be avoided through ferret surveys prior to applying strychnine to an area. Defenders of Wildlife objected to the settlement agreement devised under the second BiOp and challenged EPA's continued registration of the pesticide as an illegal taking under the ESA. Because the continued registration of strychnine resulted in its continued use, which subsequently resulted in the poisoning deaths of black-footed ferrets (*Mustela nigripes*), the court found the pesticide's continued registration (without an incidental take statement) violated the ESA. *Id.* at 1297–1301.

142 *Id.* at 1301.

143 *Id.* at 1299.

former.[144] Similarly, the Ninth Circuit recently held in *Washington Toxics Coalition v. EPA* (*Washington Toxics*)[145] that, when acting under a statute which provides for an agency to prioritize species to a lesser degree than the ESA, such as FIFRA, an agency must comply with the species protection requirements of the ESA.[146]

Although both the First Circuit and the Eighth Circuit found the ESA to apply when an agency acted under a statute with less-protective standards for species, neither directly addressed section 7(a)(2) and the obligation to consult, or explored the scope of any additional agency power to protect species derived from the ESA. In the context of these cases, the additional authority in the ESA related to the relative priority species should have in a decision; the ESA did not create the authority to consider species. This line of cases finds an agency's obligation to comply with the ESA to provide the agency with the authority to take action to protect species to a greater degree than the agency's action statute. In both cases, the agency had acted under a statute which already provided for species to be a factor in the agency decision, leaving open the question of the degree of protection afforded species under statutes not allowing discretion to consider species in the decision at all.

B. Circuits Finding the ESA Is Not a Source of Agency Authority

Courts that have concluded that the ESA does not grant agencies any additional authority have approached the question by analyzing whether the agency has the power to protect species through including additional criteria in its decision, rather than whether there is sufficient discretion within existing criteria to prioritize species. In *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC* (*Platte River II*),[147] the D.C. Circuit held

144 The court noted that "a pesticide registration that runs against the clear mandates of the ESA will most likely cause an unreasonable adverse effect on the environment under FIFRA." *Id.* at 1299.

145 413 F.3d 1024 (9th Cir. 2005).

146 *Id.* at 1028. The environmental group Washington Toxics Coalition alleged that EPA had violated the ESA when it failed to consult with NMFS regarding whether its registration of 54 pesticide ingredients would adversely affect listed salmon species in the Pacific Northwest. EPA argued that it was bound to protect species in pesticide registration decisions only to the extent required by FIFRA, and that it had no further obligation to consider impacts to species by undertaking section 7 consultation. *Id.* Under FIFRA, EPA may suspend the registration of a pesticide if it "would be likely to result in unreasonable adverse effects on the environment or will involve unreasonable hazard to the survival of a species declared endangered or threatened." 7 U.S.C. § 136*l* (2000); *see id.* § 136d(c)(1) (providing authority to suspend registration). However, like the Eighth Circuit, the court held that compliance with FIFRA "[did] not overcome an agency's obligation to comply with environmental statutes with different purposes," such as the ESA. *Wash. Toxics*, 413 F.3d at 1032. The Ninth Circuit took its analysis a step beyond the Eighth Circuit analysis to address whether EPA had discretion to alter a pesticide registration, holding EPA had a "continuing obligation to follow the requirements of the ESA" because it had ongoing regulatory authority over pesticides "for reasons that include environmental concerns." *Id.* at 1033.

147 962 F.2d 27 (D.C. Cir. 1992).

that the ESA "does not *expand* the powers conferred on an agency by its enabling act" and thus does not give agencies any additional authority to act to protect listed species.[148] When the Federal Energy Regulatory Commission (FERC) issued annual licenses to allow operations to continue during pending relicensing proceedings at two hydroelectric dams on the Platte River (Platte River Dams) in central Nebraska,[149] the agency did not include additional license conditions to protect species, although it was well documented that the dam operations had an adverse effect on habitat for several endangered bird species, including whooping crane (*Grus americana*), bald eagle (*Haliaectus leucocephelus*), and the least tern (*Sterna antillarum*).[150] The D.C. Circuit initially ruled that it was an abuse of discretion for FERC to refuse to evaluate the need for protective environmental conditions in the interim annual licenses.[151] On remand, FERC determined that although continuing to operate the Platte River Dams under the terms of the original licenses would harm species, it lacked authority to add conditions to the annual license for one of the dams because that license lacked a reopener clause.[152]

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148 *Id.* at 34. The D.C. Circuit had previously heard the challenge and remanded the licensing decision back to FERC to determine whether it was appropriate to include conditions to protect species in the annual licenses in *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC* (*Platte River I*), 876 F.2d 109 (D.C. Cir. 1989).

149 *Platte River II*, 962 F.2d at 32. In 1941, FERC issued licenses for the Platte River Dams that were scheduled to expire in 1987. The facilities applied to FERC for new licenses in 1984, but by the mid-1980s, it became clear the licenses would expire before FERC could issue new licenses. *Id.* at 30. In this situation, the Federal Power Act (FPA) requires FERC to issue annual licenses under the conditions of the original license until the agency issues a renewal license. Federal Power Act, 16 U.S.C. § 808(a)(1) (2000). Once issued, licenses for hydroelectric dams can be altered under the FPA only "upon mutual agreement between the licensee and the Commission." *Id.* § 799. Without such a "reopener clause" that includes an express reservation of authority to modify the license, FERC has interpreted the FPA to prevent it from amending annual licenses, which must be issued "under the terms and conditions under the existing license." *Id.* § 808(a)(1).

150 *Platte River I*, 876 F.2d at 115. The Platte River Dams are upstream from a 53-mile stretch of the Platte River which is home to several threatened and endangered migratory bird species, and has been designated as critical habitat for endangered whooping cranes since the 1970s. When FERC issued the annual licenses to the Platte River Dams, the Platte River Whooping Crane Critical Habitat Maintenance Trust (Trust) intervened, requesting FERC to include conditions to protect the environment in the annual licenses. *Platte River II*, 962 F.2d at 30.

151 *Platte River I*, 876 F.2d at 116. The D.C. Circuit remanded the decision back to the agency, ordering it to consider "temporary, 'rough and ready' measures to prevent irreversible environmental damage pending relicensing." *Id.*

152 FERC had concluded that "absent interim measures, project operations will continue to adversely affect Platte River habitat, impeding the recovery of endangered or threatened bird species populations . . . and thereby may affect the continued existence of these species and result in irreversible environmental damage." *Platte River II*, 962 F.2d at 31. The amended license conditions provided for minimum and maximum flows, and the development and maintenance of nesting sites for terns and plovers. *Nebraska Public Power District, Project No. 1835-028*, 51 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,040 (Apr. 17, 1990). FERC approved conservation conditions to be included in the annual license for the Platte River Dam which had a reopener clause in its license and attempted to enter into an agreement with the other dam

When the matter reached the D.C. Circuit a second time, the court upheld FERC's determination that because the original license did not allow the agency to amend its conditions, the ESA did not give the agency additional authority to include conditions to protect species.[153] The D.C. Circuit gave little consideration to the ESA claim, focusing what analysis it provided on section 7(a)(1), which requires that agencies "shall . . . utilize their authorities in furtherance of the purposes of [the ESA]."[154] It did not address the more expansive language of section 7(a)(2), which requires agencies to "insure" their actions will not cause jeopardy to species without the qualifying reference to the agency's existing authority in section 7(a)(1). The court instead relied on the agency's administrative analysis, which considered the issue in terms of whether section 7 "allows agencies to go beyond their statutory authority" to protect species.[155] The court unequivocally stated that the ESA grants agencies no additional authority to consider species. The Federal Power Act (FPA) did not provide sufficient discretion for the ESA to apply to FERC's issuance of an annual license if the original license lacked a reopener clause granting the agency the ability to amend the license.[156] Neither the D.C. Circuit nor FERC questioned the agency's ability to amend a license to protect species if it contained a reopener clause.[157] It was not the court's analytic focus on section 7(a)(1), but the lack of discretion provided in the decision to issue an annual license, which distinguishes this case from *Conservation Law.* Unlike the cases which found additional authority for agencies to consider species to a greater degree than provided in the agency's action statute, the statute at issue in *Platte River* did not provide any discretion for FERC to amend a license without a reopener clause, and the ESA could not create authority to protect species when the agency lacked discretion to include amended license conditions in the annual licenses.

In *American Forest & Paper Ass'n v. EPA* (*American Forest*),[158] the Fifth Circuit relied on the D.C. Circuit's reasoning from *Platte River II* to conclude that the ESA did not grant an agency authority to take species into account to a degree not provided by the agency's action statute.[159] In *American Forest,* an industry group[160] challenged EPA's decision to condition its

operator, but it refused. If both dams were not required to comply with the environmental conditions, the first dam operator argued that it would be unable to meet some of the new license conditions. *Platte River II*, 962 F.2d at 32.

153 *Platte River II*, 962 F.2d at 34. In the agency hearing, FERC had concluded that its "authority to implement the goals of the ESA can be exercised only within the context of the authority and discretion conferred by [its] enabling statutes." *Nebraska Public Power District, Project Nos. 1417-013 and -015 Project Nos. 1835-027 and -032, Order on Rehearing*, 51 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,257, 61,753 (May 31, 1990).

154 Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(1) (2000).

155 *Platte River II*, 962 F.2d at 34.

156 The FPA requires FERC to issue an annual license "under the terms and conditions of the existing license." 16 U.S.C. § 808(a)(1).

157 *Platte River II*, 962 F.2d at 31.

158 Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291 (5th Cir. 1998).

159 *Id.* at 299.

160 The same industry group brought a nearly identical challenge to EPA's approval of

approval of Louisiana's NPDES program on requiring the state to consult when it issued permits.[161] The Fifth Circuit rejected this condition as an impermissible addition of criteria outside the scope of the statutory factors EPA could consider in its decision to approve a state NPDES program. Like the D.C. Circuit in *Platte River,* from which the Fifth Circuit borrowed much of its ESA analysis, the court rejected the argument that the ESA grants agencies additional authority to consider species by restricting its analysis to the authority section 7(a)(1) confers on agencies to "utilize" their existing authorities to protect species. However, while the D.C. Circuit deliberately limited its analysis to section 7(a)(1), the Fifth Circuit appears to have failed to recognize the distinction between section 7(a)(1) and section 7(a)(2),[162] incorrectly noting that the D.C. Circuit wrote that *section 7(a)(2)* directs agencies to "utilize" their existing authorities to protect species.[163] The Fifth Circuit considered the obligation to consult under section 7 to be independent of any substantive requirement that agencies act on the result of a consultation,[164] and thus did not need to reach the question of whether EPA's approval of a state NPDES program was discretionary.[165] The analysis instead focused on whether the CWA *expressly required* EPA to take species

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Oklahoma's NPDES program in the Tenth Circuit, with less success. The Tenth Circuit dismissed the suit because it found American Forest lacked standing under the citizen suit provision of the CWA. Am. Forest & Paper Ass'n v. Envtl. Prot. Agency, 154 F.3d 1155, 1159–1160 (10th Cir. 1998). Section 509(b) of the CWA provides that "any interested person" may challenge EPA's determinations regarding state NPDES programs. Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(1) (2000).

161 EPA had invoked its authority under § 304(i) of the CWA, 33 U.S.C. § 1314(i) (2000), which allows EPA to establish guidelines for the administration of state NPDES programs to require Louisiana to consult regarding the impacts to species that may result from NPDES permits that it issued. As a condition of its approval of Louisiana's application to assume NPDES permitting authority in the state, EPA required Louisiana to enter into an agreement to submit copies of proposed NPDES permits to FWS and NMFS. If either agency determined a proposed permit may cause jeopardy to listed species, EPA would veto the permit. *American Forest*, 137 F.3d at 294. Under the CWA, EPA retains authority to veto any state-issued NPDES permit in delegated programs. 33 U.S.C. § 1342(d) (2000). *See* Approval of Application by Louisiana to Administer the National Pollutant Discharge Elimination System Program, 61 Fed. Reg. 47,932 (1996) (defining the scope of Louisiana's program and clarifying EPA's authority and oversight).

162 Indeed, the Ninth Circuit in *Defenders* noted that the Fifth Circuit analysis in *American Forest* rested on a "fundamental misconception concerning section 7(a)(2)" that agencies could lack authority to insure their actions will not result in jeopardy to species even if the agency action requires a consultation which was "simply incorrect." Defenders of Wildlife v. U.S. EPA, 420 F.3d 946, 971 (9th Cir. 2005).

163 *American Forest*, 137 F.3d at 298. The D.C. Circuit also did not note the distinction between an agency's obligations section 7(a)(1) and section 7(a)(2), but the court clearly it based its analysis on section 7(a)(1), not section 7(a)(2). *Platte River II*, 962 F.2d 27, 34.

164 "[S]ection 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers." *American Forest*, 137 F.3d at 298.

165 Because the Fifth Circuit considered EPA's requirement that Louisiana adopt a consultation procedure as a condition of approval to be an impermissible addition of criteria for program approval, it found the question of whether the approval decision was even a discretionary action to begin with to be "largely beside the point." *Id.* at 298 n.6.

considerations into account when deciding to transfer NPDES permitting authority to a state.

Like the Fifth Circuit, the Ninth Circuit in *Defenders* considered EPA's ability to base its decision to approve a state application to assume NPDES permitting authority on species concerns. The Fifth Circuit held that EPA lacked the authority to condition its approval of a state NPDES program on the state's agreement to assume consultation duties after the program was delegated. In concluding that the "EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA,"[166] it applied a very narrow interpretation of the ESA. Thus, the Fifth Circuit found that the ESA does not provide *any* additional authority to consider species if the agency's action statute does not specifically provide that species be considered in the decision. In contrast, the Ninth Circuit reached an expansive holding that the ESA granted agencies additional power to protect species, even when that statute does not appear to provide the agency with discretion to consider factors not specified in the statute. The cases which found there to be additional authority in the ESA for agencies to consider species in a decision involved statutes which either already provided some authority to consider species, or provided sufficient discretion for the agency to consider factors not enumerated in the statute. In contrast, both the Fifth Circuit and the D.C. Circuit addressed the scope of agency authority under the ESA in the context of statutes which provided limited, if any, discretion. Similarly, EPA's decision to approve a state NPDES program neither includes authority to consider species, nor discretion to weigh factors not specified in the statute. However, the Ninth Circuit did not address this distinguishing characteristic of the split in its analysis, in part because it interpreted EPA's decision to be discretionary. Instead, it seized on the analytic focus on section 7(a)(1), without discussing the critical difference the discretionary nature of the action at issue played in the decisions in *Platte River II* and *American Forest*. Although section 7(a)(2) provides a substantive mandate that agencies insure their actions will not jeopardize species, it applies only if an action includes sufficient discretion to allow the agency to take species into account. The Ninth Circuit failed to recognize the role this distinction played in the split, and failed to explain how the ESA could create authority for an agency to consider species when acting under a statute that does not provide discretion for the agency to include additional factors in its decision.

V. THE SCOPE OF AGENCY DISCRETION TO CONSIDER THE IMPACTS OF AN ACTION ON SPECIES

In *Defenders*, the Ninth Circuit held that the ESA "provides a modicum of additional authority to agencies, beyond that conferred by their governing statutes, to protect listed species from the impact of affirmative federal

166 *Id.* at 299.

actions."[167] The court concluded that if an agency is required to consult, it is required to act on the results of that consultation even if the agency's action statute does not provide for species protection. However, it left the extent of this additional authority undefined. The Ninth Circuit's holding in *Defenders* rests on the court's tenuous conclusion that the decision to transfer NPDES permitting authority to a state under the CWA is a discretionary action. By focusing its analysis on the language of section 7(a)(2), and functionally nullifying the qualifying regulatory language in § 402.03, the Ninth Circuit was able to conclude that EPA's decision to transfer NPDES permitting authority to Arizona was a discretionary action. To reach this conclusion, it construed the regulatory language referencing "all actions in which there is discretionary Federal involvement or control" to include all actions "authorized, funded, or carried out" by the agency.[168] The logic upon which the Ninth Circuit rested its articulation of sweeping agency authority under the ESA suffers from the court's reliance on evidence which does not fully support its conclusion that the permit transfer decision satisfies the threshold requirement of a discretionary action.

The Ninth Circuit may have followed the better-reasoned of the circuits that have considered whether the ESA grants agencies additional authority, but it failed to address how a grant of authority to prioritize species could apply when what discretion existed in the action did not provide leeway for it to consider species. In *Defenders,* the court failed to account for this significant difference between the decision to transfer NPDES permitting authority to a state and the actions involved in *Conservation Law* and *Defenders II*. In the latter cases, the decisions occurred within the context of a statute which already provided discretion for the agency to consider species. Significantly, the Ninth Circuit instead found that although the CWA provides very limited discretion, *any* discretion in the action was sufficient to trigger the requirement that the agency consult. The court construed earlier cases that found that the ESA granting additional authority to shift the priority an agency could give species in a decision to conclude that any discretion in an action was sufficient to trigger consultation and the corresponding authority to prioritize species in its decision. The holding thus interpreted the ESA to confer upon agencies a greater degree of additional authority to protect species than the earlier cases, construing any additional authority to be constrained to shifting the priority the agency must give species in a decision. Further, the Ninth Circuit did not articulate whether there were any limits to this additional authority. This Section explores the extent of the authority the ESA grants agencies, as interpreted by the Ninth Circuit. It examines whether the mandate that an agency avoid jeopardy to

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167 *Defenders*, 420 F.3d at 970.

168 *Id.* at 967. The majority acknowledged the dissent's disagreement with the holding that permit transfer decisions were discretionary actions, but it found EPA's treatment of the NPDES permitting transfer decision as requiring consultation to provide more compelling evidence that the action was discretionary. *Id.* at 969.

species could require it not only to avoid acting in a way that may harm species but also to take affirmative steps to prevent jeopardy, beyond the scope of the agency's authority under its governing statute.

A. Does Defenders *Indicate Unfettered Agency Power to Protect Species?*

The Ninth Circuit in *Defenders* concluded that the ESA conferred additional authority on agencies to act to protect species, "beyond that conferred by the agencies' own governing statutes,"[169] even when the agency's discretion did not allow it to consider factors other than those specified in the statute. If the court was correct in its conclusion, what is the extent of this additional authority? When stretched, does the additional authority derived from the ESA not only empower an agency to decline to undertake an action if it will cause harm to species, but also allow the agency to take an affirmative action which contradicts its governing statute, if that is the only way the agency could avoid causing jeopardy to species? The following case study addresses these questions as it explores the outer limits of the independent agency power to protect species the Ninth Circuit derived from section 7(a)(2) in *Defenders*.

In *Pacific Coast Federation of Fishermen's Ass'ns v. Bureau of Reclamation* (*Pacific Coast*),[170] another recent Ninth Circuit decision, the court addressed the influence the ESA holds over Bureau of Reclamation (BOR) dams and irrigation projects in the Klamath Basin.[171] Past decisions confirmed that the BOR Klamath Project operations must comply with the ESA and avoid causing jeopardy to the endangered salmon population in the basin.[172] This recent ruling invalidated a BOR operating plan for the Klamath Project because it failed to avoid jeopardy to salmon.[173] On remand, a California district judge issued an injunction requiring BOR to limit irrigation diversions for the Klamath Project to provide sufficient flows to protect

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169 *Id.* at 964.

170 426 F.3d 1082 (9th Cir. 2005).

171 The Klamath Project, a federal irrigation project established in the early 1900s, is operated by BOR in the Klamath River Basin in northern California and southern Oregon. Water use in the Klamath Basin has been the source of a great deal of contentious litigation in recent years between irrigators, federal agencies, environmental groups, and tribes. *See* Bennett v. Spear, 520 U.S. 154, 159 (1997) (regarding endangered suckers in the Klamath River); Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1203–04 (9th Cir. 1999) (stating that BOR's ESA obligations take precedence over appropriative water rights); Moden v. U.S. Fish & Wildlife Serv., 281 F. Supp. 2d 1193 (D. Or. 2003) (delisting Klamath Reservoir fish unsupported). Southern Oregon and Northern California Coast (SONCC) coho spawn and mature the Klamath River mainstem and tributaries, and as an anadromous species, spend a portion of their lives in the ocean. Since the Klamath Project's construction, SONCC coho have continued to live in the river and its tributaries below Iron Gate Dam, the part of the Klamath Project closest to the Pacific Ocean. The Klamath River SONCC coho population has plummeted during the last century, from an estimated 50,000 to 125,000 wild coho in the 1940s to fewer than 6,000 in 1996. In 1997, SONCC coho were listed as a threatened species under the ESA. *Pac. Coast*, 426 F.3d at 1086–87.

172 *Klamath Water Users*, 204 F.3d at 1209 .

173 *Pac. Coast*, 426 F.3d at 1094.

salmon.[174] With the Klamath salmon population facing dramatic decline,[175] it may not be far-fetched to hypothesize that a future, legal BiOp for the Klamath Project could conclude that the only way to avoid jeopardy to salmon is to cease operations and remove the dams.

Applying the Ninth Circuit's reasoning in *Defenders*, it follows that the ESA alone provides sufficient additional authority for BOR to remove the dams to protect the Klamath salmon population. The additional authority to avoid jeopardy to species in section 7 could be expanded to provide sufficient authority for BOR not only to cease diverting water for irrigation projects, but also to remove the dams themselves. In 1905, Congress authorized the Klamath Project under the Reclamation Act of 1902,[176] enabling BOR to acquire water rights and create diversions for a large-scale irrigation project.[177] The Reclamation Act was established to provide for "the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands," and grants the Secretary of Interior authority to "perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."[178] BOR has a wide degree of discretion in how it operates the irrigation project, although it is limited to actions to promote the purpose identified in the statute, irrigating arid western lands. BOR has discretion to decide how it will operate the Klamath Project, and the corresponding authority to prioritize species over water users in its dam operations, if necessary.[179] While the Reclamation Act grants BOR discretion in its operation of the Klamath Project, it does not grant the agency the authority to decide, independent of Congress, to decommission the dams. However, under *Defenders*, the only limit to an agency's authority to act to protect species is the requirement that the action include a "modicum" of discretion.[180] Once the ESA requirement to consult is triggered, and it is well-settled that BOR

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174 Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, No. Civ. C02-2006 SBA, 2006 WL 798920, at *6 (N.D. Cal. Mar. 27, 2006). The district judge further ordered NMFS and BOR to reinitiate consultation regarding the Klamath Project, and for NMFS to issue a new BiOp. *Id.* at *7–8.

175 *See* Peter Sleeth, *Three Hundred Protesters in Astoria Assail Fish Policies*, THE OREGONIAN, Mar. 24, 2006, *available at* http://www.oregonlive.com/search/index.ssf?/base/news/1143170718104640.xml&coll=7 (reporting fishing communities' distress at the prospect of a moratorium on salmon fishing off the Oregon and California coast to protect plummeting Klamath Basin salmon populations); Don Thompson, *Dearth of Klamath Salmon Restricts Fishing in Oregon, California*, S.F. CHRON., Mar. 11, 2005, *available at* http://sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/03/11/state/n180346S28.DTL (discussing possible restrictions for the 2005 salmon season off the Oregon and California coasts).

176 Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. §§ 371–498, 1457 (1988)).

177 Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228 (N.D. Cal. 2001).

178 43 U.S.C. §§ 373, 391 (2000).

179 Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 1999).

180 *Defenders*, 420 F.3d at 970.

must consult regarding its operations of the Klamath Project,[181] nothing in the *Defenders* reasoning indicates any limits to the "obligation in addition to those created by the agencies' own governing statute"[182] to protect species derived from the ESA. Assuming that any application for an exemption would be denied,[183] it follows that under *Defenders,* the additional authority derived from the ESA would suffice to enable BOR to decommission the Klamath dams on the strength of a section 7 consultation alone.

Under *Defenders,* the additional authority to protect species in the ESA extends beyond prioritizing species to a greater extent than provided in the action statute to include authority to prioritize species in actions which otherwise would not provide the agency with discretion to consider species at all. *Defenders* does not indicate any constraints which would prevent BOR from invoking this additional ESA authority to remove the Klamath dams without intervention from Congress. The above example it is not an impossible outcome under the Ninth Circuit's reasoning, although it serves to demonstrate some of its problematic implications.[184] While Congress may have intended for agencies to give endangered species the "highest of priorities" in decisions affected by the ESA,[185] it did not intend to grant agencies unchecked authority. The Ninth Circuit's broadening of the scope of agency actions with sufficient discretion to require a section 7 consultation has the potential to prioritize species in a range of federal actions previously beyond the scope of the ESA. This is an unlikely scenario, though, because other cases to interpret the degree of discretion necessary in an action to require consultation do not correspond with the Ninth Circuit's liberal interpretation of a discretionary action. The court's conclusion that an action with marginal discretion should trigger a wide, but undefined, range of powers to protect species raises serious questions regarding where the boundaries of agency authority under the ESA should be marked. With its reliance on unsubstantiated reasoning, however, it is difficult to conceive how the Ninth Circuit's expansive interpretation of additional authority under the ESA would apply in other contexts.

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181 Although BOR has contracted operation of the Klamath dams to a private corporation, PacifiCorp, the agency has retained control over the dam operations and the authority to alter the dam operations to comply with the ESA. *Id.*

182 *Id.* at 967.

183 *See supra* note 44 and accompanying text (discussing the process an agency must follow to obtain an exemption from the section 7 requirement that it avoid causing jeopardy to listed species).

184 While it takes a stretch of the Ninth Circuit's reasoning in *Defenders* to arrive at the conclusion that the ESA alone grants BOR authority to order the Klamath dams be decommissioned, dam removal is not an improbable result of the Klamath controversy. *See generally* Eric Bailey, *U.S. Acts to Help Wild Salmon in Klamath River*, L.A. TIMES, Mar. 30, 2006, *available at* http://www.latimes.com/news/printedition/california/la-me-salmon30mar30,1, 7907211.story?coll=la-headlines-pe-california (discussing the possibility that rising costs of mitigation measures may lead to the conclusion that dam removal makes economic sense).

185 Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978).

B. Is a Complementary Purpose Required to Trigger Additional ESA Authority?

One possible explanation for the expansive holding in *Defenders* is that an agency has additional authority under the ESA when it acts under a statute with a purpose that is "complementary" to the purposes of the ESA. In *Defenders*, the Ninth Circuit's broad interpretation of discretion in § 402.03 appeared to rest in part on its characterization of the CWA and the ESA as complementary statutes. Courts which have found the ESA to include an additional obligation to protect species beyond the requirements of the agency's action statute have characterized the statute the agency was acting under to have "different and complementary purposes" to the ESA.[186] For example, the Eighth Circuit found that EPA must comply with the ESA when acting under FIFRA because "[e]ven though a federal agency may be acting under a different statute, that agency must still comply with the ESA."[187] It did not, however, address whether a "complementary" statutory purpose could itself be the source of discretion in the action to trigger consultation. Although the Ninth Circuit relied in part upon its characterization of the ESA and the CWA as complementary statutes to bolster its conclusion that there was sufficient discretion in the permit transfer decision to trigger consultation, a complementary purpose cannot itself be the source of this authority.

The Ninth Circuit invoked the principle that "an agency cannot escape its obligation to comply with the [ESA] merely because it is bound to comply with another statute that has consistent, complementary objectives" to reject an argument that the permit transfer decision was non-discretionary because the CWA requires that EPA "shall approve" a state permit transfer application that fulfills the statutory criteria.[188] However, the court failed to explain the "complementary" nature of the objectives involved in section 7 of the ESA and the approval of a state NPDES program of the CWA. Both the

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186 Wash. Toxics Coal. v. Envtl. Prot. Agency, 413 F.3d 1024, 1032 (9th Cir. 2005). The Ninth Circuit emphasized its point with the example of its earlier conclusion that registration and labeling requirements under FIFRA do not exempt EPA from its obligations under the CWA. *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001). Further, FIFRA's labeling requirement does not exempt an agency from its obligations to assess the environmental impact of its actions under the National Environmental Policy Act of 1972 (NEPA), 16 U.S.C. §§ 1361–1421h (2000). Oregon Envtl. Council v. Kunzman, 714 F.2d 901, 905 (9th Cir. 1983).

187 *Defenders II*, 882 F.2d 1294, 1299 (8th Cir. 1989).

188 *Defenders*, 420 F.3d 946, 967 (9th Cir. 2005) (quoting *Wash. Toxics*, 413 F.3d at 1032). *See also* Federal Water Pollution Control Act, 33 U.S.C. § 1342(b) (2000) (establishing criteria for EPA to approve state applications to administer NPDES programs). The court rejected this argument, in part, because it was pursued by intervening parties, not EPA, and noted that it was also deferring to the agency's own interpretation of its authority under the CWA that it had sufficient discretion. *Defenders*, 420 F.3d at 968. Further, the court noted that notwithstanding EPA's inconsistent position regarding its obligations under section 7, the agency twice requested during litigation specifically that the court not address whether the permit transfer decision has authority under § 402.03. *Id.* at 969 n.19.

ESA and the CWA are unquestionably protective of the environment, but the statutes work to fulfill parallel purposes. The ESA is concerned with species protection, while the CWA is concerned with water quality.[189] *Washington Toxics,* which articulated the principle that an agency is bound to comply with the ESA when acting under a complementary statute, addressed EPA's obligation to comply with the ESA when it acts under FIFRA, a statute which requires the agency to take species into account, although to a lesser degree than the ESA.[190] When only the degree to which an agency may act to protect species is at issue, the agency has the authority to prioritize species under the ESA. *Washington Toxics* holds that an agency cannot use compliance with a statute with similar environmental goals, but a lesser standard of species protection, as a proxy for full compliance with the ESA.[191] However, this does not support the Ninth Circuit's unsubstantiated characterization of the CWA and the ESA as complementary statutes, because it fails to account for the absence of species considerations from the factors EPA must consider when it decides to delegate NPDES permitting authority to a state.[192] Any broad complimentary purposes shared by the ESA and CWA provide an insufficient, and unsatisfactory, explanation for the additional authority to protect species that the Ninth Circuit finds in the ESA.

C. Permit Review: A Better Avenue for Species Protection in the CWA

The Ninth Circuit may have been motivated to undertake such circuitous reasoning and invoke such a broad interpretation of the authority the ESA grants agencies by the desire to avoid the harsh result from a decision that found insufficient discretion in EPA's decision to require consultation. EPA's bizarre and inconsistent behavior in undertaking consultation while arguing it had no authority to decline an application to transfer NPDES permitting authority on species concerns, but requesting the court not reach a conclusion regarding its obligation to consult, likely contributed to the court's disinclination to absolve the agency from its ESA obligations.[193] The BiOp provided the court with evidence that section 7 consultations associated with NPDES permits EPA issued in Arizona in the past had led to mitigation measures to prevent impacts to species, and that

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189 To the extent these two environmental statutes overlap, it is in the area of water quality standards, which must provide for the protection of aquatic species and their habitats. The CWA specifically provides for EPA to consider "propagation of fish and wildlife" when it establishes water quality criteria. 33 U.S.C. § 1313(c)(2)(A) (2000). NPDES permits cannot be issued which would result in a violation of effluent limitations which would lead to a violation of water quality standards. *Id.* § 1342(b)(1)(A). However, any EPA authority to consider species in setting water quality standards "cannot be construed as discretionary authority" to decide not to delegate NPDES permitting authority to a state. Steiger, *supra* note 44, at 265 n.115.

190 *Wash. Toxics*, 413 F.3d at 1032.

191 *Id.*

192 The CWA requires EPA to evaluate proposed state NPDES programs to ensure they meet substantive enforcement and regulatory standards in the CWA. 33 U.S.C. § 1342(b) (2000).

193 *Defenders*, 420 F.3d at 959; *see* discussion, *supra* note 86.

after the NPDES program was delegated, development would continue without such mitigation measures.[194] Other measures to protect species mentioned in the BiOp would not provide equivalent protection to species, including Arizona state laws protecting native plants,[195] the ESA's anti-take provisions,[196] the voluntary state agreement to consult under the National MOA,[197] and EPA oversight of the delegated NPDES program to ensure it continues to meet CWA standards.[198]

Significantly, EPA also retains the ability to review and object to individual state-issued permits in delegated NPDES programs.[199] While EPA cannot require the state to consult when it issues NPDES permits,[200] its authority to review permits may be grounds to suggest that state-issued NPDES permits are still federal actions. As such, EPA itself could be required to consult regarding state permits. EPA may have underestimated its authority, and shirked its responsibility, in the National MOA when it restricted its interpretation of the extent of its duties under the ESA in the NPDES program to consultations when it issues NPDES permits and its evaluation of whether to delegate permitting authority to a state.[201] Like its decision to issue an NPDES permit, EPA's review of a state-issued permit provides wide latitude for agency discretion.[202] Few courts have addressed EPA's oversight of individual state NPDES permits, and what case law there is relates to the reviewability of EPA's decision not to exercise its veto authority over state-issued permits.[203] These cases tend to analogize the ESA with NEPA, but this analytic approach has been discounted by a line of cases distinguishing the ESA's greater substantive powers from NEPA.[204] The National MOA already contemplates that EPA may object to a state permit

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194 Arizona BiOp, *supra* note 7, at 18–19.

195 *Defenders*, 420 F.3d at 975; ARIZ. REV. STAT. ANN. § 3-904 (2004).

196 *Defenders*, 420 F.3d at 975; 16 U.S.C. § 1538 (2000).

197 *Defenders*, 420 F.3d at 974; National MOA, *supra* note 8, at 11, 216.

198 *Defenders*, 420 F.3d at 974; 33 U.S.C. § 1342(c) (2000).

199 33 U.S.C. § 1342(d) (2000); 40 C.F.R. § 122.44 (2005).

200 *See* Am. Forest & Paper Ass'n v. U.S. Envtl. Prot. Agency, 137 F.3d 291, 294, 298–99 (5th Cir. 1998) (finding that the ESA did not give EPA authority to require a state to undertake section 7 consultations when issuing NPDES permits under state law).

201 National MOA, *supra* note 8, at 11,215.

202 *See* Save the Bay, Inc. v. U.S. Envtl. Prot. Agency, 556 F.2d 1282, 1284 (5th Cir. 1977) (holding that EPA discretion in its review of state permits extends to its ability to refrain from objecting to a permit even if the permit violates the CWA); *see also* Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency, 859 F.2d 156, 184 (D.C. Cir. 1988) (holding that EPA discretion under the CWA is not without bounds, and that its provisions "operat[e] as a significant check on the agency's discretion").

203 Chesapeake Bay Found. v. United States, 445 F. Supp. 1349, 1353 (E.D. Va. 1978); *Save the Bay*, 556 F.2d at 1284.

204 *See* Steiger, *supra* note 44, at 292 n.270 (discussing *Connor v. Burford*, 848 F.2d 1441, 1457–58 (9th Cir. 1988), which observes that the ESA, unlike NEPA, has significant substantive requirements, and that the "strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements" than those in NEPA (emphasis in original)); Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1509 (D. Or. 1992).

and issue the permit itself after undertaking a consultation at its discretion.[205] The consultation policy established in the National MOA[206] is a step in the right direction, but EPA should be held responsible for continued ESA compliance in state NPDES programs, rather than allowing voluntary state participation to suffice. Federal oversight of state NPDES permits should be sufficient to require EPA to insure NPDES permits that might affect species will not jeopardize species or lead to the adverse modification of critical habitat.

EPA review of state-issued NPDES permits is a better place for the agency to fulfill its obligation under the ESA to insure it will not cause jeopardy to species when it acts under the CWA than the agency's current policy of consulting when it decides to transfer permitting authority to a state. EPA has limited discretion in its decision to approve a state application to assume permitting authority, and despite the Ninth Circuit's conclusion to the contrary in *Defenders,* this discretion seems to be insufficient to require consultation under the ESA. In contrast, EPA has much greater discretion in its oversight of individual state NPDES permits. As in Arizona, the primary source of harm to species when a state assumes the administration of an NPDES program is the loss of mitigation measures when future NPDES permits are issued. If state-issued NPDES permits were to be considered sufficiently federalized to require EPA to consult in its oversight role, the inadequate patchwork of stop-gap solutions, such as voluntary state consultation agreements, could be replaced with genuine agency accountability and better protections for species.

VI. CONCLUSION

In *Defenders,* the Ninth Circuit articulated a sweeping grant of additional authority to agencies to protect species under the ESA. The analytic approach the court used to arrive at this conclusion does not stand up to scrutiny. To reach its conclusion, the court first had to broadly construe the degree of discretion necessary in an action to trigger section 7 consultation. Its grounds for concluding EPA's decision to transfer authority to issue NPDES permits to a state includes sufficient discretion to require consultation is weak, supported more by the court's desire to avoid detrimental impacts to species, than by prior decisions construing the scope of a discretionary action for the purposes of section 7. The Ninth Circuit went too far to characterize the EPA decision to transfer permitting authority as a discretionary action. What additional authority exists in the ESA to allow agencies to avoid causing jeopardy to species relies foremost on the agency undertaking an action in which it has actual discretion to take species into account. If an action includes sufficient discretion to consider species, the ESA requires an agency undertaking an action that may affect listed species to prioritize measures to protect species in the action. The

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205 National MOA, *supra* note 8, at 12,216.

206 *Id.*

Ninth Circuit conclusion, that the ESA grants additional authority to agencies which somehow creates discretion that did not already exist in an action, is unsupported by prior case law and stretches the scope of agency authority under the ESA past its limits. A better approach to species protection in the delegable NPDES program is for EPA to continue to consult in its oversight role of state-issued permits. Such an approach would avoid a tenuous declaration of discretion in the permit transfer decision, and simultaneously provide better, and more consistent, protection for species. The fate of a species should not depend upon on the arbitrary distinction of whether EPA, or a state which has been delegated permitting authority, issues a NPDES permit under the federal CWA.