No. _____

In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

RUSSELL S. FRYE
FRYE LAW PLLC
3050 K Street NW,
Suite 400
Washington, DC 20007-5108
(202) 342-8878

NORMAN D. JAMES
(*Counsel of Record*)
FENNEMORE CRAIG, P.C.
3003 North Central Avenue,
Suite 2600
Phoenix, AZ 85012-2913
(602) 916-5346

DUANE J. DESIDERIO
THOMAS J. WARD
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, NW
Washington, DC 20005-2800
(202) 266-8200

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

On December 5, 2002, the U.S. Environmental Protection Agency ("EPA") approved the State of Arizona's application to administer the National Pollutant Discharge Elimination System ("NPDES") program under Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). Section 402(b) states that EPA "shall approve each submitted program" unless EPA "determines that adequate authority does not exist" for the state to administer the program in compliance with nine specified criteria. There was no dispute that Arizona's program satisfied those criteria. Instead, environmental groups contended that EPA violated Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), because EPA did not sufficiently analyze the effects of the loss of, nor require a sufficient substitute for, consultation with the U.S. Fish and Wildlife Service. A majority of the Ninth Circuit panel agreed and vacated EPA's approval of Arizona's program. The questions presented for review are:

1. Can a court append additional criteria to Section 402(b) of the Clean Water Act that require state NPDES programs to include protections for endangered species?

2. Does Section 7(a)(2) of the Endangered Species Act constitute an independent source of authority, requiring federal agencies to take affirmative action to benefit endangered species even when an agency's enabling statutes preclude such action?

3. Did the Ninth Circuit incorrectly apply the holding of *Department of Transp. v. Public Citizen*, 541

QUESTIONS PRESENTED – Continued

U.S. 752 (2004), in concluding that EPA's approval of Arizona's NPDES permitting program was the legally relevant cause of impacts to endangered species resulting from future private land use activities?

PARTIES TO THE PROCEEDING

Petitioners: National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce and American Forest & Paper Association.

Respondents: Defenders of Wildlife, Center for Biological Diversity and Craig Miller.

Other parties: U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service and the State of Arizona.

CORPORATE DISCLOSURE STATEMENT

National Association of Home Builders is a non-profit corporation organized under the laws of Nevada, has no parent companies or subsidiaries, and has issued no shares of stock to the public. Said association has more than 800 state and local home builders associations with which it is affiliated, but all of those associations are, to the best of National Association of Home Builder's knowledge, non-profit entities that have not issued stock to the public.

Southern Arizona Home Builders Association and Home Builders Association of Central Arizona are non-profit corporations organized under the laws of Arizona, have no parent companies or subsidiaries, and have issued no shares of stock to the public. Both associations are affiliated with National Association of Home Builders.

CORPORATE DISCLOSURE STATEMENT – Continued

Arizona Chamber of Commerce, Arizona Association of Industries and Greater Phoenix Chamber of Commerce are non-profit corporations, have no parent companies or subsidiaries, and have not issued shares of stock to the public.

Arizona Mining Association is an unincorporated non-profit business league, the members of which are engaged in exploration and mining activities in Arizona. It has no parent companies or subsidiaries, and has issued no shares of stock to the public.

American Forest & Paper Association is a not-for-profit corporation headquartered in Washington, D.C., that is the national trade association of the forest, paper, and wood products industry. It has no parent companies or subsidiaries, and has issued no shares of stock to the public.

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PETITION FOR WRIT OF CERTIORARI

National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce and American Forest & Paper Association ("Home Builders") jointly petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the Ninth Circuit and the dissent, Appendix ("App.") 1-68, are reported at 420 F.3d 946. The order denying the petitions for panel rehearing and rehearing en banc, the dissents from the denial of rehearing, and the concurrence, App. 134-58, are reported at 450 F.3d 394.

BASIS FOR SUPREME COURT JURISDICTION

The Ninth Circuit entered its judgment on August 22, 2005, and denied rehearing on June 8, 2006. App. 1 and App. 134. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Home Builders' members consist of businesses whose activities require discharge permits under the Clean Water Act and will be adversely affected if State of Arizona's program is vacated.

STATUTORY PROVISIONS INVOLVED IN THE CASE

The Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and the Endangered Species Act, 16 U.S.C. § 1531, *et seq*. Relevant provisions of these Acts and their implementing regulations are reproduced in App. 159-244.

STATEMENT OF THE CASE

I. INTRODUCTION

This case concerns the relationship between two major environmental laws, the Clean Water Act ("CWA") and the Endangered Species Act ("ESA"), and the authority of the agencies that administer those laws, the U.S. Environmental Protection Agency ("EPA") and the U.S. Fish and Wildlife Service ("FWS").

Section 7(a)(2) of the ESA requires each federal agency to "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat" designated for such species. 16 U.S.C. § 1536(a)(2). If a proposed action may affect such species, the agency consults with FWS, which issues a biological opinion describing the impacts of the action and, if necessary, reasonable and prudent alternatives that would avoid jeopardizing the species' existence. *See Bennett v. Spear*, 520 U.S. 154, 158, 169-70 (1997).

In its opinion, the Ninth Circuit redefined the obligations of federal agencies under Section 7(a)(2) of the

ESA, holding that: (1) Section 7(a)(2) grants independent authority to federal agencies to act for the benefit of listed species; (2) such authority overrides any conflicting mandates imposed by Congress in other statutes; and (3) any "authorizing action" by federal agencies creates an obligation to exercise this new-found authority. App. 30-44. Circuit Judge Kozinski, who dissented with five other judges from the denial of en banc rehearing, explained that "the majority treats the ESA as superior to all other laws, thereby nullifying a crucial ESA regulation and forcing agencies to violate their governing statutes." App. 137. In short, the opinion fundamentally alters the obligations of federal agencies and therefore raises questions of national importance.

II. THE ADMINISTRATIVE PROCEEDINGS CONCERNING APPROVAL OF ARIZONA'S PROGRAM

Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" into navigable waters unless the discharge complies with one of several different CWA programs. 33 U.S.C. § 1311(a). One of the CWA's primary programs is the National Pollutant Discharge Elimination System ("NPDES") program, under which the permitting authority regulates "the discharge of any pollutant, or combination of pollutants" through the issuance of permits. 33 U.S.C. § 1342(a)(1); *see South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004). Consistent with Congress' policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C. § 1251(b), Section 402(b) of the CWA contemplates that each state will administer and enforce

its own NPDES program with limited oversight by EPA. *See E.P.A. v. California ex rel. State Water Resources Control Bd.,* 426 U.S. 200, 206-09 (1976).

On January 14, 2002, the State of Arizona requested NPDES program approval pursuant to Section 402(b) of the CWA and its implementing regulations. 67 Fed. Reg. 49,916, 49,917 (Aug. 1, 2002) (App. 543-61). EPA's regional office prepared a biological evaluation of the impacts of approving Arizona's program on species listed as threatened and endangered under the ESA ("listed species"), concluding such action would not adversely affect any listed species or their critical habitat. App. 583-623. On June 21, 2002, EPA requested the initiation of consultation with FWS. App. 585-86.

A dispute developed between EPA and FWS's Arizona field office, which objected to the impact Arizona's program would have on its use of the ESA to regulate construction, water use and similar activities. App. 562-63. EPA, by contrast, believed, based on its evaluation of the effects of approving Arizona's program, that approval was simply "an administrative transfer of authority," and was "not the cause of future non-discharge-related impacts on endangered species." App. 564-65. This dispute was elevated to senior officials in both agencies' headquarters under a 2001 memorandum of agreement governing coordination between the CWA and the ESA. 66 Fed. Reg. 11,202 (Feb. 22, 2001) (App. 245-318). *See also* App. 562-82 (interagency elevation document) and App. 78-82 (consultation history).

Ultimately, FWS issued a biological opinion on December 3, 2002, concluding that EPA's approval of Arizona's program was not likely to jeopardize any listed

species or adversely modify their critical habitat. App. 77-124. FWS agreed that the proposed action merely constituted an administrative shift in authority and would not cause increases in requests for CWA permits or real estate development. App. 113-14. FWS also accepted EPA's description of its regulatory authority, including EPA's inability to object to NPDES permits "based on grounds other than guidelines and requirements of the CWA." App. 114. Finally, FWS concluded that the environmental impacts of future real estate development in Arizona are speculative. App. 114-15.

On December 5, 2002, EPA approved Arizona's program. 67 Fed. Reg. 79,629 (Dec. 30, 2002) (App. 69-76). Since that date, the Arizona Department of Environmental Quality has been administering and enforcing the NPDES program (known as the AZPDES program) in all portions of Arizona, other than Native American land. App. 71-72.

III. THE COURT PROCEEDINGS BELOW

On April 2, 2003, Defenders of Wildlife, Center for Biological Diversity and Craig Miller (collectively "Defenders") filed a petition with the Ninth Circuit seeking review of EPA's approval of Arizona's program pursuant to 33 U.S.C. § 1369(b)(1)(D), which provides for direct review in the circuit courts of EPA's determinations regarding state permitting programs. App. 13-14. Defenders never contended that Arizona's application or the AZPDES program failed to meet the requirements of the CWA. Instead, Defenders alleged that in approving Arizona's program, EPA violated Section 7(a)(2) of the ESA. App. 13. Home Builders, which consist of industry and trade associations that represent the interests of

Arizona businesses required to obtain NPDES permits, were granted permission to intervene as respondents. *Id.*

On December 16, 2002, Defenders also filed an amended complaint in a pending action in Arizona's federal district court challenging FWS's biological opinion under the Administrative Procedure Act. App. 13. The district court determined that it lacked jurisdiction to decide Defenders' challenge to the biological opinion, and ordered that the claim be severed and transferred to the Ninth Circuit. App. 13, 125-33. The Ninth Circuit consolidated the cases and issued its opinion on August 22, 2005.

A majority of the panel found that FWS's biological opinion was "fatally deficient" and that EPA "fail[ed] to understand its own authority under section 7(a)(2) to act on behalf of listed species and their habitat." App. 47-48, 60. The majority acknowledged that Section 402(b) of the CWA foreclosed EPA's discretion to act for the benefit of listed species. App. 53. Nonetheless, the majority held that Section 7(a)(2) of the ESA grants *independent authority* to federal agencies to act for the benefit of listed species, that such authority overrides any constraints imposed by Congress in Section 402(b) of the CWA, and that any "authorizing action" creates an obligation to exercise this authority. *Id.*; *see also* App. 38-39.

To support this holding, the majority focused on the phrase "insure that any action . . . is not likely to jeopardize" in Section 7(a)(2), concluding Congress intended this phrase to grant authority to act affirmatively to benefit listed species, rather than simply prohibiting actions that jeopardize species. App. 30-38.

The majority also concluded that whenever a federal agency authorizes, funds or carries out an action, Section 7(a)(2) applies: "the EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application. The EPA's decision authorized the transfer, thus triggering section 7(a)(2)'s consultation *and action* requirements." App. 43-44 (emphasis added). The majority gave no deference to FWS's long-standing regulation, 50 C.F.R. § 402.03, which limits the application of Section 7(a)(2) to situations in which a federal agency has discretion to consider the impacts on listed species. App. 39-42.

The majority concluded that EPA needed to address "whatever harm may flow from the loss of section 7 consultation" (App. 47) – an effect Congress clearly intended when it required EPA to approve qualifying state programs. In the majority's view, however, EPA could not transfer permitting authority unless it found "sufficient substitutes for section 7's consultation and mitigation mandates." App. 52. As the remedy, the majority vacated EPA's approval of Arizona's program. App. 61-63.

Senior Circuit Judge Thompson dissented, stating that "EPA did not have discretion to deny transfer of the pollution permitting program to the State of Arizona; therefore its decision was not 'agency action' within the meaning of Section 7 of the [ESA]." App. 66. The dissent noted that prior circuit opinions recognized, in accordance with 50 C.F.R. § 402.03, that Section 7(a)(2) applies only to actions in which an agency has discretion to act for the benefit of listed species. App. 64-66. Judge Thompson also pointed out that the majority's interpretation of the statute was in direct conflict with other circuits, which have held that EPA's obligation in reviewing a state's

program submittal under Section 402(b) of the CWA is limited to evaluating the nine statutory criteria. App. 66-67.

Home Builders, EPA and FWS, and the State of Arizona, filed petitions seeking rehearing en banc based on the intra-circuit and inter-circuit conflicts created by the majority's opinion. On June 8, 2006, the court issued its order denying both panel and en banc rehearing. App. 134-58. Six circuit judges dissented from the denial of rehearing, two of whom issued written dissents criticizing the majority's opinion on multiple grounds. App. 135-49. Circuit Judge Kozinski stated, for example, "the majority tramples all over the [FWS's] reasonable interpretation of the ESA, deliberately creates a square inter-circuit conflict with the Fifth and D.C. Circuits, and ignores at least six prior opinions of our own court." App. 135-36. He further emphasized that "the decision is one of considerable importance to the federal government and the states within our circuit," and that the case should have been taken en banc "to set our own house in order." App. 136.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION: THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE ADDRESSED BY THIS COURT.

No dispute exists that: (1) Arizona's NPDES program submission satisfied the nine requirements specified by Congress in Section 402(b) of the CWA as well as EPA's implementing regulations; and (2) the plain language of Section 402(b) forecloses EPA's discretion to act for the benefit of listed species in approving a state's program. *See*

App. 53. Nonetheless, the majority opinion held that the ESA overrides the Congressional mandates set forth in the CWA.

In reaching its decision, the majority created a direct conflict with Fifth and District of Columbia Circuit opinions interpreting Section 7(a)(2) of the ESA; effectively invalidated long-standing regulations of FWS and the National Marine Fisheries Service interpreting the consultation obligations of federal agencies under Section 7(a)(2); mischaracterized and misapplied this Court's holding in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) ("*TVA*"); and facially adopted, but failed to follow, this Court's causation analysis in *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004), concluding instead that EPA was responsible for the impacts caused by every future real estate development in Arizona without regard to the agency's regulatory authority.

The effects of the majority's opinion are significant and far-reaching. The majority opinion alters the legal requirements mandated by Congress for states that desire to administer the NPDES program by imposing a tenth (and unstated) requirement – that the state's program include elements that would "substitute for section 7 coverage" (App. 60). There are five states that currently do not administer their own permitting programs, two of which, Alaska and Idaho, are in the Ninth Circuit.[1] States

[1] The states without authority to administer the NPDES program are Alaska, Idaho, Massachusetts, New Hampshire, and New Mexico, as well as the District of Columbia, Puerto Rico, and various trust lands. In addition, a number of states do not have approved programs that implement all aspects of the NPDES program, and those states may apply for authority to administer additional aspects of the program

(Continued on following page)

without approved programs may be unable to exercise their right to administer the NPDES program even though their programs satisfy the criteria established in the CWA or, under the majority's logic, would be required to enact and fund programs to benefit federally-protected wildlife sufficient to "substitute" for ESA Section 7, undermining the role Congress intended states to play in administering and enforcing the CWA and raising significant federalism concerns.[2] Thus, the majority's view conflicts with Congress' policy "to recognize, preserve, and protect . . . the rights of States to prevent, reduce, and eliminate pollution," and that the states "implement the permit programs under sections 1342 and 1344 of this title." 33 U.S.C. § 1251(b).

The majority opinion also redefines and expands the obligations of federal agencies under a key provision of the ESA. Under the majority opinion, federal agencies would be required, for the first time, to ignore constraints imposed by Congress in their enabling legislation if doing so were deemed necessary to benefit listed species or their habitat. In addition, the majority opinion adopts a "but-for" causation standard for determining when agency actions impact listed species. As Judge Kozinski succinctly stated, the majority opinion "undermin[es] the entire consultative

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in the future. A complete list of the states' program status is available at *http://cfpub.epa.gov/npdes/statestats.cfm* (visited August 28, 2006).

[2] These problems extend beyond the NPDES program. Congress has authorized states to assume, for example, other CWA permitting programs, including permits to discharge dredged or fill materials under Section 404 of the CWA, 33 U.S.C. § 1344(g). *See also* 42 U.S.C. § 6926 (authorizing states to administer and enforce hazardous waste programs); 42 U.S.C. § 7411(c) (authorizing states to implement and enforce standards of performance for new sources of air pollution).

process that the ESA establishes and strik[es] down FWS's perfectly reasonable interpretation of the ESA." App. 140. The nature of federal agencies' obligations under Section 7(a)(2) is a matter of national importance given the pervasive nature of that provision, which applies to all federal agencies and programs. This Court should therefore grant the petition.

II. THE OPINION CREATES A DIRECT CONFLICT WITH OTHER FEDERAL CIRCUITS REGARDING THE APPLICABILITY OF SECTION 7(a)(2) OF THE ESA TO NON-DISCRETIONARY FEDERAL ACTIONS.

A. Background

Section 402(b) of the CWA provides that EPA "*shall approve* each . . . submitted program *unless*" the agency "determines that adequate authority does not exist" to administer the program in compliance with nine specific criteria. 33 U.S.C. § 1342(b)(1)-(9) (emphasis added). *See also* 40 C.F.R. §§ 123.1(c), 123.61(b). Courts have consistently recognized that, under the plain language of the statute, EPA lacks discretion to deny approval if a state's program meets those criteria. *See E.P.A. v. California,* 426 U.S. at 208; *American Forest and Paper Ass'n v. E.P.A.*, 137 F.3d 291, 297 (5th Cir. 1998) ("*AFPA*") (the language of Section 402(b) is "non-discretionary"), *following Save the Bay, Inc. v. Administrator of E.P.A.*, 556 F.2d 1282, 1285 (5th Cir. 1977) ("Unless the Administrator of EPA determines that the proposed state program does not meet these requirements, he must approve the proposal."); *Natural Resources Defense Council, Inc. v. E.P.A.*, 859 F.2d 156, 173-74 (D.C. Cir. 1988) (Section 402(b) "commands" EPA to

"approve the state permit system" once the statutory requirements are met); *Citizens for a Better Environment v. E.P.A.,* 596 F.2d 720, 722 (7th Cir. 1979) ("If the state program satisfies the statutory requirements of section 402(b) . . . [EPA] must approve the program."). *See also* 40 C.F.R. pt. 123 (setting forth the procedures and requirements for approving state NPDES programs).

The criteria established by Congress in CWA Section 402(b) and contained in EPA's regulations do not include implementing procedures to benefit listed species or their habitat. The majority even acknowledged that EPA's discretion under the CWA is limited, stating "the [CWA] does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of all endangered species." App. 53. The majority instead held that "the obligation of each agency to 'insure' that its covered actions are not likely to jeopardize listed species [under ESA Section 7(a)(2)] is *an obligation in addition to those created by the agencies' own governing statute.*" App. 38 (emphasis added). Thus, according to the majority, EPA was not constrained by Congress' statutory command in Section 402(b) of the CWA when acting on Arizona's application to administer the NPDES program. As shown below, that holding is in direct conflict with the Fifth and District of Columbia Circuits and is inconsistent with opinions from other federal circuits as well as prior opinions within the Ninth Circuit.

B. The Ninth Circuit's Opinion Conflicts with the Fifth Circuit's Opinion in *AFPA*.

AFPA involved EPA's approval of Louisiana's NPDES permitting program under CWA Section 402(b). As a condition of approval, EPA required Louisiana to submit proposed permits to FWS and the National Marine Fisheries Service ("NMFS"), which EPA would veto if FWS or NFMS determined that the permit would adversely impact listed species. *AFPA,* 137 F.3d at 293-94. The Fifth Circuit held EPA lacked authority to impose conditions to benefit listed species, and squarely rejected EPA's argument that "its decision is not only authorized but compelled by ESA § 7(a)(2)." *Id*. at 297 (internal citation omitted). The court explained:

> EPA argues that ESA § 7(a)(2), when construed alongside the Court's broad reading of the statute in [*TVA*], compels EPA to do everything reasonably within its power to protect endangered species. The flaw in this argument is that if EPA lacks the power to add additional criteria to CWA § 402(b), nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers.
>
> . . . .
>
> [T]he ESA serves not as a font of new authority, but as something more modest: a directive to agencies to channel their *existing* authority in a particular direction. The upshot is that EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA.

Id. at 298-99 (emphasis in original) (internal footnotes and citations omitted).

The majority rejected the Fifth Circuit's reasoning in *AFPA*, stating that it was not addressing "the precise question" decided by the Fifth Circuit. App. 46. However, the issue addressed in *AFPA* is precisely the same issue implicated here:

> CWA § 402(b), 33 U.S.C. § 1342(b), provides that the EPA Administrator "shall approve" proposed state permitting programs that meet nine specified requirements. ***The key question is whether EPA may deny a state's proposed program based on a criterion – the protection of endangered species – that is not enumerated in § 402(b).***

AFPA, 137 F.3d at 297 (emphasis added). According to the Ninth Circuit, not only can EPA deny a state's program, but also EPA *must* do so when it is necessary to benefit listed species or their habitat.[3]

[3] If the majority's reading of the ESA were correct, then EPA could impose additional conditions on the State of Arizona to benefit endangered species, which is precisely what the Fifth Circuit addressed in *AFPA*. *See* 137 F.3d 293-94. Indeed, in this case, local FWS employees in an inter-agency elevation document suggested the development of a "process" "to ensure that EPA uses its authority under the ESA to provide sufficient protection for the continued existence of listed species." App. 571; *see also* App. 563.

C. The Ninth Circuit's Opinion Conflicts With the District of Columbia Circuit's Opinion in *Platte River*.

The *AFPA* court cited and followed *Platte River Whooping Crane Critical Habitat Maintenance Trust v. F.E.R.C.*, 962 F.2d 27, 34 (D.C. Cir. 1992), noting that the petitioner in that case "pressed virtually the same argument EPA advances here." *AFPA,* 137 F.3d at 299. *Platte River* involved a challenge to annual licenses issued by the Federal Energy Regulatory Commission ("FERC") to two hydroelectric projects on the Platte River. Environmental groups challenging the annual licenses relied on Section 7(a)(2), as well as ESA Section 7(a)(1) and this Court's holding in *TVA*, arguing that FERC had an affirmative obligation to impose conditions to protect listed species. *Id.* at 33-34. The District of Columbia Circuit rejected that argument, stating:

> The Trust reads section 7 essentially to oblige [FERC] to do "whatever it takes" to protect the threatened and endangered species that inhabit the Platte River basin; any limitations on FERC's authority contained in the [Federal Power Act] are implicitly superseded by this general command. Petitioner relies on [*TVA*], the famous "snail darter" case in which the Supreme Court said that section 7's legislative history "reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." We think the Trust's interpretation of the ESA is far-fetched. As the [FERC] explained, the statute directs agencies to "utilize their authorities" to carry out the ESA's objectives; it does not *expand*

> the powers conferred on an agency by its enabling act.

962 F.2d at 34 (emphasis in original) (quoting *TVA*, 437 U.S. at 185; internal citations omitted).

The majority of the panel in this case criticized the *Platte River* court for failing to appreciate the "obvious differences" between ESA Sections 7(a)(1) and 7(a)(2). App. 46. Section 7(a)(1) directs agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of . . . species." App. 184. Because Section 7(a)(1) refers to agencies' "authorities" while Section 7(a)(2) does not, the majority concluded Congress intended to grant additional authority to federal agencies in Section 7(a)(2). App. 34-38. The majority's reliance on this distinction is misplaced for two reasons.

As an initial matter, the unsuccessful petitioners in *Platte River* relied on both ESA provisions as well as this Court's opinion in *TVA* to support their argument. In fact, the court quoted Section 7(a)(2) in its opinion. *Platte River*, 962 F.2d at 33-34. Therefore, despite the majority's characterization, the *Platte River* court's rejection of the petitioners' argument involved an analysis of both Sections 7(a)(1) and 7(a)(2).

Moreover, the legislative history fails to support the majority's attempt to distinguish *Platte River*. In the original version of Section 7, the obligations of federal agencies to carry out conservation programs (now contained in Section 7(a)(1)) and to avoid jeopardy (now contained in Section 7(a)(2)) were both qualified by the phrase "utilize their authorities." Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973)

(App. 483). Congress separated Section 7 into subsections in 1978, but explained that this revision merely restated "existing law." H.R. Conf. Rep. No. 95-1804, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9486 (emphasis added) (App. 487). Agencies' obligations under "existing law" were limited by their authorities. This limitation is supported by ESA Section 2(c), which declared Congress' policy that federal agencies "shall seek to conserve . . . species and *shall utilize their authorities* in furtherance of . . . this act." Endangered Species Act of 1973, Pub. L. No. 93-205, § 2(c), 87 Stat. 884, 885 (1973) (currently at 16 U.S.C. § 1531(c)(1)) (emphasis added) (App. 482).

Furthermore, Congress enacted significant amendments to the ESA in 1978, 1979 and 1982. Although there are numerous discussions of Section 7(a)(2) and the inter-agency consultation process in various committee reports accompanying the amendments, none of those discussions suggests Section 7(a)(2) grants additional power to federal agencies or compels agencies to ignore their statutory mandates. *See, e.g.*, H.R. Rep. No. 95-1625, at 11-12 and 19-20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9461-62, 9469-70 (App. 490-92, App. 494-97); S. Rep. No. 96-151, at 3-4 (1979) (App. 503-04); H.R. Conf. Rep. No. 96-697, at 12-16 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2572, 2575-79 (App. 509-17); H.R. Rep. No 97-567, at 24-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2824-29 (App. 518-28); S. Rep. No. 97-418, at 19-20 (1982) (App. 537-42). In short, there is nothing in the

legislative history to support the majority's summary rejection of *Platte River* and *AFPA*.[4]

D. There Are No Opinions From Other Circuits That Support the Majority's Novel Interpretation of Section 7(a)(2).

In addition to rejecting *AFPA* and *Platte River* as "unpersuasive," the majority relied on *Conservation Law Foundation of New England, Inc. v. Andrus*, 623 F.2d 712 (1st Cir. 1979), and *Defenders of Wildlife v. Administrator, E.P.A.*, 882 F.2d 1294 (8th Cir. 1989), contending an inter-circuit conflict already existed. App. 44-45. As a preliminary matter, if the majority were correct, there would be a direct conflict among five circuits rather than three, lending further support to this petition.

As Judge Kozinski explained in his dissent (App. 148, n.5), the opinions from the First and Eighth Circuits are inapposite. Neither case involved the interpretation of a statute that on its face precluded the exercise of agency discretion. In *Conservation Law*, which involved the sale of offshore leases for oil and gas exploration under the Outer

[4] The majority also criticized the *Platte River* court for ignoring the enactment of ESA Sections 7(g) and (h), 16 U.S.C. § 1536(g) and (h). App. 46. ESA Sections 7(g) and (h) were enacted in the wake of *TVA* and create a process by which projects can be declared exempt from Section 7(a)(2). These provisions deal with irreconcilable conflicts presented *at the end* of the consultation process, when, as in *TVA*, a discretionary federal action would jeopardize a listed species and therefore be prohibited. *See, e.g.,* S. Rep. No. 97-418, at 16-17 (App. 532) ("The exemption process was designed to resolve endangered species conflicts after consultation has been exhausted. . . ."). They are not relevant to whether Section 7(a)(2) applies to non-discretionary actions in the first place.

Continental Shelf Lands Act, the First Circuit held the ESA would continue to apply to future discretionary actions taken after the lease sale was held (*e.g.,* subsequent agency approvals of exploration plans). 623 F.2d at 715. In *Defenders of Wildlife*, the Eighth Circuit held that the Federal Insecticide, Fungicide, and Rodenticide Act does not exempt the EPA from complying with ESA requirements when registering pesticides. 882 F.2d at 1299-1300. In neither case did the court address the issue presented here.[5]

In sum, no circuit court has previously interpreted Section 7(a)(2) of the ESA as an independent source of authority, and prior to this case, there was no inter-circuit conflict. Decisions from other circuits have consistently stated that the authority of federal agencies is based on the agencies' enabling statutes. *See In re Operation of the Missouri River System Litigation,* 421 F.3d 618, 630 (8th Cir. 2005) ("Case law supports the contention that environmental- and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority."), *citing* 50 C.F.R. § 402.03 and *Platte River*; *Sierra Club v. Glickman*, 156 F.3d 606, 616 n.5 (5th Cir. 1998) (the "duty to consult [under Section 7(a)(2)] and the duty to conserve [under Section 7(a)(1)] is

[5] Notably, in subsequent decisions involving the application of ESA Section 7(a)(2), courts within the First and Eighth Circuits have not adopted the majority's characterization of those opinions. *See In re Operation of the Missouri River System Litigation,* 421 F.3d 618, 630 (8th Cir. 2005); *Strahan v. Linnon*, 967 F. Supp. 581, 607-08 (D. Mass. 1997), *aff'd*, 187 F.3d 623, 1998 WL 1085817 at *3 (1st Cir. 1998) (unpublished) (Section 7(a)(2) does not apply to certificates issued by the Coast Guard based on the agency's limited statutory discretion).

tempered by the actual authorities of each agency."), *citing Platte River*; *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985) (the ESA "does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the Clean Water Act."). Therefore, the Ninth Circuit's opinion imposes, for the first time since the ESA was adopted more than 30 years ago, an affirmative and broad-ranging obligation on all federal agencies to act for the benefit of listed species, even if their enabling statutes preclude them from doing so.

III. THE MAJORITY DISREGARDED THE SERVICES' LONGSTANDING INTERPRETATION OF SECTION 7(a)(2) AND EFFECTIVELY INVALIDATED SEVERAL IMPORTANT REGULATIONS IMPLEMENTING THAT PROVISION.

In 1986, FWS and NMFS ("the Services") jointly promulgated rules governing Section 7(a)(2) that implemented the 1978, 1979 and 1982 ESA amendments. *Interagency Cooperation – Endangered Species Act of 1973, As Amended; Final Rule,* 51 Fed. Reg. 19,926 (June 3, 1986) (codified at 50 C.F.R. pt. 402) (App. 318-480). In this formal rulemaking, which began in 1983 and involved public notice and comment, the Services expressly recognized that an agency's obligations under Section 7(a)(2) are limited by its existing legal authority.

Included in this rulemaking was 50 C.F.R. § 402.03, entitled "Applicability," which states: "Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control." Moreover, other regulations adopted in this same rulemaking recognize that a federal agency's duties under

Section 7(a)(2) are limited by its existing authorities. For example, 50 C.F.R. § 402.02 and § 402.14(g)(8) require that reasonable and prudent alternatives suggested by the Services to avoid jeopardy be "consistent with the scope of the Federal agency's legal authority and jurisdiction."[6] Similarly, 50 C.F.R. § 402.16 requires the re-initiation of consultation "where discretionary Federal involvement or control over the action has been retained."

As Judge Thompson explained in his dissent, the Ninth Circuit previously recognized, consistent with the Services' regulations, "that an agency may have decisionmaking authority and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered and threatened species." App. 64-65, *citing Ground Zero Ctr. For Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.,* 340 F.3d 969, 974 (9th Cir. 2003); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074-75 (9th Cir. 1996); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995).

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[6] In the preamble to their final rules implementing Section 7(a)(2), the Services, discussing the regulatory definition of "reasonable and prudent alternatives," acknowledged that they "should be mindful of the limits of a Federal agency's jurisdiction and authority when prescribing a reasonable and prudent alternative. An alternative, to be reasonable and prudent, should be formulated in such a way that it can be implemented by a Federal agency consistent with the scope of its legal authority and jurisdiction." 51 Fed. Reg. 19,937 (App. 365). Under the majority's interpretation of Section 7(a)(2), however, an alternative will *always* be consistent with the agency's authority and jurisdiction because the ESA creates an affirmative and independent duty to protect species, regardless of the limitations in an agency's authorizing statute.

In its opinion, in contrast, the majority marginalized the Services' interpretation of the obligations imposed by Section 7(a)(2), variously describing 50 C.F.R. § 402.03 as a "gloss" on and as being "congruent" and "coterminous with" the statute. App. 39-42. In other words, the Services' interpretation must necessarily correspond to the majority's view of how the ESA should apply. A "reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001); *see also Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 703 (1995) (upholding FWS's rule defining "harm" in the context of ESA Section 9). Here, the majority gave no deference to the Services' long-standing interpretation of Section 7(a)(2), effectively invalidating regulations that have applied to federal agencies since 1986. This will lead to the inconsistent application of the Services' regulations, exacerbating the inter-circuit conflict described in the preceding section and creating additional confusion about the duties of federal agencies under the ESA.

IV. THE MAJORITY MISCHARACTERIZED AND MISAPPLIED THIS COURT'S OPINION IN *TVA v. HILL*.

The linchpin of the majority's interpretation of Section 7(a)(2) was this Court's opinion in *TVA*, which was issued in 1978. App. 32-34. In that case, the Court enjoined completion of the Tellico Dam based on ESA Section 7 because it was stipulated that the dam's operation would jeopardize the continued existence of an endangered

species of minnow and destroy that species' critical habitat. *E.g.,* 437 U.S. at 171 ("We begin with the premise that operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat."), 174 ("[I]t is clear that TVA's proposed operation of the dam will [result in] the *eradication* of an endangered species.") (emphasis in original).

This Court, however, did *not* hold that Section 7 granted additional powers to federal agencies, nor did the Court need to reach that issue given the facts of the case. Instead, the central issue in *TVA* was whether Congress, in enacting Section 7, foreclosed the exercise of equitable discretion in fashioning an appropriate remedy for the agency's violation. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-17 (1982) (discussing and distinguishing *TVA* in the context of an alleged CWA violation).

Since *TVA* was decided 28 years ago, no circuit court has adopted the Ninth Circuit's expansive reading of *TVA*, or has otherwise held that Section 7(a)(2) of the ESA grants additional power to federal agencies. Both the Fifth Circuit in *AFPA* and the District of Columbia Circuit in *Platte River* rejected attempts to interpret *TVA* in that manner. Unfortunately, the majority opinion took this Court's language out of context and mischaracterized the holding of *TVA*. The lower courts in the Ninth Circuit are now bound by this erroneous reading, and other federal courts may similarly misapply *TVA*. Accordingly, Home Builders request that the Court grant this petition to clarify the interpretation of Section 7(a)(2) and to ensure that additional inter-circuit conflicts do not arise.

V. THE MAJORITY MISAPPLIED THIS COURT'S CAUSATION ANALYSIS AND HOLDING IN *PUBLIC CITIZEN*.

In *Public Citizen*, this Court addressed the obligations of federal agencies under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370d, an analogous statute that requires federal agencies to evaluate the environmental impacts of their actions prior to proceeding with them. The majority in *Defenders* expressly adopted the *Public Citizen* standard for determining whether the impacts of a proposed agency action have a legally relevant nexus to listed species and their critical habitat and therefore require consultation with FWS under ESA Section 7(a)(2). App. 29-30. However, the majority then failed to follow that standard, resulting in confusion over what standard actually applies. As Judge Kozinski noted in the dissent to the denial of rehearing en banc, the majority opinion suggests that the Ninth Circuit intends to continue to apply the "but for" causation analysis rejected in *Public Citizen* to determine whether environmental impacts are attributable to agency actions. App. 144 & n.4.

A. Summary of *Public Citizen* and Its Rejection of "But For" Causation

In *Public Citizen*, the Federal Motor Carrier Safety Administration ("FMCSA") adopted rules imposing registration and safety requirements on Mexican-domiciled motor carriers operating in the United States. To comply with NEPA, FMCSA prepared an environmental assessment, determining that the rules would not have a significant impact on the environment. The agency did not evaluate the overall environmental impacts caused by

Mexican trucks operating in the United States. FMCSA reasoned that those impacts were caused by the President's decision to lift a long-standing moratorium over which the agency had no control. 541 U.S. at 759-62.

The agency's rules were challenged on several grounds, including the narrow scope of its environmental assessment. The Ninth Circuit agreed, concluding that FMCSA violated NEPA by not preparing an environmental impact statement in order to evaluate fully the environmental impacts resulting from cross-border truck traffic. *Public Citizen v. Department of Transp.*, 316 F.3d 1002, 1021-27 (9th Cir. 2003).

This Court reversed, holding FMCSA's environmental assessment was sufficient. In approving the scope of analysis employed by the FMCSA, the Court stated that a "but for" causal relationship between an agency's action and an environmental effect "is insufficient to make an agency responsible for that particular effect under NEPA and the relevant regulations. NEPA requires a reasonably close causal relationship between the environmental effect and the alleged cause." 541 U.S. at 767 (quotation marks omitted). Thus, FMCSA was required to evaluate only those environmental impacts resulting from activities that the agency was authorized by Congress to regulate. The Court concluded:

> We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its [environmental

> assessment] when determining whether its action is a "major Federal action."

Id. at 770. Because FMCSA could not authorize (or prohibit) cross-border operations by Mexican motor carriers, the agency appropriately limited the scope of its analysis to impacts caused by its regulatory program. *Id.*

B. The Majority Ignored the Limitations on the EPA's Regulatory Authority Under the CWA and Applied a "But For" Causation Test, Improperly Attributing All Impacts Resulting From Real Estate Development to EPA's Decision.

The majority's adoption of this Court's holding in *Public Citizen* to determine the proper scope of analysis under Section 7(a)(2) was appropriate. NEPA is a procedural statute whose purpose is to ensure that federal agencies are aware of the impacts of their actions on the environment. *See, e.g., Public Citizen*, 541 U.S. at 757-78; *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980). Under ESA Section 7(a)(2), federal agencies must similarly determine, in consultation with FWS, whether their actions are likely to adversely affect listed species or critical habitat, and ultimately whether those impacts are likely to jeopardize listed species. Thus, the majority correctly stated, following *Public Citizen*, that a causal relationship must exist between a proposed federal action and impacts on listed species, and that such relationship is dependent on the agency's legal authority. *See, e.g.,* App. 29 ("a negative impact on listed species is the likely direct or indirect effect of an agency's action only if the agency has some control over that result"). The majority then ignored this

principle and erroneously assumed that *all* impacts resulting from future real estate development in Arizona are the responsibility of EPA.

The majority opinion rejected EPA's position that a "loss of conservation benefit" would not be caused by EPA's approval of the State of Arizona's program. *See* App. 111-15. As explained in the biological opinion, however, "[d]evelopments are driven by any number of factors, including but not limited to demand, supply, economics, political decisions, zoning regulations, and financial market stability. Based upon the best available information, development in the action area will not be caused by EPA's proposed approval." App. 113. The majority summarily rejected this reasoning as implausible, concluding instead that future real estate development and the CWA permits are links in the same "'but for' causal chain." App. 27-28. If this strained reasoning were applied to FMCSA's rulemaking in *Public Citizen*, the President's decision to lift the moratorium and the agency's promulgation of inspection and safety rules for Mexican motor carriers would likewise constitute "but for" links in the same causal chain, requiring FMCSA to extend the scope of its NEPA analysis to impacts over which the agency had no control – a result this Court expressly rejected.

Inherent in the majority's illogical causation construct is its erroneous belief that EPA, when issuing CWA permits, has the authority to control how private land is used. In administering the NPDES program, the permitting entity is charged only with authorizing the discharge of pollutants. It is *not* charged with regulating, and is not authorized to regulate, the activity from which the discharge results. *See Natural Resources Defense*

Council, Inc. v. E.P.A., 822 F.2d 104, 128-31 (D.C. Cir. 1987) (holding EPA lacked authority under the CWA to prohibit an applicant's construction activities pending compliance with NEPA). If the activity can proceed without discharging a pollutant into navigable water, a permit is *not* required, and EPA has no jurisdiction over the activity under the CWA at all. *See, e.g., Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1015-18 (9th Cir. 2002).[7]

For this reason, when EPA consults with FWS under ESA Section 7(a)(2) in connection with issuing an NPDES permit, the consultation must be limited to effects on the water body receiving the discharge and the waters downstream thereof (*i.e.,* the "action area"). *See* 50 C.F.R. § 402.02 (defining "action area"); *Riverside Irr. Dist.,* 758 F.2d at 512 (the relevant "action area" related to a CWA permit for the construction of a dam included downstream aquatic habitat). Real estate development and other private land uses are not an "effect" of the action because private land uses are not *caused* by the issuance of a

[7] The majority erroneously noted that EPA's general permit governing storm water discharges resulting from construction activities (which is the permit commonly used by developers) regulates the construction itself, rather than the discharge. *See* App. 49 n.22 ("As a practical matter, a developer could not perform any construction activities without such a permit."). No authority was cited for this statement, and it cannot be reconciled with the CWA's basic framework, which: (1) recognizes the paramount right of states to regulate land uses (33 U.S.C. § 1251(b)); and (2) prohibits discharges of pollutants into navigable waters unless they are authorized under one of several CWA programs (33 U.S.C. § 1311(a)). Nothing in the CWA suggests that EPA is authorized to regulate real estate development under the guise of permitting discharges of pollutants into navigable waters.

NPDES permit. Thus, under *Public Citizen*'s causation analysis, EPA is not required by Section 7(a)(2) to ensure that private land uses do not jeopardize listed species or adversely modify their critical habitat. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.01, 402.03.

In short, throughout the program approval process, EPA maintained it lacked authority under the CWA to regulate non-water-quality-related impacts resulting from private land use activities. *E.g.,* App. 564-65 (inter-agency elevation document), 114 (FWS's biological opinion). EPA also consistently maintained that approval of Arizona's program under CWA Section 402(b) would merely constitute a shift in administrative responsibility for issuing and enforcing permits under the NPDES program. App. 114, 564, 615. The majority mischaracterized EPA's position, ignored EPA's limited authority under the CWA, and treated the agency as being legally responsible for every future land-use activity that might adversely affect a listed species or its critical habitat. Such holding cannot be squared with this Court's holding in *Public Citizen,* and it will force agencies to analyze the environmental impacts of activities over which they have no control.

CONCLUSION

The majority opinion redefines and significantly expands the obligations of federal agencies under Section 7(a)(2) of the ESA, a key provision of that law which applies to all federal agencies and federal programs. The opinion also creates conflicts with other federal circuits and with prior Ninth Circuit opinions, none of which has

interpreted Section 7(a)(2) as granting additional authority to federal agencies. Finally, the opinion ignores and renders ineffective the FWS's long-standing regulatory interpretation regarding the applicability of Section 7(a)(2), compelling agencies to protect listed species even when their authorizing statutes preclude them from doing so. Therefore, this case involves matters of national importance. For these reasons, Home Builders respectfully request that this petition be granted.

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Respectfully submitted,

RUSSELL S. FRYE
FRYE LAW PLLC
3050 K Street NW, Suite 400
Washington, D.C. 20007-5108
(202) 342-8878

NORMAN D. JAMES
(*Counsel of Record*)
FENNEMORE CRAIG, P.C.
3003 North Central Avenue,
Suite 2600
Phoenix, AZ 85012-2913
(602) 916-5346

DUANE J. DESIDERIO
THOMAS J. WARD
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, NW
Washington, D.C. 20005-2800
(202) 266-8200

Counsel for Petitioners