

Loose Canons: The Supreme Court Guns for the Endangered Species Act in *National Association of Home Builders v. Defenders of Wildlife*

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Section 7 of the Endangered Species Act requires federal agencies to avoid jeopardizing endangered species. Although the plain text of the statute asserts that the consultation duty applies to “any action,” the United States Supreme Court reread the statute and its implementing regulations to limit that duty to only discretionary actions in National Association of Home Builders v. Defenders of Wildlife. In considering the conflict between this consultation duty and a mandatory duty to transfer administration of the National Pollution Discharge Elimination System (NPDES) to Arizona, the majority determined that section 7 consultation does not apply to mandatory actions. This holding rests on a poorly crafted Chevron analysis in which the majority began by misapplying the canon against implied repeals in an overbroad and inconsistent way. The canon against implied repeals has typically operated to push judges to reconcile statutes where possible, reading an implied repeal only where no such reconciliation is possible. However, the court used it here to manufacture ambiguity in otherwise straightforward language, eventually working a repeal of the later-enacted section 7. Building on the shaky ground of its Chevron analysis, the majority then erected a contrived interpretation of the federal regulation governing section 7 consultation that is wholly

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inconsistent with the history and structure of the regulation. Given the logical and legal inconsistency underlying the holding, the decision looks less like a careful analysis of the legal issues surrounding section 7 consultation and more like a policy determination to limit environmental protections. At a minimum, this holding returns United States biodiversity policy to the incoherent and ineffective state Congress expressly rejected in passing the Endangered Species Act in 1973. At worst, this holding may in fact render section 7 almost entirely without legal effect.

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INTRODUCTION

*National Association of Home Builders v. Defenders of Wildlife*¹ stands as an exemplar of judicial policy making, rooted in shaky ground. In a 5-4 split, the Court crafted a poorly reasoned opinion to reach a broad holding that the consultation requirement of section 7(a)(2) of the Endangered Species Act (ESA or “the Act”)² does not apply to actions an agency is mandated to take. The majority worked a substantial revision of United States environmental policy that limits the reach of the Act and renders biodiversity policy incoherent and self-defeating. Since confusion regarding the scope and structure of the ESA were already widespread in both agency practice and jurisprudence, the ruling may merely cement the current ineffective implementation of the Act into place. However, the opinion’s real potential for mischief lies in the specious reasoning the majority used to justify its conclusion. Read for all it’s worth, the majority’s logic may be interpreted to eliminate almost any requirement of federal agencies to conserve endangered species. Especially against the backdrop of current endangered species policies, agencies may well use the opinion to marginalize the Act entirely. On the other hand, the weaknesses of the opinion open the door for courts to cabin the holding and, more importantly, for an ESA-friendly administration to eliminate any lasting legal effects of the opinion.

Part I of this Note discusses the history of section 7 of the ESA, with a focus on the origin of the limitation of its applicability to discretionary actions. Part II describes the majority opinion and dissent in *National Association of Home Builders*. Part III discusses the various conceptual and analytical failings of the majority opinion. Finally, Part IV describes the grave implications of the holding for the future of section 7 and attempts to reassemble a coherent biodiversity policy.

1. Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007).
2. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

I. SECTION 7 OF THE ENDANGERED SPECIES ACT BEFORE *NATIONAL ASSOCIATION OF HOME BUILDERS*

A. *A Brief History of the Section 7 Duties to Prevent Extinction and to Recover Species*

The ESA was enacted “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species”³ When the Supreme Court first interpreted the Endangered Species Act in 1978 in *Tennessee Valley Authority v. Hill* (*TVA v. Hill*), it found that the language of the Act and its history made the intent of Congress clear: the statute was enacted “to halt and reverse the trend toward species extinction, whatever the cost.”⁴ The ESA was Congress’s response to a crisis of documented extinctions within the United States and an increase in the rate of extinction worldwide—a trend which has not changed in the intervening years.⁵

The legal and biological context in which the ESA was created nearly forty years ago brings the import of *National Association of Home Builders* into sharper focus. Faced with a problem of global scope and irreversible harm, Congress decided that a piecemeal approach simply did not work. The ESA was an attempt to create a more effective policy on the foundation of two failed earlier statutes: the Endangered Species Conservation Act of 1969 and the Endangered Species Act of 1966.⁶ Unlike the ESA of 1973, these statutes directed agencies to use their discretionary authorities to preserve endangered species, but only “insofar as is practicable and consistent with the primary purposes of” their primary missions.⁷ Predictably, agencies often ignored the duty to protect species, resulting in continued harm and habitat destruction at the hands of the federal government.⁸ As Congress set about reshaping biodiversity policy, the breadth of the mandate to agencies to avoid destroying species was central to the discussion.⁹ Congress rejected several versions of legislation that limited that mandate to only discretionary actions, as prior legislation had done, in favor of a law that applied to “agency actions”

3. *Id.* § 1531(b).

4. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

5. See PRECIOUS HERITAGE: THE STATUS OF BIODIVERSITY IN THE UNITED STATES (Bruce A. Stein, Lynn S. Kutner & Jonathan S. Adams eds., 2000); see also 2004 IUCN RED LIST OF THREATENED SPECIES: A GLOBAL SPECIES ASSESSMENT (Jonathan E.M. Baillie, Craig Hilton-Taylor & Simon M. Stuart eds., 2004).

6. See *Tenn. Valley Auth.*, 437 U.S. at 174–75.

7. Endangered Species Conservation Act of 1969, Pub. L. No. 89-669, 80 Stat. 926, repealed by Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

8. See *Tenn. Valley Auth.*, 437 U.S. at 174–75 (citing examples of agency inaction legislators sought to curb).

9. See *id.* at 180–83.

generically.¹⁰ The conference report of the 1973 Endangered Species Act described the reach of the Act this way:

Once this bill is enacted, the appropriate Secretary . . . *will have to take action* to see that [the] situation is not permitted to worsen The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and every agency of government is committed to see that those purposes are carried out [The] agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.¹¹

After seeing several years of the ESA in operation, Congress again took up the question of the scope of agencies' duty to act to prevent species extinction. In 1979 amendments, Congress refined the ESA by crafting two distinct provisions with slightly different mandates—one imposing an affirmative duty for a narrower range of discretionary actions, and the second imposing a duty to not harm that appears to apply to all actions.¹² The first, now found in ESA section 7(a)(1), directs agencies to “utilize their authorities” to “conserve” endangered species, which is defined as facilitating recovery until protection is no longer required.¹³ Thus, where agencies have discretion that could be exercised to facilitate recovery, they are required to use that authority to revive endangered species.

The second provision, now in section 7(a)(2), requires agencies to engage in formal consultation with federal wildlife management agencies for “any action authorized, funded, or carried out by such agency” to insure that the action “is not likely to jeopardize the continued existence of threatened species or endangered species.”¹⁴ Thus, before an agency takes an action it must first have the action analyzed by one of the two wildlife management agencies charged with administering the ESA, namely the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA Fisheries) (referred to together as “the Services”).¹⁵ In principle, section 7(a)(2) appears to apply this consultation mandate to any action taken by an agency, but only requires

10. Section 7 of the 1973 Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (Dec. 28, 1973), reads “The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and 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 and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.”

11. 119 CONG. REC. 42913 (1973).

12. See Pub. L. No. 96-159, 93 Stat. 1225 (1979).

13. Endangered Species Act of 1973, 16 U.S.C. §§ 1536(a)(1), 1532(3) (2006).

14. *Id.* § 1536(a)(2).

15. *Id.* § 1532(15); see also Reorganization Plan No. 4 of 1970, 5 U.S.C. § 903 (2006).

the agency to avoid eliminating the species, rather than requiring it to help the species recover. It is the scope of this second mandate that is the point of contention in *National Association of Home Builders v. Defenders of Wildlife*.¹⁶

B. First, Do No Harm to Endangered Species: The Consultation Requirements of Section 7

Section 7(a)(2) consultation is one of the bedrock mechanisms for preventing extinctions by embodying a kind of “first, do no harm” approach. The consultation process can be divided into two stages.¹⁷ The first stage is a procedural requirement that the federal agency taking the action (the “action agency”) consult with the relevant Service to determine whether endangered species may be present, and if so, the impacts of their planned action on the protected species.¹⁸

The second phase of consultation creates substantive requirements for the agency under section 7(b). While the statute mandates the process for arriving at these requirements, it does not dictate their substance. As the FWS emphasizes, “the process is flexible and can be adapted at any point”¹⁹ After a Service investigates, it issues a biological opinion outlining the likely impacts on the endangered species, and setting out “reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact.”²⁰ Finally, section 7(b) authorizes the Service to issue an Incidental Take Statement that “set[s] . . . the terms and conditions which must be complied with” to implement these “reasonable and prudent measures.”²¹ Although the statute does not place limits on the alternatives available to “insure that [the] action . . . is not likely to jeopardize” endangered species, agency regulations direct the measures be “consistent with the scope of the Federal agency’s authority and jurisdiction.”²² At the extreme, the Service may offer halting the action as the only alternative, or may require the agency to

16. See *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 1258 (2007).

17. See 16 U.S.C. § 1536(a)(2); *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). See also Jan Hasselman, *Holes in the Endangered Species Act: The Role of Agency ‘Discretion’ in Section 7 Consultation*, 25 STAN. ENVTL. L.J. 125 (2006).

18. 16 U.S.C. §§ 1536(a)(2), 1536(c).

19. U.S. FISH & WILDLIFE SERVICE AND NATIONAL MARINE FISHERIES SERVICE, ENDANGERED SPECIES CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT 4-2 (1998), available at <http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm>.

20. 16 U.S.C. § 1536(b).

21. 16 U.S.C. § 1536(b)(4)(C)(iv).

22. 50 C.F.R. 402.02 (2007); 16 U.S.C. § 1536(b)(3)(A) (“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) and can be taken by the Federal agency or applicant in implementing the agency action.”). See Hasselman, *supra* note 17, at 130–32.

apply for an exemption from the Endangered Species Committee (sometimes termed the “God Squad” for its power of life and death over species).²³

Ultimately, the duty to “insure” that the species is not jeopardized rests with the action agency. As the Services’ joint regulation explains:

The Service performs strictly an advisory function under section 7 by consulting with other Federal agencies to identify and help resolve conflicts between listed species and their critical habitat and proposed actions However, the Federal agency makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2).²⁴

With the biological opinion and the reasonable and prudent measures from the Services in hand, the action agency must then decide which course of action to take, which may involve choosing a different course of action from the one recommended by the Services. FWS regulations specify that agencies may decline to accept the recommended “reasonable and prudent alternatives” as long as they explain their decision, which can be based on a lack of legal authority to pursue the recommended measures.²⁵ At that point, the relevant Service could issue an incidental take permit under section 10 of the ESA for the action as long as the agency submits an acceptable conservation plan.²⁶

The action agency also has the option of rejecting the reasonable and prudent measures and proceeding without an incidental take permit, but if the action does result in “take” of endangered species,²⁷ the action may be enjoined by a court, and the agency and its staff risk civil and criminal penalties under section 9 of the ESA. Not surprisingly, while biological opinions are technically only advisory, they are not lightly disregarded by courts. The Supreme Court in *Bennet v. Spear* observed that biological opinions have a “powerful coercive effect” and that “action agencies very rarely choose to engage in conduct that the Service has concluded is likely to jeopardize the continued existence of a listed species.”²⁸

23. See 16 U.S.C. § 1536(g); 50 C.F.R. § 402.16 (2007). The Endangered Species Committee includes the Secretaries of Agriculture, the Army, the Interior, the Administrators of the EPA and NOAA, the Chair of the Council of Economic Advisors, and the President.

24. 51 Fed. Reg. 19,926, 19,928 (June 3, 1986), codified at 50 C.F.R. pt. 402 (2008).

25. 16 U.S.C. § 1536(b)(4)(A); 50 C.F.R. § 402.15.

26. See 16 U.S.C. § 1539(a)(1)(B) (authorizing incidental take permits); 16 U.S.C. § 1539(a)(2) (specifying requirements for Incidental Take Permits).

27. “Take” is prohibited by section 9 of the ESA, 16 U.S.C. § 1538, and defined by section 3(19) to include actions that “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The FWS has defined “harm” in section 3(19) to include “significant habitat modification or degradation where it actually kills or injures wildlife.” 50 C.F.R. § 17.3 (2007). See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995).

28. *Bennett v. Spear*, 520 U.S. 154, 169 (1996).

C. “Any” Means Any: *TVA v. Hill* Confirms that Section 7 is Mandatory for All Federal Agency Actions

The scope of section 7 has been the subject of a number of cases prior to *National Association of Home Builders*. The most important was *TVA v. Hill*,²⁹ a 1978 Supreme Court case where section 7 blocked the completion of a federally funded dam that threatened to annihilate an endangered fish. The Supreme Court held that section 7(a) unambiguously applied to “actions authorized, carried out or funded” by the agency, just as the statute says.³⁰ Writing for the majority, Chief Justice Burger said: “One would be hard pressed to find a statutory provision whose terms were any plainer than those in section 7 of the Endangered Species Act This language admits of no exception.”³¹ The majority held that the language made clear Congress’s “conscious decision . . . to give endangered species priority over the ‘primary missions’ of federal agencies.”³² This reading was grounded in the plain language of the ESA, and bolstered by an exhaustive analysis of the Act’s structure, legislative history, and the history of the series of statutes leading up to it. In short, it is “beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”³³

After the Court found the statute was clear and unambiguous on its face, the majority could have ended its analysis there. Instead, the Court highlighted the legislative intent behind the Act in an effort to counter the argument advanced by dissenting Justice Powell, who argued that requiring all agencies to protect species was an absurd result.³⁴ The majority first looked to the context of the 1973 Act, where Congress sought to reshape the Acts of 1966 and 1969. In particular, Congress sought to revisit the 1969 Act because its limited application to only discretionary actions consonant with the agency’s primary purpose had failed to meet the objective of conserving species.³⁵ The majority found that the broad reach of the ESA reflected the “plain intent of Congress in enacting this statute . . . to halt and reverse the trend toward species extinction, whatever the cost.”³⁶

Congress responded swiftly to *TVA v. Hill*. Within five months, Congress incorporated three significant changes designed specifically to address the “absurd result” that so bothered Justice Powell and later emerged in the

29. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978). Note that in 1978, Congress had not yet split section 7(a) into the two sections it contains today.

30. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973), amended by Pub. L. No. 95-632, 92 Stat. 3751 (1978). Note that the ESA of 1973 referred to “actions” not “any action” as the statute reads today.

31. *Tenn. Valley Auth.*, 437 U.S. at 173.

32. *Id.* at 185.

33. *Id.* at 174.

34. *Id.* at 160 n.29.

35. *Id.* at 181–82.

36. *Id.* at 184.

majority opinion in *National Association of Home Builders*.³⁷ First, instead of limiting the scope of the ESA as Justice Powell thought appropriate, Congress specifically clarified that section 7(a) applied not just to “actions . . . by [the] agency” but to “any action . . . by [the] agency.”³⁸ It is hard to imagine how Congress could have more explicitly emphasized its assent to Justice Berger’s reading in *TVA v. Hill* than by adding that single word to the statute. Second, Congress split the general section 7(a) mandate into the two separate sections, requiring action agencies to use their authorities to assist the Services in bringing species into full recovery in section 7(a)(1) (a mandate that would be meaningless except as applied to discretionary actions), and insuring that they not jeopardize species with “any action” under section 7(a)(2).³⁹ The third significant change was the creation of a mechanism for a cabinet-level committee with the power to waive the requirements of the ESA when the only available “reasonable and prudent alternative[]” within the legal authority of the agency was to not take the proposed action.⁴⁰ This provided a safety valve in situations like that presented in *T.V.A. v. Hill*, where the ESA threatened to block a major federal project.

D. A Non-Discretionary Exception Creeps into the ESA

Despite the unequivocal opinion of the Supreme Court, conclusively reaffirmed by Congress, that the scope of section 7 consultation reaches all actions, agencies and lower courts have been inconsistent in their interpretation and implementation of section 7. Agencies have sought to avoid consultation, and in the course of reviewing those actions, lower courts have shaped what amounts to a substantial exception.⁴¹ This exception excuses action agencies from section 7 consultation when the federal agency action is not discretionary.

This exception arose in significant part from an almost fluky shift in the scope of a regulation originally drafted to broaden the reach of the ESA in a narrow set of circumstances to a regulation that is now read to severely limit the applicability of the ESA in a broad range of circumstances. These regulations were originally jointly promulgated by the Services in 1978, and revised in 1986, to govern the consultation process.⁴² The original 1978 regulation was entitled “Applicability to *previously initiated actions*,” and stated that “[s]ection 7 and the requirements of this Part apply to all actions in

37. 16 U.S.C. § 1536(g)–(l); see Hasselman, *supra* note 17, at 138–42.

38. Endangered Species Act of 1973, Pub. L. No. 95-632 sec. 3, § 7, 92 Stat. 3751, 3752 (1978).

39. Endangered Species Act of 1973, Pub. L. No. 96-159 sec. 4, § 7, 93 Stat. 1225, 1226 (1979).

40. *Id.* (inserting 16 U.S.C. §§ 1536(e)–(l)).

41. For an excellent analysis of this trend and its history, see Hasselman, *supra* note 17.

42. Interagency Cooperation—Endangered Species Act of 1973, 43 Fed. Reg. 870 (Jan. 4, 1978) (emphasis added); Interagency Cooperation—Endangered Species Act of 1973, as amended, 51 Fed. Reg. 19,926, 19,937 (June 3, 1986) (codified at 50 C.F.R. pt. 402).

which there is Federal involvement or control.”⁴³ Both the title and the substance of the rule demonstrate its origin as the solution to a very specific regulatory problem. At a time when the ESA was only five years old, the Services had to deal with actions that agencies had authorized, funded or started carrying out *before* the ESA was passed, but in which the action agencies still retained some involvement, such as the construction of the Tellico Dam in *TVA v. Hill*. The question then became just how much residual involvement in a previously initiated action constituted an action covered by the Act. The Services answered the question in very broad terms: section 7 consultation applies to *all* actions in which there is federal involvement or control. Logically, if an agency lacks the authority to do anything at all, then it cannot be said to “act.”

However, in a curious two-stage process, the rule was modified. First, the title was shortened in the proposed rule in 1983 from “Applicability to previously initiated actions” to simply “Applicability,” which implicitly broadened the scope of the rule dramatically from previously initiated actions to all actions. By itself, this shift was unremarkable, since the text of the proposed rule was still a simple restatement of the plain language of section 7(a)(2) and the holding of *TVA v. Hill* that “[s]ection 7 . . . appl[ies] to all actions in which there is Federal involvement or control.”⁴⁴ More fundamentally, the meaning of the regulation was changed by the insertion of one word, “discretionary,” which did not appear in proposed rule, but was added only in the final rule without comment or justification.⁴⁵ Thus, a new limitation on section 7 was born.

A parallel shift in section 7 jurisprudence occurred at this time. While the rule that section 7 applied only to discretionary actions arose in part as a reflection of the change in the regulations, it also appeared through misapplication of language from *Sierra Club v. Babbitt*.⁴⁶ In 1994, the Sierra Club sued the Bureau of Land Management (BLM) over harms to endangered species resulting from the granting of rights-of-way to a logging company before the passage of the ESA. The Ninth Circuit held that when an agency had no ability to constrain the private party action of building the roads themselves, there was no triggering action, so “*in these narrow circumstances* section 7 does not apply . . .”⁴⁷ Effectively, discretion in this context was synonymous with having authority to act. But the presence of such legal authority was not meant by the court to define the boundaries of which actions section 7 would

43. Interagency Cooperation—Endangered Species Act of 1973, 43 Fed. Reg. 870 (January 4, 1978) (emphasis added).

44. Interagency Cooperation—Endangered Species Act of 1973, 48 Fed. Reg. 29,990, 29,999 (proposed June 29, 1983). See also Hasselman, *supra* note 17, at 145.

45. Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,937 (June 3, 1986) (codified at 50 C.F.R. pt. 402).

46. *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995).

47. *Id.* at 1508 (emphasis added).

apply generally. Rather, it was meant as a *test* to determine whether section 7 would be triggered with respect to projects that were initiated prior to the passage of the ESA.⁴⁸

Later courts' misapplication of *Sierra Club v. Babbitt* to limit the scope of section 7 to only discretionary actions is due in part to broad language in the ruling. The court stated that section 7 consultation is

a procedural process that is designed to identify federal actions that in fact are likely to jeopardize the continued existence of a protected species, and to offer reasonable and prudent alternatives [W]ithout authority to modify a [private actor's] project, identification of reasonable and prudent alternatives serves no purpose.⁴⁹

In other words, "where . . . the federal agency lacks the discretion to influence the *private action*, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species."⁵⁰ This language would later come to be misconstrued to apply broadly to all federal actions in a series of cases.⁵¹ However, the seemingly categorical language was actually employed by the court to explain why an agency's lack of discretion to change a private party's actions implies an absence of a federal agency action under the ESA—"in [the] narrow circumstances" of an action initiated prior to the ESA's passage, the absence of any control signals that the Federal agency is simply no longer involved.⁵² Indeed, it is well-settled law that in the context of previously initiated actions,⁵³ the key test is whether "there is discretionary Federal involvement or control."⁵⁴ Similarly, the discretion test applies when the lack of discretion is an indication of minimal involvement,⁵⁵ such as when a Service advises a private party informally on how to avoid the take of an endangered species in the course of their (non-federal) project.⁵⁶ What is critical is that while section 7 commands federal action agencies to insure non-jeopardy, it has no such power over private parties. Thus, while the ESA commands a federal agency subject to its provisions to take certain actions, *Sierra Club* stands for the proposition that it does not require federal agencies to force private parties to take those same actions when the action agency has no legal authority to

48. The role of discretion as a test can also be seen in the FWS regulation, 50 C.F.R. §402.16, in which "discretionary Federal involvement or control over the action" is a test for the trigger requiring reinitiation of consultation.

49. *Sierra Club*, 65 F.3d at 1509 n.10 (emphasis omitted) (citation omitted).

50. *Id.* at 1509 (emphasis added).

51. Hasselman, *supra* note 17, at 159.

52. *Sierra Club*, 65 F.3d at 1508.

53. See Hasselman, *supra* note 17, at 159 (reviewing the case law on the question of determining federal involvement).

54. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (citing 50 C.F.R. § 402.03 and § 402.16) (emphasis omitted).

55. Hasselman, *supra* note 17, at 158 (discussing *Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996) and other cases).

56. *Marbled Murrelet*, 83 F.3d 1068.

control the private parties, because there is no federal action subject to section 7.

Although the original *Sierra Club v. Babbitt* opinion was limited in scope, several courts have stretched its holding into a blanket exemption from consultation for non-discretionary actions.⁵⁷ In the earliest case to consider whether section 7 applies to mandatory actions, *Florida Key Deer v. Stickney*, a district court held that the Federal Emergency Management Agency's (FEMA's) discretion (or lack thereof) to issue flood insurance was immaterial since "[t]here is no express or implied exemption in the ESA for 'nondiscretionary involvement or control.'"⁵⁸ *Sierra Club v. Babbitt* makes no mention of *Florida Key Deer*, suggesting the Ninth Circuit did not think it was deciding whether section 7 applies to mandatory actions. In *National Wildlife Federation v. Federal Emergency Management Agency*, another district court dealt with FEMA's flood insurance program, but this time did not rely on the analysis from *Florida Key Deer* (or from *TVA v. Hill*, for that matter), and instead chose to apply the logic of *Sierra Club v. Babbitt*.⁵⁹ Similarly, in *Strahan v. Linnon*, the District Court for the District of Massachusetts held that Congress did not intend the ESA to apply to "nondiscretionary, ministerial acts of federal agencies" such as the issuance of boat permits⁶⁰ because "if the federal agency has no discretion to modify the activity at issue to accommodate the mandate of the ESA, then the consultation process would be pointless."⁶¹ Finally, in *Defenders of Wildlife v. Norton*, the D.C. Circuit applied the "discretionary only" standard, holding that the Bureau of Reclamation need not consult on water allocations on the Colorado River, because various obligations "account[ed] for every acre-foot of lower Colorado River water."⁶² As Jan Hasselman points out, these cases misapply *Sierra Club v. Babbitt*.⁶³ Furthermore, it is impossible to know when consultation would be pointless, because only through consultation can it be determined whether there are alternatives within the agency's discretion.⁶⁴

E. In the Absence of Clarity, Agencies Tend Not to Consult on Non-Discretionary Actions

Given the uncertainty created by conflicting interpretations of section 7 in the *Sierra Club v. Babbitt* line of cases on the one hand, and *TVA v. Hill* and *Florida Key Deer* on the other, agency practice is predictably confused. In this

57. Hasselman, *supra* note 17, at 159.

58. *Florida Key Deer v. Stickney*, 864 F. Supp. 1222, 1238 (S.D. Fla. 1994).

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

60. *Strahan v. Linnon*, 967 F. Supp. 581, 620 (D. Mass. 1995).

61. *Id.* at 62.

62. *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 69 (D.C. Cir. 2003).

63. Hasselman, *supra* note 17, at 167.

64. *Id.* at 168.

environment, agencies might be expected to avoid consulting where they can, simply to conserve agency resources, expedite agency activities, and to avoid the prospect of the Services from exerting control over the action the agency has planned.⁶⁵ It is rational, then, that agencies have tended to ignore indeed the consultation requirement in cases of arguably non-discretionary actions and even attempted to do so in cases involving discretionary actions.

The recent history of the ESA abounds with attempts to avoid consultation by various agencies. For example, in *Sierra Club v. Babbitt*, the Regional Solicitor of the Bureau of Land Management (BLM) considered a lack of discretion as a basis for not consulting before approving the path of a road on a previously granted right-of-way.⁶⁶ Similarly, in *Pacific Rivers Council v. Thomas*, the Forest Service tried to avoid consultation on the creation of its comprehensive Land and Resource Management Plan in Washington and Oregon by arguing that such plans alone do not constitute actions.⁶⁷ In another vein, agencies have sought to avoid consultation when they have taken a decision to allow ongoing action by third parties. For example, the Federal Energy Regulatory Commission (FERC) tried to avoid consultation on contract renewals in which FERC had not planned to alter terms, even though it had discretion to do so.⁶⁸ The Bureau of Land Management (BLM) has defended a lack of consultation on a policy not to change or contest existing rights-of-way on the grounds that the choice not to exercise its discretion was not an action.⁶⁹ The EPA's Office of Pesticide Programs declined to consult with the Services on pesticide regulations, arguing that the ecological risk assessments under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) duplicated jeopardy analysis.⁷⁰ As will be discussed in detail below, the transfers of the National Pollution Discharge Elimination System (NPDES) to state management that are the subject of *National Association of Home Builders* also involved agency uncertainty regarding the duty to consult on seemingly mandatory actions.⁷¹ Historically, the EPA has taken both positions on consultation. The EPA failed to consult on transfers of NPDES permitting authority to states for the first twenty years after the passage of the ESA; but the EPA has consulted on all the NPDES transfers after the transfer to South Dakota in 1993.⁷²

65. See Daniel J. Rohlf, *Jeopardy under the Endangered Species Act: Playing a Game Protected Species Can't Win*, 41 WASHBURN L.J. 114 (2001).

66. *Sierra Club v. Babbitt*, 65 F.3d 1508 (1995). The BLM did in fact opt to consult in that case before arguing in court that they were not required to, just as the EPA did in *National Association of Home Builders*.

67. See *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053-54 (9th Cir. 1994).

68. See *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998).

69. See *W. Watersheds Project v. Matejko*, 468 F.3d 1099 (9th Cir. 2006).

70. See *Wash. Toxics Coal. v. Dep't of Interior*, 413 F.3d 1024, 1031 (9th Cir. 2005).

71. See *Defenders of Wildlife v. EPA*, 420 F.3d 946, 952-54 & n.3 (9th Cir. 2005).

72. See *id.* at 952 n.3.

This trend is also visible at the political level. The Bush administration has taken steps to weaken consultation across the board by moving oversight of the consultation process out of the Services and into action agencies, such as the BLM, the Forest Service and the EPA.⁷³ This strategy seems to be part of an effort to keep consultation out of the hands of the Services.⁷⁴

II. *NATIONAL HOME BUILDERS V. DEFENDERS OF WILDLIFE: TESTING THE LIMITS OF SECTION 7 IN THE NINTH CIRCUIT AND THE SUPREME COURT*

A. *The Ninth Circuit Ruling and the Circuit Split over Discretionary Federal Actions*

As the controversy in *National Association of Home Builders*⁷⁵ worked its way through the courts, the case proved to be emblematic of the confusions in jurisprudence and agency practices surrounding section 7. The case centered on an apparent conflict between the ESA and the Clean Water Act of 1972 (CWA).⁷⁶ The CWA directs the EPA to administer the NPDES permitting program for each state until each state makes an application showing that it has met specific criteria, listed in section 402(b).⁷⁷ The nine criteria focus primarily on whether the state permitting agency has the requisite legal authority to administer the permitting program, but do not specify that the EPA can take wildlife considerations into account.⁷⁸ Upon a showing that the criteria are met, the EPA is mandated to transfer the program to the state. As a quintessential non-discretionary action, the transfer of authority represents a clear context in which to analyze the scope of the ESA section 7.

After receiving Arizona's application for transfer of the permitting program in 2002, the EPA initiated consultation with the FWS on whether the transfer would jeopardize the continued existence of endangered species. The local FWS field office feared the transfer would encourage development and discharges without consideration of impacts on listed species, and consequently requested that the EPA take these indirect effects of the transfer⁷⁹ into account in the decision to transfer the permit program.⁸⁰ The EPA disagreed, and took

73. Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 *ECOLOGY L.Q.* 249, 282–90 (2005).

74. *Id.*

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

76. Federal Water Quality Protection Act ("Clean Water Act") 33 U.S.C. §§ 1251–1387 (2006).

77. *Id.* § 1342(b).

78. *Id.*

79. Previous NPDES permits issued by the EPA before the transfer had findings of jeopardy and mitigation requirements to protect the critical habitat of the southwestern willow flycatcher, Pima pineapple cactus, Huachuca water umbel, cactus ferruginous pygmy owl, among others. FWS "feared that, without such mandatory consultation, Arizona would issue permits without mitigating measures. As a result, there could be harm to certain listed species and habitat . . ." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 952 (9th Cir. 2005).

80. *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2527.

the consultation to the national office of the FWS, which reversed the local office and granted a biological opinion that the transfer itself would not jeopardize any listed species. FWS determined first that the EPA's approval of the transfer would not be the cause of any impacts from the permits issued under the transferred program. The FWS also reasoned that since these state activities were not governed by the ESA's section 7 consultation mandate to federal agencies, Congress did not intend for the ESA to reach the impacts from those anticipated permits even if there were any.⁸¹ The EPA then asserted that the required section 7 consultation had been concluded and approved the transfer, based on the showing that Arizona had met the nine criteria listed in section 402(b) of the CWA.

Defenders of Wildlife and others successfully challenged the transfer as arbitrary and capricious in a direct petition to the Ninth Circuit. The court held that past reversals of the EPA's position on its consultation duties precluded a conclusion that the decision rested on reasoned decision making.⁸² In the NPDES transfer to Arizona, the EPA first consulted with the FWS and then argued later that it had no duty to do so.⁸³ Ultimately, at oral argument, the EPA refused to take a position on whether it had such a duty, despite having asserted both positions during the decision-making process.⁸⁴

Rather than remanding to the agency for clarification, the Ninth Circuit went on to examine the relationship between the CWA and ESA. The court rested its analysis on the plain language of the ESA (as had *TVA v. Hill*), observing that “[a]n ‘affirmative command’ by a superior authority—here, Congress—ordinarily carries with it both the obligation and the authority to obey that command.”⁸⁵ After analyzing the history and structure of the ESA section 7(a), the court concluded that the EPA had both the power and the duty to take the jeopardy of listed species into account when approving the transfer of permitting authority.⁸⁶ Thus, under the Ninth Circuit's construction, “the ESA applies to anything ‘authorized, funded, or carried out’ by a federal

81. *Id.*

82. *Defenders of Wildlife*, 420 F.3d at 961. In part, the history of the EPA's decision raised a question of how inconsistent the reasoning of the agency could be in the deliberations prior to a final decision. The Ninth Circuit observed that the EPA had held opposing positions on its ESA section 7 duties at different stages during the administrative process. *Id.* at 959. However, the Ninth Circuit did not strike down the EPA's decision based on this inconsistency, but rather on the agency's misinterpretation of section 7, which is the main focus of the Supreme Court decision. *Id.* at 960. In reviewing the Ninth Circuit opinion, the Supreme Court ruled that an agency is entitled to change its position before the final agency decision. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007). Thus, the final decision was not arbitrary and capricious merely because the agency changed its mind during the deliberations leading to the final decision, nor was it prejudicial to the parties. *Id.*

83. *Defenders of Wildlife v. EPA*, 420 F.3d 946, 952–54 & n.3 (9th Cir. 2005).

84. *See id.* at 960.

85. *Id.* at 964.

86. *See id.* at 967.

agency,”⁸⁷ including to actions the agency is mandated to take. In the Ninth Circuit’s view, the ESA is not limited to affecting just discretionary actions, but rather the ESA “would modify . . . every categorical mandate applicable to every federal agency.”⁸⁸ That is, if section 7 is read to apply to *any* action, then no action would be excluded.

In ruling that the EPA had a duty and authority to consult on the NPDES transfer, the Ninth Circuit seemingly split with the Fifth and D.C. Circuits. In *American Forest and Paper Products v. EPA*, the Fifth Circuit considered the EPA’s authority to mitigate risks to endangered species in the context of the NPDES program transfer to Louisiana.⁸⁹ The EPA had sought to impose restrictions on the transfer, as it had done in several other prior NPDES transfers, but the Fifth Circuit struck down those requirements, holding that the ESA did not authorize the EPA to modify the categorical mandate of the CWA.⁹⁰ The court declared the scope of the ESA’s consultation duty as irrelevant, since the ESA did not give the EPA any positive grant of authority to place restrictions on the program.⁹¹ Although some of the dissenters in the Ninth Circuit⁹² and the majority of the Supreme Court⁹³ portray this opinion as conflicting with the Ninth Circuit’s analysis, this opinion does not actually address the question of when consultation is required, but rather whether the ESA gives action agencies independent authority to implement the “reasonable and prudent alternatives” that they would not otherwise be authorized to take under their own statutes.⁹⁴ Similarly, in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, the D.C. Circuit struck down efforts by the Federal Energy Regulatory Commission (FERC) to use the ESA as a basis to impose conditions on licenses granted to dam operators because FERC supposedly lacked authority to implement the mitigation measures under its Federal Power Act licensing authority.⁹⁵ Again, the court did not discuss the scope of section 7(a)(2) (beyond a conclusory statement that it is “far-fetched” to read section 7(a)(2) to remove limits to FERC’s authority under the Federal

87. *Defenders of Wildlife v. EPA*, 450 F.3d 394, 398 (9th Cir. 2005) (Kozinski, J. dissenting from denial of hearing *en banc*) (quoting 16 U.S.C. § 1536(a)(2)).

88. *Id.* at 399 n.4.

89. *See Am. Forest & Paper Ass’n v. EPA*, 137 F.3d 291 (5th Cir. 1998).

90. *See id.*

91. *See id.* at 298 n.5.

92. *Defenders of Wildlife v. EPA*, 450 F.3d 394, 400 (9th Cir. 2007) (Kozinski, J. dissenting from denial of hearing *en banc*).

93. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2529 (2007).

94. *See Defenders of Wildlife v. EPA*, 420 F. 3d 946, 960 (9th Cir. 2006) (“Before the Fifth Circuit, the EPA ‘suggested’ that *section 7* compelled consultation regarding pollution permitting transfers and, when necessary to protect species, allowed conditioning such transfers on formal agreements requiring states to follow *section 7* procedures when issuing permits. The Fifth Circuit rejected the latter position and did not address the former.”).

95. *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992).

Power Act), but instead focused squarely on the question of what kind of authority the ESA grants to action agencies to take mitigations measures.⁹⁶

B. *The Supreme Court Weighs In*

Given the political hostility among conservatives to the environmental protections provided by the ESA and inconsistent agency practice, combined with the apparent circuit split, this case was a natural target for the new Supreme Court.⁹⁷ Here, the five-justice majority opinion held that the EPA was exempt from a consultation requirement under ESA section 7(a)(2), because section 402.03 of the Services' regulation limits the applicability of 7(a)(2) to discretionary actions.⁹⁸ Justice Alito, joined by Justices Roberts, Scalia, Thomas and Kennedy, framed the central question as whether the ESA "effectively operates as [an additional] criterion" added to the list of enumerated considerations in transferring a NPDES program under section 402(b) of the CWA, much as the Fifth Circuit characterized it in *American Forest and Paper Association*.⁹⁹

Before engaging in analysis of the ESA, the Court reviewed the Ninth Circuit's ruling that the EPA's decision was arbitrary and capricious because of the changes in position it took throughout the administrative process.¹⁰⁰ Relying on the Administrative Procedures Act¹⁰¹ standard that only final agency action is reviewable, the majority held that announcing a position during the decision-making process that contradicts a previously expressed legal position does not "constitute[] the type of error that requires a remand."¹⁰² In the end, since the EPA had already consulted with FWS, prior inconsistencies in the EPA's view of whether or not consultation was required were not relevant to the agency's ultimate decision.¹⁰³

Turning to the substantive question, the majority outlined the respective "shalls" in the two statutes: that the EPA Administrator "shall" transfer when the nine criteria are met and that the EPA "shall," in consultation with the Services, insure that the action does not jeopardize the continued existence of endangered species. Remarkably, given the rich case law on consultation, and the elaborate statutory and regulatory procedures involved in consultation, the majority simply concluded these two provisions irreconcilably conflict, without

96. *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998).

97. *See, e.g.*, the discussion of the rhetorical wars of words (and in one case firebombs) surrounding the ESA and other natural area protections in Holly Doremus, *Listing Decisions under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1031-33 (1997).

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

99. *Id.* at 2525.

100. *Id.* at 2529.

101. *See* 5 U.S.C. § 704 (2006).

102. *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2530.

103. *Id.*

discussion or analysis. Based on this supposed conflict, the majority determined that giving the ESA its full scope necessarily involves implicitly repealing section 402(b) of the CWA. To resolve this apparent problem, the majority erected a frame of analysis to reconcile the two statutes using the statutory canon against implied repeal. This canon has been used for centuries by judges to determine when and where later enacted statutes alter the effect of the existing statutory framework when the legislature has not expressly written out the specific amending effects of its new legislation.¹⁰⁴

In his opinion, Justice Alito applied the canon especially forcefully to conclude that requiring consultation would work a repeal of section 402(b) of the CWA (although, as discussed later, the opinion never really carries out the analysis required by the canon). Furthermore, the majority expands its conclusion to encompass much more than just the CWA, finding section 7 creates an implied repeal problem for “every [other] federal statute mandating agency action.”¹⁰⁵ Although “[s]ection 7(a)(2) by its terms applies to ‘any action authorized, funded or carried out by’ a federal agency—covering, in effect, almost anything an agency might do,” Justice Alito concluded that this statutory language “does not explicitly repeal [or amend or modify]¹⁰⁶ any provision of the CWA (*or any other statute*)”¹⁰⁷ Since such implied repeals are disfavored, “reading [the language of section 7(a)(2)] for all that it might be worth runs foursquare into our presumption against implied repeals.”¹⁰⁸

Although this canon against implied repeal analysis might have been a conceptually sufficient basis for the Court’s eventual holding, the majority actually uses the canon as the opening to the first stage of a *Chevron* analysis of the Services’ joint regulation.¹⁰⁹ The first question in the *Chevron* analysis is whether Congress has spoken to the issue, for “if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹¹⁰ As the Court pointed out in *TVA v. Hill*, the categorical language of the plain text of section 7(a)(2) does not appear to support the majority’s contention that the statute is ambiguous when it defines the scope of the section to be “any action authorized, funded or carried out” by an action agency. The majority instead looked to a wider “context and . . . place in the overall statutory scheme” to

104. Karen Petroski, Comment, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487, 491–499 (2004).

105. *Nat’l Ass’n of Home Builders*, 127 S. Ct. at 2533.

106. Amendments and partial repeals are treated identically to full repeals. *Id.* at 2533 n.8.

107. *Id.* at 2533 (emphasis added).

108. *Id.* at 2533.

109. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). See also *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2533–34 (2007).

110. *Chevron*. 467 U.S. at 842–43.

find ambiguity.¹¹¹ Rather than analyze section 7(a)(2) within the statutory scheme of the Endangered Species Act itself and the legislative context exhaustively laid out in *TVA v. Hill*, the majority reached to the entirety of the United States Code, and the many agency actions mandated therein, that would be implicitly amended if the phrase “any action” in fact signified an application to any action. In light of the ban on implied repeals, the action agency would be left with two conflicting mandates, and the court decided it was “left with a fundamental ambiguity that is not resolved by the statutory text.”¹¹² Since the plain text of the statute is quite clear on its face, the use of the canon must do the fundamentally important work in this opinion of reading in ambiguity to the statute, without which *Chevron* analysis would be inappropriate.

Having determined that the meaning of section 7(a)(2) is “ambiguous,” the majority then moved to the second step of *Chevron* to determine whether the reading of the statute embodied in section 402.03, with its apparent discretionary action exemption, is a permissible interpretation of the statute. The majority relied on several different strands to uphold the reasonableness of the interpretation. First, the majority argued that where an agency does not have discretion to stop an action, it will be unable to do any mitigation at all to “insure” the species is not jeopardized. Therefore, the majority asserted that it would not be reasonable to engage in the inquiry of what mitigation measures could be implemented.¹¹³ Secondly, the majority dismissed the alternative interpretations of section 402.03 given by the Ninth Circuit majority and Justice Stevens in his dissent.¹¹⁴ The majority invoked the Mexican trucking case, *Department of Transportation v. Public Citizen*,¹¹⁵ in which the Supreme Court held that the Department of Transportation was not required to carry out a National Environmental Policy Act (NEPA) analysis. The Court in that case reasoned that the Department had not undertaken an “action,” the trigger for a NEPA analysis, because any action had been in fact taken by the President by issuing the relevant orders, and not by the agency in complying with the President’s command.¹¹⁶ Ultimately, the majority pointed to the history of section 402.03, apparently without intentional irony, suggesting that other readings ignore the history of the regulation, particularly the addition of the single word “discretionary” between the proposed and final rules. The court concluded “[i]n short, we read [section] 402.03 to mean what it says: that [section] 7(a)(2)’s no-jeopardy duty covers only discretionary agency

111. *Nat’l Ass’n of Home Builders*, 127 S. Ct. at 2534 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000)).

112. *Id.* at 2534.

113. *See id.* at 2534–35.

114. *See* discussion regarding Stevens’ dissent *infra* Part II.C.

115. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004).

116. A similar conclusion was reached by the Ninth Circuit in *Ground Zero Ctr. for Nonviolent Action v. Dep’t of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004); *cf. Public Citizen*, 541 U.S. 752.

actions”¹¹⁷ (although, as the dissent points out, that isn’t what the section 402.03 actually says).¹¹⁸

Finally, the majority addressed two arguments against giving only a limited scope to section 7(a)(2). First, the majority dispatched the precedent of *TVA v. Hill* by suggesting that since that case came before the 1986 promulgation of section 402.03, that Court had not passed upon the reasonableness of the Services’ interpretation of the statute. Furthermore, the closing of Tellico Dam was a discretionary action, so Justice Alito maintained that the holding of *TVA v. Hill*, that the “language [of section 7(a)(2)] admits of no exception,” does not conflict with the exception the majority finds in section 7(a)(2) in *National Association of Home Builders*.¹¹⁹

Secondly, the court dismissed the argument that the Arizona transfer is in fact a discretionary action because the transfer does not involve the right *kind* of discretion.¹²⁰ Although the EPA does have discretion in determining whether the nine criteria in CWA section 402(b) are met, the majority held that because these do not involve considerations of wildlife or ecological values, no consultation was required. Thus, the majority’s limitations of the scope of section 7(a)(2) extend well beyond the limitations in section 402.03 that the majority purported to defer to. The text of section 402.03 is quite clear that section 7(a)(2) applies to “*all* actions in which there is discretionary Federal involvement or control,” not just wildlife-related discretion.¹²¹ The majority, however, indicated that the requisite discretion to trigger consultation must pertain to wildlife or ecological values. Although this reading contradicts the plain text of the regulation, the majority supported this reading with “formal letters” from the Services. The majority granted these agency interpretations of the regulations *Auer* deference, which means upholding them “unless plainly erroneous or inconsistent with the regulation.”¹²² In sum, the majority deferred to a reading of section 402.03 in which section 7(a)(2) applies solely to actions in which the agency already has discretion to consider and mitigate harms against endangered species, even though neither the statute nor the regulation suggest such a limitation.

C. *The Dissent*

Justice Stevens, in a dissent joined by Justices Breyer, Souter and Ginsburg, accused the majority of misrepresenting the holding in *TVA v. Hill*, misrepresenting the text of section 402.03, and failing to make a serious effort

117. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2536 (2007).

118. *Id.* at 2542. See discussion *infra* at Part II.C.

119. *Nat’l Ass’n of Home Builders*, 127 S. Ct. at 2537–38.

120. *Id.* at 2538.

121. 50 C.F.R. § 402.03 (2007) (emphasis added).

122. *Nat’l Ass’n of Home Builders*, 127 S. Ct. at 2538 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

to reconcile the CWA and the ESA. The dissenters pointed out that in *TVA v. Hill*, the Supreme Court was “[u]nconcerned with whether an agency action was mandatory or discretionary,” but rather held that the text of section 7 “reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.”¹²³ The *TVA v. Hill* Court had concluded, based on the numerous proposed and prior exceptions omitted from the legislation and “the limited number of ‘hardship exemptions’ . . . none of which would apply to federal agencies . . . that ‘there are no exemptions in the Endangered Species Act for federal agencies.’”¹²⁴ Nevertheless, the majority in *National Association of Home Builders* now somehow had discovered “that the ESA contains an unmentioned exception for nondiscretionary agency action.”¹²⁵

The dissent suggested a very different reading for section 402.03. Justice Stevens pointed out that the language of section 402.03 is broadly inclusionary of “all actions in which there is discretionary Federal involvement or control.”¹²⁶ Thus, rather than limiting consultation to “only” discretionary actions, what the regulation in fact does is “eliminate[] any possible argument that the ESA does not extend to situations in which the discretionary federal involvement is only marginal.”¹²⁷ The dissent pointed out that if the agency meant to limit the scope of section 7, it could have substituted the word “only” for the word “all” in section 402.03, just as the majority carelessly did, and “mentioned [that intent] somewhere in the text of the regulations or in contemporaneous comment about them.”¹²⁸

Lastly, Justice Stevens demonstrated that the majority goes wrong in at least two ways in its conclusion that consultation under ESA section 7(a)(2) is incompatible with CWA section 402(b). First, as described above, the regulatory framework of the Services joint regulation provides for a great deal of leeway to develop mechanisms to avoid jeopardy, as required by the ESA, and effect the transfer, as required by the CWA.¹²⁹ The ESA is so robust in its provisions for reconciliation that it even provides for a cabinet level Endangered Species Committee to resolve such conflicts.¹³⁰ Secondly, since the EPA retains oversight over the NPDES permit program after the transfer under a Memorandum of Agreement that the EPA requires of transferee states,

123. *Id.* at 2540 (Stevens, J., dissenting) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978)).

124. *Id.*

125. *Id.* at 2541.

126. 50 C.F.R. § 402.03 (2007).

127. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2542 (2007).

128. *Id.* (citing to *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005) (holding that an agency is free within “the limits of reasoned interpretation to change course” only if it “adequately justifies the change”).

129. *Id.* at 2544–46.

130. *Id.* at 2546–47 (citing 16 U.S.C. § 1536(e)–(l)).

the EPA could structure its oversight to “insure” that jeopardized species are not harmed.¹³¹

In a separate dissent, Justice Breyer offered a final criticism of the majority’s analysis of agency discretion. By its very nature, administrative discretion is always limited in some form to a “permissible class of actions”¹³² Whatever that class may have been under the original CWA, after the ESA was passed, that range has to be limited to actions that do not jeopardize endangered species.¹³³

III. THE FAULTY FOUNDATIONS OF *HOME BUILDERS*: FLAWS IN THE MAJORITY’S REASONING

A. *The Danger of Loose Canons: The Court Misapplies the Canon against Implied Repeal*

Although there are a variety of ways courts have addressed the scope of section 7, the majority embarked on a relatively new path based on the canon against implied repeal. Unfortunately, the majority eschewed a principled analysis of the respective statutes. Instead, it used the canon in order to find ambiguity in the clear language of the ESA, and then used a deeply flawed *Chevron* analysis of section 402.03 to hold that section 7(a)(2) is limited to discretionary federal actions.

In *Chevron v. Natural Resources Defense Council*, the Supreme Court held that “if the intent of Congress is clear, that is the end of the matter.”¹³⁴ Only when the standard interpretive tools fail to reach a clear meaning does the court then defer to the agency’s “reasonable” interpretation of the statute.¹³⁵ Thus, in order to uphold the regulation under a *Chevron* analysis to section 402.03’s discretionary action language, the *National Association of Home Builders* Court must have first found a way to claim that the ESA is ambiguous. Presumably, this would entail an inquiry into the intent of Congress. While the *TVA v. Hill* Court already found that “one would be hard pressed to find a statutory provision whose terms were any plainer than those in section 7 of the Endangered Species Act,”¹³⁶ the *National Association of Home Builders* majority did not even attempt to look to the text of the statute or its history.

Instead, the majority went searching for ambiguity, and found it not in the statute itself, but rather in the *effect* of the statute. Although Congress may have expected its broad declaration of the scope of section 7(a)(2) to have an equally broad effect, the Supreme Court proved reluctant to allow Congress to work

131. *Id.* at 2547–48 (citing EPA regulations at 40 C.F.R. § 123.24(a)).

132. *Id.* at 2552–53 (Breyer, J. dissenting) (quoting LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 359 (1965)).

133. *Id.* at 2553. (Breyer, J. dissenting).

134. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

135. *Id.* at 843.

136. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978).

broad consequences on previously enacted legislation.¹³⁷ In the majority's hands, it is this judicial reluctance to permit broad language to have broad effect, rather than the structure or language of the statutes involved, that created ambiguity about the intended scope of the consultation.

Although the canon against implied repeals is an old one with some well-defined contours, the majority broke with its own prior practice and the purpose of the canon to reach this result. The canon has been employed by judges since the early seventeenth century to balance the need to enact new statutes with a need to prevent undue (and unintended) disruptions of the existing legal fabric.¹³⁸ Historically, the canon against implied repeals manifests this balance by directing judges not to read an implied repeal of an earlier statute by a later-enacted one except when the circumstances strongly suggest that the work of the current legislature must necessarily change the work of prior ones.¹³⁹ Although it is often a powerful canon, it has not traditionally been unlimited in its scope.¹⁴⁰ In his own description of the operation of the canon, Justice Alito laid out the scope of the canon: implied repeals "will not be presumed unless the intention of the legislature to repeal [is] clear and manifest;" "the later statute 'expressly contradicts the original act;'" implied repeal "is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all;" "[the] two statutes are in 'irreconcilable conflict' or where the later act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'"¹⁴¹ While there is a wide range of circumstances where implied repeals will not be read into a statute, these limits imply there are also circumstances where the repeal is warranted.

Although the majority did not question whether the limits apply, all three of these exceptions do apply, suggesting that the two statutes should be reconciled if possible, but if not, then an implied repeal of the CWA by the ESA would be appropriate here. First, the intent of Congress is clear. Second, the amending statute would become a nullity without implied repeal. Third, the 'irreconcilable conflict' the majority insists on is precisely the circumstance in which implied repeal is appropriate.¹⁴² If they can be reconciled, the canon itself suggests they must be, since "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."¹⁴³ As an earlier Court held, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are

137. Petroski, Comment, *supra* note 104, at 501. Petroski also notes that the canon has the possibility of inconsistent application.

138. *Id.* at 491–499.

139. *Id.* at 511–518.

140. *See generally id.*

141. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2533 (2007) (citations omitted).

142. *Id.* at 2532.

143. *Morton v. Mancari*, 417 U.S. 535, 501 (1974) (quoting *Georgia v. Penn. R.R. Co.*, 324 U.S. 439, 456–57 (1945)).

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.”¹⁴⁴ When each of these exceptions is examined, the canon against implied repeal leads to the opposite result from the one that the majority reached.

1. The First Exception: Implied Repeal Where there is Clear Legislative Intent

As the majority describes: “‘repeals by implication are not favored’ and will not be presumed unless the ‘intention of the legislature to repeal [is] clear and manifest.’”¹⁴⁵ The majority makes no attempt to consider what the intent of Congress might have been, much less whether it was clear and manifest.¹⁴⁶ The majority ignored ample independent evidence of congressional intent to add a duty to consult to all agency actions. The plain language of section 7(a)(2) describes its own scope as applying to “any” action. This word “any” is not haphazard error, nor is it a vague choice without weight. Congress explicitly added that single word to the phrase “actions authorized, funded or carried out by [the action agencies].”¹⁴⁷ It is ironic how Justice Alito gives such care to avoid “robb[ing] the word ‘discretionary’ [in section 402.03] of any effect”¹⁴⁸ when the word was added without comment or explanation to a *regulation* by an executive agency, while in the same breath reading out of the ESA a word that was specifically chosen by Congress.¹⁴⁹

This congressional intent is reflected in the structure of section 7(a) after Congress split it into distinct mandates in 1979; one governing only the use of an agency’s “authorities” for recovery and a second consultation mandate covering “any action.”¹⁵⁰ This structure of two separate sections, which differ in the scope of the actions they apply to, indicates that Congress considered the question presented to the Court and answered it directly. Furthermore, as discussed in *TVA v. Hill*, Congress expressly considered and rejected limiting section 7(a) to only discretionary acts in 1973. Congress has since reaffirmed

144. *Id.* at 551.

145. *Nat’l Ass’n of Home Builders*, 127 S. Ct. at 2532 (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)).

146. Except for the quote of the language from *Chevron* and the quotations concerning the scope of the canon against implied repeal, the majority opinion nowhere mentions “intent”.

147. *See* Pub. L. No. 96-159, 93 Stat. 1225 (1979).

148. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2536 (2007).

149. *See* U.S. CONST. art. VI, cl. 2.

150. This distinction is also reflected in the interpreting regulations which draw a distinction between “Conservation Recommendations” and “reasonable and prudent alternatives.” Conservation Recommendations result from section 7(a)(1) consultations and “involve voluntary measures that the Federal agency has the discretion to undertake.” Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19926, 19931 (June 3, 1986) (codified at 50 C.F.R. pt. 402). Reasonable and prudent alternatives are the result of section 7(a)(2) consultation and are clearly distinguished from Conservation Recommendations as “represent avenues of fulfilling the action without violating the jeopardy standard” which is “is the ultimate barrier through which Federal agencies may not pass in conducting their actions.” *Id.*

that rejection on three separate occasions spanning a decade.¹⁵¹ The Court's own exhaustive explication in *TVA v. Hill* found that the intent of Congress was clear and written in the plainest terms possible.¹⁵² The majority's attempt to evade the plain meaning of the statute recalls the words of another Supreme Court opinion engaged in a careful application of the canon against implied repeal: "In light of the comprehensiveness of the statutory scheme . . . , we doubt that even the most meticulous draftsman would have concluded that Congress also needed to amend pro tanto the [earlier statute]."¹⁵³ In the face of such clear evidence, it is simply not tenable that the intent of Congress is ambiguous.

The lack of any analysis of congressional intent in the majority opinion stands in marked contrast to explorations of intent in the use of the canon against implied repeal in prior Supreme Court rulings. For example, in *Morton v. Mancari*, one of the leading examples of the use of the canon,¹⁵⁴ the Court pursued a searching inquiry into the structure of the statute, its history, and the policy grounds for the prior statute to uncover "independent evidence" of congressional intent.¹⁵⁵ Here, the majority's analysis is a conclusory statement that they are unable to believe that the ESA could conceivably "override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species."¹⁵⁶ This cursory analysis is even more troubling since the Court expressly considered and rejected this argument in *TVA v. Hill*.¹⁵⁷

The comparison of the cursory analysis in *National Association of Home Builders* with the analysis in *Morton v. Mancari* is also illustrative. In considering a conflict between a 1934 statute giving preference to Indians in hiring to the Bureau of Indian Affairs and the more general ban on ethnic discrimination in hiring, the court reconciled the two statutes by finding a common purpose:

A provision aimed at furthering Indian self-government by according an employment preference within the BIA . . . can readily co-exist with a general rule prohibiting employment discrimination on the basis of race.

151. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978), 1979, Pub. L. No. 96-159, 93 Stat. 1225 (1979), and 1982 Pub. L. No. 97-304, 96 Stat. 1411 (1982).

152. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978); see also *Babbitt v. Sweet Home Chapter, Communities for Great Or.*, 515 U.S. 687, 692 (1995) ("Section 7 requires federal agencies to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of endangered species 'or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical'").

153. *Arg. Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437-38 (1989).

154. Petroski, Comment, *supra* note 104; see also WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (4th ed. 2007).

155. *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

156. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2533 (2007).

157. *Tenn. Valley Auth.*, 437 U.S. at 184, n.29.

Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the [provisions at issue].¹⁵⁸

It is this rejection of formalism in favor of congressional purposes that Justice Breyer urges in concluding that “the very purpose of [section 402(b) of the Clean Water Act] is to preserve the state of our natural environment—a purpose that the Endangered Species Act shares. That shared purpose shows that *section 7(a)(2)* must apply to the Clean Water Act *a fortiori*.”¹⁵⁹

While absurd results can inform an analysis, the Court should carefully consider whether Congress could have in fact intended the result, however ill-advised it may seem. For example, there is a sharp contrast to the *National Association of Home Builders* majority opinion in the D.C. Circuit’s use of the canon in *Public Citizen v. Young*.¹⁶⁰ There, the court of appeal engaged in a thorough examination of congressional purpose before holding that the extraordinarily rigid language in the statute in question¹⁶¹ did not create an absurd result, even though the D.C. Circuit felt that it was “a clear loss for safety.”¹⁶²

The majority in *National Association of Home Builders* gave no thought to the policy goals of the CWA and ESA. The Court should have recognized that giving force to the ESA would not undermine the water quality objectives of the NPDES permitting system. Not only are the goals compatible (if not complementary), the function of the two provisions suggest that the ESA section 7 should prevail. The consultation requirement is the “substantive cornerstone” of the duty the ESA places upon agencies.¹⁶³ In marked contrast, the NPDES transfer is a procedural requirement. In the absence of the transfer, the NPDES permitting would still be administered, just by a different government body. That the majority did not even consider the policy objectives of Congress is another indication that the majority was not concerned with congressional purposes.

2. *The Second Exception: Implied Repeal to Avoid Nullifying a Later Statute*

The second circumstance in which the canon requires that a statute not be impliedly repealed arises when the alternative reading renders the words of the later statute meaningless. “We will not infer a statutory repeal . . . unless such a construction ‘is absolutely necessary . . . in order [for the] words [of the later

158. *Mancari*, 417 U.S. at 550.

159. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2552 (2007) (Breyer, J., dissenting).

160. *Pub. Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987).

161. 21 U.S.C. § 376(b)(5)(B) (1982) (current version at 21 U.S.C. § 321 (2006)).

162. *Young*, 831 F.2d at 1113.

163. *Interagency Cooperation—Endangered Species Act of 1973, as Amended*, 51 Fed. Reg. 19,926, 19,934 (June 3, 1986) (codified at 50 C.F.R. pt. 402).

statute] shall have any meaning at all.”¹⁶⁴ Yet, this is precisely the effect of the majority’s reading of section 7(a)(2). If section 7(a)(2) applies only to discretionary actions, it is identical to section 7(a)(1) in effect, rendering section 7(a)(2) mere surplusage.

To see why this is so, consider the differences between section 7(a)(1) and section 7(a)(2). Section 7(a)(1) commands that “[a]ll other Federal agencies [besides the FWS] shall . . . utilize their *authorities* in furtherance of the purposes of this Act by carrying out programs for the *conservation* of endangered species and threatened species.”¹⁶⁵ Conservation itself is defined in the ESA as the “use . . . of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which measures provided pursuant to this Act are no longer necessary.”¹⁶⁶ In other words, action agencies are directed to consult with the Secretary on how to use their discretionary authorities to *improve* the situation of endangered species.

Section 7(a)(2) differs from this language in only three places, two of which are critical.¹⁶⁷ First, the command of section 7(a)(2) to consult applies to “any action authorized, funded, or carried out by such agency,” while that of section 7(a)(1) applies to the utilization of agency “authorities.” If section 7(a)(2) does apply only to discretionary actions, it becomes entirely subsumed within 7(a)(1) and is left without meaning. “[A]ny *discretionary* action” is necessarily part of an agency’s “authorities.” Discretionary actions are those actions within the “permissible class of actions,” to quote Justice Breyer, that an agency is legally allowed, but not required, to take.¹⁶⁸ Put another way, every discretionary action an agency may take to conserve species is necessarily an exercise of an agency authority.

If the Court’s reading is to avoid eliminating the effect of section 7(a)(2), the surviving difference of section 7(a)(1) must be between the command of section 7(a)(1) to utilize agency discretion to conserve species, and that of 7(a)(2) to utilize discretion to consult with the Services to avoid jeopardizing the existence of listed species. However, the second command is only a subset of the first. By the statute’s own definition, “conservation” means “bring[ing] any endangered species or threatened species to the point at which” it no longer needs protection.¹⁶⁹ Bringing a species back to healthy status includes refraining from actions which would jeopardize the species. As the Services put it in the explanation of their joint regulation, “[t]he very concept of ‘jeopardy’

164. *Nat’l Ass’n of Home Builders*, 417 U.S. at 2532 (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988)).

165. 16 U.S.C. § 1536(a)(1) (2006) (emphasis added).

166. 16 U.S.C. § 1532(3) (2006).

167. The third difference is that section 7(a)(2) applies to “each Federal Agency” equally, including FWS. In section 7(a)(1), FWS has greater responsibilities than do other agencies.

168. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2552 (2007) (Breyer, J., dissenting).

169. 16 U.S.C. § 1532(3).

is that a Federal agency should not authorize, fund, or carry out an action that would injure a listed species' chances for survival to the point that recovery is not attainable. If survival is jeopardized, recovery is also jeopardized."¹⁷⁰ Thus, under the Court's reading, section 7(a)(2) becomes a subset of section 7(a)(1), since any action required of an agency under section 7(a)(2) would already be required as part of section 7(a)(1). But the scope of the two provisions must differ if the 1979 legislation dividing section 7(a) into two parts is to be intelligible. Congress must have intended for section 7(a)(2) to apply to "any" action, not just discretionary ones; just as every indication from the legislative history suggests and as the statute says in plain English.¹⁷¹

The Court goes even further by taking a sweeping view of how to apply the canon against implied repeal. The majority interprets an implied amendment of responsibilities as being just as unacceptable as an implied repeal.¹⁷² Thus, the majority suggests it would be an improper repeal if section 7(a)(2) even influenced the list of factors considered by the EPA in its NPDES transfer decision. "While the EPA may exercise some judgment in [transferring the NPDES program] . . . [n]othing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself"¹⁷³ This formulation suggests that the ESA cannot alter the factors an agency may consider in its decisions, leaving the statute to affect only decisions where agencies were already mandated to consider wildlife values. In that case, it is difficult to discern the actual legal effect of the enactment of section 7(a)(2). As applied by the majority, the canon appears to render the section of no discernable effect, suggesting that the interpretation given by the majority has the kind of nullifying result that the canon against implied repeal does not allow.

3. *The Third Exception: Repeal Implied Where Statutes Cannot be Reconciled*

The third limitation on implied repeal is that "[a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict.'"¹⁷⁴ The majority emphasizes that the ESA expressly contradicts the CWA by adding a requirement to the list of CWA criteria for transferring an NPDES permit program to a state, making it unclear "which command must give way."¹⁷⁵ The majority reads a "positive repugnancy" between the statutes,¹⁷⁶

170. Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,934 (June 3, 1986) (codified at 50 C.F.R. § 402).

171. Webster's Dictionary defines "any" as "every - used to indicate one selected without restriction." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 53 (10th ed. 1996).

172. See *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2533 n.8.

173. *Id.* at 2537.

174. *Id.* at 2532 (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003)).

175. *Id.* at 2534.

176. *Id.* at 2533 n.8 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974)).

and that section 7(a)(2) requiring consultation on *any* action “runs foursquare into our presumption against implied repeals.”¹⁷⁷ However, by the terms of *Branch v. Smith*, the very 2003 Supreme Court case Justice Alito cites as authority for the canon against implied repeal, the appropriate action is not to strike down the later, repealing statute, but rather to conclude that there has been an implied repeal of the *earlier* statute. In *Posadas v. National City Bank*, also cited by Justice Alito, the Court described irreconcilable conflict as one of “two well-settled categories of repeals by implication: . . . where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.”¹⁷⁸ Indeed, the Supreme Court held more recently that where the later statute institutes a particularly comprehensive set of new policies, Congress could not have been expected to enact pro tanto repealers for every statute potentially affected.¹⁷⁹ Thus, if the majority is correct that no reconciliation is possible, then the canon against implied repeal, properly applied, indicates that if there were a conflict between the ESA and the CWA, implied repeal of the later-enacted CWA would be the appropriate outcome.

B. The Court’s Failure to Reconcile the ESA and the CWA

Given the purpose of the canon to avoid accidental alterations of earlier acts of the legislature, it is not surprising that a guiding principle of the canon is to goad judges into reconciling statutes.¹⁸⁰ “When 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.”¹⁸¹ If the majority were seriously trying to avoid implied repeal, there are a host of options for reconciling these statutes that the majority ignored. First, as the dissent suggests, the majority could find grounds for reconciliation in the ESA itself, which provides for the Endangered Species Committee to waive requirements to avoid jeopardy.¹⁸² Indeed, the FWS regulation interpreting the ESA suggests exactly this option to agencies that have no authority to follow the recommendations of the biological opinion. “If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption.”¹⁸³ A second

177. *Id.* at 2533.

178. *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936) (“There are two well-settled categories of repeals by implication: (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.”).

179. *Arg. Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437–38 (1989).

180. *See* Petroski, Comment, *supra* note 104.

181. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

182. *See Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2546 (2007) (Breyer, J., dissenting); *see also* 16 U.S.C. § 1536(h)(1) (2006).

183. 50 C.F.R. § 402.15(c) (2007).

straightforward approach to reconciling these statutes stems from the simple observation that ESA section 7(a)(2) imposes both a procedural requirement to consult and a substantive requirement to comply with reasonable and prudent alternatives as deemed necessary by the Secretary under section 7(b).¹⁸⁴ Thus, a reconciliation of the statutes could take the form of suggested alternatives which are not binding upon the agency.¹⁸⁵ A third approach would be to hold that the EPA must, if it can, adopt an interpretation of its own statute allowing it to comply with both mandates.

The dissent in *National Association of Home Builders* suggests several such options grounded in the CWA. For example, EPA regulations allow the EPA to transfer NPDES authority to a state after entering into a Memorandum of Agreement (MOA) with the state outlining the conditions under which the EPA would exercise on-going oversight.¹⁸⁶ Instead of prohibiting any possibility of reconciliation, as the majority does, a court that takes its duty to reconcile seriously could hold that MOA conditions must include requirements to comply with water quality standards designed to protect endangered species (the MOA governing Maine's NPDES program includes such requirements, for example).¹⁸⁷

Although the majority decries this approach as “paper[ing] over” the conflict,¹⁸⁸ such “paper[ing] over” is the reconciliation that the canon of implied repeal directs courts to do. If the courts have a duty to give effect to statutes enacted by Congress, then giving effect to the ESA would require agencies to find some way interpret their enabling statutes in a way that allows them the necessary discretion to avoid jeopardy. This principle is supported by Justice Breyer's observation that action agencies have a range of permissible choices within their discretion, which may be narrowed by subsequent mandates such as the ESA.¹⁸⁹ Congress should be understood to have intended to change the range of these options when it passed the ESA. This theory suggests that one approach toward reconciliation of the ESA is to change the range of permissible interpretations action agencies give their own statutes to

184. Although the Court consistently misrepresents that section 7(a)(2) conflicts with the obligations of the CWA, a careful reading of the statute shows that section 7(b) is the only conflicting mandate in the statute. Thus, the court uses the conflict with one part of a statute to limit a completely different part of the statute. In fact, section 402.03 does not interpret the conflicting element of the statute, and so is not the relevant target for *Chevron* deference.

185. See Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,928 (June 3, 1986) (codified at 50 C.F.R. § 402) (“[T]he Service issues biological opinions to assist the Federal agencies in conforming their proposed actions to the requirements of section 7. However, the Federal agency makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2).”); see also *Bennett v. Spear*, 520 U.S. 154, 168–70 (1997).

186. See *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2547–48; see 40 C.F.R. § 123.24 (2008).

187. See 40 C.F.R. § 123.24; State Program Requirements, Approval of Application by Maine To Administer the National Pollutant Discharge Elimination System (NPDES) Program, 66 Fed. Reg. 12,791, 12,794 (February 21, 2001).

188. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2533 n.7 (2007).

189. See *id.* at 2553 (Breyer, J., dissenting).

include only interpretations that insure it does not jeopardize endangered species. It does not matter which of the various possibilities might be chosen for reconciling the Acts, only that the chosen path was permissible under *Chevron*.

Quite apart from the erroneous conclusions the majority reaches in applying the canon against implied repeal, the majority makes another conceptual error that undermines its holding. The majority's logic fails to distinguish between statutes passed before the ESA and those passed after. In the course of resolving the supposed conflict between the ESA and CWA specifically, the Court indicates that "the language of *section 7(a)(2)* does not explicitly repeal any provision of the CWA (or any other statute)," suggesting that the ESA is inferior to every other mandate with which it could be viewed as being in conflict. The problem here is that the logic of the canon of implied repeal can only apply to mandates that existed before the Endangered Species Act was enacted—that is, statutes that the ESA might conceivably have *repealed*. Section 7(a)(2) is part of the existing statutory framework when later statutes are passed. Essentially, for later statutes, the canon works against the majority's holding, for absent some clear exemption from the consultation requirement, the consultation duty of section 7(a)(2) should unambiguously apply to "any action" mandated in later enacted statutes.

Justice Alito's misuse of the canon seems to reflect a formalism that loses sight of the rationale for the canon's existence in the first place. The original purpose of the canon derives from the very practical concern that legislatures cannot and do not review every single statute for potential conflicts when enacting new laws, so courts should seek to guard against the possibility that new laws will inadvertently override the prior good judgment of the legislature.¹⁹⁰ Read in that light, one must ask whether the majority here has good reason to believe that Congress was unaware of the enactment of the Clean Water Act when it took up work on the Endangered Species Act. Given the profoundly compatible purposes of the two major Acts, passed within one year of each other, the majority's assumption that Congress was unaware of the Clean Water Act is simply not credible. It may be that the majority simply did not think carefully, preferring instead to apply a mere mindless textualism, or it may be that they simply displayed a conservative's hostility to the Endangered Species Act.¹⁹¹

C. *Misapplying Chevron: The Majority Misinterprets the Services' Joint Regulation*

Having concluded that the canon against implied repeals renders section 7(a)(2) ambiguous, the majority moves to the second step of its *Chevron*

190. Petroski, Comment, *supra* note 104, at 500.

191. See Doremus, *supra* note 73.

analysis and defers to the Services' joint regulation, which it says limits consultation to only actions where the agency has the discretion to consider impacts to endangered species. However, the construction of the regulation that the majority defers to bears no resemblance to the rule the Services actually promulgated. The majority's reading makes more than a few logical errors.

The first error is that the majority misreads the plain text of section 402.03 itself. As Justice Stevens said in his dissent,

The Court is simply mistaken when it says that it reads section 402.03 'to mean what it says: that section 7(a)(2)'s no-jeopardy duty covers *only* discretionary agency actions' That is not, in fact, what section 402.03 'says.' The word 'only' is the Court's addition to the text, not the agency's.¹⁹²

On its face, the regulation in question is silent with respect to non-discretionary actions.¹⁹³ The proposition that discretion implies a duty to consult is not logically equivalent to the statement that the absence of discretion implies an absence of a duty, any more than the statement "all red wines are included in the sale" tells us anything about the prices of white wines. The majority's addition reflects a conceptual error that is familiar to students of logic as the common misconception that a proposition implies its inverse.¹⁹⁴ A careful inquiry into the full rule, its history, and the realities of consultation in today's administrative state shows that the majority's insertion is almost certainly wrong.

First, the majority's reading of section 402.03 is at odds with the entire regulation in which it is embedded¹⁹⁵ and the agencies' own description of the rule. The preamble to the final rule describes the sweep of section 7(a)(2) as applying to all federal actions no fewer than seven times.¹⁹⁶ The explanation of

192. *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2552 (Stevens, J., dissenting).

193. 50 C.F.R. § 402.03 ("Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control").

194. Given a proposition, "if A then B," only the contrapositive, "if not B then not A," is a valid inference. Here the court attempts to infer the inverse, "if not A then not B" from section 402.03—an invalid inference. See generally MARK ZEGARELLI, *LOGIC FOR DUMMIES* (2007).

195. 50 C.F.R. §§ 402.01–.16 (2007).

196. Intergovernmental Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,927 (June 3, 1986) (codified at 50 C.F.R. § 402) ("formal consultation procedures (§ 402.14) are required for actions that may affect listed species" since "actions" means "all activities or programs of any kind" under § 402.01); *id.* at 19,929 ("The Service cautions that all Federal actions including "conservation programs" are subject to the consultation requirements of 7(a)(2)"); *id.* at 19,930 ("the phrase "actions that are intended to conserve listed species or their habitat" was restored from the 1978 rule because of the decision to require Service review of all Federal actions that may affect listed species or their critical habitat."); *id.* at 19,933 ("Since all future Federal actions will at some point be subject to the section 7 consultation process pursuant to these regulations,"); *id.* at 19,938 ("[The Services] ha[ve] slightly altered its consultation procedures in this final rule to ensure that all Federal actions that "may affect" listed species receive some degree of review under informal or formal consultation."); *id.* at 19,941 ("the conference requirement [a procedure analogous to section 7 consultation for proposed species] applies to all Federal actions"); *id.* at 19,945 ("Federal agencies still have an obligation to review all of their actions to determine whether formal consultation under § 402.14 is required.").

the final rule states unequivocally “the Service cautions that all federal actions . . . are subject to the consultation requirements of section 7(a)(2) if they ‘may affect’ listed species or their critical habitats.”¹⁹⁷ The definition of the term “action” was revised from the proposed rule “because of the decision to require Service review of *all* Federal actions that may affect listed species or their critical habitat.”¹⁹⁸ Furthermore, in describing formal consultation, the Services state that “Federal agencies have an obligation under section 7(a)(2) of the Act to determine whether their *actions* may affect listed species and whether formal consultation is required under these regulations.”¹⁹⁹ The definition of “action” as “*all* activities or programs *of any kind*,”²⁰⁰ is categorical. The explanation of the regulations contrasts this mandate with requirements for “the timing of this review, which is solely at the discretion of the Federal agency.”²⁰¹ Lest there be any doubt as to the Services’ understanding of section 7(a)(2), the preamble twice refers to the jeopardy standard as the “ultimate barrier past which federal actions may not proceed, absent the issuance of an exemption,” as “Congress intended.”²⁰² Surely, if the Services intended section 7 to apply only to discretionary actions, the Services would have mentioned this where the “ultimate barrier” is described. In the entire discussion of the triggers for formal consultation, action agency discretion is not mentioned. Indeed, section 402.14(b) expressly lists the circumstances in which an agency is exempt from formal consultation, but no mention is made of agency discretion.²⁰³ Nowhere in the entire final rule are these descriptions countered by any mention of an exemption for mandatory actions from the scope of the section 7(a)(2).

Although the majority suggests that its reading is the only way to render the regulations meaningful, in fact the majority’s reading renders several other parts of the same regulation meaningless. For instance, the regulations clearly anticipate situations in which the action agency has no options within its authority: “A ‘jeopardy’ biological opinion 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.”²⁰⁴ Furthermore, the regulation states that in the event “the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption.”²⁰⁵ The only circumstance in which such language would have any meaning would be when the agency had no legal authority to comply,

197. 51 Fed. Reg. at 19,929.

198. *Id.* at 19,930 (emphasis added).

199. *Id.* at 19,949 (emphasis added).

200. 50 C.F.R. § 402.02 (2007) (emphasis added).

201. 51 Fed. Reg. at 19,949.

202. *Id.* at 19,931, 19,934.

203. 50 C.F.R. § 402.14(b) (2007).

204. *Id.* § 402.14(h)(3).

205. *Id.* § 402.15(c).

since agencies can also comply by not taking the action if they have the discretion not to do so. Thus, under the Court's reading, the agency seemingly promulgated regulations which can actually never apply to any situation.

Even more striking is section 402.16 which governs reinitiation of consultation when circumstances change. "Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, *where discretionary Federal involvement or control over the action has been retained or is authorized by law* and . . ." a series of other changes in status apply.²⁰⁶ If consultation generally applies *only* to "actions in which there is discretionary Federal involvement or control," as the majority argues, then the language limiting reinitiation to discretionary actions would be superfluous, because non-discretionary actions would already be exempted under section 402.03. This qualifier would be redundant. Such a provision does make perfect sense, however, in light of the original purpose of both section 402.03 and section 402.16 as a test to determine whether agencies have enough residual involvement in a project when conditions change. In the context of reinitiation, neither third party actions nor a change in conditions would trigger consultation if the federal government were no longer involved. Thus, 402.16 includes a test for the requisite presence of ongoing involvement, for which the Services employed very much the same test used in *Sierra Club v. Babbitt* and the original section 402.03—*discretionary Federal involvement or control over the action*.

Furthermore, several components of the consultation process are required by the Services' regulation, regardless of the existence of discretion. For example, section 402.10 requires a conference with the relevant Secretary on "any action" to determine whether there may be effects on endangered species. Furthermore, section 402.12 requires the preparation of a biological assessment for "major construction activities" which constitute a "major federal action." The criterion for this requirement makes no mention of discretion to carry out the project. If section 7(a)(2) only applies to discretionary actions, the regulation's requirements would be inconsistent, since procedural preliminaries would be required of agencies which ultimately would not be required to consult with the Services.

What then to make of section 402.03's peculiar reference to "all actions in which there is discretionary Federal involvement or control"? The majority suggests that "[t]his history of the regulation also supports the reading to which we defer today" based solely upon the introduction of the word "discretionary" between proposed and final rule in 1986.²⁰⁷ Viewed in the context of the entire history of the rule, rather than the majority's convenient selection of history, this statement must be untrue. As discussed earlier, the 1978 precursor of section 402.03 specifically dealt with situations of "previously initiated

206. *Id.* § 402.16.

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

actions”—commenced before passage of the ESA which were still subject to section 7(a). In the final rule, the cross-reference Table 1 indicates a correspondence between these regulations.²⁰⁸ Previously initiated actions to which the ESA still applies (because of ongoing federal involvement) included actions in which “[f]ederal involvement or control remains which in itself could jeopardize the continued existence of a listed species.”²⁰⁹ Thus, the current regulation unremarkably and accurately codifies one of the central holdings of *TVA v. Hill* and *Sierra Club v. Babbitt* on a question that is of no relevance whatsoever to the controversy in *National Association of Home Builders*.

D. Are These Mere Intellectual Errors, or the Work of an Activist Court?

Upon closer examination, this is an opinion that comes dangerously close to presuming its own conclusion. To apply the canon against implied repeals appropriately, a court is required to find that congressional intent is unclear. The Court starts with the assertion that it is absurd to read the ESA as written because so many actions would be subject to the ESA—even though the amendments, legislative history, Supreme Court precedent and agency regulations agree that all agency actions are subject to section 7(a)(2). The majority’s presumption creates ambiguity, allowing the Court to defer to a regulation which it erroneously reads to defeat the broad meaning of the statute. Stated bluntly, if the court begins by presuming that the ESA could not possibly have been meant to amend the CWA, then it can safely conclude that the ESA does not amend the CWA.

While it is possible that this opinion may merely represent slipshod judicial craftsmanship, *National Association of Home Builders* appears to be less a judicial ruling than a policy decision. Given the political realities—the unpopularity of the ESA in conservative circles, the tendency of agencies to avoid consultation where possible, the skepticism toward the ESA shown by some of the justices in the majority previously,²¹⁰ and the desire of the current administration to remove consultation from the Services’ purview—it is hardly surprising that the majority took the easy way out. Still, it is lamentable that the majority did not heed the words of Chief Justice Burger: “[i]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with ‘common sense and the public weal.’ Our Constitution vests such responsibilities in the political branches.”²¹¹

208. See Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,929 (June 3, 1986) (codified at 50 C.F.R. § 402).

209. Interagency Cooperation—Endangered Species Act of 1973, 43 Fed. Reg. 870, 875 (January 4, 1978) (codified at 50 C.F.R. pt. 402); Hasselman, *supra* note 17, at 145.

210. See, e.g., Scalia’s dissent in *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995).

211. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978).

IV. THE FUTURE: A REQUIEM FOR ENDANGERED SPECIES?

A. *A Lack of Consultation: Same Story, Just Louder*

The outcome in *National Association of Home Builders* raises a question—in this brave new world of judicial policy making, what next for endangered species? The immediate effects of the decision are likely to be limited. In many ways, section 7 has long been a largely toothless statute. Protections depend fundamentally on listing decisions, which have been remarkably slow.²¹² The ESA actually interfering with federal agency actions is uncommon, since jeopardy findings require establishing that the action “reasonably would be expected . . . to reduce appreciably the likelihood of both the survival and recovery of a listed species”²¹³ As mentioned, agencies tend not to consult on every action, and lower courts have already provided legal cover for not consulting on mandatory actions. By one count, the doctrine enunciated here would have changed the outcome in only one district court case.²¹⁴

The ruling will likely encourage agencies to continue avoiding consultation, even on discretionary actions, if they feel they can assert a lack of discretion. Agencies face a range of incentives to avoid consultation. When agencies see their primary mission as an economic one, consultation may frustrate their plans, especially for agencies with no particular expertise in environmental matters.²¹⁵ This is a particularly acute problem when agencies are captured by industry interests.²¹⁶ Further exacerbating the situation, agencies may now have to defend their voluntary consultations should opposing parties sue the agency based on a lack of agency discretion.

The most obvious approach to avoiding consultation is simply to assert a lack of discretion. Agencies may construe their governing mandates broadly to mandate the actions they wish to take. Given a choice, agencies that consult frequently, such as the BLM or Forest Service, may write implementing regulations which bind the agency to a particular course. Although this would essentially be something of an artificial “congressional mandate,” a receptive court may give *Chevron* deference to the regulation as an authoritative

212. Amy Whritenour Ando, *Waiting to Be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J. L. ECON. 29; see generally DALE D. GOBLE AND ERIC T. FREYFOGLE, *WILDLIFE LAW: CASES AND MATERIALS* (2002).

213. 50 C.F.R. § 402.02 (2007) (defining “jeopardy”).

214. See Hasselman, *supra* note 17, at 163 (discussing Fla. Key Deer v. Stickney, 864 F. Supp. 1222 (S.D. Fla. 1994)).

215. Daniel J. Rohlf, *supra* note 65, at 114; see also Wendy B. Davis, *The Fox is Guarding the Henhouse: Enhancing the Role of the EPA in FONSI Determinations Pursuant to NEPA*, 39 AKRON L. REV. 35, 49–51 (2006) (discussing examples of the Department of Transportation’s road construction plans, the Federal Aviation Authority’s evaluations of noise impacts from airport expansions, and the Department of the Navy’s field testing).

216. See, e.g., Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL’Y F. 363 (2004).

interpretation of the statute. Given the leanings of the current Supreme Court, it is easy to imagine a ruling that would exempt an agency from consultation where the agency had given itself a mandatory duty by regulation. This problem is something akin to the “fox guarding the henhouse” problem of allowing the regulated community to determine what it must comply with. Taken to the extreme, courts might even defer to agencies’ interpretations of their own implementing regulations that disable section 7(a)(2) requirements. Such interpretations could be subject only to a very deferential standard of review under *Auer*.²¹⁷ Agencies are left with tremendous flexibility in determining when and where they consult. Indeed, courts are already attuned to this threat. After deferring to an agency’s interpretation of its own statute as allowing no discretion, the D.C. Circuit “acknowledg[ed] such deference in this case may give rise to a concern that agencies will increasingly rely on section 402.03 to avoid ESA consultation duties.”²¹⁸

A more sophisticated approach would be to attempt to segment actions and to tier discretionary site-specific actions into non-discretionary regional plans.²¹⁹ In effect, agencies may try to tie their own hands to limit what discretion they retain. For example, the Forest Service sought to avoid consultation on some aspects of forest policies by first issuing a Long Range Management Plan without consultation, arguing that only the final permits and sales made pursuant to the plan were ongoing agency actions. Notice that under this theory, the locations of logging, harvest levels and the practices used in extraction would be determined by a guidance document without consultation. Since this document is binding on actions taken during the duration of the plan, the discretion of the Forest Service to take mitigations on individual operations would then be significantly reduced, allowing what are overall discretionary actions to do far more harm than they might otherwise.

In practice, case law and parts of the FWS regulation would make this strategy difficult. For example, section 402.02 of the joint regulation defines the “effects of the action” to include “effects of other activities that are interrelated or interdependent with [the] action”²²⁰ Nevertheless, within limits it might be a successful approach.²²¹ Although in some instances larger scale plans can be used to authorize smaller scale private actions (on which

217. *Auer v. Robbins*, 519 U.S. 452 (1997).

218. *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 69 (D.C. Cir. 2003).

219. *See id.*

220. 50 C.F.R. § 402.02 (2007).

221. *See* section 402.01 definition of “effects of action,” which the preamble describes as including both interdependent and interrelated actions. “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 significant independent utility apart from the action that is under consideration” Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,932 (June 3, 1986) (codified at 50 C.F.R. § 402).

consultation would not be required), courts have required consultation where discretionary control is in any way retained.²²²

B. The Canon Blows a Hole in U.S. Biodiversity Policy

Even if the effects of *National Association of Home Builders* turn out to be restricted to agency strategy, the Court nevertheless missed a chance to correct a de facto flawed implementation of the ESA. The hodgepodge regime that preceded this decision was not effective in preventing species extinctions.²²³ Reading section 7 to apply to *all* actions would prohibit a wider range of threats by forcing action agencies into consultation on non-discretionary actions. If the congressional mandate to “insure” that endangered species are not jeopardized applies to all actions, it would strengthen the argument that the ESA independently authorizes agencies to implement reasonable and prudent alternatives that are slightly outside their current scope of discretion, repudiating contrary analyses in cases such as *Platte River Whooping Crane Critical Habitat Management Trust* and *American Forest and Paper Association*.²²⁴ The situation would have been as Representative Dingell, the House manager of the ESA of 1973, put it: “[The] agencies of Government can no longer plead that they can do nothing about it. *They can, and they must. The law is clear.*”²²⁵ At minimum, if the Court had reconciled the two statutes to require consultation as a procedural matter, the rate at which agencies actually consult would probably increase, particularly considering how the confusion concerning the scope of section 7(a)(2) fostered an atmosphere where agencies often opted not to consult. While this may not have stopped actions altogether, increased public information would have been beneficial.

It is important to focus on preventing harm in this way because recovering species is a harder and slower task than driving them to extinction. A policy emphasizing recovery over prevention creates a “one strike and you’re out” problem. Recovery likely requires many coordinated agency actions, while extinction may require but one jeopardizing action. The rejected Ninth Circuit reading could have helped prevent this downward ratchet which undermines the purpose of the ESA. Without strong consultation requirements to avoid harm to species, extinction at the hands of the federal government is not prevented, just delayed until a thoughtless mandatory action annihilates a species at taxpayer expense.

Endangered species present a fundamentally different kind of policy problem than those addressed by other environmental statutes. Unlike issues of pollution, the harms cannot typically be undone, nor are half measures effective. Halving the pollution in a river makes it cleaner, and a dirty river can

222. See, e.g., *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

223. See PRECIOUS HERITAGE, *supra* note 5.

224. See discussion *supra* Part II.A.

225. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (citing 119 CONG. REC. 42,913 (1973)).

usually be restored. A species which is under half as many fatal threats is still at risk to become extinct forever. Thus, limitations on the ESA are more troubling than similar limitations to NEPA or the CWA, for example.

An even more frustrating aspect of this policy is the degree of inter- and intra-agency conflict and policy incoherence it creates. In particular, it pits the Services against the rest of the federal government. Under sections section 4(f) and section 7(a)(1), the Services must take actions to bring species back to the point where those efforts are no longer needed. Great effort and expense could be dedicated to this effort, only to be undone by a coincidental effect of some unrelated, mandatory action by another agency. Even worse, under section 7(a)(1) all other agencies are directed to assist the FWS in these efforts with their respective “authorities.” Thus, agencies are likely to be put in the bind of working to conserve a species with their discretionary actions while simultaneously working to destroy that species with other mandatory actions. It is absurd that an agency might “utilize its authorities” and dedicate resources to recover a species, but then be subsequently required to destroy it. It is precisely this situation that section 7(a)(2) was written to prevent.

For example, in the Pacific Northwest, treaty obligations and ESA protections of anadromous fish run squarely into water allocation and FERC hydropower mandates. In this context, it is entirely possible for various agencies, such as the Forest Service or BLM to adopt environmentally friendly policies to reduce sedimentation only to have FERC or the Bureau of Reclamation withdraw too much water from the rivers, causing a fish kill, as happened on the Klamath in 2002.²²⁶ Worse yet, private parties may participate in section 10 habitat conservation plans to protect species as well. Imagine the political backlash when loggers, property developers and homeowners who have changed their practices or paid to conserve a species or its habitat find that some federal agency, unrestrained by the ESA, has been *legally required* to kill the very species the private parties have sought to protect.

Another negative effect of this ruling will be the diminishment of transparency and disclosure. Supporters of the Court’s ruling might argue that where an agency lacks discretion to take the actions recommended by a consultation, it is in fact pointless or “meaningless” to consult at all.²²⁷ The Court itself approvingly mentions this rationale in *National Association of Home Builders*.²²⁸ However, this view is based in a naïve miscomprehension of the structure of the ESA. Consultation is independent of the mitigations that follow from it, so this logic is untenable. Agencies can of course consult even when there is no discretion, only to find that no satisfactory solution exists. In

226. Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 *ECOLOGY L.Q.* 279 (2003).

227. See, e.g., *Strahan v. Linnon*, 967 F. Supp. 581, 620 (D. Mass. 1995); *Nat’l Wildlife Fed’n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151 (W.D. Wash. 2004) and discussion *supra* Part I.B.

228. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534–35 (2007).

fact, this outcome is exactly what is envisioned by the Services' regulations.²²⁹ The Court misses the mark when they suggest that a purely procedural provision, such as section 7(a)(2), is void because of its association with a difficult substantive one, such as section 7(b).

To suggest that only substantive requirements of agencies are "meaningful" ignores the overwhelming body of administrative law, filled with examples of procedural and informational requirements that do not bind agency actions. Even a cursory examination of these laws shows the absurdity of this proposition. Federal agency mandates are rife with obligations for fact gathering and dissemination, without any requirement to act on that information. Examples include the National Environmental Policy Act,²³⁰ the Freedom of Information Act,²³¹ or the requirements for reasoned rejection of comments and decision making of the Administrative Procedures Act,²³² to name the most prominent. The primary purpose of the consultation requirement is to insure that federal actions do not drive vulnerable species to extinction. This does not mean that it is the *only* function of ESA consultation.²³³

Understanding the jeopardizing effects of actions alone may be valuable, even if not actionable by the agency. Consultation provides the FWS itself with notice of the actions, as well as information to the agency, the applicant and potentially the public of the consequences of actions. Even in the case of the transfer of the NPDES program to Arizona, if the consultation had revealed substantial harms to endangered species, the EPA might not have been able to act, but that doesn't mean that the State of Arizona or the citizens of the state would be similarly powerless to prevent the harms. Furthermore, preparing biological opinions that result from consultation assists the FWS in performing its own conservation duties under section 7(a)(1).²³⁴ Again, a conclusory suggestion by the courts that consultation is useless without authority to unilaterally stop the action in question betrays a profound lack of understanding of how the ESA works.

C. Limiting Section 7(a)(2) to Nothing

Not only does this holding render section 7(a)(2) superfluous to 7(a)(1), as discussed above, there is a real prospect that this opinion may eliminate section 7(a) nearly altogether. The majority appears to limit the scope of section 7(a)(2) to encompass only those discretionary actions which already permit or mandate the consideration of endangered species protections. Thus, Justice Alito writes

229. See discussion *supra* notes 19–28 and accompanying text.

230. See 42 U.S.C. § 4332(c) (2006).

231. See 5 U.S.C. § 552 (2006).

232. See *id.* § 553.

233. See *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985); *Romero-Barcelo v. Brown*, 643 F.2d 835, 857 (1st Cir. 1981).

234. See *Romero-Barcelo*, 643 F.2d at 857.

that while the “EPA may exercise some judgment . . . , the statute clearly does not grant it the discretion to . . . consider the protection of threatened or endangered species as an end in itself”²³⁵ Thus, it appears the ESA not only cannot amend mandatory actions, it also cannot change the considerations involved in discretionary decisions which are statutorily constrained in some way.

The arguments the majority used to determine that the ESA does not change the requirements placed on NPDES transfers could apply equally well to arguing that the ESA cannot require additional weight be given to endangered species considerations where such considerations are already among the list the agency must already consider. For example, where a statute, such as the Federal Power Act (FPA), instructs an agency to consider a range of factors, possibly including wildlife, the agency may be able to ignore requirements stemming from consultation with the Services on the basis that the ESA does not “implicitly repeal” their mandates to consider other factors. In *Platte River Whooping Crane*, the D.C. Circuit summarily dismissed any notion that FERC could take any actions based on the ESA that it would not have been able to take under the FPA anyway.²³⁶ Although the FPA entitles FERC to consider effects on wildlife along with other factors, under the majority’s logic, changes to the weight given to the other factors mentioned in the FPA might “repeal” the statute.

In another example, the Pacific Northwest Electric Power and Planning and Conservation Act requires conservation to be a top priority in planning, but only as far as would be cost-effective.²³⁷ Quite possibly, the majority would find an implied repeal there too precludes choosing reasonable and prudent alternatives to avoid jeopardy, if they are not optimally cost-effective. Indeed, this is quite similar to the argument the intervenors deployed in *Platte River Whooping Crane* to argue that FERC put more emphasis on environmental concerns in their discretionary action than the FPA alone would allow.²³⁸ Still another example, the EPA’s office of Pesticide Programs has argued that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)²³⁹ is the sole basis upon which pesticide registrations can be made or withdrawn, exempting the EPA from any need to consult.²⁴⁰ That was a losing argument when it was made in 2005, but under an aggressive *National Association of Home Builders* approach it could be precisely the kind of context where section 7(a)(2) is held not to erect additional requirements for the EPA.

235. Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2537 (2007).

236. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992).

237. 16 U.S.C. § 839(e) (2006).

238. *See Platte River*, 962 F.2d at 25, 30.

239. 7 U.S.C. § 136 (2006).

240. *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1031 (9th Cir. 2005).

At most, *any* change in agency behavior based on the ESA may be argued to have worked an implied amendment of the governing statute. Reading the canon as robustly as the majority has turns the canon into a ban on implied amendment, even if it could be reconciled with other statutes. Since section 7(a)(2) does not expressly name any statute it affects, it would seem to not affect or amend any. If this argument carries the day, section 7(a)(2) will have vanished entirely, becoming a ghost statute, floating everywhere but unable to affect physical reality. The only decisions where section 7(a)(2) would have any bite would be those where wildlife protection is already accorded great significance or those agency decisions involving unfettered discretion.

Furthermore, the approach of *National Association of Home Builders* risks spreading to other environmental statutes. For example, in one of the first post-*Home Builders* rulings in a NEPA case, *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the Ninth Circuit addressed an attempt to apply *National Association of Home Builders* to NEPA. The Ninth Circuit distinguished the ESA context from NEPA because NEPA does not “‘add[] another entirely separate prerequisite to th[e] list’ of statutory factors in the relevant statute.”²⁴¹ While *National Association of Home Builders* did not effect the NEPA analysis there, certainly any general mandate could be subject to the same logic.

D. *Can Anyone Undo the Policy of the Supreme Court?*

Given the pernicious effects of this poorly reasoned decision, various parties may seek to undo it. Indeed, it may yet prove a very brittle decision. Since it is rooted in deference to an FWS interpretation, the Services may be best positioned to reverse the Court. The majority defers to the Services joint regulations under *Chevron* and applies *Auer* deference to the Services’ strained interpretations of them.²⁴² Assuming such an interpretation by an agency of its own regulation is entitled to great deference,²⁴³ courts would presumably defer to the Services if they were to issue an interpretation of section 402.03 clarifying that no discretionary actions escape the reach of section 7(a)(2). In principle, this would throw back to the courts the question of whether the *National Association of Home Builders* interpretation of section 402.03 was the only permissible reading of the ESA. Reading the opinion literally, the majority declares that in light of the agency interpretation in section 402.03, section 7(a)(2) does not apply to non-discretionary actions. But the opinion in fact stops short of declaring that *the ESA* itself cannot be read to apply to non-discretionary actions.

241. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508, 547 n.68 (2007).

242. *See Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2537 (2007) (citing to agencies’ interpretations of section 402.03 and to section 402.03 as the basis for the holding).

243. *See Auer v. Robbins*, 519 U.S. 452 (1997).

The judiciary also has several options to limit the effect of this holding, and several examples have emerged since the Supreme Court handed down *National Association of Home Builders*. First, the courts can limit the scope of the holding to particular legal contexts. For example, in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the Ninth Circuit signaled a possible limit of *National Association of Home Builders* to only circumstances in which the relevant statute expressly elaborates enumerated lists of requirements.²⁴⁴

Secondly, courts may hold that this decision applies only to the “authorizing” branch of “actions.” Unlike authorizations, which primarily require the agency to approve or disapprove a third party action, “funding and carrying out” actions invariably involve implicit discretion in deciding precisely when, where and how to meet the statutory mandate, which may well place such actions within the Court’s reading of “discretionary action” under section 402.03. Thus, courts wishing to work around this decision may simply shape a presumption that only authorizations that are so narrowly constrained as to involve no discretion whatsoever are truly “non-discretionary actions.” A suggestion of such an approach can be seen in how the Ninth Circuit distinguishes *National Association of Home Builders* in *Center for Biological Diversity v. National Highway Traffic Safety Administration*. The Ninth Circuit does not focus on discretion *per se*, but rather on whether the agency could be fairly discerned as a “legally relevant cause” of harmful greenhouse gas emissions through the promulgation of fuel efficiency standards.²⁴⁵ This may well be a broader standard for actions carried out by an agency.

Tellingly, it is Congress itself which is likely to face the greatest difficulty in limiting or overturning *National Association of Home Builders*. Notwithstanding the political difficulties that would attend attempts to clarify the ESA, to reflect what appears to have been the statute’s original intent, the ruling presents Congress with some difficulty in delegating the duty to insure that species are not driven to extinction. Since the majority essentially places the legal cause of non-discretionary actions in Congress, then the only possible remaining recourse is for Congress itself to consult before establishing a mandatory duty. This is practically impossible because it would be a highly speculative task to determine the impacts of any broad mandate. Furthermore, while Congress could amend the ESA to make it more clear that consultation applies to all actions, there is no guarantee that an unfriendly Supreme Court might create some new standard of explicitness to apply to defeat the statute, as happened between *TVA v. Hill*, in which the categorical language referring “any action” was read as a clear statement of intent, and *National Association of Home Builders*, in which that same language was read to be newly ambiguous.

244. See *Ctr. for Biological Diversity*, 508 F.3d at 547 n.68.

245. *Id.* at 546.

E. Is an Overly Strong Canon against Implied Repeal a Threat to Congress?

The logic of implied repeal threatens to become a powerful weapon for any activist court aiming to remove congressional authority. As has been noted, the Supreme Court has increasingly converted the canon against implied repeals from a principle guiding the reconciliation of acts into a blanket ban on congressional effort to enact comprehensive, government-wide reforms.²⁴⁶ Such a ban can work great mischief. In the past, this canon has operated to foster reconciliation between seemingly conflicting statutes, sometimes carving limited exceptions to a later-enacted general framework.²⁴⁷ Perhaps the canon here should also work a limited exception from the ESA. As the majority applies it, however, the canon is so strong that irreconcilable conflict works not to force the court to read in an implied exception in the later-enacted statute. Rather, the effect is to work a repeal of the later enacted statute across the board to preserve the mandate of the former.

A naïve citizen might think that in writing the ESA, Congress could simply declare that it applies to any action the government takes. All evidence suggests that this is precisely the approach Congress meant to take. However, nearly 20 years later, the Court declared that Congress was not explicit enough. What makes matters worse is that at the time, inserting the word “any” in front of “action” in section 7(a)(2) may have been sufficient in 1979, but now Congress must again insert clarifying words into section 7(a)(2), which may in later be deemed insufficient. This appears to cast Congress in the role of the Red Queen, forever running just to stand still. Perhaps Judge Posner is right in suggesting that the Court demands a thorough combing of the code by legislative aides in order to ensure that no prior statutes have been touched.²⁴⁸ Only this way could Congress produce the express listing of all statutes subject to consultation requirements. Perhaps some formula such as “any action authorized, funded or carried out, notwithstanding other provisions of law” might have sufficed. Congress is not in a position to know what changes the courts may wreak on the effects of its enactments, making it difficult for Congress to find firm footing on the shifting sands of judicial canons. The uncertainty created by *National Association of Home Builders* is troubling because it could seriously hamper Congress’ ability to establish comprehensive and coherent policy for the nation.²⁴⁹ Congress must be free to repeal and amend prior statutes in order to craft policy, which means in turn that the canon cannot operate in the manner it has in this ruling.

Finally, the judiciary itself may come to regret poorly reasoned and possibly disingenuous decisions like *National Association of Home Builders v.*

246. See Petroski, Comment, *supra* note 104, at 511–16.

247. See, e.g., *id.* at 510 n.107; Mancari v. Morton, 417 U.S. 535 (1974).

248. Petroski, Comment, *supra* note 104, at 517 & n.151 (quoting Edwards v. United States, 814 F.2d 486, 488 (7th Cir. 1987) (Posner, J.).

249. *Id.*

Defenders of Wildlife. In a quick and dirty decision apparently aimed at reaching a result, the court short-sightedly undermines the credibility and stature of the judiciary as neutral arbiters of the laws. Politicizing its decision-making in this way encourages all parties to ignore the Court. As Justice Breyer wrote in another context,

[I]n this highly politicized matter, the . . . decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, 'John Marshall has made his decision; now let him enforce it!' . . . But we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.²⁵⁰

250. *Bush v. Gore*, 531 U.S. 98, 157–58 (2000) (Breyer, J. dissenting).

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