

INTRODUCTION

This case concerns the U.S. Environmental Protection Agency's ("EPA's") recent "final action authorizing Arizona to implement the NPDES [National Pollutant Discharge Elimination System] program in all areas of the State except for Indian Country," Petitioners' Excerpts of Record ("ER") at 321 (emphasis added), and whether EPA complied with the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., in taking that "final action." Section 7(a)(2) of the ESA provides that "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat" designated as "critical." Id. § 1536(a)(2) (emphasis added).

Although the plain terms of section 7(a)(2) apply to the agency action at issue, and despite the fact that the Supreme Court has held that the "language [of section 7] admits of no exception," TVA v. Hill, 437 U.S. 153, 173 (1978), the federal respondents and intervenors seek en banc rehearing on the grounds that the "consultation and jeopardy protection duties of section 7(a)(2) do not apply" to decisions to transfer NPDES authority – i.e., regardless of whether such actions will likely result in the extinction of one or more listed species. See Petition for

Rehearing En Banc by Environmental Protection Agency and U.S. Fish and Wildlife Service (“Fed. Pet.”) at 6 n.1. Although as the panel ruled, EPA itself conceded during the decisionmaking process at issue that it was required to consult with the Fish and Wildlife Service (“FWS”) pursuant to section 7(a)(2). As discussed below, the government and intervenors have not satisfied their heavy burden of establishing that the extraordinary step of en banc review is warranted.

BACKGROUND

A. Section 7 of the ESA

When Congress enacted the ESA in 1973, its “plain intent . . . was to halt and reverse the trend towards species extinction, whatever the cost.” Hill, 437 U.S. at 184. While “[t]his is reflected not only in the stated policies of the Act, but in literally every section of the statute,” id., “[s]ection 7 . . . provides a particularly good gauge of congressional intent.” Id. at 181.

As explained by the Court in Hill, which exhaustively reviewed the legislative history, the ESA’s predecessor statute “qualified the obligation of federal agencies by stating that they should seek to preserve endangered species only ‘*insofar as is practicable and consistent with [their] primary purposes . . .*’” 437 U.S. at 181 (italics in original). “Likewise, every bill introduced in 1973 contained a qualification similar to that found in the earlier statutes,” id., i.e.,

that other agency mandates “would always prevail [over endangered species concerns] if conflict were to occur.” Id. at 182 (emphasis added; internal citation omitted).

However, in a development the Court deemed “very significant,” the “final version of the 1973 Act carefully omitted all of the reservations described above,” and deleted “all phrases which might have qualified an agency’s responsibilities” to avoid species extinction. Id. at 182 (emphasis added). The decision to instead adopt “stringent, mandatory” language, id. at 183, reflected

an explicit congressional design to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the ‘primary mission’ of federal agencies.

Id. at 185 (emphasis added).

The end result of Congress’s deliberations is that “[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7” since that provision’s

very words affirmatively command all federal agencies ‘to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence’ of an endangered species or ‘*result* in the destruction or modification of habitat of such species . . .’ This language admits of no exception.

Id. at 173 (underlining added; italics in original; internal citation omitted).

In short, the provision was “designed . . . for the first time [to] *prohibit* a federal agency from taking action which does jeopardize the status of endangered species.” *Id.* at 179 (italics in original; internal citation omitted).¹

In *Hill*, the Court held that the language of section 7 “require[d] the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million,” despite the fact that “Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised” of the project’s conflict with the survival of an endangered species. 437 U.S. at 172. Indeed, the Court explained that “[i]n 1975, 1976, and 1977, Congress, with full knowledge of the Tellico Dam Project’s effects on the snail darter, continued to appropriate money for the completion of the Project,” and that various congressional committees repeatedly expressed their view that section 7 “did not prohibit the Project’s completion, a view that Congress presumably accepted in approving the appropriations each year.” *Id.* at 200-01 (emphasis added). Nonetheless, the Court “conclude[d] . . . that the explicit provisions” of section 7 fully applied to the project. *Id.* at 153. In reaching that result, the Court stressed that Congress had “create[d] a number of

¹ In 1978, this language was slightly amended to provide that an agencies’ obligation is to “insure” that their actions are “not likely to jeopardize” the continued existence of a species or result in the destruction of critical habitat, 16 U.S.C. § 1536(a)(2) (emphasis added), but Congress made no change to the array of “actions” to which the provision applies.

limited ‘hardship exemptions’” to the ESA’s requirements, but there are “no exemptions in the [ESA] for federal agencies . . .” Id. at 188.

As explained by the panel ruling here, “[a]fter the Supreme Court decided Hill in 1978, Congress amended the [ESA], creating a narrow exception to section 7’s requirements” for federal agencies. Defenders of Wildlife v. EPA, 420 F.3d 946, 966 (9th Cir. 2005). The 1978 amendments allow any agency to “apply . . . for an exemption” if, following consultation, the FWS has determined that the “agency action would violate” section 7(a)(2). 16 U.S.C. § 1536(g)(1). Congress set forth a detailed decisionmaking process regarding such applications – including consideration by an “Endangered Species Committee,” id. § 1536(e)(1) – and also enumerated criteria for the evaluation of exemptions, including that “there are no reasonable and prudent alternatives to the agency action.” Id. § 1536(h)(1)(A)(i).

The FWS and National Marine Fisheries Service (“NMFS”) have adopted regulations that flesh out how the section 7 consultation process must be pursued. Each agency must determine if a proposed action “may affect” a listed species or critical habitat and, if so, must request “formal consultation” with a Service, unless the Service concurs that the project is unlikely to “adversely affect” such species or habitat. 50 C.F.R. § 402.14(a), (b).

The consultation process culminates in a “Biological Opinion” (“BO”) that must “[e]valuate the effects of the action,” including all “indirect effects,” and

address “whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species” or impair critical habitat. Id. § 402.14(g)(2), (4). The agency must then “determine whether and in what manner to proceed” in light of the BO, id. § 402.15(a); if the FWS has made a “jeopardy” finding, the agency must determine whether to adopt any proposed “reasonable and prudent alternative,” 16 U.S.C. § 1536(b)(3)(A), or whether to seek an exemption.

B. EPA’s Transfer of NPDES Authority to Arizona

The Clean Water Act (“CWA”) was enacted in 1972, one year before Congress “prohibited” all agencies from taking any actions that “jeopardize the status” of listed species. Hill, 437 U.S. at 179. The overarching “objective” of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a) (emphasis added). To achieve this objective, the statute establishes a “national goal” of “water quality which provid[es] for the protection of fish, shellfish, and wildlife” Id. § 1251(a)(2). Both the FWS and EPA have repeatedly declared that they “find[] the goals of the CWA and ESA compatible and complementary,” 66 Fed. Reg. 11202, 11208 (Feb. 22, 2001), ER-8 (emphasis added); see also ER-51 (statement by EPA that the “goal of the CWA . . . is consistent with the ESA’s purpose”) (emphasis added; internal citation omitted).

Section 402(b) of the CWA allows states to apply to EPA for authorization to administer the NPDES program, with EPA oversight. 33 U.S.C. § 1342(b). The statute states that EPA “shall approve” the transfer of permitting authority “unless [it] determines that adequate [state] authority does not exist” to carry out nine enumerated responsibilities. *Id.* As noted by the panel, however, EPA has, on many occasions, followed the section 7 consultation process before deciding whether to transfer permitting authority to states, 420 F.3d at 952 n.3. Moreover, Congress has repeatedly amended the CWA but has never intimated that there is any conflict between section 402 and section 7(a)(2) of the ESA, or that the consultation process should be disregarded when EPA makes NPDES transfer decisions.²

Likewise, prior to this case, neither the EPA nor FWS, has ever suggested that EPA, in taking actions under the CWA, could or should be relieved of its duties under section 7(a)(2). To the contrary, in 2001, the EPA and FWS signed a “Memorandum of Agreement” (“MOA”) that “address[ed] interagency coordination under the Clean Water Act and Endangered Species Act,” ER-2, and was designed to “help ensure that EPA actions meet the substantive requirements of section 7(a)(2) of the ESA” *Id.* at 4 (emphasis added). Instead of

² See, e.g., Pub. L. 95-217 (1977); Pub. L. 100-4, Title IV (1987); Pub. L. 102-580, Title III (1992); Pub. L. 104-66, Title II (1995); Pub. L. 105-554 (2000).

providing that EPA’s decisions on transferring NPDES authority could avoid section 7(a)(2) – as the government now insists – the MOA declares that

EPA’s current practice is to consult with the Services where EPA determines that approval of a State’s or Tribe’s application to administer the NPDES program may affect federally listed species . . . When formal consultation is undertaken, a biological opinion issued by the Service(s) would include an incidental take statement in accordance with section 7 of the ESA and 50 CFR Part 402.

Id. at 5 (emphasis added).

Consistent with that understanding, when Arizona sought NPDES authority, EPA “requested the initiation of formal consultation” with the FWS on the “effects of the USEPA’s proposed approval of the AZPDES program on Federally-listed” species. ER-35. EPA also provided the FWS with a “Biological Evaluation” (“BE”) that acknowledged that “all Federally-listed and critical habitats in, adjacent to, or dependent on all surface waters in Arizona may be affected by the action.” ER-51 (emphasis added). The BE further explained that:

[i]n changing from a Federal permitting program to a State permitting program, the permit-related ESA Section 7 processes for consultation will no longer apply. Thus, there will be a reduction in the number of mechanisms available to the Service to protect Federally-listed species and designated critical habitat in Arizona.

Id. (emphasis added). EPA attached to the BE a list of sixty federally listed species that EPA conceded could be harmed by the transfer of NPDES authority. Id. at 56-59.

During consultation, FWS biologists opined that the proposed transfer could have a “devastating effect” on listed species, ER-64, and, indeed, that it would jeopardize the continued existence of several of them. *Id.* at 69-72. This concern was based on the fact that section 7 consultation on NPDES permits in Arizona had been vital in avoiding and mitigating the effects of large construction projects on several species, but that “[g]reat strides in minimizing the disturbance of construction projects in the range of these species to provide for their survival and recovery will be diminished, if not lost” because, upon the transfer of permitting authority, all section 7 consultation on such projects would cease. *Id.* at 69 (“[T]his action is more than a shift in program authority: we will lose our section 7 nexus for consultation, and construction projects . . . will destroy important habitat and adversely affect listed species.”) (emphasis added).

Hence, in its discussions with EPA, the FWS took the position that the consultation “must evaluate the indirect effects associated with the proposed action,” including the loss of section 7 protections that are “reasonably certain to occur,” and whether alternative conservation mechanisms would be adequate to offset this loss. *Id.* 117; *id.* at 118 (“The FWS concludes that the transfer of this program from EPA to the State causes the loss of protections to species resulting from the section 7 process, and the impact of this loss must be taken into account in the effects analysis in the biological opinion”). However, while EPA conceded

that “the approval of the State permitting program . . . is a federal action subject to this [section 7(a)(2) consultation] requirement, but the State’s subsequent AZPDES permit actions are not,” ER-77 (emphasis added), EPA nonetheless maintained “that its proposed approval of the Arizona NPDES program will not result in jeopardy” to any listed species because the loss of section 7 protections should not be regarded as an “indirect effect” of the transfer. Id. at 119-120.

Since the FWS continued to advocate for a full analysis of likely effects, see ER-194, the inter-agency conflict was “elevated” to Interior Department and EPA political appointees in Washington, D.C. Id. at 116-127, 194. As a result, the FWS was evidently instructed to issue a “no jeopardy” BO that did not analyze, as an “indirect effect,” how the loss of section 7 safeguards would affect listed species. Id. at 194.

Consequently, the Service produced a paradoxical document that acknowledged that “we have expressed concerns that the approval will result in a loss of section 7 consultation-related conservation benefits,” id. at 223 (emphasis added), and that “there will be a reduction in the number of mechanisms available to both of our agencies [FWS and EPA] to protect federally-listed species and critical habitat in Arizona,” id. at 225, but then refused to analyze whether these predictable effects would actually contribute to the extinction of listed species or destruction of critical habitat. Instead, the Service stated that:

our field staff biologists have expressed concerns that the approval will result in loss of section 7 consultation-related conservation benefits. We have stated our belief that the loss of section 7 conservation benefits is an indirect effect of the authorization. Furthermore, we have stated that this loss of conservation benefits will appreciably reduce the conservation status of [listed species]. Notwithstanding this, our final opinion is that the loss of section 7-related conservation benefits, which would otherwise be provided by section 7 consultations, is not an indirect effect of the authorization action.

Id. (emphasis added).

C. The Panel Ruling

Petitioners (“Defenders”) challenged EPA’s reliance on this internally contradictory BO as arbitrary and capricious, and the panel majority agreed. In an exhaustive ruling, the Court first stressed that EPA had “definitively stated several times during the decisionmaking process, including when announcing the final decision, that section 7 requires consultation regarding the effect of a permitting transfer on listed species.” 420 F.3d at 959. Thus, according to the Court, EPA’s clear concession that it had to consult before making a transfer decision necessarily meant that the agency also had the authority to take into account the predictable effects of the transfer on listed species, since “[s]ection 7(a)(2) makes no legal distinction between the trigger for its *requirement* that agencies consult with FWS and the trigger for its *requirement* that agencies shape their actions so as not to jeopardize endangered species.” Id. at 961 (italics in original.). Rather, “*both* apply” if an agency “‘action’ is under consideration.” Id. (italics in original).

Second, the Court held that EPA was correct when the agency concluded that it was obligated to consult. The Court reasoned that the Supreme Court’s analysis in Hill of the language and “legislative history of the [ESA] confirms that the authority conferred on agencies to protect listed species goes beyond that conferred by agencies’ own governing statutes,” 420 F.3d at 964, and, indeed, since “section 7(a)(2) speaks in mandatory terms,” it imposes an explicit “duty” on agencies not to “jeopardize protected species” when the agencies affirmatively authorize, fund, or carry out “any action.” Id. at 963. On the other hand, the Court explained, when an agency is not engaging in an “affirmative action that is both within its decisionmaking authority and unconstrained by earlier agency commitments,” id. at 967, then it is not authorizing, funding, or carry out an action within the meaning of section 7(a)(2).

In reaching this conclusion, the Court carefully considered this Court’s prior case law, as well as a FWS regulation providing that “[s]ection 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. With respect to the regulation, the Court explained that EPA had made no argument that its “transfer decision was not a ‘discretionary’ one within the meaning of 50 C.F.R. § 402.03” – but, instead, had expressly “recognize[d] that it had a duty to consult,” 420 F.3d at 968 – and, in any event, that regulation could only be construed as being “congruent with the

statutory reference to actions ‘authorized, funded, or carried out’ by the agency.”

Id.

Finally, the Court found the BO at issue to be inadequate because it “never considered in any detail the likely real-world impact of the transfer decision on listed species in Arizona.” Id. at 972. The Court did not rule out the possibility that a transfer decision could be based on an adequate BO, but remanded for a “more careful consideration” of whether “other federal and state statutory provisions” could, in fact, sufficiently substitute for the protections afforded by the section 7 process. Id. at 972, 977.³

ARGUMENT

The government and intervenors have presented no compelling grounds for en banc review and, for several reasons, this case is a particularly poor candidate for such review.

1. As the panel ruling makes clear and as the government’s rehearing petition essentially admits, Fed. Pet. at 6 n.1, the legal position that federal respondents are now advancing as the rationale for rehearing was not the position that the government took either at the administrative stage or before the panel. To

³ Judge Thompson dissented on the grounds that EPA’s “decision was not ‘agency action’ within the meaning of section 7” of the ESA, 420 F.3d at 979 – a rationale that the dissent conceded was not even advocated by EPA itself. Id. at 980 n.1.

the contrary, both EPA and the FWS “definitively stated” during the administrative process – as well as in their 2001 MOA – that EPA was required to consult with the Service. See 420 F.3d at 959. Simply put, therefore, the government’s new position that the consultation process simply “does not apply” here, Fed. Pet. at 8, is the quintessential “post hoc rationalization,” SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943), that should not even be considered by the Court under elementary Administrative Procedure Act principles, let alone serve as a basis for en banc review. See, e.g., Altamirano v. Gonzalez, 427 F.3d 586, 595 (9th Cir. 2005) (“We may not accept appellate counsel’s *post hoc* rationalizations for agency action.”) (internal citation omitted).⁴

⁴ The government makes no effort whatsoever to explain how its petition can be granted consistent with Chenery principles, other than to say that the “agencies’ position” has been “under reconsideration” and they have now come to a new “conclu[sion],” Fed. Pet. at 6 n.1. Plainly, if that is all an agency need do to circumvent the rule against *post hoc* rationalizations, then Chenery and its progeny are meaningless. The dissent, on the other hand, suggested that this rule could be disregarded where the “issue in dispute is the interpretation of a statute.” 420 F.3d at 980 n.1. However, as noted by the panel majority, id. at 969 n.19, the underlying “issue in dispute” is the adequacy and logical consistency of the BO on which EPA relied in making its transfer decision – which is exactly the kind of administrative law question to which Chenery principles have long applied. See also Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962). But even if this case involved a pure question of statutory construction, that hardly assists the government, since the “unambiguously expressed intent of Congress,” Chevron v. Nat’l Res. Def. Council, 467 U.S. 837, 843 (1984), as construed by the Supreme Court itself, was to “give endangered species priority over the ‘primary missions’ of federal agencies.” Hill, 437 U.S. at 185.

2. Even if the Court were inclined to entertain the government’s newly minted argument at this late stage, the government and intervenors are simply incorrect in asserting that the panel ruling is in conflict with any prior holding of this Court. In the cases relied on in the rehearing petitions, the Court held that federal agencies were not obligated to consult under section 7(a)(2) where there was no ongoing agency action on which to consult. Not surprisingly, in none of those cases did an agency admittedly take “final action authorizing” a specific course of conduct, ER-320, and then, after completing the consultation process, argue that its action was somehow immune from both the procedural and substantive mandates of section 7(a)(2). Consequently, as the panel ruling makes clear, the intra-Circuit “conflict” on which respondents heavily rely is, on close inspection, simply illusory.

For example, Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995), on which the government and intervenors heavily rely, involved a reciprocal right-of-way agreement that the Bureau of Land Management (“BLM”) entered into “before the enactment of the ESA,” id. at 1505 (emphasis added), and the sole “action” occurring following the passage of the Act was “wholly private action” undertaken by the beneficiary of the agreement. Id. at 1512 (emphasis added). The Court’s holding that “Congress did not intend for section 7 to apply to an agreement finalized before passage of the ESA,” id. at 1511-12 – and where, post-passage, no

federal agency took any action falling within the plain terms of section 7(a)(2) – is certainly not in conflict with the panel ruling here.

Indeed, the closest that BLM came to such an action in Sierra Club was a letter sent to the private party, which was legally irrelevant to use of the right-of-way. The Court held that such a letter “cannot be construed as an authorization within the meaning of section 7(a)(2),” and that a “BLM ‘action’ will implicate section 7(a)(2) only if it legitimately authorizes Seneca’s activity.” Id. at 1511 (emphasis added). This reasoning clearly supports application of section 7(a)(2) here, where EPA admittedly “has taken final action authorizing Arizona to implement the NPDES program,” ER-321 (emphasis added), and where such “authorization” was legally required for the transfer to occur.

Likewise, Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1996), involved purely private action – a company’s logging operation on private land. Once again, the only federal involvement was a FWS “letter” that “merely provided advice on how the lumber companies could avoid a ‘take’ under section 9 of the ESA.” Id. at 1074. This holding clearly does not conflict with the panel’s ruling that section 7(a)(2) is triggered where the action agency not only expressly took a “final action authorizing” a transfer of permitting authority that could not otherwise occur, but actually requested formal consultation on that action.

On the other hand, whenever an agency has taken a post-ESA action within the agency’s actual decisionmaking authority, the Court has ruled that section 7(a)(2) applies. Most recently, in Washington Toxics Coalition v. EPA, 413 F.3d 1024 (9th Cir. 2005), the Court rejected EPA’s argument that it was not obligated to consult on its decisions regarding the registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. §§ 136 et seq. Stressing that “the ESA affords endangered species the ‘highest of priorities,’” 413 F.3d at 1032 (quoting Hill, 437 U.S. at 174), the Court explained that “the reasoning of our case law therefore leads us to conclude that an agency cannot escape its obligations to comply with the ESA merely because it is bound to comply with another statute that has consistent, complementary objectives.” Id. (emphasis added). This analysis also compels the conclusion that section 7(a)(2) cannot be circumvented here, since EPA and the FWS have declared, including in their recent MOA, that they “find the goals of the CWA and ESA compatible and complementary.” ER-8.⁵

⁵ In Washington Toxics Coalition, the Court also found that EPA “retains discretion to alter the registration of pesticides for reasons that include environmental concerns,” 413 F.3d at 1033, but this finding related to the nature of the injunctive “remedy” that the Court could fashion for the violation of section 7(a)(2), id. at 1032 (emphasis added), and not to whether section 7(a)(2) applied to the actions at issue. In any event, EPA has also represented that, following the transfer of an NPDES program to a state, the agency may exercise its ongoing authority to “make a formal objection . . . where EPA finds that a State permit . . . will likely have more than minor detrimental effect on Federally-listed species or

In sum, none of the Circuit cases on which the government and intervenors rely are in genuine conflict with, the panel ruling here. Rather, in all of those cases, either a federal agency had never taken an action at all, or any “agency action had been completed, and was not ongoing” at the time that conservation groups were invoking section 7(a)(2). Washington Toxics Coalition, 413 F.3d at 1033. Simply put, therefore, those cases stand for the proposition – which is fully consistent with the plain terms of section 7 and Hill’s construction of it – that section 7(a)(2) does not apply to agency inaction, and cannot be used to compel an agency to take an action that it otherwise would have no legal obligation to take. That principle in no way contradicts the panel’s clearly correct ruling that, when an agency does “engage[] in an affirmative action” that is “within its decisionmaking authority,” 420 F.3d at 967, then section 7(a)(2) must come into play.

3. The government’s and intervenors’ argument that there is an inter-circuit conflict that warrants rehearing is also, at the least, overblown. In reality, no circuit court has issued a ruling that squarely conflicts with the specific holding adopted by the panel. Rather, the D.C. Circuit’s cursory discussion in Platte River Whooping Crane Critical Habitat Maint. Trust (“Platte River”), 962 F.2d 27 (D.C. Cir. 1992) did not actually construe section 7(a)(2) at all but, rather, analyzed the

critical habitat.” ER-16; see also American Forest and Paper Ass’n v. EPA (“AFPA”), 137 F.3d 291, 294 (5th Cir. 1998) (“EPA retains oversight authority even when it delegates permitting authority to a state.”).

extent of an agency's obligations under section 7(a)(1), *id.* at 34, which, as the panel ruling explains, contains critically different language. *See* 420 F.3d at 970-71. Rather than mirroring section 7(a)(2)'s command that agencies not jeopardize species whenever they take "any" actions, section 7(a)(1) directs agencies to "utilize their authorities' to carry out the ESA's objectives." *Platte River*, 962 F.2d at 34 (quoting 16 U.S.C. § 1536(a)(1)) (emphasis added).

Likewise, the Fifth Circuit's ruling in *AFPA*, *supra*, while addressing EPA's ESA obligations in the context of a transfer of an NPDES program, did not address the specific issue raised by the rehearing petitions here, *i.e.*, whether EPA's transfer decisions is an agency "action" that requires consultation under section 7(a)(2). Indeed, the Fifth Circuit stated that "[w]hether EPA's approval of Louisiana's permitting program constitutes 'agency' action for ESA purposes is largely beside the point," *id.* at 298 n. 5 (emphasis added), and that Court appeared to assume that EPA was "require[d] to consult with FWS" before making a transfer decision. *Id.* at 298. Instead, the specific issue in that case – which is not raised here – was whether the FWS could condition the transfer of the NPDES program on a state's agreement to consult with the FWS on permits following the transfer. *Id.* at 294.

In the course of resolving that issue, the Fifth Circuit broadly asserted that "[s]ection 7 . . . confers no substantive powers" on agencies to protect listed

species. Id. at 298. But, in making that pronouncement – which simply makes no sense in the context of section 7(a)(2) – the Court relied entirely on Platte River which, as noted, construed section 7(a)(1), not section 7(a)(2). If this qualifies as an inter-circuit “conflict” at all – which is doubtful – it hardly warrants en banc review of the panel’s thorough analysis of section 7(a)(2).

4. While there is no intra- or inter-circuit conflict that justifies rehearing, the position advocated by respondents and intervenors would, if accepted by the Court, create an irreconcilable conflict with Hill. If, as the Supreme Court held in that case, section 7 applied to a massive dam project that had already cost “more than \$100 million dollars” in public funds, was “near completion” when the ESA was enacted, 437 U.S. at 172, 174, 184, and for which “Congress had continued appropriations . . . with full awareness of the [endangered species] problem,” id. at 167, then it cannot plausibly be the case that the same provision of law has no relevance to EPA’s “final action authorizing” transfer of Clean Water Act permitting authority to Arizona. Rather, if the federal respondents and intervenors do not like the consequences of the Supreme Court’s ruling that, in enacting section 7, Congress intended to “give endangered species priority over the

‘primary missions’ of federal agencies,” *id.* at 185 (internal citation omitted), then their proper recourse is to Congress, not to this Court.⁶

CONCLUSION

For the foregoing reasons, the petitions for rehearing en banc should be denied.

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⁶ Even aside from Hill, it is impossible to reconcile the government’s and intervenors’ position with elementary principles of statutory construction. One such principle is that, rather than reading “statutes as being in irreconcilable conflict” with one another, courts should strive to adopt interpretations that “give effect to each” law “while preserving their sense and purpose.” Watt v. Alaska, 451 U.S. 259, 266-67 (1981); see also Blackfeet Indian Tribe v. Montana Power Co., 838 F.2d 1055, 1058 (9th Cir. 1988) (“[a]pparently conflicting statutes must be read to give effect to each if such can be done by preserving their sense and purpose”). Here, the most straightforward way of “giv[ing] effect” to each law is to conclude that the CWA requires transfer of NPDES programs to states when the criteria set forth in section 402(b) are satisfied and, in addition, such a transfer would not violate other federal legal obligations imposed on EPA. Indeed, this is precisely how EPA previously construed its authority, since its final decision document on the Arizona transfer states not only that EPA was required to “meet[] the substantive requirements of the ESA,” but also that the agency was required by section 106 of the National Historic Preservation Act, 16 U.S.C. § 470(f), to consider the effects of the transfer “on historic properties.” ER-320.

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WORD COUNT CERTIFICATION

I certify that pursuant to the Court's November 29, 2005 Order and Circuit Rule 40-1 the foregoing response has 5,236 words (the Court's November 29, 2005 Order granted Defenders' request to file an answer not exceeding 5,250 words), is proportionally spaced and has a typeface of 14 points or more.

December 22, 2005

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CERTIFICATE OF SERVICE

I certify that copies of Defenders' Response to Federal Respondents' and Intervenor-Respondents' Petitions for Rehearing En Banc were served via regular mail on the following:

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