Nos. 06-340 and 06-549

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL., PETITIONERS

v.

DEFENDERS OF WILDLIFE, ET AL.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER ENVIRONMENTAL PROTECTION AGENCY

ROGER R. MARTELLA
Acting General Counsel
MICHAEL G. LEE
JULIE K. WALTERS
Attorneys
Environmental Protection Agency
Washington, D.C. 20460

PAUL D. CLEMENT
Solicitor General
Counsel of Record
MATTHEW J. MCKEOWN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
ANDREW C. MERGEN
DAVID C. SHILTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), which requires each federal agency to insure that its actions are not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat, overrides statutory mandates or constraints placed on an agency's discretion by other Acts of Congress.

2. Whether the court of appeals correctly held that the Environmental Protection Agency's decision to transfer pollution permitting authority to Arizona under the Clean Water Act, see 33 U.S.C. 1342(b), was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. 1536(a)(2); and, if so, whether the court of appeals should have remanded to the Environmental Protection Agency for further proceedings without ruling on the interpretation of Section 7(a)(2).

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory and regulatory provisions involved 2
Statement 2
Summary of argument 14
Argument:
I. Approval of Arizona's transfer application was compelled by Section 402(b) of the CWA, and Section 7(a)(2) of the ESA neither authorized nor required EPA to disregard that statutory mandate 17
A. Section 402(b) of the CWA unambiguously required EPA to approve Arizona's application for transfer of NPDES permitting authority 17
B. Section 7(a)(2) of the ESA does not impliedly repeal the CWA's requirement that EPA must approve a state transfer application that satisfies the criteria set forth in Section 402(b)(1)-(9) 19
1. Repeals by implication are disfavored 19
2. Section 7(a)(2)'s no-jeopardy and consultation requirements apply only to discretionary conduct attributable to the relevant federal agency itself, which does not include conduct mandated by another Act of Congress 21

Table of Contents—Continued: Page

3. The development of Section 7 of the ESA since its original enactment in 1973 confirms that the no-jeopardy requirement of current Section 7(a)(2) does not override mandates or constraints imposed by other Acts of Congress 29
4. Regulations promulgated by FWS and NMFS in 1986 reflect the expert agencies' view that Section 7(a)(2)'s no-jeopardy mandate does not apply to conduct required by another Act of Congress 34
5. This Court's decision in *TVA* v. *Hill* does not support the court of appeals' analysis 39

II. EPA's approval of Arizona's transfer application was not arbitrary or capricious, and a remand to the agency is unnecessary, particularly because EPA, FWS, and NMFS have clarified their understanding of the legal issues presented here . . . 41
A. EPA's initiation of consultation in this case does not preclude the agencies' ultimate determination that approval of the state's transfer application would not jeopardize listed species 42
B. Although EPA incorrectly stated during the administrative process that consultation was required by the ESA, those misstatements do not render the challenged agency action arbitrary or capricious 44

Table of Contents—Continued: Page

C. A remand for further administrative proceedings is unnecessary at the present stage of the case because EPA, FWS, and NMFS have clarified their current views concerning the applicability of Section 7(a)(2)'s consultation and no-jeopardy requirements to transfers of NPDES permitting authority 48
Conclusion 50
Appendix 1a

TABLE OF AUTHORITIES

Cases:

American Forest & Paper Ass'n v. *United States EPA*, 137 F.3d 291 (5th Cir. 1998) 11, 26, 42
Arkansas v. *Oklahoma*, 503 U.S. 91 (1992) 2
Auer v. *Robbins*, 519 U.S. 452 (1997) 38
Babbitt v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995) 22, 35
Bennett v. *Spear*, 520 U.S. 154 (1997) 22
Bowman Transp., Inc. v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974) 47
Branch v. *Smith*, 538 U.S. 254 (2003) 19
Burlington N., Inc. v. *United States*, 459 U.S. 131 (1982) 48
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 35

Cases—Continued: Page

Cook County v. *United States ex rel. Chandler*, 538 U.S. 119 (2003) 33
Department of Transp. v *Public Citizen*, 541 U.S. 752 (2004) 14, 21, 24, 25, 43
DSE, Inc. v. *United States*, 169 F.3d 21 (D.C. Cir. 1999) 46
Environmental Prot. Info. Ctr. v. *Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) 35
General Chem. Corp. v. *United States*, 817 F.2d 844 (D.C. Cir. 1987) 48
Gonzales v. *Thomas*, 126 S. Ct. 1613 (2006) 48
Ground Zero Ctr. for Non-Violent Action v. *United States Dep't of the Navy*, 383 F.3d 1082 (9th Cir. 2004) 35
INS v. *Orlando Ventura*, 537 U.S. 12 (2002) 48
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 39
Mianus River Preservation Comm. v. *Administrator, EPA*, 541 F.2d 899 (2d Cir. 1978) 3
Morton v. *Mancari*, 417 U.S. 535 (1974) 19
Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), cert. denied, 480 U.S. 951 (1987) 47
Operation of the Mo. River Sys. Litig., In re, 421 F.3d 618 (8th Cir. 2005), cert. denied, 126 S. Ct. 1879 and 1880 (2006) 26
Platte River Whooping Crane Critical Habitat Maint. Trust v. *FERC*, 962 F.2d 27 (D.C. Cir. 1992) 11, 26

Cases—Continued: Page

PDK Labs., Inc. v. *United States DEA*, 362 F.3d 786 (D.C. Cir. 2004) 45, 46
Posadas v. *National City Bank*, 296 U.S. 497 (1936) 19
Shell Oil Co. v. *Train*, 585 F.2d 408 (9th Cir. 1978) 3
Sierra Club v. *Babbitt*, 65 F.3d 1502 (9th Cir. 1995) 35
Traynor v. *Turnage*, 485 U.S. 535 (1988) 19, 26
TVA v. *Hill*, 437 U.S. 153 (1978) 16, 30, 32, 39, 40
Watt v. *Alaska*, 451 U.S. 259 (1981) 18

Statutes and regulations:

Act of Dec. 28, 1979, Pub. L. No. 96-159, § 4, 93 Stat. 1226 33
Administrative Procedure Act, 5 U.S.C. 706 45
Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (16 U.S.C. 1531 *et seq.*):
16 U.S.C. 1531(b) 3
16 U.S.C. 1531(c)(1) (§ 2(c)(1)) 3, 27
16 U.S.C. 1533 (2000 & Supp. IV 2004) (§ 4) 4
16 U.S.C. 1536 (1976) (§ 7) 29, 30, 31, 32, 33
16 U.S.C. 1536 (Supp. II 1978) (§ 7) 31
16 U.S.C. 1536 (§ 7) . . . . . *passim*
16 U.S.C. 1536(a) (Supp. II 1978) (§ 7(a)) . . 31, 32, 33
16 U.S.C. 1536(a) (§ 7(a)) 33
16 U.S.C. 1536(a)(1) (§ 7(a)(1)) 4, 27, 28, 30, 31, 33
16 U.S.C. 1536(a)(2) (§ 7(a)(2)) . . . . . *passim*
16 U.S.C. 1536(b)(3) (§ 7(b)(3)) 33
16 U.S.C. 1536(b)(3)(A) (§ 7(b)(3)(A)) 4, 5, 28

Statutes and regulations—Continued: Page

16 U.S.C. 1536(e)-(*l*) 28
16 U.S.C. 1536(g)(3)(A)(i) 29
16 U.S.C. 1538 (§ 9) 22
16 U.S.C. 1539 (§ 10)) 22
Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751:
§ 3:
92 Stat. 3752 (16 U.S.C. 1536 (Supp. II (1978)) 32
92 Stat. 3752 (16 U.S.C. 1536(a) (Supp. II (1978)) 32
92 Stat. 3753-3760 (16 U.S.C. 1536(e)-(q) (Supp. II 1978)) 33
§ 5, 92 Stat. 3761 33
Endangered Species Conservation Act of 1969, Pub. L. No. 89-669, § 1(b), 80 Stat. 926 (repealed by Endangered Species Act of 1973, Pub. L. No. 93-205, § 14, 87 Stat. 903) 40
Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) 2
33 U.S.C. 1251(a) 2
33 U.S.C. 1251(b) 3, 18
33 U.S.C. 1342 . . . . . 2, 20a
33 U.S.C. 1342(b) (§ 402(b)) . . . . . *passim*
33 U.S.C. 1342(b)(1)-(9) (§ 402(b)(1)-(9)) 3, 11, 17, 18

Statutes and regulations—Continued: Page

33 U.S.C. 1342(d)(2)(B) 3
33 U.S.C. 1369(b)(1) 45
33 U.S.C. 1369(b)(1)(D) 10
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 24
50 C.F.R.:
Pt. 17:
Section 17.11 4
Pt. 222:
Section 222.101(a) 4
Pt. 223:
Section 223.102 4
Pt. 402 5
Section 402.01(b) 4
Section 402.02 . . . . . *passim*
Section 402.03 . . . . . *passim*
Section 402.14 . . . . . 2, 5
Section 402.14(g) 5
Section 402.14(h) 5
Section 402.14(h)(2) 5
Section 402.14(h)(3) 5

Miscellaneous:

119 Cong. Rec. 42,913 (1973) 30, 40
61 Fed. Reg. (1996):
p. 47,931 45
pp. 47,934-47,935 45

Miscellaneous—Continued: Page

p. 65,047 45
p. 65,053 45
63 Fed. Reg. 33,657-33,658 (1998) 45
64 Fed. Reg. (1999):
p. 73,552 45
pp. 73,554-73,555 45
65 Fed. Reg. 50,529-50,530 (2000) 6
66 Fed. Reg. (2001):
p. 12,791 45
pp. 12,793-12,794 45
70 Fed. Reg. 5461-5462 (2005) 7
71 Fed. Reg. 19,452 (2006) 7
H.R. 37, 93d Cong., 1st Sess. (1973) 30
H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. (1978) . . . 32
H.R. Rep. No. 412, 93d Cong., 1st Sess. (1973) 30
S. 1983, 93d Cong., 1st Sess. (1973) 40

In the Supreme Court of the United States

No. 06-340

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL., PETITIONERS

v.

DEFENDERS OF WILDLIFE, ET AL.

No. 06-549

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER
ENVIRONMENTAL PROTECTION AGENCY

OPINION BELOW

The opinion of the court of appeals (06-549 Pet. App. 1a-67a) is reported at 420 F.3d 946.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2005. Petitions for rehearing were denied on June 8, 2006 (06-549 Pet. App. 68a-69a). The petition for a writ of certiorari in No. 06-340 was filed on September 6, 2006. On August 30, 2006, Justice Kennedy extended

the time for the Environmental Protection Agency (EPA) to file a petition for a writ of certiorari to and including October 6, 2006. On September 27, 2006, Justice Kennedy further extended the EPA's time to October 23, 2006, and the petition for a writ of certiorari in No. 06-549 was filed on that day. The petitions were granted on January 5, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in an appendix to this brief: 16 U.S.C. 1536, 33 U.S.C. 1342(b), 50 C.F.R. 402.02, 402.03, and 402.14.

STATEMENT

1. This case involves a transfer of administrative authority under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA). The CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. 1251(a)). Under the CWA, the National Pollutant Discharge Elimination System (NPDES) is administered by the Environmental Protection Agency (EPA) unless and until authority to administer the program within a particular State is transferred to state officials. See 33 U.S.C. 1342. The CWA states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to

prevent, reduce, and eliminate pollution." 33 U.S.C. 1251(b).

Section 402(b) of the CWA provides that "the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to [EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. 1342(b). The CWA further states that EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" to ensure that nine specified criteria are satisfied. *Ibid.*; see 33 U.S.C. 1342(b)(1)-(9). Those criteria are addressed to whether the responsible state agency has the requisite authority under state law to administer the NPDES program. Section 402(b) thus prescribes "a system for the mandatory approval of a conforming State program." *Shell Oil Co.* v. *Train*, 585 F.2d 408, 410 (9th Cir. 1978) (quoting *Mianus River Preservation Comm.* v. *Administrator, EPA*, 541 F.2d 899, 905 (2d Cir. 1976)); see 33 U.S.C. 1251(b) ("It is the policy of Congress that the States * * * implement the permit program[] under section[] 1342 * * * of this title."). After NPDES permitting authority has been transferred to state officials, EPA can object to a state-issued permit only if it is "outside the guidelines and requirements" of the CWA. 33 U.S.C. 1342(d)(2)(B).

2. Congress enacted the Endangered Species Act of 1973 (ESA) to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). Section 2(c)(1) of the ESA, 16 U.S.C. 1531(c)(1), states that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in

furtherance of the purposes of this chapter." Section 4 of the ESA directs the Secretaries of Commerce and the Interior to list threatened and endangered species and to designate their critical habitats. See 16 U.S.C. 1533 (2000 & Supp. IV 2004). The National Marine Fisheries Service (NMFS) administers the Act with respect to species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. 222.101(a), 223.102. The Fish and Wildlife Service (FWS) implements the ESA with respect to species under the jurisdiction of the Secretary of the Interior. See 50 C.F.R. 17.11, 402.01(b).

Section 7 of the ESA, 16 U.S.C. 1536, is entitled "Interagency cooperation." Section 7(a)(1) states that "[t]he Secretary [of Commerce or the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter," and that "[a]ll other Federal agencies shall, in consultation with and the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. 1536(a)(1). Section 7(a)(2) states that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2).

Section 7(b)(3)(A) of the ESA states that, once the consultation process contemplated by Section 7(a)(2) has been completed, "the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a sum-

mary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. 1536(b)(3)(A). Section 7(b)(3)(A) further provides that, "[i]f jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of [Section 7] and can be taken by the Federal agency * * * in implementing the agency action." *Ibid.*

Regulations promulgated jointly by the Secretaries of Commerce and the Interior furnish a structure for consultation concerning the likely effects on listed species of proposed federal actions. See 50 C.F.R. Pt. 402. *Inter alia*, the regulations establish a process of "formal consultation," see 50 C.F.R. 402.14, which culminates in the issuance of a biological opinion (BiOp), see 50 C.F.R. 402.14(h), that includes a "detailed discussion of the effects of the action on listed species or critical habitat," 50 C.F.R. 402.14(h)(2). The BiOp assesses the likelihood of jeopardy to listed species and whether the proposed action will result in destruction or adverse modification of designated critical habitat. See 50 C.F.R. 402.14(g).

If FWS or NMFS determines that the action as proposed is likely to jeopardize a listed species, it is required to identify "reasonable and prudent alternatives, if any," that will avoid jeopardy. 50 C.F.R. 402.14(h)(3). In order to qualify as a "reasonable and prudent alternative" as defined in the regulations, an alternative course of action must be capable of implementation in a manner "consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. 402.02. The regulations define the term "effects of the action" to include "indirect effects," *i.e.*, "those that are caused by the proposed action and are later in time, but still are reason-

ably certain to occur." *Ibid.* The regulations further provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. 402.03.

3. Before 1993, EPA had not engaged in consultation pursuant to Section 7(a)(2) of the ESA when considering state applications for transfer of NPDES permitting authority under Section 402(b) of the CWA. See 06-549 Pet. App. 7a n.3. In that year, however, EPA engaged in consultation before approving South Dakota's transfer application, and it subsequently consulted with respect to applications submitted by Florida, Louisiana, Oklahoma, Texas, and Maine. See *ibid.* In 2001, EPA, FWS, and NMFS entered into a "Memorandum of Agreement [MOA] * * * Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act." 06-340 Pet. App. 245-317. The MOA addressed a number of different areas of interaction among the agencies. The MOA noted that "EPA's current practice is to consult with the Services where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federal listed species," and it stated that the three agencies would "continue to conduct such consultation on a case-by-case basis." *Id.* at 260.

In January 2002, Arizona officials requested EPA's authorization to administer the NPDES program in that State. 06-549 Pet. App. 7a. EPA had previously granted such authorization to 43 other States (and the Virgin Islands). See 65 Fed. Reg. 50,529-50,530 (2000) (listing then-approved States). Consistent with the MOA, EPA subsequently initiated consultation with FWS concerning the likely effects on listed species of the proposed transfer of permitting authority. See 06-340 Pet. App.

559. The EPA regional office prepared and forwarded to FWS a biological evaluation, see *id.* at 587-623, which concluded that Arizona's Water Quality Standards would provide adequate protection to aquatic species, see *id.* at 615-616. EPA also found that its oversight of the State's program would ensure that the State continued to meet CWA requirements, including those for the protection of fish, shellfish, and wildlife. *Id.* at 616.

The FWS regional office staff members who received EPA's biological evaluation agreed with EPA that the proposed transfer of permitting authority would not result in water-quality-related impacts that would adversely affect listed species in Arizona. See 06-340 Pet. App. 564. FWS staff expressed a concern, however, that transfer of the NPDES program to the State could result in certain indirect adverse effects on listed non-aquatic species, such as the cactus ferruginous pygmy-owl and the Pima pineapple cactus. See *id.* at 562.[1] In its own administration of the CWA, EPA would consider the non-water-quality-related impacts of associated development in deciding whether EPA would issue a CWA permit. See *id.* at 563, 566, 576-577. EPA would consult with FWS pursuant to Section 7(a)(2) of the ESA concerning the potential effects of development not only on listed aquatic species but also on listed terrestrial species, and it might deny an application for a discharge permit based on the likely effects on terrestrial species of the associated development. See *id.* at 566, 577. EPA staff believed, however, that if administration of the

[1] In April 2006, FWS removed the pygmy-owl from the list of endangered and threatened species. See 71 Fed. Reg. 19,452. The Pima pineapple cactus is currently being reviewed to determine whether it is a valid taxonomic entity. See 70 Fed. Reg. 5461-5462 (2005).

NPDES program in Arizona were transferred to state officials, EPA would lack the legal authority under the CWA to object to state permits based on non-water-quality-related impacts on listed species. See *id.* at 564. And because Section 7(a)(2) of the ESA applies only to federal agency action, Arizona officials implementing the NPDES program pursuant to the proposed transfer of authority would not be subject to that provision's no-jeopardy mandate and would not be required to consult with FWS concerning the effects on listed species of individual permitting decisions. See *id.* at 563.

FWS regional staff urged that the consultation process concerning the proposed transfer of NPDES permitting authority to Arizona should include an assessment of the potential impact on terrestrial species that (in FWS staff's view) would result from the inapplicability of Section 7(a)(2) to Arizona's future permitting activities. See 06-340 Pet. App. 565. EPA staff, by contrast, took the position that the transfer of authority could not properly be regarded as the cause of any adverse effects on terrestrial species that might result from subsequent development in Arizona, both because the link between the two is speculative and attenuated as a factual matter, and because the CWA directs EPA to approve a State's application to assume administration of the NPDES program if the criteria in Section 402(b) of the CWA are met. See *id.* at 564-565. Pursuant to procedures set forth in the MOA, that dispute was elevated for resolution at higher levels within the agencies. See *id.* at 562.

On December 3, 2002, FWS issued its BiOp, which concluded that the requested transfer of NPDES permitting authority would not cause jeopardy to listed species. 06-340 Pet. App. 77-124. FWS stated that, "[a]fter

further reflection and analysis of causation and the definition of indirect effects found in our Consultation Handbook, our final opinion is that the loss of section 7-related conservation benefits is not an indirect effect of the approval action." *Id.* at 112. FWS explained, *inter alia*, that the

> loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

Id. at 114. FWS also concluded that, even if the effects of the transfer on listed species could properly be attributed to EPA, other mechanisms were sufficient to support the conclusion that the transfer of NPDES permitting authority was not likely to jeopardize a listed species. See *id.* at 101-108.

After FWS issued the BiOp, EPA approved the transfer of permitting authority to Arizona. C.A. App. 232; see 06-340 Pet. App. 69-76. EPA found that Arizona's application satisfied each of the criteria for program approval specified in Section 402(b) of the CWA. C.A. App. 258. In the *Federal Register* notice that announced the approval of Arizona's transfer application, EPA stated that the issuance of the FWS biological opinion had "conclude[d] the consultation process required by ESA section 7(a)(2) and reflects the Service's agreement with EPA that the approval of the State program meets the substantive requirements of the ESA." 06-340 Pet. App. 73.

4. Respondents filed a petition for review in the court of appeals, contending that EPA had acted arbitrarily and capriciously by approving Arizona's request for authority to administer the NPDES program.[2] The court of appeals granted the petition for review. 06-549 Pet. App. 1a-67a.

a. The court of appeals first held that EPA's approval of Arizona's transfer application was arbitrary and capricious because EPA had "relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." 06-549 Pet. App. 23a; see *id.* at 23a-28a. The court explained that, although EPA had construed Section 7 of the ESA as requiring it to consult with FWS concerning the effect on listed species of the proposed transfer of permitting authority, FWS's no-jeopardy opinion was based in part on the premise that EPA cannot deny a transfer application under Section 402(b) of the CWA based on ESA concerns if the CWA criteria are satisfied. See *id.* at 23a-26a. The court concluded that EPA's approval of the transfer application "was not the result of reasoned decisionmaking" because "the two propositions that underlie the EPA's action—that (1) it must, under the [ESA], consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision—cannot both be true." *Id.* at 26a-27a. The court stated that it was therefore required to "remand to the agency for a plausible explanation of

[2] Petitioners also filed a complaint in district court challenging the FWS BiOp. The district court determined that the court of appeals had exclusive jurisdiction over that challenge pursuant to 33 U.S.C. 1369(b)(1)(D), and it transferred the claim to the court of appeals. 06-549 Pet. App. 13a.

its decision, based on a single, coherent interpretation of the statute." *Id.* at 28a.

b. Rather than, in fact, remanding the case on that ground, however, the court of appeals went on to hold that EPA had both the power and the duty under the ESA to determine whether transfer of NPDES permitting authority to state officials would jeopardize listed species, and to deny a transfer application if it found jeopardy to be likely. 06-549 Pet. App. 28a-48a. The court recognized that it is undisputed in this case that the State of Arizona had satisfied the criteria (see 33 U.S.C. 1342(b)(1)-(9)) that trigger the requirement in Section 402(b) of the CWA that EPA "shall" approve a State's transfer application. See 06-549 Pet. App. 31a n.11. The court concluded, however, that Section 7 of the ESA provides an "affirmative grant of authority to attend to protection of listed species," over and above whatever obligations federal agencies may have under their own governing statutes. *Id.* at 34a; see *id.* at 38a-39a. The court of appeals found that authority to be unaffected by the CWA's directive that EPA "shall approve" state applications that satisfy the criteria set forth in Section 402(b). See 06-549 Pet. App. 40a.[3]

The court of appeals also rejected the contention, advanced by non-federal parties who had intervened in support of EPA, that EPA's approval of the State's

---

[3] The Ninth Circuit acknowledged that its resolution of the interpretive question presented here conflicts with decisions of two other courts of appeals. See 06-549 Pet. App. 46a-47a (citing *American Forest & Paper Ass'n* v. *United States EPA*, 137 F.3d 291 (5th Cir. 1998), and *Platte River Whooping Crane Critical Habitat Maint. Trust* v. *FERC*, 962 F.2d 27 (D.C. Cir. 1992)). The court believed, however, that its holding was supported by Ninth Circuit precedent and decisions of two other courts of appeals. 06-549 Pet. App. 42-43a, 44a-46a, 47a-48a.

transfer application was not subject to Section 7 of the ESA because it was not a "discretionary" action within the meaning of 50 C.F.R. 402.03. See 06-549 Pet. App. 40a-43a. The court construed that regulation's reference to "discretionary" action to encompass all agency actions that are "authorized, funded, or carried out" by the agency. *Id.* at 43a (quoting 16 U.S.C. 1536(a)(2)). The court reached that conclusion despite the government's repeated request to have the opportunity for additional briefing on the question if the court, contrary to the suggestion of the government, decided to reach the issue. See *id.* at 43a n.19.[4]

c. Judge Thompson dissented, relying on 50 C.F.R. 402.03 and on an array of Ninth Circuit precedents holding that Section 7(a)(2) of the ESA does not encompass agency conduct as to which the agency lacks discretion. See 06-549 Pet. App. 63a-67a. Judge Thompson explained:

> Here, the EPA did not have discretion to deny transfer of the pollution permitting program to the State of Arizona; therefore its decision was not "agency action" within the meaning of section 7 of the Endangered Species Act. The Clean Water Act, by its very terms, permits the EPA to consider only the nine specified factors. If a state's proposed permitting program meets the enumerated requirements, the EPA administrator "shall approve" the program. 33 U.S.C. § 1342(b). This Congressional directive does not permit the EPA to impose additional conditions.

---

[4] The court of appeals also held that the other bases for FWS's no-jeopardy conclusion did not adequately support EPA's decision to approve the transfer. See 06-549 Pet. App. 48a-61a.

Id. at 65a-66a (footnote omitted). Judge Thompson concluded that, because "[t]he EPA's authority to grant or to deny the State of Arizona's application to administer the pollution permitting program was nondiscretionary," the petition for review should be denied. *Id.* at 67a.

d. The court of appeals denied rehearing and rehearing en banc, with six judges dissenting. 06-549 Pet. App. 68a-92a. Judge Kozinski, writing for the dissenting judges, took issue with the majority's determination that EPA's analysis was internally inconsistent. *Id.* at 71a-72a. The dissenting judges further stated that, if EPA's approach had in fact been tainted by such inconsistency, "the majority should have remanded to EPA for further clarification" rather than deciding the merits question itself. *Id.* at 72a. With respect to the proper reconciliation of the relevant statutory provisions, the dissenting judges concluded that, so long as the nine criteria set forth in Section 402(b) of the CWA were satisfied, Section 7 of the ESA neither allowed nor required EPA to deny Arizona's application for transfer of permitting authority. *Id.* at 75a-76a. The dissenting judges observed that, "[i]f the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Id.* at 78a n.4.

5. In October 2006, after the court of appeals denied rehearing in this case, the relevant federal agencies clarified their positions concerning the applicability of Section 7(a)(2) of the ESA to EPA's NPDES transfer decisions under the CWA. The State of Alaska had submitted an application for transfer of NPDES permitting authority to EPA in July 2006. In connection with that application, EPA requested confirmation from FWS and NMFS of EPA's current view that, because Section

402(b) of the CWA denies EPA discretion to do anything other than approve the State's application if the CWA criteria are satisfied, the decision whether to approve the transfer is not subject to the no-jeopardy and consultation requirements of Section 7(a)(2) of the ESA. See 06-549 Pet. App. 93a-102a. FWS and NMFS confirmed that they share that understanding of the relevant statutory provisions. See *id.* at 103a-116a. FWS and NMFS further confirmed that, because the CWA requires that transfer applications must be granted under specified circumstances, EPA lacks "discretionary Federal involvement or control," within the meaning of 50 C.F.R. 402.03, over the transfer decision once the CWA criteria are met, and EPA's approval is not the legal "cause[]," within the meaning of 50 C.F.R. 402.02, of any impacts on listed species that may result from a state-issued NPDES permit. See 06-549 Pet. App. 105a-106a, 109a-110a, 114a-115a.

SUMMARY OF ARGUMENT

I. Section 402(b) of the CWA provides without qualification that EPA "shall" approve a State's application for transfer of NPDES permitting authority if the criteria set forth in the CWA are met. Section 7(a)(2) of the ESA does not impliedly repeal that directive, even in situations where the transfer of authority might entail possible jeopardy to listed species. Section 7(a)(2) applies only to conduct that is attributable to the federal agency itself, and any consequences that may follow from an agency's compliance with a mandatory statutory directive are attributable to Congress rather than to the agency. That causation analysis is strongly supported by this Court's recent decision in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004), which

held in a related context that a federal agency cannot be considered the legal cause of effects that it lacks statutory authority to prevent. That reading of Section 7(a)(2) is reinforced by other ESA provisions, which channel federal agencies' exercise of existing discretionary authority but do not confer new powers, and it avoids unnecessary conflicts between the ESA and other Acts of Congress.

The development of Section 7 of the ESA since its enactment in 1973 confirms this reading of Section 7(a)(2) in its current form. Under the 1973 statute, the duty of federal agencies to avoid jeopardizing listed species was explicitly identified as one means by which agencies should "utilize their authorities." That language reflected a clear congressional intent that Section 7 would limit the agencies' exercise of existing authorities but would not grant agencies new power to disregard mandatory statutory obligations. Although the current Section 7(a)(2) does not contain the phrase "utilize their authorities," the legislative history of the relevant ESA amendments and the circumstances under which they were enacted make clear that those amendments were not intended to alter or expand the scope of federal agencies' responsibilities under Section 7.

Longstanding regulations promulgated by FWS and NMFS reflect the expert agencies' view that Section 7(a)(2)'s no-jeopardy mandate does not apply to conduct required by another Act of Congress. Those regulations direct federal agencies to focus on species-related effects "caused" by their own actions, 50 C.F.R. 402.02, and they state that Section 7's requirements apply to agency conduct "in which there is discretionary Federal involvement or control," 50 C.F.R. 402.03. Those regulations reflect a reasonable construction of the statutory

text and are entitled to deference from a reviewing court. Contrary to the view of the court of appeals, this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), does not cast doubt on the agencies' understanding of Section 7(a)(2). The decision in *Hill* makes clear that Section 7(a)(2)'s no-jeopardy mandate supersedes contrary agency policy judgments concerning the appropriate exercise of *discretionary* authority. But because the agency action (operation of a dam) at issue in *Hill* was not mandated by any Act of Congress, the Court had no occasion to address the question presented here.

II. Contrary to the court of appeals' conclusion, EPA's approval of Arizona's transfer application was not rendered arbitrary and capricious either by the agency's initiation of consultation or by its erroneous statements that consultation was legally required. EPA's misstatements did not prejudice respondents because they did not affect the outcome of the proceedings. Nor did those statements obscure the rationale for the agencies' ultimate no-jeopardy determination in a way that would hinder effective judicial review. During the course of the consultation process, EPA and FWS both concluded that EPA's approval of the transfer application should not be regarded as a cause of any harm to listed species that might occur under the state permitting regime because the transfer was mandated by the CWA. The agencies' basic chain of reasoning was therefore clear, even though EPA did not initially perceive the full implications of that causation analysis. In any event, the agencies have since clarified their views on the question presented here.

ARGUMENT

I. APPROVAL OF ARIZONA'S TRANSFER APPLICATION WAS COMPELLED BY SECTION 402(b) OF THE CWA, AND SECTION 7(a)(2) OF THE ESA NEITHER AUTHORIZED NOR REQUIRED EPA TO DISREGARD THAT STATUTORY MANDATE

A. Section 402(b) Of The CWA Unambiguously Required EPA To Approve Arizona's Application For Transfer Of NPDES Permitting Authority

Section 402(b) of the CWA authorizes the Governor of a State to "submit to [EPA] a full and complete description of the [NPDES] program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. 1342(b). A State that seeks to administer the NPDES program must also submit a statement from the appropriate legal officer of the State "that the laws of such State * * * provide adequate authority to carry out the described program." *Ibid.* Section 402(b) provides that EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" under state law to perform nine specified categories of functions in connection with the administration of the program. *Ibid.*; see 33 U.S.C. 1342(b)(1)-(9).

The CWA thus unqualifiedly directs EPA to approve a State's application for transfer of NPDES permitting authority "unless" the State fails to satisfy one or more of the requirements set forth in Section 402(b)(1)-(9). Although EPA's determination whether those standards are met in a particular instance may involve the exercise of judgment, EPA does not possess discretion under the CWA to deny a state application, or condition its ap-

proval of such an application, based on considerations other than the enumerated criteria. See 06-549 Pet. App. 82a (Kleinfeld, J., dissenting from denial of rehearing en banc) ("The 'shall/unless' formula makes the nine condition list exclusive."). In the instant case, "[n]o party questioned the EPA's determination that Arizona's transfer application met the Clean Water Act factors." *Id.* at 31a n.11. Under the plain terms of the CWA, EPA was therefore required to approve the State's application.

Respondents contend (Br. in Opp. 25) that the CWA and ESA may be harmonized by holding that EPA must *both* "apply the CWA criteria" *and* "insure" against jeopardy to listed species. In a similar vein, Judge Berzon suggested that, under the interpretive approach adopted by the court of appeals, the ESA does not impliedly repeal any part of the CWA but simply "*adds* one requirement to the list of considerations under the Clean Water Act permitting transfer provision." 06-549 Pet. App. 87a n. 2 (Berzon, J., concurring in the order denying the petition for rehearing en banc). That analysis is misconceived.

Section 402(b) of the CWA does not simply establish *minimum* prerequisites for the transfer of NPDES permitting authority to state officials, leaving EPA with discretion to determine which conforming applications will be approved. Rather, consistent with the overall statutory policy that States should have the "primary responsibilities and rights * * * to prevent, reduce, and eliminate pollution" under the CWA, 33 U.S.C. 1251(b), and that States should implement the NPDES program in particular, see *ibid.*, Section 402(b) *mandates* approval of any state application that meets the specified criteria. If EPA denies a state transfer appli-

cation that satisfies the requirements of Section 402(b)(1)-(9), the agency is not "apply[ing]" the CWA, but rather is acting ultra vires and violating the CWA directive that such applications "shall" be approved. And the ultimate consequence of the court of appeals' "add[ition]" of a tenth criterion to the list contained in Section 402(b)(1)-(9) was that the court vacated an administrative action that the CWA required EPA to take.

B. Section 7(a)(2) Of The ESA Does Not Impliedly Repeal The CWA's Requirement That EPA Must Approve A State Transfer Application That Satisfies The Criteria Set Forth In Section 402(b)(1)-(9)

As we explain above, the court of appeals' disposition of this case is flatly contrary to the unambiguous terms of the CWA. The court's decision cannot reasonably be viewed as harmonizing the two statutory provisions at issue here. Rather, in practical effect, the court treated Section 7(a)(2) of the ESA as impliedly repealing the CWA's directive that EPA "shall approve" a state transfer application unless EPA finds that the application does not satisfy the CWA criteria. See 06-549 Pet. App. 78a-79a n.4 (Kozinski, J., dissenting from denial of rehearing en banc). That holding is erroneous.

1. Repeals by implication are disfavored

"[R]epeals by implication are not favored," and "[t]he intention of the legislature to repeal must be clear and manifest." *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) (citations and internal quotation marks omitted). The Court has explained that

> [i]t is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute

> covering a more generalized spectrum, unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all.

Traynor v. *Turnage*, 485 U.S. 535, 547-548 (1988) (citations, brackets, ellipses, and internal quotation marks omitted); see *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will be found only where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.") (internal quotation marks omitted); *Posadas* v. *National City Bank*, 296 U.S. 497, 504 (1936). "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

Because Section 402(b) of the CWA deals with the "narrow, precise, and specific subject" (*Traynor*, 485 U.S. at 548) of state transfer applications under the NPDES program, Section 7(a)(2) of the ESA should not be deemed to override the CWA's specification of the circumstances in which such applications can be denied unless the text of Section 7(a)(2) unambiguously compels that result. Indeed, as a general matter, Section 7(a)(2) should be construed in a manner that avoids conflicts with other Acts of Congress if such a construction is fairly possible. In a choice between (1) a statute that effectively allows an agency to consider *only* nine specific factors in acting on a particular application (and in a context where federalism concerns and an interest in respecting the state applicants loom large), and (2) general language injecting jeopardy considerations into a

whole range of agency decisionmaking, the need to enforce the specific, mandatory, and exclusive language is clear. More broadly, the path to harmonization lies in construing Section 7(a)(2) as channelling the exercise of federal agencies' *existing* discretionary authority, not as overriding the mandatory language of other statutes or adding a tenth criterion where Congress clearly specified nine. That reading, which allows Section 7(a)(2) of the ESA to be harmonized with Section 402(b) of the CWA and with other statutory mandates, is consistent with the text and history of Section 7(a)(2) and with the interpretive principles set forth above.[5]

2. *Section 7(a)(2)'s no-jeopardy and consultation requirements apply only to discretionary conduct attributable to the relevant federal agency itself, which does not include conduct mandated by another Act of Congress*

a. Section 7(a)(2) of the ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Because the word "jeopardize" obviously requires a causal link between the agency's own decisions and jeopardy to

[5] Even if an agency's performance of a duty imposed by another federal statute could be said to violate Section 7(a)(2), it would not necessarily follow that Section 7(a)(2)'s no-jeopardy mandate supersedes all competing statutory directives. Rather, in any case where the ESA prohibited conduct that another Act of Congress required, the court would need to perform a conflict-of-laws analysis to determine which provision should control. Cf. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 766 (2004). Construing Section 7(a)(2) to apply only to discretionary agency conduct obviates the need for such inquiries.

listed species, Section 7(a)(2) does not require federal agencies to protect listed species from harms caused by other actors. Rather, a federal agency's duty under that provision is simply to ensure that the species is not jeopardized by actions attributable to the agency itself. See *Bennett* v. *Spear*, 520 U.S. 154, 158 (1997) ("If an agency determines that action *it* proposes to take may adversely affect a listed species, it must engage in formal consultation with the Fish and Wildlife Service.") (emphasis added).[6]

Where (as here) the challenged conduct is mandated by an Act of Congress, any alleged jeopardizing effect may not properly be attributed to the federal agency that simply carries out the statutory directive. As FWS explained in its BiOp in this case, any harm to listed species that may result from the challenged transfer is

> not caused by EPA's decision to approve the State of Arizona's program. Rather, the absence [in connection with the issuance of state permits] of the section 7 process that exists with respect to Federal NPDES permits reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act.

---

[6] Other provisions of the ESA—most notably Section 9's general ban on "takes" of listed species of fish or wildlife, see 16 U.S.C. 1538, and Section 10's provision for the issuance of "'incidental' take" permits on conditions established by FWS or NMFS, see 16 U.S.C. 1539—apply to state officials and private actors as well as to federal agencies. See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 690-691, 696-704 (1995). As the FWS BiOp in this case recognized, those provisions will remain applicable to private development activities in Arizona notwithstanding the transfer of NPDES permitting authority to state officials. See 06-340 Pet. App. 112.

06-340 Pet. App. 114. The absence of that process also reflects Congress's decision not to subject the actions of state agencies to the no-jeopardy requirement and ancillary consultation provisions in Section 7(a)(2) of the ESA.

FWS thus correctly recognized that Congress's decision to enact the mandatory directive contained in Section 402(b) of the CWA, rather than EPA's compliance with that command, is the legal cause of any harm to listed species that the transfer of NPDES permitting authority may entail. FWS/NMFS regulations implementing the ESA state that an agency is required to take into account only effects that are "caused" by its actions. See 06-340 Pet. App. 111 (FWS BiOp citing 50 C.F.R. 402.02, which defines "indirect effects" as effects that are both "caused" by the proposed action and "are later in time, but still are reasonably certain to occur").

The gravamen of respondents' challenge to the transfer of NPDES authority is that Arizona's permitting regime will be less protective of listed species than is the NPDES program as administered by EPA officials because the State's individual permitting decisions will not be federal agency actions and therefore will not be subject to the no-jeopardy and consultation requirements of Section 7(a)(2) of the ESA. That consequence, of course, is a direct result of Congress's deliberate decision to treat state agencies differently from federal agencies. To treat that possibility as a basis for overturning EPA's transfer decision would therefore frustrate Congress's federalism-sensitive judgments to transfer authority to States once the nine CWA criteria are met and not to impose the distinct no-jeopardy and related consultation requirements on state agencies. Those congressional judgments, not any discretionary federal agency action,

would clearly be the cause of any ultimate adverse impact on listed species that might result from activities authorized by state permits following the transfer of NPDES authority to the State.

b. The causation analysis in the FWS BiOp is strongly supported by this Court's subsequent decision in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004). The Court in *Public Citizen* held that the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, did not require the Federal Motor Carrier Safety Administration (FMCSA) to assess the environmental effects of allowing Mexican trucks onto United States roads once the President lifted a prior moratorium on such vehicles. The Court explained that an agency is "responsible for a particular effect under NEPA" only if "a reasonably close causal relationship [exists] between the environmental effect" and the pertinent agency conduct. 541 U.S. at 767 (internal quotation marks omitted). The Court further observed that

> FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are willing and able to comply with the applicable * * * requirements. FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.

Id. at 758-759 (citation and internal quotation marks omitted). In those circumstances, the Court reasoned, "the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while

simultaneously limiting FMCSA's discretion." *Id.* at 769.

The Court in *Public Citizen* concluded that, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. at 770. The same principle applies here. Because the CWA forecloses EPA's ability to deny a State's transfer application based on projections of injury to listed species, EPA is not the legal cause of any such harm that may result from activities that are authorized by NPDES permits issued by the State of Arizona after the transfer occurs. Instead, insofar as the federal government is concerned, the legally relevant cause would be the action of "Congress in * * * limiting [EPA's] discretion," *id.* at 769, by mandating approval of a transfer application that satisfies the criteria in Section 402(b) of the CWA. The agency's approval of Arizona's transfer application therefore cannot properly be said to "jeopardize"—*i.e.*, *cause* jeopardy to—the continued existence of any listed species.[7]

---

[7] Alternatively, EPA's lack of discretion in this area would support a conclusion that EPA's approval of a State's transfer application in accordance with the CWA's command is not an "agency action" within the meaning of Section 7(a)(2) of the ESA. See 06-549 Pet. App. 65a (Thompson, J., dissenting). Although an action taken by an agency in compliance with a statutory mandate could be viewed as an "action * * * carried out by" the agency for purposes of Section 7(a)(2), that language can also be read to cover only actions properly *attributed* to the agency—*i.e.*, those in which the agency provides the critical causal link by choosing to authorize, fund, or carry out an action that would not otherwise occur. The latter reading avoids the absurd consequence of requiring the agency to consider the marginal effect of actions over which the agency has no control whatever, but instead is directed by Congress to perform.

Thus, Section 7(a)(2) does not "expressly contradict" the specific mandate of CWA Section 402(b). See *Train*, 485 U.S. at 548. Nor is respondents' proposed construction of Section 7(a)(2) "absolutely necessary in order that the words of [Section 7(a)(2)] shall have any meaning at all," *ibid.* (brackets, ellipses, and citation omitted), since Section 7(a)(2) has significant practical effect even though its coverage is limited to discretionary agency conduct. Accordingly, the court of appeals erred in construing Section 7(a)(2) to override the mandatory approval provision of Section 402(b) of the CWA. Properly understood, Section 7(a)(2) "serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction." *American Forest & Paper Ass'n* v. *United States EPA*, 137 F.3d 291, 299 (5th Cir. 1998); see *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 630 (8th Cir. 2005) (explaining that "[c]ase law supports the contention that environmental- and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority"), cert. denied, 126 S. Ct. 1879 and 1880 (2006); *Platte River Whooping Crane Critical Habitat Maint. Trust* v. *FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992); note 3, *supra*.[8]

---

[8] In support of its conclusion that the ESA vests federal agencies with additional authority to protect listed species, even in the face of a statute that imposes a mandatory duty and limits consideration to an enumerated list of discrete factors, the court of appeals attached significance to Section 7(a)(2)'s use of the word "insure," which the court understood to mean "make certain." 06-549 Pet. App. 31a-32a. The court stated:

c. Other ESA provisions reinforce the conclusion that Section 7(a)(2)'s no-jeopardy and ancillary consultation requirements apply only to an agency's exercise of existing authorities and do not apply to agency conduct that is mandated by another federal statute. Section 2(c)(1) reflects Congress's policy judgment that all federal agencies "shall *utilize their authorities* in furtherance of" the statute's purposes. 16 U.S.C. 1531(c)(1) (emphasis added). Section 7(a)(1) similarly provides that agencies "*shall * * * utilize their authorities* in furtherance of the purposes of [the ESA] by carrying

---

> Unless an agency has the authority to take measures to prevent harm to endangered species, it is impossible for that agency to "make certain" that its actions are not likely to jeopardize those species. Otherwise, agencies would be forced to choose between violating section 7's prohibition on agency actions that are likely to jeopardize listed species and acting beyond their powers to protect such species.

Id. at 32a. That analysis is misconceived. The impossibility that drove the court of appeals to derive new authority for the agency was itself a product of applying Section 7(a)(2) in a circumstance where it is inapplicable—*i.e.*, a circumstance in which the agency's existing authority gives it no discretion to consider the effect of an action mandated by Congress. Congress's use of the word "insure" suggests not that Section 7(a)(2) vests federal agencies with new and ill-defined authority, but that the statute applies only in situations where agencies have the practical capacity to prevent jeopardy to listed species. Section 7(a)(2) does not require federal agencies to "insure" that listed species are not jeopardized by the conduct of actors other than the agency itself. Rather, by its terms, Section 7(a)(2) directs agencies to "insure" only that their *own* actions are not likely to be the cause of jeopardy. That statutory mandate is properly applied in accordance with the background principles of legal causation discussed in the text. That more modest role for Section 7(a)(2) was even more evident in its original version, but the basic scope of the no-jeopardy requirement has never been altered. See pp. 29-34, *infra*.

out programs for the conservation of endangered species." 16 U.S.C. 1536(a)(1) (emphasis added). And Section 7(b)(3)(A), which governs the inter-agency consultation process, states that, "[i]f jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate [Section 7(a)(2)] and *can be taken by the Federal agency* * * * in implementing the agency action." 16 U.S.C. 1536(b)(3)(A) (emphasis added).[9] The italicized language in each of those provisions reflects Congress's intent that federal agencies' efforts to prevent harm to listed species must be undertaken in conformity with any constraints imposed by other laws.

d. Pursuant to ESA amendments enacted in 1978 (see pp. 31-33, *infra*), Congress has established an Endangered Species Committee and has authorized that body to grant exemptions authorizing agency conduct that would otherwise violate Section 7(a)(2). See 16 U.S.C. 1536(e)-(*l*). Respondents contend (Br. in Opp. 27 & n.13) that Congress's creation of the exemption procedure supports their argument that the requirements of Section 7 apply even where an agency is acting pursuant to an express statutory directive. The statutory language makes clear, however, that the exemption mechanism was not intended to address such situations. The ESA requires an applicant for an exemption to show, *inter alia*, that it has exhausted the consultation process and has "made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action

[9] Accord 50 C.F.R. 402.02 (defining reasonable and prudent alternatives as alternatives that, *inter alia*, "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction").

which would not violate subsection (a)(2) of this section." 16 U.S.C. 1536(g)(3)(A)(i). That requirement could not sensibly be applied to circumstances in which an agency is required by statute to take a particular described action. Indeed, the court of appeals itself noted that the exemption provisions "focus on practical concerns, not legal constraints on agency power to protect species." 06-549 Pet. App. 37a.

3. The development of Section 7 of the ESA since its original enactment in 1973 confirms that the no-jeopardy requirement of current Section 7(a)(2) does not override mandates or constraints imposed by other Acts of Congress

The court of appeals appeared to recognize that the phrase "utilize their authorities," where it appears in the ESA, reflects Congress's intent that federal agencies pursue the ESA's objectives only to the extent that they are permitted to do so by other provisions of law. See 06-549 Pet. App. 34a-35a, 46a. The court concluded, however, that because Section 7(a)(2) itself does not contain that phrase or similar limiting language, Section 7(a)(2)'s no-jeopardy mandate supersedes mandatory directives contained in other Acts of Congress. See *ibid.* That conclusion reflects a misunderstanding of the ESA's history.

a. As originally enacted in 1973, Section 7 of the ESA directed all federal agencies to

> utilize their authorities in furtherance of the purposes of [the] Act by carrying out programs for the conservation of endangered species and threatened species * * * and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued exis-

> tence of such endangered species and threatened species or result in the destruction or modification of [critical] habitat of such species.

ESA, Pub. L. No. 93-205, 87 Stat. 892 (16 U.S.C. 1536 (1976)). As that text makes clear, in Section 7's original form, the obligations of federal agencies to carry out conservation programs (now contained in Section 7(a)(1)) and to avoid jeopardy (now contained in Section 7(a)(2)) were *both* qualified by the phrase "utilize their authorities." Consistent with that limitation, Representative Dingell, the floor manager of the bill in the House of Representatives, explained that the ESA as originally enacted "substantially amplified the obligation of * * * agencies * * * to take steps *within their power* to carry out the purposes of this act." 119 Cong. Rec. 42,913 (1973) (emphasis added). This Court quoted that very statement by Representative Dingell in its seminal ESA decision in *TVA* v. *Hill*, 437 U.S. 153, 183 (1978).[10]

---

[10] The relevant House Report contained the following description of Section 7(a) of the House bill (H.R. 37, 93d Cong., 1st Sess. (1973) (as reported by the House Comm. on Merchant Marine and Fisheries)), which was substantively equivalent to Section 7 of the ESA as enacted in 1973:

> This subsection requires the Secretary and the heads of all other Federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species, and it further requires that those agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species.

H.R. Rep. No. 412, 93d Cong., 1st Sess. 14 (1973). In the court of appeals' view, the report's description of the no-jeopardy mandate as a "further require[ment]," beyond the directive to engage in conservation measures, reinforces the inference that the omission of the phrase "utilize their authorities" from current Section 7(a)(2) should be treated

b. Through amendments enacted in 1978, Section 7 of the ESA was divided into subsections. See Endangered Species Act Amendments of 1978 (1978 Amendments), Pub. L. No. 95-632, § 3, 92 Stat. 3752 (16 U.S.C. 1536 (Supp. II 1978)). Subsection (a) of Section 7, as enacted in those 1978 amendments, contained in one paragraph substantially the same language as is now set forth in current Subsections 7(a)(1) and (2). As amended in 1978, Section 7(a) provided as follows:

> Consultation.—The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of [the ESA]. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act. Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical, unless such agency has been granted

---

as significant. See 06-549 Pet. App. 34a-35a. But because the text of Section 7 of the 1973 ESA itself described the avoidance of jeopardy as one end to which federal agencies should "utilize their authorities," the court's interpretation of the 1973 legislative history is clearly unfounded.

> an exemption for such action by the Committee pursuant to subsection (h) of this section.

1978 Amendments § 3, 92 Stat. 3752 (16 U.S.C. 1536(a) (Supp. II 1978)).

The Conference Report accompanying the 1978 Amendments explained that the new subsection 7(a) "essentially restates section 7 of existing law." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Thus, while the no-jeopardy and ancillary consultation requirements were set forth in a separate sentence that did not repeat the phrase "utilize their authorities" contained in the preceding sentence, the 1978 legislative history indicates that Congress in rewording Section 7 did not seek to expand the scope of federal agencies' no-jeopardy and consultation duties in potentially far-reaching ways, but rather intended to preserve the substance of the requirements in their prior form. Indeed, the court of appeals in this case recognized that "[t]he 1978 amendment did not change section 7's substantive provisions," 06-549 Pet. App. 36a, though the court failed to appreciate the significance of that fact. The clear import of the 1978 Amendments therefore is that the obligation of an agency not to jeopardize a listed species remained simply a particular (albeit mandatory) aspect of the more generalized provision in the preceding sentence for agencies to "utilize their authorities" in furtherance of the Act's purposes.

The foregoing history is particularly significant in light of the events that precipitated passage of the 1978 Amendments. Those amendments were enacted only a few months after this Court's decision in *TVA* v. *Hill*, *supra*, which construed the ESA to preclude operation of the Tellico Dam in Tennessee. See 437 U.S. at 156-158, 193-195. *Inter alia*, the 1978 Amendments softened

the practical effect of the decision in *Hill* by creating the Endangered Species Committee, which is authorized to grant exemptions from Section 7(a)(2)'s no-jeopardy mandate, see 1978 Amendments, § 3, 92 Stat. 3753-3760 (16 U.S.C. 1536(e)-(q) (Supp. II 1978)), and by directing the Committee promptly to determine whether the Tellico Dam and Reservoir Project should be granted an exemption, see § 5, 92 Stat. 3761. Given that sequence of events and the resulting thrust of the 1978 Amendments, it is most unlikely that Congress chose simultaneously to *expand* the reach of Section 7's no-jeopardy requirement to require an agency to ignore a mandate in another Act of Congress. And it is altogether implausible to suppose that Congress intended to accomplish that result obliquely, by putting the phrase "utilize their authorities" in a separate sentence from Section 7(a)'s no-jeopardy and consultation requirements, without mentioning the change in the legislative history. Cf. *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 132-134 (2003) (declining to construe 1986 amendments to the False Claims Act as impliedly removing municipal corporations from the Act's coverage when such a change would have been contrary to the primary thrust of the 1986 legislation).

Finally, in 1979, Section 7(a) was further divided into subsections (1), (2), and (3), see Act of Dec. 28, 1979, Pub. L. No. 96-159, § 4, 93 Stat. 1226, and Section 7(a) remains in that form.[11] Once again, however, that further subdivision made no substantive change. Accordingly, an agency's duty to "insure" that its actions will not jeopardize a listed species (and to engage in consul-

[11] The 1979 amendments also added the final sentence of what is now Section 7(a)(2).

tation to that end) continues to be limited to measures the agency might take to "utilize [its] authorities" under existing law.

4. Regulations promulgated by FWS and NMFS in 1986 reflect the expert agencies' view that Section 7(a)(2)'s no-jeopardy mandate does not apply to conduct required by another Act of Congress

a. The federal agencies charged with primary responsibility for the administration of the ESA have addressed the application of Section 7(a)(2)'s no-jeopardy and consultation requirements to agency conduct, like EPA's approval of Arizona's transfer application in this case, that is affirmatively mandated by some other provision of law. First, as noted above, a regulatory provision jointly adopted by FWS and NMFS states that the relevant effects on listed species under Section 7(a)(2) are those "caused" by the agency's own action. 50 C.F.R. 402.02 (defining "[e]ffects of the action"). The effects of a statutory mandate are caused by Congress, not by the agency. See pp. 22-25, *supra*.

Second, another regulatory provision adopted jointly by FWS and NMFS states that "Section 7 and the requirements of [50 C.F.R. Pt. 402, concerning the no-jeopardy provision and consultation process] apply to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. 402.03 (emphasis added). That rule reflects the longstanding view of FWS and NMFS that Section 7 channels federal agencies' exercise of existing authority and discretion, but does not supersede other legal constraints on agency conduct. See 06-549 Pet. App. 64a (Thompson, J., dissenting) (discussing prior Ninth Circuit decisions that had relied on 50 C.F.R. 402.03 in holding Section 7(a)(2) inapplicable to

situations where an agency lacks discretionary authority to act to benefit listed species).[12] The construction of Section 7 of the ESA that is reflected in 50 C.F.R. 402.02 and 402.03 is entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 703 (1995) ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation.").

The FWS/NMFS regulations reflect a reasonable construction of Section 7(a)(2). By its terms, Section 7(a)(2) requires federal agencies to ensure, not that a listed species is never placed in jeopardy, but that a likelihood of jeopardy is not caused by actions attributable to the agency itself. FWS and NMFS have reasonably interpreted Section 7(a)(2)'s no-jeopardy and consulta-

---

[12] See, *e.g.*, *Ground Zero Ctr. for Non-Violent Action* v. *United States Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (holding that Section 7(a)(2) of the ESA did not apply to the upgrading of Trident II missile facilities "because the Navy lacks the discretion to cease Trident II operations * * * for the protection of the threatened species"); *Environmental Prot. Info. Ctr.* v. *Simpson Timber Co.*, 255 F.3d 1073, 1083 (9th Cir. 2001) (holding that FWS had not retained sufficient discretionary control over an earlier-issued permit to require the permittee to take steps that would benefit newly-listed species, and hence was not required to reinitiate consultation under Section 7(a)(2) when new species were listed in the area subject to the permit); *Sierra Club* v. *Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (holding that Section 7(a)(2) did not apply to the Bureau of Land Management's approval of road construction under a right-of-way agreement where the agreement had not retained discretionary authority for the agency to demand protections for listed species).

tion requirements to apply only to *discretionary* agency actions because a federal agency cannot properly be held responsible for conduct that it is legally obliged to undertake. The construction of Section 7(a)(2) set forth in the regulations is thus consistent with the statutory text and with background principles of legal causation. Under respondents' view, by contrast, Section 7(a)(2) would require every federal agency to ensure that its performance of mandatory duties over which it has no discretion does not jeopardize listed species, and it would potentially authorize agencies to override specific statutory directives when a no-jeopardy finding cannot be made. Adopting an interpretation that avoids such consequences is surely reasonable.

b. The court of appeals did not hold the pertinent FWS/NMFS regulations invalid, but instead purported to reconcile those regulations with its conclusion that Section 7(a)(2) overrides the mandatory provisions of other federal statutes. The court's analysis is unpersuasive. The court quoted 50 C.F.R. 402.02 and recognized its parallel to the causation standard under NEPA as explained in *Public Citizen*. See 06-549 Pet. App. 30a. The court nevertheless attributed to EPA the effects of an administrative decision mandated by Congress, thus reaching a conclusion flatly contrary to *Public Citizen*'s holding and analysis.

As for 50 C.F.R. 402.03, the court of appeals construed its reference to "actions in which there is discretionary Federal involvement or control" to encompass EPA's approval of Arizona's transfer application, on the ground that "EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application." See 06-549 Pet. App. 44a. Under the CWA, however, EPA did *not* have discretion to grant or deny the

transfer, but was instead compelled to grant Arizona's application once the CWA criteria were satisfied. The court's construction of 50 C.F.R. 402.03 as encompassing agency conduct mandated by Congress effectively reads the word "discretionary" out of the regulation. Indeed, the court of appeals acknowledged that, under prior Ninth Circuit decisions construing 50 C.F.R. 402.03, Section 7(a)(2) of the ESA does not apply "where the challenged action [i]s legally foreordained by an earlier [agency] decision, such as where the agency lack[s] the ability to amend an already-issued permit." 06-549 Pet. App. 41a. The court of appeals did not explain, however, why conduct mandated by an Act of Congress should be treated as "discretionary" if conduct "foreordained" by an agency's own prior administrative decisions is not.

In any event, whatever uncertainty might previously have existed concerning the proper interpretation of 50 C.F.R. 402.02 and 402.03 has since been eliminated. In connection with the State of Alaska's application for transfer of NPDES permitting authority, FWS and NMFS have confirmed that, because the CWA requires that transfer applications must be granted under specified circumstances, EPA's approval is not the legal "cause," within the meaning of 50 C.F.R. 402.02, of any impacts on listed species that may result from a state-issued NPDES permit. See 06-549 Pet. App. 105a-106a, 115a-116a. FWS and NMFS have further confirmed that, in light of the mandatory character of Section 402(b) of the CWA, EPA lacks "discretionary Federal involvement or control," within the meaning of 50 C.F.R. 402.03, over the transfer decision once the CWA criteria are met. See 06-549 Pet. App. 109a-110a, 114a-115a. Under this Court's decisions, the interpretation of 50 C.F.R. 402.02 and 402.03 set forth in the recent ex-

change of letters is "controlling unless plainly erroneous or inconsistent with the regulation[s]." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). As in *Auer*, "[t]hat deferential standard is easily met here." *Ibid.*[13]

---

[13] The government's brief in the court of appeals stated:

> The holding in [*American Forest & Paper Ass'n*, *supra* (see note 3, *supra*)] supports a finding that EPA lacks "discretionary involvement or control" in the approval of a state NPDES program and thus, the decision to approve a program is not subject to the requirements of § 7. *See* 50 C.F.R. § 402.03. As that was not a basis for EPA's decision in this case or FWS' [BiOp], [EPA does] not make that argument in this case, and this Court need not address this issue.

Gov't C.A. Br. 31 n.9. The private intervenors (petitioners in No. 06-340), however, relied on 50 C.F.R. 402.03 in arguing that, because EPA lacked "discretionary involvement or control" over the decision whether to approve Arizona's transfer application, Section 7(a)(2) was inapplicable to that decision. The court of appeals did not treat the government's silence on this point as a ground for ignoring the regulation, but instead announced its own construction of the rule, see 06-549 Pet. App. 39a-44a, which is flatly inconsistent with that of the federal agencies that administer it and are responsible for its promulgation. The court of appeals also noted the potential relevance of 50 C.F.R. 402.02, though the court construed that regulation in a manner inconsistent with this Court's causation analysis in *Public Citizen*. See 06-549 Pet. App. 29a-30a; p. 36, *supra*. This Court therefore should consider and give deference to those regulatory provisions in resolving the question of statutory construction presented in this case. The Court should also defer to the interpretation of those regulations that is set forth in the recent inter-agency correspondence, even though those letters postdated the court of appeals' decision in this case. Cf. *Auer*, 519 U.S. at 461-462 (deferring to the Secretary of Labor's interpretation of the Secretary's regulations when that interpretation was first announced in a brief in that case filed at the invitation of this Court).

5. This Court's decision in TVA *v.* Hill *does not support the court of appeals' analysis*

The court of appeals viewed this Court's decision in *TVA* v. *Hill*, *supra*, as supporting the conclusion that Section 7(a)(2) of the ESA supersedes mandatory directives contained in other federal statutes. The court's reliance on *Hill* was misplaced.

a. The Court in *Hill* held that Section 7 of the ESA prohibited the Tennessee Valley Authority (TVA) from putting the Tellico Dam into operation when that action would "either eradicate the known population of [endangered] snail darters or destroy their critical habitat." 437 U.S. at 171; see *id.* at 156-158, 193-195; pp. 32-33, *supra*. The Court rejected the contention that continuing lump-sum congressional appropriations for the TVA had impliedly repealed Section 7's no-jeopardy mandate as it applied to the dam. 437 U.S. at 189-193. Although the House and Senate Appropriations Committees had issued reports that purported to "direct[]" the TVA to complete the Tellico Project, see *id.* at 164, 167, the Court noted that "[t]he Appropriations Acts did not themselves identify the projects for which the sums had been appropriated," *id.* at 189 n.35, and it explained that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress," *id.* at 191. Accord *Lincoln* v. *Vigil*, 508 U.S. 182, 192-194 (1993) (holding that expenditures from lump-sum appropriations are discretionary in nature).

Because the relevant Appropriations Acts *authorized* but did not *require* the TVA to put the Tellico Dam into operation, this Court had no occasion to consider the application of the ESA's no-jeopardy mandate to conduct required by another Act of Congress. The Court in

Hill did not suggest that Section 7 of the ESA superseded an express statutory directive like that contained in Section 402(b) of the CWA. Indeed, any such holding would have been implausible under the version of Section 7 that was in effect when *Hill* was decided, which identified the avoidance of jeopardy to listed species as simply one means by which federal agencies were directed to "utilize their authorities in furtherance of the purposes of" the ESA. See pp. 29-30, *supra*; *Hill*, 437 U.S. at 160. Furthermore, as noted above (see p. 30, *supra*), the Court in *Hill* quoted the statement by Representative Dingell, the floor manager of the bill, explaining that the ESA substantially amplified the duty of federal agencies to take steps "within their power" to carry out the Act's purposes. See 437 U.S. at 183 (quoting 119 Cong. Rec. at 42,913).

b. The Court in *Hill* also noted that previous endangered species legislation had "qualified the obligation of federal agencies by stating that they should seek to preserve endangered species only '*insofar as is practicable and consistent with the[ir] primary purposes*.'" 437 U.S. at 181 (quoting Endangered Species Conservation Act of 1969, Pub. L. No. 89-669, § 1(b), 80 Stat. 926, repealed by ESA, Pub. L. No. 93-205, § 14, 87 Stat. 903). The Court further observed that a bill passed by the Senate in 1973 had "merely required federal agencies to 'carry out such programs *as are practicable* for the protection of species.'" *Id.* at 182 (quoting S. 1983, 93d Cong., 1st Sess. § 7(a) (1973)). The court of appeals viewed Congress's deletion of prior statutory references to practicability and consistency with primary agency purposes as reinforcing the court of appeals' interpretation of the 1973 ESA as ultimately enacted. See 06-549 Pet. App. 34a. That inference is unfounded, since

species-protective measures that are otherwise prohibited by an Act of Congress are different in kind from measures that an agency simply regards as impracticable or inconsistent with its primary mission. Congress's determination that the ESA's no-jeopardy mandate should supersede an agency's discretionary policy choices does not imply—much less clearly manifest (see pp. 19-20, *supra*)—an intent to repeal enacted laws.

II. EPA'S APPROVAL OF ARIZONA'S TRANSFER APPLICATION WAS NOT ARBITRARY OR CAPRICIOUS, AND A REMAND TO THE AGENCY IS UNNECESSARY, PARTICULARLY BECAUSE EPA, FWS, AND NMFS HAVE CLARIFIED THEIR UNDERSTANDING OF THE LEGAL ISSUES PRESENTED HERE

Before addressing the question whether Section 7(a)(2) of the ESA applies to agency conduct that is mandated by another Act of Congress, the court of appeals reviewed the course of agency proceedings in this case and concluded that "EPA's approval of Arizona's transfer application cannot survive arbitrary and capricious review because the EPA relied during the administrative proceedings on legally contradictory positions regarding its section 7 obligations." 06-549 Pet. App. 23a. The court found that a principal basis for FWS's finding that the transfer of permitting authority would not jeopardize listed species—*i.e.*, FWS's conclusion that the transfer decision was not the legal cause of any harm to the species because the transfer was mandated by Section 402(b) of the CWA—was inconsistent with EPA's antecedent determination that consultation was required by Section 7(a)(2) of the ESA. See *id.* at 25a-26a. The court stated that, "[b]y relying on [the FWS BiOp's] line of reasoning after determining that it did

have a consultation obligation, the EPA decided that it had to consult but had no authority to do anything concerning the matter about which it had to consult." *Id.* at 25a. The court explained that such a position would be contrary to the text of Section 7(a)(2), which "makes no legal distinction between the trigger for its *requirement* that agencies consult with FWS and the trigger for its *requirement* that agencies shape their actions so as not to jeopardize endangered species." *Id.* at 26a.

The court of appeals was correct in stating that the no-jeopardy and consultation requirements of Section 7(a)(2) go hand in hand,[14] and that Section 7(a)(2) does not require federal agencies to consult about conduct to which the no-jeopardy mandate does not apply. The court was also correct that the course of agency proceedings in this case reflected a degree of confusion regarding the ESA's application to the NPDES transfer decision. EPA's prior statements that it was legally required to consult, however, do not cast doubt on the lawfulness of its ultimate decision to grant Arizona's transfer application, and the relevant federal agencies have since clarified their understanding of the legal principles that govern in this setting.

A. EPA's Initiation Of Consultation In This Case Does Not Preclude The Agencies' Ultimate Determination That Approval Of The State's Transfer Application Would Not Jeopardize Listed Species

Section 7(a)(2) of the ESA states that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any [agency ac-

[14] But cf. *American Forest & Paper Ass'n*, 137 F.3d at 298 n.6 (suggesting possible distinction between consulting obligations and substantive powers).

tion] is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). That phrasing makes clear that "consultation" with FWS or NMFS is not an end in itself, but rather is a means of ensuring compliance with Section 7(a)(2)'s substantive no-jeopardy mandate. Once it is confirmed that an agency is *compelled* by another federal law to engage in particular conduct, Section 7(a)(2) of the ESA does not require the agency to engage in consultation concerning species-related impacts that it has no authority to prevent. Cf. *Public Citizen*, 541 U.S. at 767-769 (holding that, under the "rule of reason" implicit in NEPA, a federal agency is not required to assess the environmental impacts of an action that it is legally obligated to perform).

The FWS BiOp did not discuss 50 C.F.R. 402.03, and it did not address the question whether the consultation that produced the BiOp was required by the ESA. The BiOp's no-jeopardy finding, however, was grounded in substantial part on FWS's conclusion that, even if Arizona's administration of the NPDES program proved to be less protective of listed species than the prior EPA regime, that disparity would not be "caused" by EPA's approval of the transfer, but instead would be attributable to "Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." 06-340 Pet. App. 114. Because Section 7(a)(2)'s consultation requirement is intended to facilitate compliance with the no-jeopardy mandate—and therefore applies only to conduct that is properly attributable to the agency—FWS's causation analysis logically implies that consultation on Arizona's transfer application was not compelled by the ESA.

Neither the ESA nor the CWA, however, *prohibits* a federal agency from seeking the views of FWS or NMFS concerning the effects on listed species of conduct that the CWA requires, even though consultation in those circumstances would not be statutorily-required and would not serve its usual purpose of facilitating compliance with Section 7(a)(2)'s no-jeopardy requirement. In some cases, moreover, it may require significant factual or legal analysis to determine whether a potential effect on listed species is properly attributable to an action mandated by Congress or to a related discretionary judgment, and consultation with FWS or NMFS would be an appropriate means of resolving that question. Cf. 06-549 Pet. App. 73a (Kozinski, J., dissenting from denial of rehearing en banc). EPA's decision to initiate consultation with FWS concerning Arizona's transfer application therefore was not inconsistent with FWS's ultimate determination that any harm to listed species that the transfer might entail was legally attributable to Congress rather than to EPA.

B. Although EPA Incorrectly Stated During The Administrative Process That Consultation Was Required By The ESA, Those Misstatements Do Not Render The Challenged Agency Action Arbitrary Or Capricious

At both the beginning and the end of its consideration of Arizona's transfer application, EPA expressed the view that consultation concerning that application was required by the ESA. Thus, in soliciting comments on the transfer application, EPA cited Section 7(a)(2) of the ESA and stated that "[t]he approval of the State permitting program under section 402 of the Clean Water Act is a federal action subject to this requirement." 06-340 Pet. App. 559. And the *Federal Register* notice

that announced EPA's approval of the State's application stated that "[i]ssuance of the biological opinion * * * concludes the consultation process required by ESA section 7(a)(2)." *Id.* at 73.[15] EPA's characterization of the consultation as a process "required" by Section 7(a)(2) is not consistent with the relevant federal agencies' understanding of Section 7(a)(2) as reflected in the FWS/NMFS regulations, see 50 C.F.R. 402.02, 402.03; pp. 34-38, *supra*, and in more recent agency pronouncements, see 06-549 Pet. App. 93a-116a; pp. 13-14, *supra*; pp. 48-49, *infra*.

Not every misstatement of law, however, renders an associated agency decision arbitrary or capricious. The Administrative Procedure Act (APA) provides that, when a reviewing court determines whether challenged agency action is arbitrary or capricious, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706.[16] Thus, "[i]n administrative law, as in federal civil and criminal litigation, there is a harmless error rule." *PDK Labs., Inc.* v. *United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (citing 5 U.S.C. 706). "If the

---

[15] EPA had made similar statements in considering some prior state applications for transfer of NPDES permitting authority. See 64 Fed. Reg. 73,552, 73,554-73,555 (1999) (requesting comment on Maine application); 66 Fed. Reg. 12,791, 12,793-12,794 (2001) (approving the same); 63 Fed. Reg, 33,657-33,658 (1998) (seeking comment and approving public hearing on Texas application); 61 Fed. Reg. 65,047, 65,053 (1996) (approving Oklahoma application); *id.* at 47,931, 47,934-47,935 (requesting comment on Louisiana application). See also 06-549 Pet. App. 7a-8a n.3.

[16] Although the instant case involves a petition for direct court of appeals review of EPA's transfer decision pursuant to 33 U.S.C. 1369(b)(1), see 06-549 Pet. App. 14a-16a, the parties agree that the case is governed by the standards of review set forth in 5 U.S.C. 706, see 06-549 Pet. App. 20a-21a & n.9.

agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." *Ibid.*; see *DSE, Inc.* v. *United States*, 169 F.3d 21, 31 (D.C. Cir. 1999) ("Under the APA, we will not set aside agency action unless the party asserting error can demonstrate prejudice from the error.") (brackets and internal quotation marks omitted).

In the instant case, EPA's misperception that it was legally required to consult on Arizona's transfer application did not affect the outcome of the agency proceedings. If EPA had recognized from the outset that Section 7(a)(2)'s consultation requirement did not apply, the agency would still have granted Arizona's application once it determined that the CWA criteria were satisfied. Respondents therefore were not prejudiced by EPA's erroneous view that the consultation was required by Section 7(a)(2).

Nor did EPA's misstatements preclude informed judicial review by obscuring the basic rationale for the agency's transfer decision. The analysis contained in FWS's BiOp reflects a correct understanding of the causation principles that govern in this area, and it provides a fully sufficient basis for concluding that approval of Arizona's transfer application would not jeopardize any listed species. See pp. 22-25, *supra*. During the consultation process, moreover, the pertinent EPA regional office expressed the view that its approval of the State's application was "not the cause of future non-discharge-related impacts on endangered species from projects requiring State NPDES permits" because, *inter alia*, "section 402(b) of the CWA states that EPA 'shall' approve the State program if it meets certain specified criteria." 06-340 Pet. App. 564, 565.

Although a reviewing court "may not supply a reasoned basis for the agency's decision that the agency itself has not given," the court "will * * * 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). Here, both EPA and FWS ultimately recognized that, in light of the directive set forth in Section 402(b) of the CWA, EPA was not properly treated as the legal cause of any effects on listed species that the transfer of NPDES permitting authority might entail. The only issue directly before the court of appeals was the propriety of the agencies' no-jeopardy determination, and the court did not assert that the agencies' rationale for *that* determination was unclear.

Because the relevant agencies in the MOA had previously expressed their intent to continue to consult on NPDES transfer decisions, the question whether consultation about Arizona's application was legally required was of little practical importance, and the documents prepared in connection with that application contain only passing references to that issue. Thus, despite EPA's failure at that time to appreciate the full logical implications of the causation analysis suggested by the EPA regional office and incorporated into the FWS BiOp, the administrative record clearly reveals the agencies' bases for concluding that the transfer of permitting authority would not jeopardize listed species. Because EPA's isolated references to the consultation as a process "required" by the ESA neither prejudiced respondents nor obscured the rationale for the no-jeopardy

finding, the court of appeals was not required to remand the matter to the agency for further clarification.[17]

C. A Remand For Further Administrative Proceedings Is Unnecessary At The Present Stage Of The Case Because EPA, FWS, And NMFS Have Clarified Their Current Views Concerning The Applicability Of Section 7(a)(2)'s Consultation And No-Jeopardy Requirements To Transfers Of NPDES Permitting Authority

In any event, a remand to the agency for further clarification is unnecessary at the current stage of the case. In connection with Alaska's application for transfer of NPDES permitting authority (see pp. 13-14, *supra*), EPA requested confirmation from FWS and NMFS of EPA's current view that "the no-jeopardy *and consultation* duties of ESA Section 7(a)(2) do not apply

---

[17] If the administrative record had failed to identify a clear and coherent rationale for EPA's approval of the State's transfer application, or had failed to address a material legal or factual issue, the court of appeals would have been required under established principles to remand the matter to the agency rather than attempting to resolve the disputed interpretive question in the first instance. See 06-549 Pet. App. 72a (Kozinski, J., dissenting from denial of rehearing en banc); see also *Gonzales* v. *Thomas*, 126 S. Ct. 1613, 1614-1615 (2006) (per curiam) (summarily reversing court of appeals decision and directing the court to remand the case to the agency for initial resolution of a contested immigration-law issue); *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."); *Burlington N., Inc.* v. *United States*, 459 U.S. 131, 143 (1982) (holding that, if a reviewing court is unsure about the continued vitality of a prior agency position, the more appropriate course is to remand to the agency for explanation); *General Chem. Corp.* v. *United States*, 817 F.2d 844, 850 (D.C. Cir. 1987) (holding that, when an agency has failed to engage in reasoned decisionmaking, a reviewing court should not itself determine what the result should have been).

to approval of a State's application to administer the NPDES program." 06-549 Pet. App. 96a (emphasis added); see *id.* at 93a-102a. EPA noted the court of appeals' statement in this case that the agency had taken "'contradictory' positions regarding the application of ESA Section 7(a)(2) to Arizona's application to administer the NPDES program," and it expressed the hope that "obtaining [FWS's and NMFS's] views on these issues in advance of processing Alaska's application may avoid a repetition of that problem here." *Id.* at 95a.

In response to EPA's letter, FWS and NMFS confirmed their understanding that consultation is not required in this context. See 06-549 Pet. App. 107a (FWS states that "there is no need to conduct Section 7 consultations on proposed actions to approve State NPDES programs because such actions are not the cause of any impact on listed species and do not constitute discretionary federal agency actions to which Section 7 applies"); *id.* at 116a (NMFS "concur[s] with EPA's conclusion that EPA is not required to engage in section 7 consultation on applications to approve State programs in situations under Section 402(b) of the CWA"). The agencies have thus provided the very clarification that might have occurred if the court of appeals had vacated the challenged EPA action on the ground of internal inconsistency and had remanded for further administrative proceedings. Whether or not such a remand would have been appropriate at an earlier stage of the case, it is therefore unwarranted now.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
MATTHEW J. MCKEOWN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
ANDREW C. MERGEN
DAVID C. SHILTON
Attorneys

ROGER R. MARTELLA
Acting General Counsel
MICHAEL G. LEE
JULIE K. WALTERS
Attorneys
Environmental Protection Agency

FEBRUARY 2007

APPENDIX

1. Section 1536 of Title 16 provides:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or

license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant,

before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in

accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed

travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5.

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action

which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an

exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of

the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in

accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) of this section or was not identified in any

biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(*l*) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant

may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by

the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(*o*) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5171 or 5172],

and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

2. Section 1342 of Title 33 provides:

National pollutant discharge elimination system.

* * * * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the is-

suance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a sub-

stantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

* * * * *

3. Section 402.02 of Title 50 Code of Federal Regulations provides:

Definitions

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq*.

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR Parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Director refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of

all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means 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.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11-1712.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Proposed critical habitat means habitat proposed in the FEDERAL REGISTER to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the FEDERAL REGISTER to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate

to minimize the impacts, i.e., amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

4. Section 402.03 of Title 50 Code of Federal Regulations provides:

Applicability.

Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.

5. Section 402.14 of Title 50 Code of Federal Regulations provides:

Formal Consultation

(a) *Requirement for formal consultation*. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions*. (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation*. A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accor-

dance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1)-(3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits com-

ments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions*. The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opin-

ion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take*.

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraph (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the

issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation*. (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.