DEFENDERS OF WILDLIFE V. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY: THE FUTURE OF NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMITTING IN ARIZONA

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INTRODUCTION

On August 22, 2005, the United States Court of Appeals for the Ninth Circuit, in a decision that could have a significant impact on the procedures by which surface water permits are issued in the State of Arizona and beyond, ruled that the United States Environmental Protection Agency ("EPA") was "arbitrary and capricious" in its approval of Arizona's request to administer its own Clean Water Act pollution-permitting ("NPDES") program.[1] The EPA's approval of

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1. Defenders of Wildlife v. EPA, 420 F.3d 946, 977 (9th Cir. 2005), *cert. granted*, 127 S.Ct. 853 (U.S. Jan. 5, 2007) (No. 06-549). NPDES stands for "national

Arizona's NPDES program, the Arizona Pollutant Discharge Elimination System ("AZPDES"), was vacated by the court.[2] On June 8, 2006, the Ninth Circuit voted to deny the petition for a rehearing on the case.[3] On September 6, 2006, the National Association of Home Builders ("Home Builders") filed a petition for certiorari[4] and on October 23, 2006, the United States filed a petition.[5] The State of Arizona, which intervened in this case in the Ninth Circuit, requested that the U.S. Supreme Court grant the Petition for a Writ of Certiorari filed by the Home Builders.[6] Certiorari was granted on January 5, 2007.[7] The Ninth Circuit's ruling is not in effect pending the Supreme Court's review of the case.

I. STATUTORY BACKGROUND

A. The Clean Water Act

In 1972, Congress passed the Clean Water Act ("CWA" or the "Act") which created the NPDES. Under this system, the EPA was given authority to issue permits for the "discharge of pollutants" into navigable waters.[8] In addition, the Act stipulated that a state may be given the authority to administer its own pollution permitting for waters within its jurisdiction if the EPA approves that state's program.[9] In considering the approval of a state's petition, the EPA must ensure that the state meets nine requirements designed to determine if the state has "adequate authority" to administer an NPDES program at least as effective as an EPA administered program.[10] If the proposed state-run NPDES program fulfills all

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pollutant discharge elimination system," which is the statutory title of the Clean Water Act pollution-permitting program. 33 U.S.C. § 1342 (2000).

2. *Id.* at 979.

3. Defenders of Wildlife v. EPA, 450 F.3d 394, 395 (9th Cir. 2006).

4. Petition for Writ of Certiorari, Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, No. 06-340 (U.S. Sept. 6, 2006), 2006 WL 2582501.

5. Petition for Writ of Certiorari, EPA v. Defenders of Wildlife, No. 06-549 (U.S. Oct. 23, 2006), 2006 WL 3005020.

6. State of Arizona's Brief in Support of Petition for Writ of Certiorari, Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, No. 06-340 (U.S. Sept. 26, 2007), 2006 WL 2791293.

7. EPA v. Defenders of Wildlife, 127 S.Ct. 853 (U.S. Jan. 5, 2007) (No. 06-549); Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 127 S.Ct. 852 (U.S. Jan. 5, 2007) (No. 06-340).

8. 33 U.S.C. § 1342(a) (2000).

9. *Id.* § 1342(b).

10. *Id.* The nine requirements mandate that the state have the authority:

> (1) To issue permits which—
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> (A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1366, 1317, and 1343 of this title;
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> (B) are for fixed terms not exceeding five years; and
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> (C) can be terminated or modified for cause including, but not limited to, the following:
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> (i) violation of any condition of the permit;
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> (ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;
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> (iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

nine requirements, the EPA "shall approve" the program.[11] After the state program is approved, the EPA maintains the ability to object to specific permits and revoke

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(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 issuance 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 substantial 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.

Id.

11. *Id.*

the state's permitting authority if it decides that the state's program is in violation of the Act.[12]

B. The Endangered Species Act

Congress passed the Endangered Species Act ("ESA") in 1973. Section 7(a)(2) states as follows:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], 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 result in the destruction or adverse modification of habitat of such species.[13]

In accordance with the Act's regulations, actions that fall under the section 7 requirement are those "in which there is discretionary Federal involvement or control."[14] If the agency determines that the "action may affect" these endangered species ("listed species") or their natural habitat ("critical habitat"), a formal consultation must be performed with the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") in the case of marine animals.[15]

During the consultation, the FWS must use the "best scientific and commercial data available" and "[e]valuate the effects of the action and cumulative effects on the listed species or critical habitat."[16] At the conclusion of the consultation, the FWS will issue a "Biological Opinion" discussing the "effects of the action on listed species or critical habitat" and "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."[17] The effects that the action will have on the listed species or critical habitat include both "direct and indirect effects" and any effects from other activities "interrelated" with the action.[18] After the Biological Opinion is issued, the agency must then make the final decision to continue with the action or to make any necessary modifications to comply with the section 7 listed species protection ("section 7 protection").[19]

Section 7 of the ESA applies only to federal agencies. Therefore, a state-based NPDES permitting authority is not required to consult with the FWS about listed species or critical habitats.[20] To compensate for the lack of section 7

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12. *See id.* § 1342(c)–(d).
13. 16 U.S.C. § 1536(a)(2) (2000).
14. 50 C.F.R. § 402.03 (2006).
15. *See* 50 C.F.R. § 402.14(a) (2006).
16. *Id.* § 402.14(g).
17. *Id.* § 402.14(h).
18. 50 C.F.R. § 402.02 (2006).
19. *See* 50 C.F.R. § 402.15 (2006).
20. However, Section 9 and Section 10 of the ESA, commonly called the "anti-take" provisions, apply not just to federal agencies, but to "any person subject to the jurisdiction of the United States" and forbid the taking of any listed species. 16 U.S.C. § 1538 (2000). To "take" is defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 1533(19).

protection inherent in state-run programs, the EPA and the FWS published a Memorandum of Agreement ("MOA") in 2001 to coordinate the two agencies' involvement in state pollution-permitting programs and "to enhance communication between the Services, [FWS], EPA, and States/Tribes about how to ensure that water quality standards and NPDES permits will protect endangered and threatened species."[21] To accomplish the protection of these species, the MOA listed several procedures to be followed by the FWS and the EPA.[22] However, while the MOA is designed to help protect listed species and critical habitats, it "does not impose legally binding requirements on [the] EPA [or] States."[23]

II. *DEFENDERS* CASE HISTORY

The plaintiffs in the actions are the Defenders of Wildlife, a national non-profit organization "dedicated to the protection of all native wild animals and plants in their natural communities,"[24] the Center for Biological Diversity, a nonprofit organization headquartered in Arizona, and an Arizona resident (collectively "Defenders").

Defenders' first lawsuit, filed directly to the Ninth Circuit, challenged the EPA's decision directly by claiming that the EPA failed to consider the transfer's effect on endangered species, that the EPA's reliance on the FWS's Biological Opinion ("the Opinion") violated the ESA, and that the transfer decision was "arbitrary and capricious" under the Administrative Procedures Act.[25] An agency decision is not arbitrary and capricious when "it is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency."[26]

Defenders' second suit, filed in district court in Arizona, challenged the Opinion itself and argued that the Opinion failed to meet the requirements of the ESA.[27] To support their argument that the Opinion was flawed, Defenders pointed to the fact that during the consultation, FWS biologists initially expressed concern that the transfer could harm listed species such as the Pima pineapple cactus and the pygmy owl but were "overruled" by officials in Washington D.C. for the final Opinion.[28] According to Defenders, before the transfer, the EPA would authorize "thousands" of construction sites in Arizona every year, working in conjunction with the FWS under the mandate of ESA section 7 to ensure that listed species and critical habits were protected from the impacts of the NPDES-authorized

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21. Memorandum of Agreement between the Environmental Protection Agency, Fish and Wildlife Service, and National Marine Fisheries Service, 66 Fed. Reg. 11,202, 11,203 (Feb. 22, 2001).

22. *Id.* at 11,216.

23. *Id.* at 11,202.

24. Defenders of Wildlife, About Us, http://www.defenders.org/about (last visited Aug. 28, 2006).

25. Defenders of Wildlife v. EPA, 420 F.3d 946, 954–55 (9th Cir. 2005).

26. *Id.* at 955.

27. *Id.*

28. Petitioners' Opening Brief at 13–15, Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2005) (Nos. 03-71439, 03-72894), 2003 WL 22752580.

commercial and residential development.[29] They argued that the Opinion did not "contain a meaningful analysis" of the effects of the loss of section 7 protection on listed species or critical habitat.[30]

The District Court transferred the second claim to the Ninth Circuit which consolidated both claims into one lawsuit. Other parties supporting the EPA's transfer, including the Home Builders, other Arizona home builders' associations, the Arizona Chamber of Commerce, and the State of Arizona, joined the case as Intervenors.[31]

The EPA and the other supporting parties (collectively "Respondents") argued that the EPA's decision was neither arbitrary nor capricious because the "EPA was entitled to rely on the expert determination of the FWS [in the Opinion] that approval of the Arizona NPDES program would not jeopardize the continued existence" of listed species.[32] Most of Respondents' arguments mirror the conclusions from the Opinion or the conclusions from the EPA's initial analysis referenced by the Opinion. Respondents recognized that section 7 protection would no longer be mandatory under the state program and therefore, one less means of protecting listed species would be available.[33] However, echoing the Opinion, Respondents maintained that the approval of the transfer, being an "administrative shift of authority," had no direct effect on the listed species.[34] Respondents also argued that the transfer would not cause any indirect effects because, as stated in the Opinion, the EPA has no discretion in approving a transfer petition when the petitioning state has passed all nine criteria.[35] In such situations, the EPA should be obligated to approve the petition. To support this claim, Respondents referred to decisions by the Fifth and D.C. Circuits finding that the phrase "shall approve" is mandatory.[36] Therefore, the "EPA cannot be said to 'cause' [indirect effects] merely by carrying out its congressionally mandated duty to approve state programs meeting the requirements of [the CWA]."[37] Furthermore, Respondents argued that other forms of protection would be

29. *Id.* at 10.

30. *Id.* at 19.

31. *See Defenders*, 420 F.3d at 955.

32. Respondents' Answering Brief at 32, *Defenders*, 420 F.3d at 946 (Nos. 03-71439, 03-72894), 2003 WL 22926366.

33. *Id.* at 17.

34. *Id.* at 20.

35. *Id.* at 31.

36. Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291, 297 (5th Cir. 1998) ("The language of § 402(b) is firm: It provides that EPA 'shall' approve submitted programs unless they fail to meet one of the nine listed requirements."); Natural Res. Def. Council v. EPA, 859 F.2d 156, 173–74 (D.C. Cir. 1988) ("The Act . . . commands the Administrator to approve the state permit system once he determines that the statutory requirements . . . are met."); Save the Bay, Inc. v. EPA, 556 F.2d 1282, 1285 (5th Cir. 1977) ("Unless the Administrator of EPA determines that the proposed state program does not meet these [nine] requirements, he must approve the proposal.").

37. Respondents' Answering Brief at 32, *Defenders*, 420 F.3d at 946 (Nos. 03-71439, 03-72894), 2003 WL 22926366.

available for listed species and critical habitats, including Section 9 and 10 of the ESA and Arizona state law.[38]

In addition to those arguments, the Home Builders claimed that the Defenders' argument regarding the EPA's "NPDES-authorized" construction and development projects was "illusory" because the EPA consults with the FWS only for the initial pollution permit action, not entire "development projects."[39] They argue that the Defenders overstate the EPA's role, and thus magnify the loss of protection with the transfer because "[u]nder the NPDES Program, the permitting entity" authorizing pollution discharge is not responsible for the regulation of "the activity from which the discharge results."[40]

In its decision vacating the EPA's transfer of the NPDES program to Arizona, the Ninth Circuit first stated that the EPA's transfer decision relied on "legally contradictory positions regarding its section 7 obligations," noting the fact that at various times the EPA had asserted the necessity of section 7 consultations and had at other times claimed them not to be necessary.[41] However, the court felt that the EPA ultimately based its actions under the "belief that section 7 required consultation."[42]

Next, the court explained its reasoning in finding the Opinion defective. The court found a conflict in the conclusion of the Opinion that the transfer would not have an effect on listed species.[43] The court also objected to the conclusions in the Opinion that (1) the EPA must approve a transfer request if the conditions of the CWA are met because the EPA is without authority to reject the request on section 7 grounds; and (2) any impact of the transfer was the fault of Congress because it had not made section 7 apply to the states.[44]

The court rejected the first claim, finding that section 7(a)(2) of the ESA mandated the EPA to perform a section 7 consultation "even if the agency's governing statute does not so provide."[45] Although the CWA instructs the EPA to approve a transfer when the state meets the nine criteria, the court held that the ESA "independently empowers" the EPA to fulfill the consultation and species protection requirement.[46] Not only does the EPA have the authority to consult and

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38. *Id.* at 34–35.

39. Intervenors-Respondents Home Builders' Answering Brief at 30–31, Defenders of Wildlife v. EPA, 420 F.3d at 946 (Nos. 03-71439, 03-72894), 2003 WL 23004752.

40. *Id.* at 32–33.

41. *Defenders*, 420 F.3d at 959–60.

42. *Id.* at 960.

43. *See id.* at 960–61.

44. *See id.*

45. *Id.* at 967. *But see id.* at 980–81 (Thompson, J., dissenting) (arguing that "[t]he Clean Water Act, by its very terms, permits the EPA to consider only the nine specified factors," that the decision was not an agency action under section 7 of the ESA because it was not discretionary, and that the decision was therefore not subject to the requirements of section 7).

46. *Id.* at 971.

to ensure that no listed species are harmed, the ESA makes it "an obligation in addition to those created by the agencies' own governing statute."[47]

The court found the Opinion's assertion that construction development (rather than the transfer decision) would cause the impact on listed species to be implausible.[48] Instead, the court concluded that both the transfer decision and private development would cause an impact.[49] Therefore, the court ultimately held that because the EPA did have the authority to ensure that no listed species were harmed with the transfer decision, the loss of section 7 protection "on the many projects subject to a water pollution permit" should have been classified in the Opinion as an indirect effect.[50] The court dismissed the holdings of the Fifth and D.C. Circuits, declaring that those holdings "do not reflect a full consideration of the text and history of section 7(a)(2)."[51]

The court subsequently addressed the Home Builders' argument that construction projects were not intended to be the focus of NPDES permitting and analysis. According to the court, "a developer could not perform any construction activities without [the pollution permit from the NPDES]."[52] Therefore, if the construction project "cannot go forward without" the permit, the project is interrelated enough with the permitted discharge activity and is covered under section 7.[53]

The court then discussed the possible alternatives to section 7 protection proposed by the Opinion and Respondents. The court first addressed the MOA designed to coordinate FWS and the EPA activities to compensate for the loss of the section 7 requirement on the states and called the MOA "the closest substitute for the provisions of section 7."[54] However, the court found that the MOA was still inadequate because Arizona would not be required to comply with section 7 protection.[55]

The court also examined sections 9 and 10 anti-take provisions of the ESA. These also were found to be inadequate replacements. As section 7 protects species from federal actions that could threaten them or threaten their habitat, the anti-take provisions can only prescribe penalties after the animals have been killed and depend on a level of enforcement for the effectiveness of the provisions.[56] Similarly, the Arizona state law regarding native plants also is inadequate in that it only governs how state citizens may obtain permission to destroy the plants.[57]

The court concluded by stating that the EPA "[a]rbitrarily and capriciously rel[ied] on a faulty Biological Opinion" and failed in its duty under

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47. *Id.* at 967 (majority).
48. *See id.* at 961.
49. *See id.*
50. *Id.* at 971.
51. *Id.* at 970.
52. *Id.* at 972 n.22.
53. *Id.* at 972.
54. *Id.* at 973.
55. *Id.*
56. *Id.* at 975.
57. *See id.* at 976.

section 7 to ensure that the transfer decision would not harm listed species or critical habitat.[58] Although the court eventually voted to deny rehearing the case, six judges dissented on grounds that the ESA did not overcome the mandatory requirements of the CWA and that the decision went against those in other circuits.[59]

III. ARIZONA'S NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (AZPDES)

The Supreme Court of the United States has granted certiorari and has scheduled oral argument for April 17, 2007. In the meantime, Arizona, having been granted a stay pending Supreme Court review, continues to administer the issuance of NPDES permits. However, if the Court upholds the decision, the authority to administer NPDES permitting in Arizona would return to the EPA. Arizona would still have the option to reapply to administer its own NPDES program.

In January, 2002, Arizona applied to the EPA for transfer of the NPDES program regarding Arizona waterways (except those on Indian land). On December 5, 2002, the EPA approved Arizona's application to administer the NPDES program pursuant to section 402(b) of the CWA, 33 U.S.C. § 1342(b). Arizona thus became the forty-fifth state to obtain this authority. The EPA found that Arizona had met all the requirements of section 402(b). This finding is not disputed by any party to *Defenders*.

Arizona obtained the EPA approval of its program, the AZPDES, as the result of more than two years of effort. The State invested over one million dollars in resources and staff time in creating the AZPDES program. Arizona employees developed new state laws and rules, prepared the submission of the program for approval, negotiated and drafted the memoranda of agreement with the EPA to implement the program, and drafted the program guidance materials for the regulated community. Arizona's financial commitment to AZPDES has continued to increase substantially during the pendency of its appeal in the *Defenders* case.

The EPA believed at one point that a decision on Arizona's application would itself constitute a federal action under section 7 of the ESA and was therefore subject to the statutory requirement of section 7 protection for listed

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58. *Id.*

59. Defenders of Wildlife v. EPA, 450 F.3d 394, 395 (9th Cir. 2006). In writing for the dissent, Judge Kozinski stated:

> In striking down EPA's transfer approval, the majority makes five fundamental blunders: First, it mistakes EPA's internal deliberations for analytical inconsistency. Second, the majority fails to give appropriate deference to FWS's interpretation of the ESA. Third, the majority treats the ESA as superior to all other laws, thereby nullifying a crucial ESA regulation and forcing agencies to violate their governing statutes. Fourth, the majority contradicts the Supreme Court's recent pronouncement in *Public Citizen*. Finally, the majority dismisses the reasoned opinions of two other circuits, creating a square conflict.

Id. at 396 (Kozinski, J., dissenting).

species and critical habitats.[60] To ensure that the loss of mandatory section 7 protection with an Arizona NPDES program would not jeopardize listed species or critical habitat, the EPA engaged in a section 7 consultation with the FWS. While the EPA had engaged in section 7 consultation with six NPDES transfer decisions since 1993, those were the first consultations it had ever required.[61]

On December 3, 2002, the FWS issued its Biological Opinion. FWS based its Opinion on an initial analysis from the EPA, the Arizona Department of Environmental Quality ("ADEQ") proposal, FWS field studies, and other sources.[62] The Opinion outlined the permitting procedure that would take place after the transfer, including continued EPA oversight to ensure that permitting standards met CWA requirements and continued protection of listed species in accordance with the MOA.[63] Also, the Opinion stated that Congress clearly intended for states to administer their own NPDES program.[64] In addition, the EPA believed the transfer of the NPDES to the state would make more state resources available to the permitting program.[65]

However, the Opinion also describes the concern of the "field office staff biologists" during the biological analysis that the transfer would result in the loss of mandatory section 7 protection for listed species.[66] The Opinion stated that this loss would reduce the "number of mechanisms" to protect listed species (such as the pygmy owl and Pima pineapple cactus) and critical habitat.[67] Furthermore, the Opinion identified this loss of section 7 protection as an "indirect effect of the authorization."[68]

The Opinion then offered a legal argument on the concepts of causation and indirect effects and stated that the transfer would not be a "substantial factor" in the loss of section 7 protection.[69] Therefore, the Opinion's final conclusion was that the loss of section 7 protection would not be an indirect effect of the transfer; there would be "only an attenuated causal link" between the loss of protection and

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60. *See* State Program Requirements; Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Arizona, 67 Fed. Reg. 49,916, 49,916–17 (Aug. 1, 2002).

61. *See* Water Pollution Control; Approval of Application by South Dakota to Administer the National Pollutant Discharge Elimination System, 59 Fed. Reg. 1535, 1543–44 (Jan. 11, 1994) (publishing the approval of South Dakota's NPDES program, the first to have required section 7 consultation).

62. E-mail from Steven L. Spangle, Field Supervisor, FWS, to Terry Oda, Clean Water Act Standards and Permits Office, EPA, Region IX, at 1 (Dec. 3, 2002), *available at* http://www.fws.gov/southwest/es/arizona/Documents/Biol_Opin/020268_EPA_approval_of_AZ_AZPDES.pdf ("This letter constitutes the U.S. Fish and Wildlife Service's biological opinion.").

63. *Id.* at 14–18.

64. *Id.* at 7–8.

65. *Id.* at 4.

66. *Id.* at 22.

67. *Id.*

68. *Id.*

69. *Id.* at 20. The Opinion states, "[T]he action (EPA approval of NPDES to the State of Arizona) must have been a substantial factor in the occurrence of the effect (loss of conservation benefit)." *Id.*

the transfer.[70] The Opinion focused on construction development and how the "administrative transfer of authority" would not be a cause of more development or an increase in permit requests that could threaten the listed species.[71] Furthermore, the Opinion pointed out the EPA's conclusion that it is obligated to approve an NPDES transfer if the state meets the nine CWA criteria.[72] Therefore, the FWS concluded that "it does not have the legal authority" to reject a transfer application on section 7 protection grounds.[73] Finally, the Opinion stated that other forms of protection, such as anti-take provisions and Arizona state laws protecting endangered native plants, would also apply to permittees.[74] Therefore, the FWS concluded that the transfer was "not likely to jeopardize" the listed species or critical habitat.[75]

Under the AZPDES program, two main categories of permits are issued: general permits and individual permits. A general permit is issued for "multiple facilities within a specific category"[76] and is comprised of four different types of permits which include: stormwater discharges from large municipal separate storm sewer systems ("MS4s"), the Construction General Permit ("CGP") for new construction sites, concentrated animal feeding operations ("CAFO"s), and De Minimis permits.[77] The AZPDES may also issue a Multisector General Permit ("MSGP") which authorizes stormwater discharges from industrial facilities.[78] Individual permits are drafted and issued on a case-by-case basis considering the circumstances of a specific facility and discharge. Sewage treatment facility discharges require individual permits. In addition, Arizona may require a facility otherwise eligible for general permit coverage to obtain an individual permit.[79]

Invalidation of the AZPDES program would seriously disrupt the pollution-permitting process in Arizona. If Arizona's authority to continue its program is denied, regulated facilities would not know where or how to send information regarding their permits or which government officials to contact regarding permit issues. Action on permit applications would be substantially delayed pending a determination as to which agency would take over their processing.

Further, invalidation of the AZPDES program would halt or delay Arizona business activities, including construction projects, that are proceeding under general permits that have been issued under the AZPDES program. For

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70. *Id.* at 22–23.

71. *Id.* at 20.

72. *See id.* at 21.

73. *Id.* The question then arises, if the EPA was obligated to approve a NPDES transfer application when the state had met the nine CWA requirements, why did it consult with the FWS in the first place?

74. *Id.* at 17–18. For a discussion of the ESA anti-take provisions, see *supra* note 20.

75. E-mail from Steven L. Spangle to Terry Oda, *supra* note 62, at 22.

76. *Id.* at 6.

77. Declaration of Alexis Strauss Hacker at 2–3, Defenders of Wildlife v. EPA, Nos. 03-71439, 03-72894 (9th Cir. Jun. 15, 2006).

78. *Id.* at 3.

79. *See, e.g.*, ARIZ. ADMIN. CODE § R18-9-C902 (2006).

example, in 2003, ADEQ completed promulgation of the AZPDES Construction General Permit. As the Ninth Circuit majority noted, ADEQ issues several thousand stormwater discharge construction permits annually. The EPA revised its National Construction General Permit on July 1, 2003, but it does not cover construction projects in Arizona outside of reservations.[80] If Arizona's Construction General Permit is invalid, there will be many new construction sites that would otherwise be covered by the Arizona permit that will no longer be able to legally discharge until the EPA issues permits facility by facility.

ADEQ has implemented education and outreach efforts to ensure that the regulated community understands its responsibilities under the CWA and Arizona law. Generally speaking, under the AZPDES program, there are more inspections of (and other site visits to) discharging facilities than there were when the EPA was managing the NPDES program in Arizona. These benefits and increased regulatory oversight would cease if the AZPDES program's authority is invalidated.

In addition, since approval of AZPDES, ADEQ has provided the FWS with significantly increased notice of proposed projects in Arizona that may affect endangered species. ADEQ requires every construction general permit applicant to submit a Notice of Intent including a unique geographic identifier. The FWS has provided ADEQ with a geographic information system map that identifies the areas in Arizona that are of concern due to listed species. ADEQ's "Smart Notice of Intent" computer system matches the identified project area with the established areas of concern provided by the FWS. Upon receiving a general permit Notice of Intent in an area of critical habitat concern, ADEQ informs developers that they are not authorized to discharge for thirty-two business days, preventing the beginning of construction during that time. ADEQ sends a copy of Notices of Intent that affect critical habitat areas to the FWS. The FWS thus has thirty-two days to assess the impact on endangered species and contact the developer concerning the impacts. Under the federal NPDES program in Arizona, developers could automatically begin construction within forty-eight hours of giving notice.

It is the State of Arizona's opinion that the invalidation of the AZPDES program is not in the best interests of Arizona's regulated community, environment, or water quality.

IV. THE STATE OF ARIZONA'S POSITION ON THE CASE

The State of Arizona argues that the Court of Appeals erroneously invalidated the EPA's transfer of the CWA pollution-permitting program to Arizona.[81] In reaching its decision, the Court of Appeals incorrectly found that the requirements of the ESA[82] could be imposed on the EPA's transfer decision despite

80. Final National Pollutant Discharge Elimination System (NDPES) General Permit for Storm Water Discharges from Construction Activities, 68 Fed. Reg. 39,087, 39,089 (July 1, 2003).

81. Congress created this program (the National Pollutant Discharge Elimination System) and authorized EPA to transfer the program to the States in section 402 of the CWA. *See supra* Part I.A.

82. 33 U.S.C. § 1342 (2000).

mandatory provisions of the CWA. The decision thus directly conflicts with the decisions of the Fifth and D.C. Circuits, is contrary to Congress's intent to preserve the states' right to regulate water pollution and land and water use planning, and wrongfully expands the ESA to reach all federal agency actions, regardless of the mandatory provisions of other federal statutes. Arizona believes that the U.S. Supreme Court was correct to grant the Petition for a Writ of Certiorari to provide uniformity and certainty in this critical area of environmental law that directly affects the federal government's relationship with the states.

Even though all parties to the original lawsuit acknowledge that Arizona's transfer application met all the criteria under section 402(b) of the CWA, the Ninth Circuit vacated the EPA's approval of AZPDES because the EPA did not comply with section 7(a)(2) of the ESA. This determination directly conflicts with the Fifth Circuit's decision in *American Forest and Paper Association v. EPA*[83] and the D.C. Circuit's decision in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*.[84]

In *American Forest*, the Fifth Circuit held that section 7 of the ESA does not provide authority for the EPA to add requirements to the approval of a state NPDES permitting program pursuant to section 402(b) of the CWA.[85] *American Forest* therefore addresses the precise issue presented by the *Defenders* case. Although *Platte River* did not involve the EPA's authority to withhold its approval of a state permitting program under the section 402(b) of the CWA, the D.C. Circuit did hold that section 7 of the ESA "does not expand the powers conferred on an agency by its enabling act."[86] Thus, *Platte River* conflicts with the Ninth Circuit's determination that the ESA gives the EPA the authority to deny approval of the AZPDES program even though Arizona has met all the criteria set forth for such approval in the CWA.

Although the Ninth Circuit acknowledged that there is a circuit split concerning whether section 7(a)(2) of the ESA provides additional authorities to agencies, it opined that its decision is consistent with preexisting precedent from other circuits. As Judge Kozinski noted in his dissent from the denial of rehearing en banc, the Eighth and First Circuit decisions are inapposite because they "address situations where the governing statute and the ESA were complementary, not where the governing statute *precluded* consideration of endangered species as the CWA does."[87]

Arizona argued that the Supreme Court should resolve the circuit split in favor of the decisions of the Fifth and D.C. Circuits. Arizona and other states governed by the Ninth Circuit decision should not be required to comply with an erroneous application of the ESA when the states in other circuits have received or

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83. 137 F.3d 291 (5th Cir. 1998).
84. 962 F.2d 27 (D.C. Cir. 1992).
85. 137 F.3d at 291. The section is codified at 33 U.S.C. § 1342(b).
86. 962 F.2d at 34.
87. Defenders of Wildlife v. EPA, 450 F.3d 394, 401 n.5 (9th Cir. 2006) (Kozinski, J., dissenting).

will receive approval of their permitting programs upon compliance with section 402(b) of the CWA.[88]

Arizona claims that the Ninth Circuit's decision is contrary to the purpose and language of the CWA and the ESA. The CWA manifests Congress's desire that the respective states be responsible for running the Act's several pollution control programs, including the NPDES program at issue in this case:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title.[89]

Further, under the CWA NPDES statutes, at section 402(b)[90], the EPA administrator "shall approve" each state application to administer the NPDES program "unless" he determines that the applying state does not meet one of the nine specified requirements set forth therein. This Court and others have recognized that approval is thus mandatory where a state, like Arizona, demonstrates that it has met all nine criteria.[91]

The Ninth Circuit ignored both the clear statement of congressional intent in the CWA and its plain language in holding that section 7 of the ESA expanded the requirements that Arizona must meet to receive EPA approval of its NPDES program. In addition to conflicting with the CWA, the Ninth Circuit opinion conflicts with Congress's decision not to impose the requirements of the ESA on the states. The majority opinion found that the transfer of the NPDES program to Arizona would harm endangered species because section 7 consultation would not be required when Arizona was running the program. Arizona took a number of actions to increase its protection of endangered species, including its innovative "Smart Notice of Intent" program that provides early warning to the state and the FWS whenever a development is proposed near critical habitat. Nonetheless, the Ninth Circuit majority opinion contends that Arizona's voluntary efforts did not suffice under section 7 to allow the program transfer to proceed:

> In the abstract, voluntary compliance by state agencies willing to follow FWS recommendations to the same extent as would the EPA *might* substitute for section 7 coverage. The EPA, however, could

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88. The State of Alaska has recently applied to EPA for approval of its NPDES permit program and thus is concerned about the impact of the Ninth Circuit decision on its ability to obtain EPA approval. Brief of Amicus Curiae State of Alaska in Support of Petitions for Writ of Certiorari at 1, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, Nos. 06-340, 06-549 (U.S. Nov. 21, 2006), 2006 WL 3419814.

89. 33 U.S.C. § 1251(b) (2000).

90. 33 U.S.C. § 1342(b).

91. *See, e.g.*, EPA v. California *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 208 (1976); *Am. Forest*, 137 F.3d at 297; Natural Res. Def. Council v. EPA, 859 F.2d 156, 174 (D.C. Cir. 1988); Citizens for a Better Env't v. EPA, 596 F.2d 720, 722 (7th Cir. 1979).

> not so conclude without first analyzing the likelihood that *all* relevant Arizona agencies can and would live up to the Game and Fish Department's promises, as well as considering the effectiveness of federal oversight if Arizona agencies fail to live up to any such promises.[92]

Under the majority's analysis, the states that do not have authority over their NPDES programs could arguably not receive EPA approval without first statutorily creating programs substantially similar to the ESA, or by agreeing to consult with the FWS or National Marine Fisheries Service on all state NPDES permitting decisions. The Ninth Circuit opinion does not describe how a state could obtain approval of its NPDES program without committing itself by law (or agreement with the EPA) to following section 7's requirements.[93] Because the majority opinion has the effect of imposing ESA requirements on Arizona and other states in the Ninth Circuit, it is contrary to Congress's determination that the states are not subject to ESA requirements.

The Ninth Circuit also misreads the legislative history of the ESA. It contends that the *American Forest* and *Platte River* courts failed to make the distinction between the requirements of sections 7(a)(1) and 7(a)(2) of the ESA, with the latter supposedly providing an additional unqualified mandate controlling the actions of federal agencies. Yet the two subsections originated as a single provision, and both were qualified by the phrase "utilize their authorities," thus limiting an agency's ESA responsibility to actions within its statutory powers.[94] When Congress separated section 7 into subsections in 1978, it explained that the revision merely restated "existing law."[95] The Ninth Circuit's dramatic expansion of federal agency authority and responsibility under the ESA is thus not supported by the Act's legislative history.

The Ninth Circuit decision is contrary to the CWA and ESA. Arizona has invested considerable resources in developing and operating the AZPDES program. According to Congress, Arizona has the right to control that program. Further, the majority opinion may well affect the states and federal agencies in matters other than approval of state NPDES programs. As stated by Judge Kozinski in his dissent from the denial of rehearing en banc: "If 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."[96] In light of Arizona's interests and those of the other states in the Ninth Circuit, Arizona is requesting that the Supreme Court overturn the decision below

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92. Defenders of Wildlife v. EPA, 420 F.3d 946, 977 (9th Cir. 2005).

93. The State of Alaska shares Arizona's concerns about the practical difficulty of evaluating whether the EPA's approval of its NPDES program will affect endangered species. Brief of Amicus Curiae State of Alaska in Support of Petitions for Writ of Certiorari, *supra* note 88, at 3.

94. Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973).

95. H.R. Rep. No. 95-1804, at 18 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. 9484, 9486.

96. Defenders of Wildlife v. EPA, 450 F.3d 394, 399 n.4 (9th Cir. 2006) (Kozinski, J., dissenting).

to ensure consistency and certainty in the application of federal environmental laws.

CONCLUSION

The Director of the Water Division for Region 9 of the EPA, Alexis Strauss Hacker, has expressed serious concerns about the potential transfer of NPDES administration back to the EPA, especially if the authority would be eventually transferred back to Arizona.[97] According to the EPA, EPA staff would be required to "familiarize themselves" with Arizona projects and requirements, and therefore, a transfer would cause delays in the issuing of new permits and less enforcement of existing permits.[98] Furthermore, after the approval of Arizona's program, the EPA transferred NPDES personnel to other projects and would face a staff shortage in appointing resources to administer the NPDES.[99]

Director Hacker argued that the resource shortage and permitting delays would cause "a number of potential adverse environmental and health consequences."[100] The standards in newer permits are often more stringent and a delay in the issuance of such a permit would result in the discharging facility continuing under the older standard.[101] Additionally, inadequate resources would not only be felt in Arizona, but in all Region 9 states and territories.[102] Director Hacker argues that the EPA oversight of the NPDES programs and other CWA programs in Region 9 would suffer.[103]

Other parties have expressed concern that, if the EPA resumes NPDES permitting, they would have to endure the costly and time-consuming process of section 7 consultation for EPA-issued permits.

Arizona successfully met the CWA's nine criteria for the mandatory transfer of the NPDES from the EPA to the state and at the time joined forty-four other states in exercising local oversight and control of this federal program. Arizona may be deprived of this authority due to the federal administrative and regulatory uncertainty and inconsistency in the interpretation and interrelationships of the CWA and ESA.

Reviewing the events preceding the Ninth Circuit's decision, one central factor in the conflict is the statutory ambiguity as to whether the EPA was obligated to approve state NPDES programs when the state had met all nine CWA criteria. By adopting the Fifth and D.C. Circuit Courts' approach to the mandatory

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97. *See* Hacker, *supra* note 77, at 6. ("I am told no state program has ever returned to EPA under any federal environmental statute.")

98. *Id.* at 5–6. Hacker stated, "As program approval in 2002 was both expected and scheduled, ADEQ and EPA had ample time to prepare for an orderly transition and did not have to confront these issues." *Id.*.

99. *See id.* at 7–8.

100. *Id.* at 9.

101. *Id.* at 9.

102. *Id.* at 10. Region 9 includes Arizona, California, Hawaii, Nevada, 147 southwest tribes, and hundreds of Pacific islands. *See* About EPA Region 9, http://www.epa.gov/region9/reg9bck.html (last visited Aug 28, 2006).

103. *See* Hacker, *supra* note 77, at 11.

nature of the congressional intent, the EPA's approval of the NPDES transfer to Arizona would not be discretionary and section 7 of the ESA would not apply. Indeed, the EPA itself never required section 7 consultations to NPDES transfers prior to 1993, and argued in *Defenders* that it was under no obligation under section 7.

Regardless of the cause of the current situation, the State of Arizona's position is clearly stated in its Intervenor Brief submitted to the Ninth Circuit Court of Appeals:

> Section 7 of the Endangered Species Act is not appropriately applied to EPA's decision to transfer NPDES authority to Arizona. The State having met the criteria set forth in the Clean Water Act, approval of the program is mandated. Arizona urges this Court to uphold the decision of the United States Environmental Protection Agency to approve the Arizona NPDES program.[104]

The future of NPDES permitting in Arizona awaits the Supreme Court's decision.

104. Brief of Intervenor State of Arizona at 22, Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2006) (Nos. 03-71439, 03-72894), 2003 WL 23004754.