1   IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL ASSOCIATION OF HOME   :

4 BUILDERS, ET AL.,   :

5   Petitioners   :

6   v.   : No. 06-340

7 DEFENDERS OF WILDLIFE, ET AL.; :

8   and   :

9 ENVIRONMENTAL PROTECTION AGENCY, :

10   Petitioner   :

11   v.   : No. 06-549

12 DEFENDERS OF WILDLIFE, ET AL.   :

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14   Washington, D.C.

15   Tuesday, April 17, 2007

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17   The above-entitled matter came on for oral

18 argument before the Supreme Court of the United States

19 at 10:18 a.m.

20 APPEARANCES:

21 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

22   Department of Justice, Washington, D.C.; on behalf of

23   Petitioner.

24 ERIC R. GLITZENSTEIN, ESQ., Washington, D.C.; on

25   behalf of Respondents.

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3 EDWIN S. KNEEDLER, ESQ.

5 ORAL ARGUMENT OF

6 ERIC R. GLITZENSTEIN, ESQ.

8 REBUTTAL ARGUMENT OF

9 EDWIN S. KNEEDLER, ESQ.

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1   P R O C E E D I N G S

2   (10:18 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first today in 06-340, National Association of Home

5   Builders versus Defenders of Wildlife, and 06-549,

6   Environmental Protection Agency versus Defenders of

7   Wildlife.

8   Mr. Kneedler.

9   ORAL ARGUMENT OF EDWIN S. KNEEDLER

10   ON BEHALF OF THE PETITIONER

11   MR. KNEEDLER: Mr. Chief Justice, and may it

12   please the Court:

13   Section 402(b) of the Clean Water Act

14   provides that the Environmental Protection Agency shall

15   approve an application by a State to administer its own

16   NPDES program unless EPA finds that the state's program

17   does not satisfy nine criteria that are addressed to

18   whether the State has the legal authority under State

19   law to carry forward with the program.

20   There's no dispute in this case that

21   Arizona's program satisfies those criteria. The Ninth

22   Circuit nonetheless set aside EPA's approval of

23   Arizona's program. The Ninth Circuit held that EPA

24   could not approve Arizona's application unless it first

25   insured that there would be in place under Arizona's

1   administration protections equivalent to those that

2   would be applicable under Section 7 of the Endangered

3   Species Act when EPA itself issues permits. That

4   holding is inconsistent not only with Section 402(b)'s

5   mandatory directive, it's also inconsistent with Section

6   7 of the ESA itself.

7   JUSTICE KENNEDY: Do we take the case and --

8   I'll ask the same question to your colleagues from the

9   other side -- on the assumption that if the nine -- the

10   factors in the statutes are met, that EPA has no

11   discretion to withhold the transfer?

12   MR. KNEEDLER: Yes. That is our position,

13   and that I think is clear from Section 402(b). It says

14   that the administrator shall approve unless he finds

15   that the state legal authority criteria are not

16   satisfied. I should also point out that that's

17   reinforced by 33 U.S.C. 1251(b), which expresses a

18   strong preference for State protection of waters and in

19   particular states that it's the policy of Congress that

20   the states administer the NPDES program.

21   JUSTICE STEVENS: How long has that been the

22   government's -- the EPA position? How long has that

23   been the EPA's interpretation of the statute?

24   MR. KNEEDLER: Well, until 1993 when the

25   vast majority -- by the time -- by that time the vast

1   majority of transfers or approvals had already taken

2   place. There had never been consultation, at least that

3   we're aware of under Section 7 of the Endangered Species

4   Act. EPA did consult with the wildlife agencies on six

5   programs but after the Fifth Circuit -- from then until

6   -- until this one, but after the Fifth Circuit's

7   decision in the American Forestry case, EPA never tried

8   to impose any obligations on a State under Section 7 of

9   the Endangered Species Act.

10   What it did is, EPA and the Fish and

11   Wildlife Service worked out between themselves certain

12   arrangements by which EPA would look at endangered

13   species considerations, but it never conditioned the

14   approval of a State program after the Louisiana program

15   struck down in the American Forestry decision in 1998,

16   on the states having in place certain protections. And

17   in fact, I think EPA would not characterize what it did

18   even in the Louisiana programs as the sort of condition

19   that the Fifth Circuit understood.

20   JUSTICE STEVENS: Has that always been the

21   EPA's position? Because there's an allegation in one of

22   the briefs that you changed your position in this Court,

23   to change the position you took even in the lower courts

24   at issue. Is that --

25   MR. KNEEDLER: Well, I'm -- there may be two

1   different things that, referring to it. Section 7

2   imposes an obligation on Federal agencies in their own

3   actions not to jeopardize -- or to ensure that their

4   actions are not likely to jeopardize a species.

5   Ancillary to that, there is an obligation on Federal

6   agencies to consult with the fish and wildlife agencies.

7   As to the consultation obligation, as I mentioned, EPA

8   has engaged in consultation from 1993 until --

9   JUSTICE STEVENS: But your position was they

10   didn't have to?

11   MR. KNEEDLER: Our position now is that it

12   did not have to, but -- and more fundamentally our

13   position is that because the transfer or the approval of

14   the State application is mandatory if these nine legal

15   authority criteria are satisfied, EPA could not withhold

16   approval of --

17   CHIEF JUSTICE ROBERTS: So your position is

18   the consultation is a waste of time?

19   MR. KNEEDLER: Basically, yes. If in the

20   end EPA could not disapprove the State's application,

21   and since consultation is ancillary to the substantive

22   obligation not to jeopardize --

23   JUSTICE GINSBURG: Isn't there a difference

24   between denying the application because the Endangered

25   Species Act hasn't been attended to adequately, and

1   saying you meet the nine criteria, you're going to get

2   your application. But then, so it's not just automatic

3   that the thing becomes the State's domain rather than

4   the Federal. But isn't there something rather detailed

5   called a memorandum of agreement that's worked out, and

6   couldn't the Endangered Species Act concerns be

7   accommodated that way instead of saying one statute is

8   out the window, even though EPA in a number of states

9   has made an accommodation.

10   Why couldn't the Endangered Species Act

11   concerns be reflected in that memorandum of agreement?

12   MR. KNEEDLER: The memorandum, the

13   memorandum of agreement, is called for under EPA's

14   regulations as really a procedural mechanism for the EPA

15   and the State agency to work out the practicalities of

16   the State's administering the program. They typically

17   address such things as how the State agency will furnish

18   EPA draft permits and that sort of thing, time

19   limitations for EPA to look at, who to contact at the

20   State agency.

21   It's essentially procedural in order to

22   facilitate EPA's continuing oversight role. It's not a

23   vehicle for EPA to impose substantive obligations coming

24   from other statutes.

25   JUSTICE SOUTER: No, but the point is why

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1   can't it be?

2   MR. KNEEDLER: Because we think that would

3   been consistent with Section 402(b), which requires,

4   which requires the EPA to approve the transfer.

5   Now, if a State agency chooses to cooperate

6   with Fish and Wildlife Service or NOAA in the Department

7   of Commerce with respect to species under its

8   jurisdiction, that is all fine. And I should point

9   out --

10   JUSTICE SOUTER: Doesn't the ESA require

11   something more than voluntary cooperation? I mean, you

12   quite rightly emphasize the mandatory nature of the

13   approval under the Clean Water Act. But the Endangered

14   Species Act mandate seems equally unconditional.

15   MR. KNEEDLER: It's unconditional with

16   respect in our view to actions that are within the

17   agency's discretion or consequences that the agency will

18   cause. But more fundamentally in response to your

19   question, Section 7 imposes obligations only on Federal

20   agencies, not on State agencies. Like 402(b), it is a

21   federalism-sensitive --

22   JUSTICE SOUTER: I realize that that's your

23   point. But doesn't that sort of beg the question?

24   Because it's not that anyone is suggesting here, I

25   think, that under the Endangered Species Act the Federal

8

1 Government can keep control or that the Federal

2 Government can in effect provide guarantees of what may

3 happen in response to some future development proposal.

4   What I think they're arguing is that when,

5 when, when the agency gives the approval, it should

6 require that there be some kind of procedure in place on

7 the part of the State so that when problems arise the

8 States will probably respond to them with the same

9 values in mind that the feds would.

10   And the question is why cannot the

11 Endangered Species Act be enforced in that way, to

12 require, in effect, an advanced mechanism before, in

13 effect, the whole business is turned over to the States?

14   MR. KNEEDLER: Well, as to the latter, we

15 don't believe that EPA can condition the transfer. But

16 let me point out that in 2001 --

17   JUSTICE SOUTER: I know you say you don't

18 think they can do it. But the problem is we've got two

19 statutes each of which is mandatory. And your response

20 seems to be, well, we'll give full effect to one and we

21 will ignore the other. And I don't see how that is a

22 tie breaker. And why do you not have an obligation to

23 do what you can with respect to the Endangered Species

24 Act?

25   MR. KNEEDLER: First of all, with respect to

1   the Endangered Species Act, the memorandum of agreement

2   that was entered into in 2001 between EPA and the two

3   Federal wildlife services does furnish a way in which

4   after the transfer EPA can take into account endangered

5   species considerations within the scope of its --

6   JUSTICE SOUTER: At which point EPA doesn't

7   have any authority left under the Clean Water Act.

8   MR. KNEEDLER: No, that's not correct.

9   Under Section 402(d) EPA has the authority to object to

10   a State permit. And if the -- but to do so on, based on

11   a determination that the State permit would not satisfy

12   the guidelines and requirements of the Clean Water Act.

13   So if --

14   JUSTICE SOUTER: That begs the question

15   because the concern is the enforcement of the Endangered

16   Species Act.

17   MR. KNEEDLER: With respect to water quality

18   issues that might affect an endangered species, EPA

19   takes the position -- and I think it's correct -- that

20   EPA can object to a State permit where that permit would

21   not comply with State water quality standards that are

22   necessary to protect the endangered species.

23   JUSTICE SOUTER: Why don't they get that in

24   the memorandum of agreement up front?

25   MR. KNEEDLER: EPA doesn't need the State's

1   agreement to object to a State permit. That is

2   authority --

3   JUSTICE SOUTER: Maybe it doesn't, but isn't

4   it the case that if it's in the agreement up front the

5   odds are better that the State will address it, as

6   opposed to the State ignoring the problem, requiring EPA

7   then to take affirmative action to object?

8   MR. KNEEDLER: And I wanted to get to the

9   further mechanisms that are in place under EPA

10 regulations and the memorandum of agreement.

11   JUSTICE SOUR TER: No, but would you answer

12 my question first? Isn't it likely that the States are

13 going to respond or deal with the problem if they have

14 an obligation in the memorandum of agreement right up

15 front?

16   I suppose. But let me, let me, let me

17 explain what is in place. EPA's regulations require

18 that a State furnish its draft permits to the public,

19 but also specifically to the Federal wildlife agencies.

20   That gives Fish and Wildlife Service an

21 opportunity to comment about endangered species concerns

22 that may be raised by the draft permit.

23   The regulations also require the State

24 agency to take into account the comments that are

25 submitted by anyone, including the Fish and Wildlife

1   Service and NOAA. Those provisions built in allow the

2   Federal agencies to bring their concerns to the State

3   agency, and I think there is every reason to believe

4   that the State agencies will --

5   JUSTICE SOUTER: Is there an obligation on

6   the part of the State agency to take reasonable action

7   in response to them, or can the State agency simply sit

8   there, listen with a tin ear and then do whatever it

9   wants to?

10   MR. KNEEDLER: Those regulations do not

11   because they are procedural. Then what happens if the

12   State agency does not respond to the concerns raised or

13   does not remedy the concerns raised by Fish and Wildlife

14   Service or NOAA, EPA is notified and EPA can then try to

15   work it out with the State agency, or, failing that, EPA

16   can object to the State permit if it does not satisfy

17   the Clean Water Act standards.

18   And again with respect to water quality,

19   those standards are set at a level that is necessary to

20   protect endangered species. So as far as water quality

21   impacts are concerned, EPA retains complete control

22   under its ability to object to the permit.

23   JUSTICE SOUTER: You are in effect saying

24   that the, that the, that the enforcement of water

25   quality standards is, in effect, the indirect answer to

1   the problem that the other side raises? That's the way

2   it's done?

3   MR. KNEEDLER: It is. EPA --

4   JUSTICE SCALIA: Except to the extent that a

5   project may be endangering a species, not by reason of

6   change in water quality but, for example, by destroying

7   habitat, constructing a dam or that sort of thing.

8   MR. KNEEDLER: Upland habitat, if it's water

9   habitat, water quality standards. EPA has to approve

10   State water quality standards. It consults with Fish

11   and Wildlife Service and NOAA in doing so to make sure

12   endangered species would be protected by the water

13   quality standards. And then each individual State

14   permit is measured against those water quality standards

15   to make sure they comply.

16   So therefore, with respect to water quality,

17   Fish and Wildlife Service agreed that the mechanisms I

18   have just described would take care of any Endangered

19   Species Act concerns.

20   JUSTICE GINSBURG: Are you referring to, in

21   what you just described about the cooperation among the

22   Federal agencies, to what has been called in their

23   brief, it's referred to as a coordination agreement?

24   MR. KNEEDLER: Yes, the 2001, February 22,

25   2001, agreement between EPA and --

1   JUSTICE GINSBURG: And that agreement, I

2   take it from what you just said, is in full force? EPA

3   hasn't retreated from that agreement and it will

4   continue to --

5   MR. KNEEDLER: That is correct. And some of

6   the things I described were embodied in EPA regulations

7   aside from the agreement, including an agreement that

8   State agencies furnish draft permits to Fish and

9   Wildlife Service and take into account comments that are

10   received in return.

11   Justice Scalia is correct that, that the

12   impacts that would not be covered by this would be

13   non-water quality-related impacts on upland habitat.

14   But in our view that simply reflects the nature of the

15   Clean Water Act and under 402(b) it is a Clean Water

16   Act. It deals with water quality, and we do not believe

17   that EPA is authorized to withhold the approval or

18   condition the approval of a transfer of permitting

19   authority to a State on the basis of what the State will

20   do with respect to upland, upland habitat.

21   JUSTICE SOUTER: Which is the -- the later

22   act is the Endangered Species Act?

23   MR. KNEEDLER: Essentially, the Endangered

24   Species -- there was a subsequent amendment to 402(b),

25   but for these purposes -- but --

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1   JUSTICE SOUTER: Why doesn't that control?

2   MR. KNEEDLER: Because it is -- we do not

3   think it repeals -- it's essentially a repeal by

4   implication question.

5   JUSTICE SOUTER: No, but you can just as

6   well say that if it does not control then there is an

7   exception by implication, the exception being based on

8   the prior act. Neither of them is particularly

9   satisfactory, but neither answer gives you a reason to

10   ignore the problem.

11   MR. KNEEDLER: Beyond that, Section 7 of the

12   ESA is a generally applicable statute, whereas Section

13   402(b) speaks specifically and comprehensively to the

14   question of Federal approval of State programs. We also

15   think this would be a particularly unlikely candidate

16   for an exception to that because EPA's approval of the

17   State program does not result in any immediate

18   on-the-ground consequences. That would only happen --

19   or in-the-water consequences. That would only happen if

20   after the transfer the State agency actually issued,

21   issued a permit. So what we're talking about is --

22   JUSTICE SOUTER: Well, but by that very

23   reasoning you could say that if assurance are required

24   that the Endangered Species Act is going to be honored,

25   that does not in and of itself prevent any development

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1   program. Each, in effect, is a kind of mechanism for

2   dealing with something that may happen in the future.

3   MR. KNEEDLER: Well, if I could go back to

4   the point I was making earlier, that we think that the

5   central thrust of the court of appeals' opinion and

6   Respondent's position here is that EPA could not

7   transfer the authority unless it and the State together

8   replicated the sort of protections that were in place

9   when EPA itself administered the Endangered Species Act.

10   And as I said, that's inconsistent not only with 402(b),

11   but with Congress's federalism-sensitive judgment, to

12   impose the sort of substantive and procedural

13   administrative requirements in Section 7 of the ESA only

14   on Federal agencies, not on State agencies.

15   And let me also stress that this does not

16   mean that the rest of the ESA is inapplicable once a

17   permitting program of the State is approved. The

18   central provision of the ESA, the prohibition against

19   taking endangered species act and other provisions

20   against trading in them and importing, exporting, all

21   those remain applicable. Those are the generally

22   applicable provisions that prohibit the taking

23   of endangered species.

24   JUSTICE BREYER: I understand very well your

25   argument that if the EPA is going to transfer this, they

1   transfer it to Arizona and the first thing they say is,

2   we look at Arizona's laws and they protect everything.

3   And now we look at our own authority and if they get --

4   start mucking around with this, we can refuse the

5   permit. And besides that, we have a memorandum of

6   understanding and the memorandum of understanding or

7   whatever it is, agreement or something, is going to be

8   they're going to pay as much attention as we are. So

9   they'll pay attention to this, too, and if they don't we

10   have an enforcement mechanism. So no problem; we are

11   not putting any species in jeopardy. We satisfy the

12   standard. I've got that part of the argument. I think

13   I paraphrased it pretty well.

14   The part I don't get is then you say,

15   anyway, we don't have to do any of this because it says

16   "shall transfer," therefore, it's not discretionary,

17   it's mandatory. That part I don't get because there are

18   nine standards there and it seems to me to say that is

19   rather like saying, well, the ICC used to say you shall

20   let the railroad build a spur, provided it's in the

21   public interest, convenience, and necessity.

22   I mean, are you suddenly saying every

23   statute that uses the word "shall" is not subject to the

24   ESA?

25   MR. KNEEDLER: Well, I think it would

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1   require a statute by statute evaluation.

2   JUSTICE BREYER: All right, fine.

3   MR. KNEEDLER: But we think this one is

4   particularly clear.

5   JUSTICE BREYER: Now, my problem with saying

6   it's clear is that they have nine criteria. One of the

7   criteria is you look to five other statutes, which they

8   have their own criteria and one of those criteria is you

9   have to be certain that the State will assure the

10   protection and propagation of a balanced population of

11   shellfish, fish, and wildlife.

12   And by the time you get through those nine

13   criteria, I don't think you'd have to be too imaginative

14   a lawyer to figure out ways that they involve everything

15   the ESA involves. So if there ever was an act prefaced

16   by the word "shall" where the ESA would apply, you would

17   think it would this be this one, which has to do with

18   water, environmental protection, nine criteria, many

19   vague, and they use words like "wildlife," "shellfish,"

20   et cetera.

21   MR. KNEEDLER: Several, several responses to

22   that. Those cross-references -- first of all, 402(b)

23   looks only to whether the State has the legal report

24   under State it law. Among other things, it requires a

25   certification or determination by the attorney general

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1   of the State to establish that the State actually has

2   the authority to administer.

3   And the references to, cross-references to

4   fish and wildlife that come from incorporating other

5   provisions have to do with the setting of the standards

6   or setting -- under section 302, which EPA has never

7   invoked, setting certain supplementary effluent

8   standards to protect fish and wildlife. Those are the

9   standards. EPA does not evaluate the state's water

10   quality standards in deciding whether the State has the

11   legal authority under 402(b) to administer the program.

12   JUSTICE ALITO: Of the states to whom a

13   transfer has been made how many have agreed to comply

14   with this provision of the Endangered Species Act?

15   MR. KNEEDLER: I'm not sure. I don't think

16   --

17   JUSTICE ALITO: In the memorandum of

18   agreement with the states to whom transfers have been

19   made, in some of them, is there not language in which

20   the State has agreed that we'll consult with Fish and

21   Wildlife --

22   MR. KNEEDLER: There was, there was in the

23   Louisiana memorandum of agreement that was involved in

24   the Fifth Circuit's American Forestry decision, and it

25   was that provision that the Fifth Circuit held was

19

1   unlawful on two grounds. That, that memorandum of

2   agreement basically said we're trying to do something

3   analogous to Section 7 of the ESA when the State is

4   administering the program; and the Fifth Circuit said

5   that went beyond EPA's authority by conditioning the

6   approval on the State putting in place a compensation

7   arrangement.

8   JUSTICE GINSBURG: You mentioned a whole

9   string of states, I think, Texas, Florida, Maine were

10   mentioned as states that -- in connection with the

11   transfer of the permitting authority had conditions that

12   made the Endangered Species Act applicable.

13   MR. KNEEDLER: That's not correct,

14   Justice -- Justice Ginsburg. What, after the Fifth

15   Circuit's decision, EPA never tried to impose on a State

16   an obligation to go forward in the same way that EPA, or

17   even in a similar way that EPA would under Section 7 of

18   the Endangered Species Act.

19   JUSTICE GINSBURG: So what was done in

20   Texas, Florida and Maine?

21   MR. KNEEDLER: They all provided what I've

22   described to Justice Souter, that -- that the

23   pre-existing ESA, EPA regulations require that draft

24   permits be furnished to the, to Fish and Wildlife and to

25   NOAA, and that they take into account the comments by

20

1   Fish and Wildlife and NOAA. That doesn't come from the

2   memorandum of agreement or -- or -- or EPA's memorandum

3   of agreement with the states. That's something that

4   comes from the regulations. Everything else --

5   JUSTICE GINSBURG: So that, would that apply

6   in this case? Would that apply to Arizona?

7   MR. KNEEDLER: Yes. And, and the

8   biological, the memorandum of agreement in this case

9   applies to all State-administered programs including

10   those that were approved by EPA before 1993. This is a

11   nationwide memorandum of agreement.

12   And the basis --

13   JUSTICE STEVENS: Mr. Kneedler, may I ask a

14   question about the memorandum of agreement? That's kind

15   of a new concept that I have a little difficulty

16   following.

17   Is there -- is that, is one of the nine

18   conditions of approval that the State enter into a

19   memorandum of agreement?

20   MR. KNEEDLER: No, it is -- no it is not.

21   The memorandum of --

22   JUSTICE STEVENS: Is there not a regulation

23   that issues, that requires the states --

24   MR. KNEEDLER: Yes. There, there's --

25   JUSTICE STEVENS: What's the statutory

1   authority for the regulation?

2   MR. KNEEDLER: 33 U.S.C. 1314(i) allows --

3   provides -- excuse me -- for EPA to establish

4   guidelines, basic guidelines, minimum standards for

5   State programs and -- part of that --

6   JUSTICE STEVENS: What if -- what if the

7   State just refused to enter into a memorandum of

8   agreement? Would that, could that be a ground for

9   refusing to transfer decision?

10   MR. KNEEDLER: If, if the, if its refusal

11   was based on an objection to things that are within the,

12   within the legitimate scope of a memorandum of

13   agreement. I think that --

14   JUSTICE STEVENS: Just says don't want -- it

15   just says we don't want to enter into a memorandum of

16   agreement, period.

17   MR. KNEEDLER: Yeah. I -- I think -- I

18   don't think EPA has ever confronted that. But I think

19   it probably, it probably could be denied, but the

20   regulations do not -- as I recall -- specifically

21   condition the approval of the program on the memorandum

22   of agreement.

23   JUSTICE STEVENS: -- that require the making

24   of a memorandum of agreement.

25   MR. KNEEDLER: Yes. I would, I would

1   hesitate to say that EPA could not -- could not insist

2   on that, but it's important again to come back to the --

3   JUSTICE STEVENS: But how can that be

4   consistent with your shall argument?

5   MR. KNEEDLER: Because there's a separate

6   authority for the, for the, for EPA to issue guidelines

7   for minimum, minimum standards for State programs, but

8   those have to do with -- with communications with EPA

9   and sort of running a program. And it's not a vehicle

10   as I said before for EPA to impose new substantive

11   requirements outside the Clean Water Act on the State.

12   And that's why if -- that's why if EPA insisted that a

13   State enter into a memorandum of understanding that

14   basically said we will, we will act like EPA does under

15   Section 7 of the Endangered Species Act under the

16   administration of the program, I think the, I think the

17   State agency would be entitled to decline to enter into

18   that agreement. And again that's essentially what the

19   Fifth Circuit held in the American Forestry case, and to

20   what extent we agree with the American Forestry

21   decision.

22   If I may, I'd like to reserve the balance of

23   my time.

24   CHIEF JUSTICE ROBERTS: Thank you,

25   Mr. Kneedler.

1   Mr. Glitzenstein?

2   ORAL ARGUMENT OF ERIC R. GLITZENSTEIN,

3   ON BEHALF OF RESPONDENTS

4   MR. GLITZENSTEIN: Mr. Chief Justice, and

5   may it please the Court.

6   I particularly start off with the memorandum

7   of agreement that was just being discussed, and to, I

8   think, at least try to clarify an answer, I think, to

9   Justice Ginsburg's question about compliance with that

10   memorandum of agreement. If you look at page 260 of the

11   NAHB appendix that was filed along with the petition,

12   one of the elements of that memorandum of agreement is

13   that there would be compliance with Section 7 of the

14   Endangered Species Act when there were transfer

15   decisions being made by the EPA. And --

16   JUSTICE SCALIA: Where is this? Would you

17   --

18   MR. GLITZENSTEIN: This is page 260.

19   JUSTICE SCALIA: Of --

20   MR. GLITZENSTEIN: Of the NAHB appendix,

21   which is -- there are two volumes of that appendix,

22   Justice Scalia. Volume one was pages 1 to 317, which is

23   the white cover volume, and I can quote from the

24   paragraph that I was referring to. And it's the first

25   full paragraph and it reads --

24

1   JUSTICE SCALIA: 270 you say?

2   MR. GLITZENSTEIN: 260, I'm sorry.

3   JUSTICE SCALIA: 260.

4   MR. GLITZENSTEIN: 260, around.

5   JUSTICE SCALIA: I got it.

6   MR. GLITZENSTEIN: And it's the first full

7   paragraph and it says: "EPA's current practice is to

8   consult with the Services where EPA determines that

9   approval of a State's or a Tribe's application to

10   administer the NPDES program may affect federally listed

11   species." And they actually complied with that

12   memorandum of agreement in this case when they consulted

13   in response to the Arizona application.

14   Now, this memorandum of agreement which

15   Mr. Kneedler just represented to the Court is continuing

16   to be complied with, specifically provides the

17   mechanisms by which the Clean Water Act and the

18   Endangered Species Act will be reconciled and will be

19   harmonized. This language was adopted after notice and

20   comment proceedings. It is reflected not only in the

21   application and the final decision made in this case,

22   where once again the EPA said point blank, we are

23   required to comply with Section 7 of the Endangered

24   Species Act; but essentially the same understanding of

25   the Agency's legal duties and how they would be

1   reconciled was set forth in all these past consultation

2   decisions that are described in the decisions below and

3   our brief.

4   JUSTICE SCALIA: Can that be read just to

5   apply to any, any State permits that -- that violate

6   Clean Water requirements? As opposed to upland habitat

7   which -- which might be affected?

8   MR. GLITZENSTEIN: There's certainly there's

9   nothing in the memorandum of agreement that says that.

10   But can I just add a critical point on that,

11   Justice Scalia? The Government's position now is that

12   it doesn't matter. Their new position in response to

13   Justice Stevens's question about the change in position,

14   before the Government came to this Court, they never

15   previously suggested what they're now saying, which is

16   that Section 7(A)(2) consultation obligations and the

17   no-jeopardy prohibition don't apply at all to these

18   transfer decisions.

19   So this distinction between aquatic species

20   and upland species, which may be an interesting one to

21   explore, we would submit on remand, is not the current

22   reflection of their position. Their position now is we

23   could have something causing the extinction of aquatic

24   species as a result of a pollution impact but we are

25   under no obligation to even take a look at that under

1   the seemingly mandatory requirement of Section 7.

2   JUSTICE SCALIA: Well, how do you feel --

3   CHIEF JUSTICE ROBERTS: That's not quite

4   right. They would look at that in the context of

5   reviewing the permits that are issued by the State

6   agencies.

7   MR. GLITZENSTEIN: Your Honor, and I think

8   that's where we seem to have a little bit of a

9   disconnect. The assumption that Mr. Kneedler seems to

10   be making is the end of the consultation process that

11   Section 7 requires, not the beginning of it. The

12   purpose of the consultation process is to avoid

13   conflicts with other statutory obligations, note to

14   create them, and indeed as that memorandum of agreement

15   language suggests, the consultation process has been

16   used precisely --

17   CHIEF JUSTICE ROBERTS: No, what he's

18   suggesting is there isn't going to be any impact on any

19   endangered species until a particular permit is issued

20   by the State agency, and that those permits are

21   submitted to the Fish and Wildlife Service for their

22   review.

23   MR. GLITZENSTEIN: That's correct, Your

24   Honor. But to go back to the suggestion that I think

25   Justice Souter made, what the agencies have done in the

27

1   past, and this is a situation where we don't have to

2   speculate about whether the agencies can comply with

3   those statutes. They have done it. They've worked

4   these problems out. And what they have done when

5   they've consulted, if you go back and look at the

6   underlying consultation documents, they've spelled out

7   exactly what Your Honor just suggested should be the

8   approach. They've said, all right, when we issue these

9   permits under Section 402 -- under 402(b) and do we

10   exercise our oversight responsibilities under 402(d),

11   here are the species we are going to pay special

12   attention to. For example, in the Maine delegation, one

13   of the principal species of concern was the Atlantic

14   salmon, which they were concerned about because of

15   impacts from the aquaculture industry. What they did in

16   the biological opinion prepared as a consequence of that

17   consultation was not say, we're not going to let this

18   transfer go through. They said we have this oversight

19   ability. We're going to work out with the Fish and

20   Wildlife Service the mechanism by when those permits

21   come to our attention, as they must under section

22   402(d), we will discuss the circumstances and criteria

23   for objecting to those, we will go to the State under

24   the following circumstances, and say we think this

25   permit is going to cause the jeopardy of the species --

1   CHIEF JUSTICE ROBERTS: What does that have

2   to do with the -- I'm sorry.

3   JUSTICE SCALIA: I thought that those are in

4   place. As I understood Mr. Kneedler to say that that's

5   exactly what they, what they continue to do.

6   MR. GLITZENSTEIN: Your Honor, and again --

7   JUSTICE SCALIA: But that has nothing to do,

8   as the Chief was about to say before I interrupted him,

9   that has nothing to do with, with whether they have to

10 issue the NPDES authorization.

11   MR. GLITZENSTEIN: And I guess the point I'm

12 trying to make, Your Honor, is that the Court's

13 fundamental obligation when it has two statutes that

14 have shall provisions, is to see if there's a way they

15 can be reconciled and worked out. And What I'm saying

16 is that the consultation process has been and should be

17 precisely the process where those kinds of issues will

18 be reconciled and that's exactly how this process is

19 working. So for the Government to come in and say let's

20 not use the process that 7(a)(2) calls for, in order to

21 try to avoid the problems, is to really put the cart

22 before the horse in the most, I think, obvious way

23 imaginable.

24   JUSTICE SCALIA: Could I get back to the

25 memorandum of agreement that you've called our attention

1 to on page 260? I read that paragraph, and I don't see

2 anything in it that imposes any obligation whatever on

3 the State. It is just a description of what -- what EPA

4 is, is going to do.

5   MR. GLITZENSTEIN: Right.

6   JUSTICE SCALIA: The same kind of

7 consultation with Fish and Wildlife that, that

8 Mr. Kneedler described to us.

9   MR. GLITZENSTEIN: I think, Your Honor, and

10 I think that's critical. I think we're making some

11 assumptions here that, at least on our side, we're not

12 making. We're not assuming that the outcome of the

13 consultation process has to be to impose new conditions

14 on the State. One of the outcomes of the prior

15 consultation process with Maine, with Texas, for

16 example, was to spell out how the Service and EPA would

17 address their post-transfer concerns.

18   JUSTICE SCALIA: But this is talking about

19 consultation when the permit is -- the permit

20 application is issued. Not consultation at the, at the

21 stage of approving the State plan.

22   MR. GLITZENSTEIN: With all deference, Your

23 Honor, it says: "The current practice to consult with

24 the Services where EPA determines that approval of a

25 State's or Tribe's application to administer the

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 1   program. And I think there is concession by the other

 2   side that that in fact was a reflection of what the

 3   practice was. They were consulting on the actual

 4   transfer of the programs, and the reason they were doing

 5   that, Chief Justice Roberts, was to do exactly what Your

 6   Honor is suggesting, that is to work out a mechanism

 7   beforehand, so that when the State permits are being

 8   issued, the agencies would know how to address their

 9   concerns.

10   CHIEF JUSTICE ROBERTS: But the point -- the

11   point is that it's the issuance of a permit under the

12   program, whether administered by the Federal Government

13   or the State government that has the potential for

14   jeopardizing endangered species. It is not the

15   administration of the program. And EPA has in place the

16   procedures to allow them to review the particular

17   permits, which what is what might jeopardize an

18   endangered species. And they don't need to leverage

19   their limited authority, their non-discretionary

20   authority to approve a transfer, to have that authority

21   to review the actual act that might jeopardize an

22   endangered species.

23   MR. GLITZENSTEIN: That's true, Your Honor,

24   but again I think what the Court may be doing is

25   assuming that this consultation process is somewhat more

1   draconian than it frequently turns out to be. If the

2   only outcome of the consultation process under Section

3   7(a)(2) is for the Fish and Wildlife Service to reach

4   some understanding with EPA, it says when these permits

5   are issued by the states, here are the circumstances

6   under which you're going to lodge objections, because

7   we're the expert agency on species. And I think this

8   record shows what we're talking about.

9   JUSTICE KENNEDY: Are you -- are you saying

10   that the consultation does beyond the nine factors that

11   are listed in the statute?

12   MR. GLITZENSTEIN: No, Your Honor. I think

13   what we're saying is that consultation goes to the

14   separate obligation under 7(a)(2) of the Endangered

15   Species Act to address the impacts on a listed species.

16   And if I could --

17   JUSTICE KENNEDY: But isn't that beyond the

18   nine factors?

19   MR. GLITZENSTEIN: I don't think -- I think

20   what it is is an effort, as there's been discussion

21   here, to reconcile two obligations, both of which

22   Congress felt were important. And that's exactly what

23   the agency has done in other circumstances.

24   JUSTICE KENNEDY: I -- I understand that.

25   But when they sit down and they have the consultation,

32

1   is it proper for the EPA to say now, we're consulting

2   with you, but only with respect to the nine factors, as

3   to permits that are issued by the states afterwards, but

4   then that's something else.

5   MR. GLITZENSTEIN: Well, and Your Honor,

6   just on that point, I found the Government's reply brief

7   a little bit odd, because I think consistent with the

8   questioning from Justice Breyer, it acknowledges for the

9   first time that these factors do encompass some

10   consideration of wildlife impacts. But putting that to

11   one side, I think it's very important to compare what

12   they're arguing now with how they dealt with other

13   cross-cutting legal obligations. If you look, for

14   example, at how they dealt with the Indian trust

15   responsibility -- I'm only bringing this up by way of

16   analogy, because I think the government's position is,

17   oh, we're trying to elevate the Endangered Species Act

18   to some exalted status, and in fact all we're saying on

19   this administrative record is that's the same status

20   that they accorded to other cross-cutting legal

21   obligations.

22   JUSTICE KENNEDY: But what is your position

23   as to the propriety of the EPA's saying what I've said

24   in my hypothetical instance? If they -- they say we're

25   going to consult with you but we want to make it clear

33

1   we're only talking about the nine factors.

2   MR. GLITZENSTEIN: I think that my argument

3   is that the Endangered Species Act on its face says that

4   it prohibits jeopardy or the result of habitat

5   destruction, critical habitat destruction, for any

6   agency action that is authorized, funded or carried out.

7   Our view is that they should first look to the Clean

8   Water Act criteria and factors. We think --

9   JUSTICE KENNEDY: Well, I think you are at

10   issue with the government on that point.

11   MR. GLITZENSTEIN: We are, Your Honor. What

12   I will say to you, with all respect, Justice Kennedy,

13   and the reason I bring up their other legal obligations,

14   and I think it also reinforces the value of a remand in

15   this case, so some of the issues raised by the

16   government's new position would be flushed out in the

17   administrative process. If you look at joint appendix,

18   page 203, when Native American tribes wrote to the

19   agency and said we are concerned about the impact of

20   this transfer on Native American historic properties and

21   cultural and religious attributes, the EPA did not write

22   back and say well, we're sorry, Native American tribes,

23   that doesn't fall within the nine criteria.

24   CHIEF JUSTICE ROBERTS: So what is -- is

25   there any limitation? Let's say that EPA says we're all

1   set to approve this transfer, except OSHA sent us a

2   letter and they don't like the occupational safety rules

3   you have at the State environmental agency; so until you

4   change those rules, or enter a memorandum of agreement

5   that you're going to change those rules, we're not going

6   to approve the transfer.

7   MR. GLITZENSTEIN: I think the line, Your

8   Honor, is whether you've got another crosscutting

9   obligation --

10   CHIEF JUSTICE ROBERTS: Yeah, like the OSHA

11 act. It says, you know, the states should do this, and

12 they're not doing it. So EPA can leverage their

13 approval into any area of law?

14   MR. GLITZENSTEIN: Again, Your Honor, I

15 think the first problem is, with that question is that,

16 I don't mean to be evasive, but I think the problem is

17 you're assuming the outcome of the analysis, which is

18 that they'll have to impose some new condition on the

19 State. With the Native American tribes, they didn't do

20 that. They didn't impose any condition on the State.

21 They said we'll have an agreement with the Native

22 American tribes that when we exercise our oversight

23 authority, we will look at the impact upon --

24   CHIEF JUSTICE ROBERTS: But sometimes states

25 say no. So if they say no, presumably they're going to

35

1   have to impose the obligation as a condition of

2   approval.

3   MR. GLITZENSTEIN: Yeah. And what I will

4   say, Your Honor, is we think that in the past they have

5   been able to work these problems out. But if they

6   can't, I think it's important to recognize that Congress

7   created a mechanism precisely for the very

8   rare situation where there is --

9   JUSTICE BREYER: That isn't the -- what I'm

10 trying to figure out with Justice Kennedy's questions

11 and your answers is, is there really an issue here? And

12 I'm beginning to see maybe there is an issue when you

13 said what are they talking about. Can you -- it's a

14 cactus. They're kidnapping cactus, as apparently

15 happens. And if in fact this cactus, if the thing is

16 transferred to the State, that cactus is going to

17 disappear. Now that isn't fish. It isn't wildlife. It

18 isn't water. It's a cactus.

19   So can you take that into account? Is that

20 theoretical? I think they're trying to raise this

21 question of, suppose you know the IRS, that if you mail

22 a refund check at the time, the person who gets it is

23 going to use the $500 to destroy the last salamander in

24 the world. Okay? Now there we are, endangered species.

25 Does the Act apply to the IRS? I would have thought the

1 answer's no.

2   MR. GLITZENSTEIN: The answer is no, Your

3 Honor.

4   JUSTICE BREYER: And then I would have

5 thought the same reasoning is true here, but what the

6 Act tells you to do is read your existing authority, but

7 read it in light of informed by the endangered species

8 objectives language, et cetera.

9   And now I wonder if with that approach, is

10 it possible that even the cactus could fall within the

11 nine criteria? You're not going to depart from them but

12 you're going to read them generously in light of the

13 objective of the Endangered Species Act, which is itself

14 an environmental objective. Now how does that work?

15 Can you do that? You're an imaginative lawyer. Can you

16 do it?

17   MR. GLITZENSTEIN: Well, I think you can.

18   JUSTICE BREYER: All right. The answer is

19 you can. Then are you satisfied with this result in

20 this Court? One, it can be read that way. They're not

21 going to agree with that. It can be read that way, and

22 therefore, it applies. The ESA, the Endangered --

23   Two, that means they consult.

24   But three, the result of the consultation

25 here which has been done means there's no real objection

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1   to the transfer, because it's virtually inconceivable

2   given the weapon that the EPA has, withdrawing permits,

3   given a memorandum of agreement, given the possibility

4   of supervision, given the fact that the wildlife service

5   will object, writing them a letter or a phone call

6   immediately, given all that stuff, there's simply no

7   reason to believe that Arizona will fail to protect

8   endangered species.

9   MR. GLITZENSTEIN: I think that's a good

10   summary of what has happened with these consultations,

11   and on the cactus --

12   JUSTICE BREYER: So what's your view of an

13   opinion that roughly wrote what I just said?

14   MR. GLITZENSTEIN: Well, I think the concern

15   I would have is that I think it goes beyond what's

16   necessary here because we're not dealing, everybody

17   agrees, with some purely ministerial situation like that

18   one.

19   I think the other critical factor here, Your

20   Honor, that we haven't talked about, is the funding of

21   this program. And it's very interesting when the

22   government points out, if I can just get across to the

23   Court I think a critical citation, because the

24   government says funding is not before us. And the

25   reason they say that is because it didn't need to be

38

1   before us when they took the position that authorization

2   of the program was sufficient to trigger their

3   consultation duties. And in a footnote in their reply

4   brief, they say pay no attention to funding, which is of

5   course a discretionary activity, because that's

6   completely separate from the decision to authorize. If

7   you look at 40 C.F.R. Section 123.23(3), and I

8   apologize -- this is a response to their reply brief

9   point so there's not any appendix before the Court --

10   but it specifically provides that funding opportunities

11   are part and parcel of the decision to authorize the

12   program.

13   JUSTICE SCALIA: I don't know what you're

14   talking about. Funding of what?

15   MR. GLITZENSTEIN: Funding of the NPDES

16   program carried out by Arizona that had to be approved

17   in order to allow --

18   JUSTICE SCALIA: How does the government

19   fund it?

20   MR. GLITZENSTEIN: They have to -- there's a

21   -- Section 106 of the Clean Water Act provides the EPA

22   with an opportunity, and it's certainly not mandatory,

23   to provide funding to a State. And this is 40

24   percent Federal -- we're not talking about de minimis

25   funding. So it's one thing for the State to say well,

1   it should get the program. It's another thing to say

2   funding. And just to be clear about this, this is an

3   argument we're making to reinforce the propriety of

4   remand in this case.

5   JUSTICE SCALIA: Well, you -- you have

6   other -- let's assume that I disagree with you on

7   whether they could withhold approval of the NPDES

8   transfer. Even so, I think you -- the point you're

9   making now is that apart from that approval, there were

10   other discretionary actions taken here, one of which is

11   this funding; and another one of which, I believe, is

12   whether -- never mind the MOAs, but -- I have it written

13   down here, one of the other ones. Oh, whether existing

14   permits would be transferred to State authority or not.

15   And that is apparently discretionary and can be -- what

16   do we do about that?

17   MR. GLITZENSTEIN: Well, we suggest, Your

18   Honor -- and I think this goes back to Justice Stevens's

19   question about the change in position. I think we're in

20   an odd position in this Court quite frankly because we

21   have an administrative record where the administrator

22   conceded a duty to comply with Section 7 of the

23   Endangered Species Act. We have a new position here

24   saying they don't. And we think funding and the other

25   example you came up with is a good reason why a common

1   sense result in this case is to say we have a change in

2   position, there are new issues brought to the fore. As

3   a consequence of that --

4   JUSTICE STEVENS: May I ask this question

5   about changing position? Have you agreed and conceded

6   that the nine statutory criteria are satisfied?

7   MR. GLITZENSTEIN: We have --

8   JUSTICE STEVENS: You shift back and forth

9   on that point.

10   MR. GLITZENSTEIN: Your Honor, let me be

11   clear about that. We never conceded that. What

12   happened --

13   JUSTICE STEVENS: What is your view now?

14   Are they or are they not?

15   MR. GLITZENSTEIN: I think that there are

16   actually arguments that, especially with regard to the

17   wildlife related parts of the criteria, that are not

18   satisfied. Let me -- let me try to explain why we

19   didn't feel it necessary to argue that in the court of

20   appeals.

21   JUSTICE BREYER: Before you say why you

22   didn't argue it, it's exactly that point I sort of

23   expected you might agree when I though maybe you have

24   hooks to hang the NSA, the Endangered Species Act on.

25   But it was the other half, which I think is what

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1 Justice Stevens is saying now. I read through this

2 record, not completely but pretty well, and I couldn't

3 find a single thing that would suggest that Arizona

4 presents any risk to you. And so, what is the risk to

5 an endangered species that you're actually worried about

6 there? And you rather -- I didn't think you'd like to

7 agree with that, but I want to press you to find out

8 what actually is the problem.

9   MR. GLITZENSTEIN: If I can give Your Honor

10 some citations to the record, I think it will help

11 answer that. On page 54 of the joint appendix, the Fish

12 and Wildlife Service biologists, the expert agency

13 employees, said that there would be significant effects

14 to survival and recovery of listed species through a

15 destruction, degradation and fragmentation of habitats.

16 They specifically pinpointed the flycatcher, the

17 southwestern willow flycatcher is a species that could

18 be devastated. That's at page --

19   JUSTICE BREYER: And how would that happen?

20 How would it happen that they would get rid of the

21 flycatcher in Arizona, considering the fact that they

22 have laws themselves that protect endangered species,

23 and that's a bird, and a bird is wildlife; and so if

24 they decide they want to kill all their flycatchers,

25 which I would doubt, you could intervene at EPA and stop

42

1 them. So how is that actually a problem?

2   MR. GLITZENSTEIN: Your Honor, the concern

3 that they had was that the mechanism that had been used

4 to protect these wildlife species, and particularly

5 plant species, which I want to get to in a moment,

6 because I think actually the concern is even greater

7 with plants, was that the consultation on federally

8 issued permits had in effect been used, and this was not

9 conjectural, they had been used to safeguard

10 considerable habitat for these species. And if I could

11 turn actually to the water level, which is I think

12 actually our best example, and --

13   JUSTICE SCALIA: I mean, that's not enough.

14 Why wouldn't -- what would lead you to believe that it

15 wouldn't -- that the same would not happen when the

16 State issued the permits? I mean, you have to show some

17 reason why we don't trust Arizona to do what the Federal

18 government's doing.

19   MR. GLITZENSTEIN: Your Honor, it is not a

20 question of trusting them. I think part of the outcome

21 of the consultation --

22   JUSTICE SCALIA: Well then, you have to

23 establish jeopardy. You have to establish jeopardy.

24 And the mere fact that you're giving it to a State which

25 Congress has been willing to trust with implementing

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1   this law is not enough to show that there's jeopardy.

2   Prima facie, we would expect Arizona to do the right

3   thing.

4   JUSTICE SOUTER: Just as a technical matter,

5   don't they have to show there's no jeopardy?

6   MR. GLITZENSTEIN: Yes, Your Honor. The

7   burden is on the Agency in the consultation process.

8   And it's at, as TVA versus Hill makes clear, the benefit

9   of the doubt is accorded to the species. But, could I

10 try to answer that question?

11   CHIEF JUSTICE ROBERTS: Yes.

12   MR. GLITZENSTEIN: We're not saying we don't

13 trust the State. And In fact, one of the outcomes of

14 one these prior consultation processes has been where

15 it's appropriate, the service works had an agreement

16 with the State where it says here are our concerns where

17 the expert Federal agency, we listed these species, you

18 didn't. Part of it's expertise, not trust. And in

19 fact, if the State comes back and says we understand,

20 we'll deal with that problem, that is one aspect of a

21 consultation process that the government is now saying

22 we should never have to go through.

23   On the plants however, Your Honor, there is

24 a very serious concern. In this respect the service

25 biologists said we have protected these plants' habitats

1   through the Section 7 mechanism.   The State of Arizona

2   acknowledges that it has no law or regulation which

3   forbids the destruction of federally listed plant

4   species.

5   Section 9 of the Endangered Species Act,

6   which Mr. Kneedler brought up and said it was the most

7   important provision, and I would beg to differ.   I think

8   Sweet Home, both the majority and dissenting opinions

9   agree that Section 7 -- and Hill -- that Section 7 is

10   the most important provision.   But plant species are not

11   protected generally by Section 9 of the Endangered

12   Species Act, the take provision, except when they're on

13   Federal lands.

14   So we have a situation where the service

15   biologists were saying, and this is how I read the

16   record, and if I can give a couple more citations, page

17   128 and 139 of the joint appendix.   On one plant

18   species, joint appendix page 436.   On the water on both,

19   they were essentially predicting jeopardy, unless

20   additional protections could be worked out in this

21   process.

22   CHIEF JUSTICE ROBERTS: Jeopardy from the

23   issuance of a prospective future issuance of a permit by

24   Arizona if they get the delegated authority.   And that

25   issuance of the permit would be subject to objection and

1   review by EPA and the Fish and Wildlife Service.

2   MR. GLITZENSTEIN: With regard to the plant,

3   Your Honor, EPA's position to date has been that they do

4   not have the authority to protect that plant species

5   under their Clean Water Act authorities. Now we may

6   disagree with that, but that is the position they've

7   taken so far.

8   CHIEF JUSTICE ROBERTS: The position that

9   EPA has taken.

10   MR. GLITZENSTEIN: That's correct, Your

11   Honor.

12   CHIEF JUSTICE ROBERTS: Under their

13   authority.

14   MR. GLITZENSTEIN: Under their Clean Water

15   Act authority, which is what informs their oversight

16   activities.

17   CHIEF JUSTICE ROBERTS: So how does it

18   matter whether they have it or if it's transferred to

19   Arizona?

20   MR. GLITZENSTEIN: Because again, what the

21   consultation process is designed to accomplish, either

22   through the funding, discretionary decision that was

23   made, other mechanisms that can come into play, the idea

24   behind the consultation on the transfer -- and I think

25   this is critical to our position -- is to say if we're

1   not going to be able to protect the species through the

2   State issuance of the permits and the other authorities

3   we have, what understanding can we come to, consistent

4   with our --

5   JUSTICE SCALIA: I don't understand --

6   MR. GLITZENSTEIN: -- other obligations to

7   protect the plant species.

8   JUSTICE SCALIA: I don't understand that

9   answer. The Chief Justice is asking, if EPA cannot do

10   it itself, how is it creating any jeopardy in

11   transferring the authority to somebody else who can't do

12   it?

13   MR. GLITZENSTEIN: Your Honor, what the --

14   JUSTICE SCALIA: I mean, if you assume that

15   EPA can't protect these plant species under its

16   legislation, what harm is there in transferring the

17   authority to somebody else who can't protect it?

18   MR. GLITZENSTEIN: Well, I should just first

19   say that we disagree with the premise of that question.

20   In terms of EPA's position, we happen to think that EPA

21   can protect those kind of plant species, and I think

22   that's one of the additional bases s for a remand.

23   But I think the more important answer to

24   Your Honor's question is that the Fish and Wildlife

25   Service biologist said in this administrative record

1   that the loss of those protections was an indirect

2   effect of the transfer, that because we have used these

3   protections when we've issued Federal permits to prevent

4   species like these plant species from going extinction

5   -- and this was not speculative --

6   JUSTICE KENNEDY: If the EPA can protect the

7   plants when the permit is under its own jurisdiction,

8   why can't it use that same basis for objecting when it's

9   under the State's jurisdiction?

10   MR. GLITZENSTEIN: Your Honor, that's an

11   awfully good question. And in fact we believe that

12   should have been one of the outcomes of the

13   consultations.

14   On the transfer. If one of the results of

15   the transfer -- and I think this was -- I think what's

16   happening is that the government has basically assumed

17   the answer to the consultation before we've gotten to

18   that point. They've assumed --

19   JUSTICE ALITO: What's the difference

20   between Arizona's situation and all the other States

21   that can issue permits? Are they under legal obligation

22   to consult?

23   MR. GLITZENSTEIN: I believe that --

24   JUSTICE ALITO: And where is --

25   MR. GLITZENSTEIN: It's not the State's

1   obligation to consult, Your Honor. Just to be clear,

2   Section 67 imposes no obligation on the State. We

3   completely agree with that. It imposes an obligation on

4   a Federal agency.

5   JUSTICE ALITO: You say it imposes an

6   obligation on EPA to require the States to consult.

7   MR. GLITZENSTEIN: We don't disagree with

8   that either, Your Honor. We believe that there are

9   mechanisms that have been used in past consultations,

10   especially after the Louisiana decision that came down,

11   which involve the State not at all, which involve only

12   the Fish and Wildlife Service and the EPA recognizing

13   how they would exercise their --

14   JUSTICE ALITO: I still don't understand the

15   difference between what you think is going to happen in

16   Arizona and what is happening in all the other States

17   that issue permits.

18   MR. GLITZENSTEIN: Your Honor, we're not

19   saying that -- particularly with regard to Texas,

20   Florida, Oklahoma, Louisiana and other States that have

21   gone through the consultation process, we're not saying

22   that anything different should happen. We're saying go

23   through a full consultation process, agree on mechanisms

24   that can protect these species.

25   JUSTICE ALITO: No, in the issuance of a

1   permit in any of these States, pick any State you like,

2   what is the difference between what you envision would

3   happen in Arizona, if Arizona can issue permits, and

4   what's happening in these other States?

5   MR. GLITZENSTEIN: Again, with regard to

6   consultation with Arizona, all we're asking for and all

7   we've ever asked for in this case, and this was what the

8   service biologist said, was use the consultation process

9   to agree on measures that can be put in place

10   post-transfer that will prevent the species from going

11   extinct. That's what happened --

12   JUSTICE SOUTER: May I ask you to follow up

13   on that? A few minutes -- I guess your time is getting

14   short and I'd like to get away from some of the

15   specifics and back to the general. A minute ago,

16   Justice Breyer in effect offered you an opinion and he

17   spelled it out and he said, if I put that in writing is

18   that what you want? You said, well, it's really more

19   than we need.

20   Would you please at this point summarize as

21   succinctly as you can what you need to win this case?

22   MR. GLITZENSTEIN: Well, the narrowest thing

23   we need is simply a decision that the government changed

24   its position and the case should be remanded.

25   JUSTICE SOUTER: No, tell me substantively,

1   what do you want? What substantively do you want at the

2   end of this case?

3   MR. GLITZENSTEIN: Your Honor, what we would

4   like is a ruling that says that 7(a)(2) imposes

5   obligations on Federal agencies just like the Clean

6   Water Act does, that the agency should make a good faith

7   -- and this is the words of Congress -- "a good faith

8   effort to use the consultation process provided by

9   7(a)(2) to devise mechanisms to protect species.

10   JUSTICE SOUTER: And how will they put those

11   mechanisms in legal form?

12   MR. GLITZENSTEIN: They would put those

13   mechanisms in legal form either through memorandum of

14   agreement, which is what's been used in the past,

15   separate agreements between EPA and the Fish and

16   Wildlife Service --

17   JUSTICE SCALIA: By coercing, by coercing

18   the States to sign those agreements on pain of not

19   getting NPDES authority?

20   MR. GLITZENSTEIN: No, Your Honor. In fact

21   --

22   JUSTICE SCALIA: What do they do then? They

23   just whistle and this comes forth? States don't sign

24   stuff just, just for the sake of it.

25   MR. GLITZENSTEIN: Your Honor, I think part

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1   of this, these agreements, wouldn't have to be signed by

2   the State at all.

3   JUSTICE SOUTER: Justice Scalia's got a fair

4   point. What if the States say, we don't want a

5   memorandum of agreement? What does the Federal

6   Government do at that point? Doesn't the Federal

7   Government at that point say, okay, we're not going to

8   issue the transfer under Clean Water because we have an

9   independent obligation under Endangered Species and

10   there's got to be both or there will be neither? Isn't

11   that the Federal Government's position?

12   MR. GLITZENSTEIN: At the end of the day I

13   think it is. And there is an endangered species

14   committee. Once again --

15   JUSTICE SCALIA: It's your position, not the

16   Federal Government's position. It's your position of

17   what the Federal Government's position ought to be,

18   right?

19   MR. GLITZENSTEIN: What I was trying to

20   suggest was -- I think if in the end of the day you look

21   at all of these opportunities to protect species and you

22   say there's nothing we can do about it and the State

23   refuses to cooperate, you have what's called jeopardy or

24   destruction of critical habitat, and Congress said that

25   the mechanism for working out the conflict with another

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1   law is the endangered species committee, which we have

2   not talked about very much. That was Congress's answer.

3   But what I was trying to suggest was, long

4   before you get to that point and without imposing a

5   single obligation on the State, simply using the

6   authority under 402(d) of the Clean Water Act, which

7   provides for this oversight opportunity, the service and

8   the EPA can come to their own understanding as to how

9   EPA will in fact carry out its post-transfer review of

10   these. And we think that is, that is an acceptable

11   answer to the question.

12   CHIEF JUSTICE ROBERTS: Thank you, counsel.

13   MR. GLITZENSTEIN: Thank you.

14   CHIEF JUSTICE ROBERTS: Mr. Kneedler, you

15   have four minutes remaining.

16   REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

17   ON BEHALF OF THE PETITIONERS

18   MR. KNEEDLER: Mr. Chief Justice:

19   First, with respect, stepping back and

20   looking at the legal theory, we think that this case is

21   really on all fours with the Public Citizen case. In

22   fact, the court of appeals recognized that the operative

23   regulation here, the definition of "indirect effect,"

24   meaning something caused by the agency, is just like the

25   one in Public Citizen. In Public Citizen this Court

1   held that where an agency has a mandatory duty and does

2   not have the ability to control subsequent events, that

3   the agency cannot be regarded as the legal cause of

4   whatever effects happen. That is exactly the case here.

5   Section 402(b) mandates that EPA approve the

6   State's application. EPA therefore, EPA's decision

7   therefore is not the legal cause of any effects that

8   might happen with respect to endangered species.

9   I should point out that in this Court's

10   decision in Sweet Home this Court in footnotes 9 and 13

11   read the other principal provision of the ESA, the take

12   provision, to incorporation a proximate cause

13   limitation. We think it follows that the jeopardize

14   prohibition in Section 7 also incorporates a proximate

15   cause or here legal cause restriction.

16   JUSTICE SCALIA: Mr. Kneedler, I hate to eat

17   up any of your rebuttal time, but would you state

18   briefly what -- how you would treat these other matters

19   that were resolved by the agency and that were not

20   mandatory, its decision to transfer prior certificate

21   authority to the States, for example, and the other

22   instance raised by opposing counsel? What if I agree

23   with you on whether you can deny the NPDES permit, but

24   I'm concerned about these other actions by the agency

25   that were discretionary?

1   MR. KNEEDLER: There has been no challenge

2   to that, so I'm not in a position to give a definitive

3   answer. But I believe to the extent it would be

4   discretionary that Section 7 may well kick in.

5   JUSTICE SCALIA: Should we remand?

6   MR. KNEEDLER: No, because there was no

7   challenge to that. There was no challenge to that

8   aspect of it. This was a challenge to the transfer of

9   authority, not ancillary matters addressed under the

10   agreement.

11   Also, footnote 18 of the court of appeals

12   opinion makes clear that Respondents did not challenge

13   anything to do with funding, which is an entirely

14   separate administrative determination that there's a

15   regulatory set of criteria for how funding gets

16   distributed, it is not dependent on whether the State

17   has NPDES authority. Section 106 of the Clean Water Act

18   has a separate funding mechanism for Clean Water Act

19   authority generally. So funding is simply not, it's

20   simply not in the case.

21   JUSTICE STEVENS: And it's in your

22   discretion -- your distinction to the snail darter case

23   is that the decision to built the dam is discretionary,

24   not mandatory?

25   MR. KNEEDLER: Yes, and in fact this Court's

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1   decision in Hill can't be understood in any other day

2   because the Court went out of its way to say that, while

3   Congress committee reports indicated, for the

4   appropriations bills, indicated an expectation that the

5   dam would be built, the Court emphasized the fact that

6   there was no mandate in the appropriations statute

7   itself. That would have been --

8   JUSTICE SCALIA: Do you mean the executive

9   can ignore earmarks?

10   MR. KNEEDLER: Yes. That part of the

11   Court's decision would have been unnecessary.

12   JUSTICE BREYER: What's a mandatory

13   decision? No, what's a discretionary decision? I mean,

14   in the sense you're using it. I've never heard of an

15   agency that could just give out money to whoever they

16   want, like you or me. There are always criteria. Write

17   a "shall"; there are always criteria.

18   MR. KNEEDLER: But there are few statutes

19   like this, that say the agency shall unless certain

20   things happen.

21   JUSTICE BREYER: You mean is it the word

22   "unless," because here we have nine and they're broad.

23   Probably with funding we have 32. Maybe with some

24   others we have 14. But I can't get my mind around --

25   MR. KNEEDLER: There may be particular

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1 applications of the standard, but that did not deter

2 this Court in Public Citizen, where the Court applied

3 the same principle and said where the agency has a

4 mandatory duty and no discretion it is not the legal

5 cause. That's the general principle. If there are

6 other cases where that general principle has to be

7 applied, there will be time enough for that

8 consideration to arise.

9   Another important aspect of Hill is this

10 Court quoted Representative Dingell, the sponsor of it,

11 saying that agencies are to take actions within their

12 power, which suggest that -- and we think it's clear

13 through the history, as we recite in our brief at pages

14 27 and 28, from the text of the Act and from the

15 evolution of Section 7, it was always understood to

16 apply to situations where the agencies had the existing

17 authority to take action, not to require them to

18 countermand statutory directives the way the Department

19 of Transportation could not countermand statutory

20 directives in Public Citizen.

21   Thank you.

22   CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24   (Whereupon, at 11:19 a.m., the case in the

25 above-entitled matter was submitted.)

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