

INSERT at approximately pages 283-84 of Coggins, Wilkinson, Leshy & Fischman, Federal Public Land & Resources Law (6th ed. 2007):

National Ass'n of Home Builders v. Defenders of Wildlife
___ U.S. ___, 127 S. Ct. 2518 (June 25, 2007)

Justice ALITO delivered the opinion of the Court.

These cases concern the interplay between two federal environmental statutes. Section 402(b) of the Clean Water Act requires that the Environmental Protection Agency transfer certain permitting powers to state authorities upon an application and a showing that nine specified criteria have been met. Section 7(a)(2) of the Endangered Species Act of 1973 provides that a federal agency must consult with agencies designated by the Secretaries of Commerce and the Interior in order 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." The question presented is whether § 7(a)(2) effectively operates as a tenth criterion on which the transfer of permitting power under the first statute must be conditioned. We conclude that it does not * * * [and] therefore reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

A
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The Clean Water Act of 1972(CWA) established a National Pollution Discharge Elimination System (NPDES) that is designed to prevent harmful discharges into the Nation's waters. The Environmental Protection Agency (EPA) initially administers the NPDES permitting system for each State, but a State may apply for a transfer of permitting authority to state officials. If authority is transferred, then state officials--not the federal EPA--have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight.

Under § 402(b) of the CWA, [a state governor may apply for a delegation fo atuhority from EPA, if he or she certifies] "that the laws of such State ... provide adequate authority to carry out the described program." The same section provides that the EPA "shall approve each submitted program" for transfer of permitting authority to a State "unless [it] determines that adequate authority does not exist" to ensure that nine specified criteria are satisfied. These criteria all relate to whether the state agency that will be responsible for permitting has the requisite authority under state law to administer the NPDES program.² If the criteria are met, the transfer must be approved.

²The State must demonstrate that it has the ability: (1) to issue fixed-term permits that apply and ensure compliance with the CWA's substantive requirements and which are revocable for cause; (2) to inspect, monitor, and enter facilities and to require reports to the extent required by the CWA; (3) to provide for public notice and public hearings; (4) to ensure that the EPA receives notice of each permit application; (5) to ensure that any other State whose waters may be affected by the issuance of a permit may submit written recommendations and that written

* * *

Section 7 of the ESA prescribes the steps that federal agencies must take to ensure that their actions do not jeopardize endangered wildlife and flora. Section 7(a)(2) provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." * * * [The consultation process requires the Secretary] to give the agency a written biological opinion "setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." If the Secretary concludes that the agency action would place the listed species in jeopardy or adversely modify its critical habitat, "the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate [§ 7(a)(2)] and can be taken by the Federal agency ... in implementing the agency action." Regulations promulgated jointly by the Secretaries of Commerce and the Interior provide that, in order to qualify as a "reasonable and prudent alternative," an alternative course of action must be able to be implemented in a way "consistent with the scope of the Federal agency's legal authority and jurisdiction." § 402.02. Following the issuance of a "jeopardy" opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U.S.C. § 1536(e). The regulations also provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 CFR § 402.03.

B
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[In February 2002, Arizona officials applied for EPA authorization to administer that State's NPDES program. The FWS regional office expressed concern that the transfer of authority could harm listed endangered species in Arizona because the ESA's consultation requirement would not apply to permitting decisions by Arizona authorities. ESA disagreed, arguing the link between the transfer of permitting authority and potential harm to species was "too attenuated." In December 2002, the national office of FWS issued a final biological opinion concluding the requested transfer would not result in jeopardy to listed species, essentially buying EPA's argument. Environmentalists filed suit, and the Ninth Circuit eventually held, en banc, over a dissent by six judges, that § 7(a)(2) of the ESA

reasons be provided if such recommendations are not accepted; (6) to ensure that no permit is issued if the Army Corps of Engineers concludes that it would substantially impair the anchoring and navigation of navigable waters; (7) to abate violations of permits or the permit program, including through civil and criminal penalties; (8) to ensure that any permit for a discharge from a publicly owned treatment works includes conditions requiring the identification of the type and volume of certain pollutants; and (9) to ensure that any industrial user of any publicly owned treatment works will comply with certain of the CWA's substantive provisions. §§ 1342(b)(1)-(9).

provided an "affirmative grant of authority to attend to [the] protection of listed species." Among other things, the Court held that EPA's transfer decision was arbitrary and capricious because EPA and the FWS had "legally contradictory positions regarding [their] section 7 obligations." The Supreme Court addressed this issue first, as follows:]

As an initial matter, we note that if the EPA's action was arbitrary and capricious, as the Ninth Circuit held, the proper course would have been to remand to the agency for clarification of its reasons * * * [rather than] jump[ing] ahead to resolve the merits of the dispute. In so doing, it erroneously deprived the agency of its usual administrative avenue for explaining and reconciling the arguably contradictory rationales that sometimes appear in the course of lengthy and complex administrative decisions. We need not examine this question further, however, because we conclude that the Ninth Circuit's determination that the EPA's action was arbitrary and capricious is not fairly supported by the record.

Review under the arbitrary and capricious standard is deferential; we will * * * "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). * * * The Court of Appeals concluded that the EPA's decision was "internally inconsistent" because, in its view, the agency stated--both during preliminary review of Arizona's transfer application and in the Federal Register notice memorializing its final action--"that section 7 requires consultation regarding the effect of a permitting transfer on listed species." With regard to the various statements made by the involved agencies' regional offices during the early stages of consideration, the only "inconsistency" respondents can point to is the fact that the agencies changed their minds--something that, as long as the proper procedures were followed, they were fully entitled to do. The federal courts ordinarily are empowered to review only an agency's *final* action, see 5 U.S.C. § 704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.

Respondents also point to the final Federal Register notice memorializing the EPA's approval of Arizona's transfer application. This notice stated that the FWS's issuance of its biological opinion had "conclude[d] the consultation process required by ESA section 7(a)(2)." Respondents contend that this statement is inconsistent with the EPA's previously expressed position--and their position throughout this litigation--that § 7(a)(2)'s consultation requirement is not triggered by a transfer application under § 402 of the CWA.

We are not persuaded that this statement constitutes the type of error that requires a remand. By the time the Federal Register statement was issued, the EPA had already consulted with the FWS about the Arizona application, and the question whether that consultation had been *required*, as opposed to voluntarily undertaken by the agency, was simply not germane to the final agency transfer decision. The Federal Register statement, in short, was dictum, and it had no bearing on the final agency action that respondents challenge. Mindful of Congress' admonition that in reviewing agency action, "due account shall be taken of the rule of prejudicial error," 5 U.S.C. § 706, we do not believe that this stray statement, which could have had no effect on the underlying agency action being challenged, requires that we further delay the transfer of permitting authority to Arizona by

remanding to the agency for clarification.

III

A

We turn now to the substantive statutory question raised by the petitions, a question that requires us to mediate a clash of seemingly categorical-and, at first glance, irreconcilable-legislative commands. Section 402(b) of the CWA provides, without qualification, that the EPA "shall approve" a transfer application unless it determines that the State lacks adequate authority to perform the nine functions specified in the section. By its terms, the statutory language is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application.

* * *

The language of § 7(a)(2) of the ESA is similarly imperative: it provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize" endangered or threatened species or their habitats. This mandate is to be carried out through consultation and may require the agency to adopt an alternative course of action. As the author of the panel opinion below recognized, applying this language literally would "*ad[d]* one [additional] requirement to the list of considerations under the Clean Water Act permitting transfer provision." (Berzon, J., concurring in denial of rehearing en banc) (emphasis in original). That is, it would effectively repeal the mandatory and exclusive list of criteria set forth in § 402(b), and replace it with a new, expanded list that includes § 7(a)(2)'s no-jeopardy requirement.

B

* * * Here, reading § 7(a)(2) as the Court of Appeals did would effectively repeal § 402(b)'s statutory mandate by engrafting a tenth criterion onto the CWA.⁷ Section 402(b) of the CWA commands that the EPA "shall" issue a permit whenever all nine exclusive statutory prerequisites

⁷Justice STEVENS' dissenting opinion attempts to paper over this conflict by suggesting that the EPA and the agencies designated by the Secretary of the Interior could reconcile the commands of the CWA and the ESA by "generat[ing] an alternative course of action whereby the transfer could still take place ... but in such a way that would honor the mandatory requirements of § 7(a)(2)." For example, it suggests that the EPA could condition transfers of permitting authority on the State's acceptance of additional continuing oversight by the EPA (presumably beyond that oversight already contemplated by the CWA's statutory language). But such a take-it-or-leave-it approach, no less than a straightforward rejection of a transfer application, would impose conditions on an NPDES transfer beyond those set forth in § 402(b), and thus alter the CWA's statutory command.

are met. Thus, § 402(b) does not just set forth *minimum* requirements for the transfer of permitting authority; it affirmatively mandates that the transfer "shall" be approved if the specified criteria are met. The provision operates as a ceiling as well as a floor. By adding an additional criterion, the Ninth Circuit's construction of § 7(a)(2) raises that floor and alters § 402(b)'s statutory command.

The Ninth Circuit's reading of § 7(a)(2) would * * * also result in the implicit repeal of many additional otherwise categorical statutory commands. Section 7(a)(2) by its terms applies to "any action authorized, funded, or carried out by" a federal agency-covering, in effect, almost anything that an agency might do. Reading the provision broadly would thus partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species. While the language of § 7(a)(2) does not explicitly repeal any provision of the CWA (or any other statute), reading it for all that it might be worth runs foursquare into our presumption against implied repeals.

C
1

The agencies charged with implementing the ESA have attempted to resolve this tension through regulations implementing § 7(a)(2). The NMFS and FWS, acting jointly on behalf of the Secretaries of Commerce and the Interior and following notice-and-comment rulemaking procedures, have promulgated a regulation stating that "Section 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control." 50 CFR § 402.03 (emphasis added). Pursuant to this regulation, § 7(a)(2) would not be read as impliedly repealing nondiscretionary statutory mandates, even when they might result in some agency action. Rather, the ESA's requirements would come into play only when an action results from the exercise of agency discretion. This interpretation harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors.

We have recognized that "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation" of the statutory scheme. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 703 (1995). But such deference is appropriate only where "Congress has not directly addressed the precise question at issue" through the statutory text. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) * * *

We must therefore read § 7(a)(2) of the ESA against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal if it were construed as broadly as the Ninth Circuit did below. When § 7(a)(2) is read this way, we are left with a fundamental ambiguity that is not resolved by the statutory text. An agency cannot simultaneously obey the differing mandates set forth in § 7(a)(2) of the ESA and § 402(b) of the CWA, and consequently the statutory language-read in light of the canon against implied repeals-does not itself provide clear guidance as to which command must give way.

In this situation, it is appropriate to look to the implementing agency's expert interpretation, which cabins § 7(a)(2)'s application to "actions in which there is discretionary Federal involvement or control." 50 CFR § 402.03. This reading harmonizes the statutes by applying § 7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates.

2

We conclude that this interpretation is reasonable in light of the statute's text and the overall statutory scheme, and that it is therefore entitled to deference under *Chevron*. Section 7(a)(2) requires that an agency "insure" that the actions it authorizes, funds, or carries out are not likely to jeopardize listed species or their habitats. To "insure" something--as the court below recognized--means "[t]o make certain, to secure, to guarantee (some thing, event, etc.)." 420 F.3d, at 963 (quoting 7 Oxford English Dictionary 1059 (2d ed.1989)). The regulation's focus on "discretionary" actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to "insure" that such action will not jeopardize endangered species.

This reasoning is supported by our decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). That case concerned safety regulations that were promulgated by the Federal Motor Carrier Safety Administration (FMCSA) and had the effect of triggering a Presidential directive allowing Mexican trucks to ply their trade on United States roads. The Court held that the National Environmental Policy Act (NEPA) did not require the agency to assess the environmental effects of allowing the trucks entry because "the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion." *Id.*, at 769 (emphasis in original). The Court concluded that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.*, at 770.

We do not suggest that *Public Citizen* controls the outcome here; § 7(a)(2), unlike NEPA, imposes a substantive (and not just a procedural) statutory requirement, and these cases involve agency action more directly related to environmental concerns than the FMCSA's truck safety regulations. But the basic principle announced in *Public Citizen*--that an agency cannot be considered the legal "cause" of an action that it has no statutory discretion *not* to take--supports the reasonableness of the FWS's interpretation of § 7(a)(2) as reaching only discretionary agency actions.

3

The court below simply disregarded § 402.03's interpretation of the ESA's reach, dismissing "the regulation's reference to 'discretionary ... involvement' " as merely "congruent with the statutory reference to actions 'authorized, funded, or carried out' by the agency." 420 F.3d, at 968. But this reading cannot be right. Agency discretion presumes that an agency can exercise "judgment" in connection with a particular action. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401

U.S. 402, 415-416 (1971); see also Random House Dictionary of the English Language 411 (unabridged ed.1967) ("discretion" defined as "the power or right to decide or act according to one's own judgment; freedom of judgment or choice"). As the mandatory language of § 402(b) itself illustrates, not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion.

The dissent's interpretation of § 402.03 is similarly implausible. The dissent would read the regulation as simply clarifying that discretionary agency actions are included within the scope of § 7(a)(2), but not confining the statute's reach to such actions. But this reading would render the regulation entirely superfluous. Nothing in either § 7(a)(2) or the other agency regulations interpreting that section, see § 402.02, suggests that discretionary actions are *excluded* from the scope of the ESA, and there is thus no need for a separate regulation to bring them within the statute's scope. On the dissent's reading, § 402.03's reference to "discretionary" federal involvement is mere surplusage, and we have cautioned against reading a text in a way that makes part of it redundant. * * *

In short, we read § 402.03 to mean what it says: that § 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that an agency is *required* by statute to undertake once certain specified triggering events have occurred. This reading not only is reasonable, inasmuch as it gives effect to the ESA's provision, but also comports with the canon against implied repeals because it stays § 7(a)(2)'s mandate where it would effectively override otherwise mandatory statutory duties.

D

Respondents argue that our opinion in *TVA v. Hill*, 437 U.S. 153 (1978), supports their contrary position. * * * [There,] the Court concluded that "the ordinary meaning" of § 7 of the ESA contained "no exemptions" and reflected "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies."

TVA v. Hill, however, had no occasion to answer the question presented in these cases. That case was decided almost a decade before the adoption in 1986 of the regulations contained in 50 CFR § 402.03. And in any event, the construction project at issue in *TVA v. Hill*, while expensive, was also discretionary. * * * Central to the Court's decision was the conclusion that Congress did not *mandate* that the TVA put the dam into operation; there was no statutory command to that effect; and there was therefore no basis for contending that applying the ESA's no-jeopardy requirement would implicitly repeal another affirmative congressional directive. * * * [T]hat case did not speak to the question whether § 7(a)(2) applies to *non*-discretionary actions, like the one at issue here. The regulation set forth in 50 CFR § 402.03 addressed that question, and we defer to its reasonable interpretation.

IV

Finally, respondents and their *amici* argue that, even if § 7(a)(2) is read to apply only to

"discretionary" agency actions, the decision to transfer NPDES permitting authority to Arizona represented such an exercise of discretion. They contend that the EPA's decision to authorize a transfer is not entirely mechanical; that it involves some exercise of judgment as to whether a State has met the criteria set forth in § 402(b) * * * .

The argument is unavailing. While the EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out § 402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list. Nothing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application. * * *

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

* * * In the celebrated "snail darter" case, *TVA v. Hill*, we held that the ESA "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." Consistent with that intent, Chief Justice Burger's exceptionally thorough and admirable opinion explained that § 7 "admits of no exception." Creating precisely such an exception by exempting nondiscretionary federal actions from the ESA's coverage, the Court whittles away at Congress' comprehensive effort to protect endangered species from the risk of extinction and fails to give the Act its intended effect. After first giving *Hill* the attention it deserves, I will comment further on the irrelevance of § 402.03 to these cases and offer other available ways to give effect to both CWA and the ESA. Having done so, I conclude by explaining why these cases should be remanded to the EPA for further proceedings.

* * * Given our unequivocal holding in *Hill* that the ESA has "first priority" over all other federal action, if any statute should yield, it should be the CWA. But no statute must yield unless it is truly incapable of coexistence. Therefore, assuming that § 402(b) of the CWA contains its own mandatory command, we should first try to harmonize that provision with the mandatory requirements of § 7(a)(2) of the ESA.

The Court's solution is to rely on 50 CFR § 402.03, [explaining] at this regulation "harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but by lifting that mandate when the agency is forbidden from considering such extrastatutory factors." This is not harmony, and it certainly isn't effect. Rather than giving genuine effect to § 7(a)(2), the Court permits a wholesale limitation on the reach of the ESA. Its interpretation of § 402.03 conflicts with the text and history of the regulation, as well as our interpretation of § 7 in the "snail darter" case.

* * * [Furthermore, at no point in the administrative proceedings in these cases did EPA even mention [the regulation]. As an initial matter, it is worth emphasizing that even if EPA had relied on § 402.03, its interpretation of the ESA would not be entitled to deference under *Chevron*, because

it is not charged with administering that statute. * * * And EPA has conceded that the Department of the Interior's biological opinion "did not discuss 50 CFR. 402.03, and it did not address the question whether the consultation that produced the [biological opinion] was required by the ESA." Pet. for Cert. (never mentioning § 402.03). Left with this unfavorable administrative record, EPA can only lean on the fact that the Department of the Interior has recently "clarified" its position regarding § 402.03 in a *different* administrative proceeding. See Pet. for Cert. ("The recent F[ish and Wildlife Service] and N[ational Marine Fisheries Service] communications regarding Alaska's pending transfer application reflect those agencies' considered interpretations ... of [50 CFR] 402.03"). We have long held, however, that courts may not affirm an agency action on grounds other than those adopted by the agency in the administrative proceedings. The majority ignores this hoary principle of administrative law and substitutes a post-hoc interpretation of § 7(a)(2) and § 402.03 for that of the relevant agency. For that reason alone, these cases should be remanded to the agency. And for the other reasons I have given, § 402.03 cannot be used to harmonize the CWA and the ESA.

III

There are at least two ways in which the CWA and the ESA can be given full effect without privileging one statute over the other. * * * [First, w]hile the ESA does mandate that the relevant agencies "consul[t]" with the Interior Department, that consultation process also provides a way for the agencies to give effect to both statutes. * * *

When applied to the NPDES transfer program, the "reasonable and prudent alternatives" process would enable EPA and the Department of the Interior to develop a substitute that would allow a transfer of permitting authority *and* would not jeopardize endangered species. Stated differently, the consultation process would generate an alternative course of action whereby the transfer could still take place--as required by § 402(b) of the CWA--but in such a way that would honor the mandatory requirements of § 7(a)(2) of the ESA. This should come as no surprise to EPA, as it has engaged in pre-transfer consultations at least six times in the past and has stated that it is not barred from doing so by the CWA.⁷

Finally, for the rare case in which no "reasonable and prudent alternative" can be found, Congress has provided yet another mechanism for resolving any conflicts between the ESA and a proposed agency action. [Justice Stevens here discusses the "God Squad" discussed on p. 283 of the text.] * * * By creating this Committee, Congress recognized that some conflicts with the

⁷See, e.g., 63 Fed.Reg. 51199 (1998) (approving Texas' application to administer the NPDES program after consultation with FWS and stating that "EPA believes that section 7 does apply" to EPA's action); 61 Fed.Reg. 65053 (1996) (approving Oklahoma's NPDES application after consultation with FWS and stating that "EPA's approval of the State permitting program under section 402 of the Clear Water Act is a federal action subject to [§ 7's consultation] requirement"); see also Tr. of Oral Arg. 5 (conceding that EPA conducted six pre-transfer consultations in the past).

ESA may not be capable of resolution without having to forever sacrifice some endangered species. At the same time, the creation of this last line of defense reflects Congress' view that the ESA should not yield to another federal action except as a final resort and except when authorized by high level officials after serious consideration. In short, when all else has failed and two federal statutes are incapable of resolution, Congress left the choice to the Committee-not to this Court; it did not limit the ESA in the way the majority does today.

B

EPA's regulations offer a second way to harmonize the CWA with the ESA. After EPA has transferred NPDES permitting authority to a State, the agency continues to oversee the State's permitting program. * * * EPA can use-and in fact has used-the MOA process to structure its later oversight in a way that will allow it to protect endangered species in accordance with § 7(a)(2) of the ESA. EPA might negotiate a provision in the MOA that would require a State to abide by the ESA requirements when issuing pollution permits. See Brief for American Fisheries Society et al. as *Amici Curiae* 28. ("In the Maine MOA, for example, EPA and the state agreed that state permits would protect ESA-listed species by ensuring compliance with state water quality standards"). Alternatively, "EPA could require the state to provide copies of draft permits for discharges in particularly sensitive habitats such as those of ESA-listed species or for discharges that contain a pollutant that threatens ESA-listed wildlife." *Id.*, at 10. Or the MOA might be drafted in a way that would allow the agency to object to state permits that would jeopardize any and all endangered species. See *id.*, at 28 (explaining that the Maine MOA includes a provision allowing EPA to "object to any state permit that risks harm to a listed species by threatening water quality"). These are just three of many possibilities. I need not identify other ways EPA could use the MOA process to comply with the ESA; it is enough to observe that MOAs provide a straightforward way to give the ESA its full effect without restricting § 7(a)(2) in the way the Court does.

IV

As discussed above, I believe that the Court incorrectly restricts the reach of § 7(a)(2) to discretionary federal actions. Even if such a limitation were permissible, however, it is clear that EPA's authority to transfer permitting authority under § 402(b) *is* discretionary.

The EPA Administrator's authority to approve state permit programs pursuant to § 402(b) of the CWA does not even fit within the Court's description of the category of mandatory actions that the Court holds are covered by the ESA. In the Court's words, that category includes actions "that an agency is *required* by statute to undertake once certain specified triggering events have occurred." The "triggering event" for EPA's approval is simply the filing of a satisfactory description of the State's proposed program. The statute then commands that the EPA Administrator "shall approve" the submitted program unless he determines that state law does not satisfy nine specified conditions. Those conditions are not "triggering events"; they are potential objections to the exercise of the Administrator's authority.

What is more, § 402(b) is a perfect example of why our analysis should not end simply because a

statute uses the word "shall." Instead, we must look more closely at its listed criteria to determine whether they allow for discretion, despite the use of "shall." After all, as then-Justice Rehnquist's dissenting opinion in the "snail darter" case explains, a federal statute using the word "shall" will sometimes allow room for discretion. See *Hill*, 437 U.S. at 211-212 (Rehnquist, J., dissenting). In these cases, there is significant room for discretion in EPA's evaluation of § 402(b)'s nine conditions.

* * * Even the Court acknowledges that EPA must exercise "some judgment in determining whether a State has demonstrated that it has the authority to carry out § 402(b)'s enumerated statutory criteria." However, in the very same breath, the Court states that the dispositive fact is that "the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list." *Ibid.* This reasoning flouts the Court's own logic. Under the Court's reading of § 402.03, § 7(a)(2) applies to discretionary federal actions of any kind. The Court plainly acknowledges that EPA exercises discretion when deciding whether to transfer permitting authority to a State. If we are to take the Court's approach seriously, once *any* discretion has been identified—as it has here—§ 7(a)(2) must apply. * * *

V

Mindful that judges must always remain faithful to the intent of the legislature, Chief Justice Burger closed his opinion in the "snail darter" case with a reminder that "[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." This Court offered a definitive interpretation of the Endangered Species Act nearly 30 years ago in that very case. Today the Court turns its back on our decision in *Hill* and places a great number of endangered species in jeopardy * * *.

Justice BREYER, dissenting.

I join Justice STEVENS' dissent, * * * [and] add one additional consideration in support of his (and my own) dissenting views. * * * My own understanding of agency action leads me to believe that the majority cannot possibly be correct in concluding that the structure of § 402(b) precludes application of § 7(a)(2) to the EPA's discretionary action. That is because grants of discretionary authority always come with *some* implicit limits attached. See L. Jaffe, *Judicial Control of Administrative Action* 359 (1965) (discretion is "a power to make a choice" from a "permissible class of actions"). And there are likely numerous instances in which, prior to, but not after, the enactment of § 7(a)(2), the statute might have implicitly placed "species preservation" outside those limits.

To take one example, consider the statute that once granted the old Federal Power Commission (FPC) the authority to grant a "certificate of public convenience and necessity" to permit a natural gas company to operate a new pipeline [if the agency finds, among other things] "that the proposed service ... is or will be required by the present or future public convenience and necessity." Before enactment of the Endangered Species Act of 1973, it is at least uncertain whether the FPC could have withheld a certificate simply because a natural gas pipeline might threaten an endangered animal, for given the Act's language and history, species preservation does not naturally fall within

its terms. But we have held that the Endangered Species Act changed the regulatory landscape, "indicat[ing] beyond doubt that Congress intended endangered species to be afforded the *highest* of priorities." *TVA v. Hill* (emphasis added). Indeed, the Endangered Species Act demonstrated "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.* And given a new pipeline's potential effect upon habitat and landscape, it seems reasonable to believe, once Congress enacted the new law, the FPC's successor (the Federal Energy Regulatory Commission) would act within its authority in taking species-endangering effects into account.

To take another example, the Food and Drug Administration (FDA) has, by statute, an "exclusive" list of criteria to consider in reviewing applications for approval of a new drug. * * * Preservation of endangered species is not on this "exclusive" list of criteria. Yet I imagine that the FDA *now* should take account, when it grants or denies drug approval, of the effect of manufacture and marketing of a new drug upon the preservation or destruction of an endangered species.

The only meaningful difference between the provision now before us, § 402(b) of the Clean Water Act, and the energy- and drug-related statutes that I have mentioned is that the very purpose of the former is to preserve the state of our natural environment—a purpose that the Endangered Species Act shares. That shared purpose shows that § 7(a)(2) must apply to the Clean Water Act *a fortiori*.

NOTES AND QUESTIONS

1. Does all that vigorous language in Chief Justice Burger's majority opinion in *TVA v. Hill* have meaning any longer? How big a hole does this decision tear in the ESA's protective thrust, as announced in *TVA v. Hill*? Does the majority's emphasis here on the presumption against "repeals by implication" mean that the ESA will be read narrowly when its protective mandate threatens to collide with other statutory authority?
2. Notice that the federal agencies had been in some disarray on whether and how to apply section 7 of the ESA to EPA's decisions whether to delegate Clean Water Act NPDES enforcement to states. Not only was there disagreement between FWS's regional office and its national office, but also some disagreement between FWS nationally and EPA, no previous reliance on the § 402.03 regulation in this context, and some inconsistency in how these questions had been answered in the past. Are you persuaded by the Court's explanation as to why this confusion should not lessen the judiciary's deference to the ultimate position the government came to argue in this litigation?
3. How would the majority answer Justice Breyer's two examples (the FERC and FDA decisions)?
4. Will federal agencies take this decision as an invitation to characterize their actions as non-discretionary in order to avoid the consultation requirements of the ESA's § 7? Will there likely be lots of litigation over whether specific federal actions are discretionary?

5. Did the majority in the Ninth Circuit make a strategic error here in conceding that the consultation process of the ESA effectively added a tenth criteria to nine Clean Water Act prerequisites for delegating the NPDES program to the state?
6. What if anything (short of going back to Congress for new legislation) can a new Administration do to change the result here? Revise regulation § 402.03?
7. EPA provides, through grants of federal dollars, a substantial share of the money that states need to administer the NPDES program. If environmentalists now seek to apply the § 7 consultation requirement to state NPDES decisions, alleging they are being funded by the federal government, what result? Justice Alito's majority opinion discussed this possibility twice, as follows:

Respondents also contend that if the case were remanded to the EPA, they would raise additional challenges--including, for example, a challenge to the EPA's provision of financial assistance to Arizona for the administration of its NPDES program. However, as explained below, any such agency action is separate and independent of the agency's decision to authorize the transfer of permitting authority pursuant to § 402(b). See n. 11, *infra*. We express no opinion as to the viability of a separate administrative or legal challenge to such actions.

[Footnote 11 reads:] Respondents also contend that the EPA has taken, or will take, other discretionary actions apart from the transfer authorization that implicate the ESA. For example, they argue that the EPA's alleged provision of funding to Arizona for the administration of its clean water programs is the kind of discretionary agency action that is subject to § 7(a)(2). However, assuming this is true, any such funding decision is a separate agency action that is outside the scope of this lawsuit. Respondents also point to the fact that, following the transfer of permitting authority, the EPA will retain oversight authority over the state permitting process, including the power to object to proposed permits. But the fact that the EPA may exercise discretionary oversight authority--which may trigger § 7(a)(2)'s consultation and no-jeopardy obligations--*after* the transfer does not mean that the decision authorizing the transfer is itself discretionary.

8. Assuming that the government (either a new Administration or the Congress) resolves to apply the ESA's consultation requirement in some fashion to NPDES permitting decisions made by a state under a Clean Water Act delegation, how should that be achieved? What makes the most practical (and political) sense in trying to mesh the two statutes?