

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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P R O C E E D I N G S

(10:18 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in 06-340, National Association of Home Builders versus Defenders of Wildlife, and 06-549, Environmental Protection Agency versus Defenders of Wildlife.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

section 402(b) of the Clean Water Act provides that the Environmental Protection Agency shall approve an application by a State to administer its own NPDES program unless EPA finds that the State's program does not satisfy nine criteria that are addressed to whether the State has the legal authority under State law to carry forward with the program.

There's no dispute in this case that Arizona's program satisfies those criteria. The Ninth Circuit nonetheless set aside EPA's approval of Arizona's program. The Ninth Circuit held that EPA could not approve Arizona's application unless it first ensured 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. Section --

7 JUSTICE KENNEDY: Do we take the case and --
8 I'll ask the same question on the colleagues from the
9 other side -- on the assumption that if the nine factors
10 in statutes are met, that EPA has no discretion to
11 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 State's that it's the policy of Congress that
20 the States administer the NPDES program.

21 JUSTICE GINSBURG: Is it not true --

22 JUSTICE STEVENS: Mr. Kneedler, how long has
23 that been the Government's -- the EPA's position? How long
24 has that been the EPA's interpretation of the statute?

25 MR. KNEEDLER: Well, until 1993 when the

1 vast majority -- by the time -- by that time the vast
2 majority of transfers or approvals had already taken
3 place. There had never been consultation, at least that
4 we're aware of under section 7 of the Endangered Species
5 Act. EPA did consult with the wildlife agencies on six
6 programs but after the Fifth Circuit -- from then until
7 -- until this one, but after the Fifth Circuit's
8 decision in the American Forestry case, EPA never tried
9 to impose any obligations on a State under section 7 of
10 the Endangered Species Act.

11 What it did is, EPA and the Fish and
12 Wildlife Service worked out between themselves certain
13 arrangements by which EPA would look at endangered
14 species considerations, but it never conditioned the
15 approval of a State program after the Louisiana program
16 struck down in the American Forestry decision in 1998,
17 on the States having in place certain protections. And
18 in fact, I think EPA would not characterize what it did
19 even in the Louisiana program as the sort of condition
20 that the Fifth Circuit understood.

21 JUSTICE STEVENS: Mr. Kneedler, are you
22 claiming this has always been the EPA's position? Because
23 there's an allegation in one of the briefs that you changed
24 your position in this Court, as the position you took
25 even in the lower courts on that issue. Is that wrong or

1 right?

2 MR. KNEEDLER: Well, I'm -- there may be two
3 different things that, referring to it. section 7
4 imposes an obligation on Federal agencies in their own
5 actions not to jeopardize -- or to ensure that their
6 actions are not likely to jeopardize a species.
7 Ancillary to that, there is an obligation on Federal
8 agencies to consult with the fish and wildlife agencies.
9 As to the consultation obligation, as I mentioned, EPA
10 has engaged in consultation from 1993 until --

11 JUSTICE STEVENS: But your position was they
12 didn't have to?

13 MR. KNEEDLER: Our position now is that it
14 did not have to, but -- and more fundamentally our
15 position is that because the transfer or the approval of
16 the State application is mandatory if these nine legal
17 authority criteria are satisfied, EPA could not withhold
18 approval of --

19 CHIEF JUSTICE ROBERTS: So your position is
20 the consultation is a waste of time?

21 MR. KNEEDLER: Basically, yes.

22 JUSTICE BREYER: How does that --

23 MR. KNEEDLER: If in the end EPA could not
24 disapprove the State's application, and since consultation
25 is ancillary to the substantive obligation not to

1 jeopardize --

2 JUSTICE GINSBURG: Mr. Kneedler, isn't there a
3 difference between denying the application because the
4 Endangered Species Act hasn't been attended to adequately,
5 and saying you meet the nine criteria, so you're going to
6 get your application. But then, so it's not just automatic
7 that the thing becomes the State's domain rather than
8 the Federal. But isn't there something rather detailed
9 called a memorandum of agreement that's worked out, and
10 couldn't the Endangered Species Act concerns be
11 accommodated that way instead of saying one statute is
12 out the window, even though EPA in a number of States
13 has made an accommodation.

14 Why couldn't the Endangered Species Act
15 concerns be reflected in that memorandum of agreement?

16 MR. KNEEDLER: The memorandum of -- the
17 memorandum of agreement is called for under EPA's
18 regulations as really a procedural mechanism for the EPA
19 and the State Agency to work out the practicalities of
20 the State's administering the program. They typically
21 address such things as how the State Agency will furnish
22 EPA draft permits and that sort of thing, time
23 limitations for EPA to look at, who to contact at the
24 State Agency.

25 It's essentially procedural in order to

1 facilitate EPA's continuing oversight role. It's not a
2 vehicle for EPA to impose substantive obligations coming
3 from other statutes.

4 JUSTICE SOUTER: No, but the point is why
5 can't it be?

6 MR. KNEEDLER: Because we think that would
7 been inconsistent with section 402(b), which requires --
8 which requires the EPA to approve the transfer.

9 Now, if a State Agency chooses to cooperate
10 with Fish and Wildlife Service or NOAA in the Department
11 of Commerce with respect to species under its
12 jurisdiction, that is all fine. And I should point
13 out --

14 JUSTICE SOUTER: Doesn't the ESA require
15 something more than voluntary cooperation? I mean, you
16 quite rightly emphasize the mandatory nature of the
17 approval under the Clean Water Act. But the Endangered
18 Species Act mandate seems equally unconditional.

19 MR. KNEEDLER: It's unconditional with
20 respect in our view to actions that are within the
21 Agency's discretion or consequences that the Agency will
22 cause. But more fundamentally in response to your
23 question, section 7 imposes obligations only on Federal
24 agencies, not on State agencies. Like 402(b), it is a
25 federalism-sensitive --

1 JUSTICE SOUTER: No, but doesn't -- no, I
2 realize that that's your point. But doesn't that sort of
3 beg the question? Because it's not that anyone is
4 suggesting here, I think, that under the Endangered
5 Species Act the Federal Government can keep control or
6 that the Federal Government can in effect provide
7 guarantees of what may happen in response to some future
8 development proposal.

9 What I think they're arguing is that -- when
10 -- when, when the Agency gives the approval, it should
11 require that there be some kind of procedure in place on
12 the part of the States, so that when problems arise the
13 States will probably respond to them with the same
14 values in mind that the Feds would.

15 And the question is why cannot the
16 Endangered Species Act be enforced in that way, to
17 require, in effect, an advanced mechanism before, in
18 effect, the whole business is turned over to the States?

19 MR. KNEEDLER: Well, as to the latter, we
20 don't believe that EPA can condition the transfer. But
21 let me point out that in 2001 --

22 JUSTICE SOUTER: I know you say you don't
23 think they can do it. But the problem is we've got two
24 statutes each of which is mandatory. And your response
25 seems to be, well, we'll give full effect to one and we

1 will ignore the other. And I don't see how that is a
2 tie breaker. And why do you not have an obligation to
3 do what you can with respect to the Endangered Species
4 Act?

5 MR. KNEEDLER: First of all, with respect to
6 the Endangered Species Act, the memorandum of agreement
7 that was entered into in 2001 between EPA and the two
8 Federal wildlife services does furnish a way in which
9 after the transfer EPA can take into account endangered
10 species considerations within the scope of its
11 post-transfer --

12 JUSTICE SOUTER: At which point EPA doesn't
13 have any authority left under the Clean Water Act.

14 MR. KNEEDLER: No, that's not correct.
15 Under section 402(d) EPA has the authority to object to
16 a State permit. And if the -- but to do so on, based on
17 a determination that the State permit would not satisfy
18 the guidelines and requirements of the Clean Water Act.
19 So if --

20 JUSTICE SOUTER: Which begs the question
21 because the concern is the enforcement of the Endangered
22 Species Act.

23 MR. KNEEDLER: With respect to water quality
24 issues that might affect an endangered species, EPA
25 takes the position -- and I think it's correct -- that

1 EPA can object to a State permit where that permit would
2 not comply with State water quality standards that are
3 necessary to protect the endangered species.

4 JUSTICE SOUTER: Then why don't they get that
5 in the memorandum of agreement up front?

6 MR. KNEEDLER: EPA doesn't need the State's
7 agreement to object to a State permit. That is
8 authority --

9 JUSTICE SOUTER: Maybe it doesn't, but isn't
10 it the case that if it's in the agreement up front the
11 odds are better that the State will address it, as
12 opposed to the State ignoring the problem, requiring EPA
13 then to take affirmative action to object?

14 MR. KNEEDLER: And I wanted to get to the
15 further mechanisms that are in place under EPA
16 regulations and the memorandum of agreement.

17 JUSTICE SOUTER: No, but would you answer
18 my question first? Isn't it likely that the States are
19 going to respond or deal with the problem if they have
20 an obligation in the memorandum of agreement right up
21 front?

22 MR. KNEEDLER: I suppose. But let me -- let
23 me -- let me explain what is in place. EPA's regulations
24 require that a State furnish its draft permits to the
25 public, but also specifically to the Federal wildlife

1 agencies.

2 That gives Fish and Wildlife Service and NOAA
3 an opportunity to comment about endangered species concerns
4 that may be raised by the draft permit.

5 The regulations also require the State
6 Agency to take into account the comments that are
7 submitted by anyone, including the Fish and Wildlife
8 Service and NOAA. Those provisions built in allow the
9 Federal agencies to bring their concerns to the State
10 Agency, and I think there is every reason to believe
11 that the State agencies will --

12 JUSTICE SOUTER: But does it give an obligation
13 on the part of the State Agency to take reasonable action
14 in response to them, or can the State Agency simply sit
15 there, listen with a tin ear and then do whatever it
16 wants to?

17 MR. KNEEDLER: Those regulations do not
18 because they are procedural. Then what happens if the
19 State Agency does not respond to the concerns raised or
20 does not remedy the concerns raised by Fish and Wildlife
21 Service or NOAA, EPA is notified and EPA can then try to
22 work it out with the State Agency, or, failing that, EPA
23 can object to the State permit if it does not satisfy
24 the Clean Water Act standards.

25 And again with respect to water quality,

1 those standards are set at a level that is necessary to
2 protect endangered species. So as far as water quality
3 impacts are concerned, EPA retains complete control
4 under its ability to object to the permit.

5 JUSTICE SOUTER: So you are in effect saying
6 that the -- that the -- that the enforcement of water
7 quality standards is, in effect, the indirect answer to
8 the problem that the other side raises? That's the way
9 it's done?

10 MR. KNEEDLER: It is. EPA --

11 JUSTICE SCALIA: Except to the extent that a
12 project may be endangering a species, not by reason of
13 change in water quality but, for example, by destroying
14 habitat, in constructing a dam, or something of that sort;
15 right?

16 MR. KNEEDLER: Upland habitat, if it's water
17 habitat, water quality standards. EPA has to approve
18 State water quality standards. It consults with Fish
19 and Wildlife Service and NOAA in doing so to make sure
20 endangered species would be protected by the water
21 quality standards. And then each individual State
22 permit is measured against those water quality standards
23 to make sure they comply.

24 So therefore, with respect to water quality,
25 Fish and Wildlife Service agreed that the mechanisms I

1 have just described would take care of any Endangered
2 Species Act concerns.

3 JUSTICE GINSBURG: Mr. Kneedler, are you
4 referring to, in what you just described about the
5 cooperation among the Federal agencies, to what has been
6 called in the Fisheries brief, it's referred to as a
7 coordination agreement?

8 MR. KNEEDLER: Yes, the 2001, February 22,
9 2001, agreement between EPA and --

10 JUSTICE GINSBURG: And that agreement, I
11 take it from what you just said, is in full force? EPA
12 hasn't retreated from that agreement and it will
13 continue to --

14 MR. KNEEDLER: That is correct. And some of
15 the things I described were embodied in EPA regulations
16 aside from the agreement, including the requirement that
17 State agencies furnish draft permits to Fish and
18 Wildlife Service and take into account comments that are
19 received in return.

20 Justice Scalia is correct that -- that the
21 impacts that would not be covered by this would be
22 non-water quality-related impacts on upland habitat.
23 But in our view that simply reflects the nature of the
24 Clean Water Act; under 402(b) it is a clean water act.
25 It deals with water quality, and we do not believe

1 that EPA is authorized to withhold the approval or
2 condition the approval of a transfer of permitting
3 authority to a State on the basis of what the State will
4 do with respect to upland -- upland habitat.

5 JUSTICE SOUTER: Which is the -- the later
6 Act is the Endangered Species Act?

7 MR. KNEEDLER: Essentially, the Endangered
8 Species -- there was a subsequent amendment to 402(b),
9 but for these purposes -- but --

10 JUSTICE SOUTER: Why doesn't that control?

11 MR. KNEEDLER: Because it is -- we do not
12 think it repeals -- it's essentially a repeal-by-
13 implication question.

14 JUSTICE SOUTER: No, but you can just as
15 well say that if it does not control then there is an
16 exception by implication, the exception being based on
17 the prior Act. Neither of them is particularly
18 satisfactory, but neither answer gives you a reason to
19 ignore the problem.

20 MR. KNEEDLER: Beyond that, section 7 of the
21 ESA is a generally applicable statute, whereas section
22 402(b) speaks specifically and comprehensively to the
23 question of Federal approval of State programs. We also
24 think this would be a particularly unlikely candidate
25 for an exception to that because EPA's approval of a

1 State program does not result in any immediate
2 on-the-ground consequences. That would only happen --
3 or in-the-water consequences. That would only happen if
4 after the transfer the State Agency actually issued,
5 issued a permit. So what we're talking about is the
6 transfer --

7 JUSTICE SOUTER: Well, but by that very
8 reasoning you could say that if assurances are required
9 that the Endangered Species Act is going to be honored,
10 that does not in and of itself prevent any development
11 program. Each, in effect, is a kind of mechanism for
12 dealing with something that may happen in the future.

13 MR. KNEEDLER: Well, if I could go back to
14 the point I was making earlier, that we think that the
15 central thrust of the court of appeals' opinion and
16 Respondent's position here is that EPA could not
17 transfer the authority unless it and the State together
18 replicated the sort of protections that were in place
19 when EPA itself administered the Endangered Species Act.
20 And as I said, that's inconsistent not only with 402(b),
21 but with Congress's federalism-sensitive judgment, to
22 impose the sort of substantive and procedural
23 administrative requirements in section 7 of the ESA only
24 on Federal agencies, not on State agencies.

25 And let me also stress that this does not

1 mean that the rest of the ESA is inapplicable once a
2 permitting program of the State is approved. The
3 central provision of the ESA, the prohibition against
4 taking endangered species act and other prohibitions
5 against trading in them and importing, exporting, all
6 those remain applicable. Those are the generally
7 applicable provisions that prohibit the taking
8 of endangered species.

9 JUSTICE BREYER: I understand very well your
10 argument that if the EPA is going to transfer this, they
11 transfer it to Arizona and the first thing they say is,
12 we look at Arizona's laws and they protect everything.
13 And now we look at our own authority and if they get --
14 start mucking around with this, we can refuse the
15 permit. And besides that, we have a memorandum of
16 understanding and the memorandum of understanding or
17 whatever it is, agreement or something, is going to be
18 they're going to pay as much attention as we are. So
19 they'll pay attention to this, too, and if they don't we
20 have an enforcement mechanism. So no problem; we are
21 not putting any species in jeopardy. We satisfy the
22 standard. I've got that part of the argument. I think
23 I paraphrased it pretty well.

24 The part I don't get is then you say,
25 anyway, we don't have to do any of this because it says

1 "shall transfer," therefore, it's not discretionary,
2 it's mandatory. That part I don't get because there are
3 nine standards there and it seems to me to say that is
4 rather like saying, well, the ICC used to say you shall
5 let the railroad build a spur, provided it's in the
6 public interest, convenience, and necessity.

7 I mean, are you suddenly saying every
8 statute that uses the word "shall" is not subject to the
9 ESA?

10 MR. KNEEDLER: Well, I think it would
11 require a statute-by-statute evaluation.

12 JUSTICE BREYER: All right, fine. If we had
13 this statute --

14 MR. KNEEDLER: But we think this one is
15 particularly clear.

16 JUSTICE BREYER: Clear. Now, my problem with
17 saying it's clear is that they have nine criteria. One of
18 the criteria is you look to five other statutes, which
19 they have their own criteria and one of those criteria is
20 you have to be certain that the State will assure the
21 protection and propagation of a balanced population of
22 shellfish, fish, and wildlife.

23 And by the time you get through those nine
24 criteria, I don't think you'd have to be too imaginative
25 a lawyer to figure out ways that they involve everything

1 the ESA involves. So if there ever was an Act prefaced
2 by the word "shall" where the ESA would apply, you would
3 think it would this be this one, which has to do with
4 water, environmental protection, nine criteria, many
5 vague, and they use words like "wildlife," "shellfish,"
6 et cetera.

7 MR. KNEEDLER: Several, several responses to
8 that. Those cross-references -- first of all, 402(b)
9 looks only to whether the State has the legal authority
10 under State law. Among other things, it requires a
11 certification or determination by the attorney general
12 of the State to establish that the State actually has
13 the authority to administer.

14 And the references to -- cross-references to
15 fish and wildlife that come from incorporating other
16 provisions have to do with the setting of the standards
17 or setting -- under section 302, which EPA has never
18 invoked, setting certain supplementary effluent
19 standards to protect fish and wildlife. Those are the
20 standards. EPA does not evaluate the state's water
21 quality standards in deciding whether the State has the
22 legal authority under 402(b) to administer the program.

23 JUSTICE ALITO: Of the States to whom a
24 transfer has been made how many have agreed to comply
25 with this provision of the Endangered Species Act?

1 MR. KNEEDLER: I'm not sure. I don't think
2 --

3 JUSTICE ALITO: In the memorandum of
4 agreement with the States to whom transfers have been
5 made, in some of them, is there not language in which
6 the State has agreed that we'll consult with the Fish
7 and Wildlife Service?

8 MR. KNEEDLER: There was -- there was in the
9 Louisiana memorandum of agreement that was involved in
10 the Fifth Circuit's American Forestry decision, and it
11 was that provision that the Fifth Circuit held was
12 unlawful on two grounds. That, that memorandum of
13 agreement basically said we're trying to do something
14 analogous to section 7 of the ESA when the State is
15 administering the program; and the Fifth Circuit said
16 that that went beyond EPA's authority by conditioning
17 the approval on the State's putting in place a
18 compensation arrangement.

19 JUSTICE GINSBURG: But some of the --
20 mentioned a whole string of States, I think, Texas,
21 Florida, Maine were mentioned as States that, in
22 connection with the transfer of the permitting
23 authority, had conditions that made the Endangered
24 Species Act applicable.

25 MR. KNEEDLER: That's not correct,

1 Justice -- Justice Ginsburg. What -- after the Fifth
2 Circuit's decision, EPA never tried to impose on a State
3 an obligation to go forward in the same way that EPA, or
4 even in a similar way that EPA would under section 7 of
5 the Endangered Species Act.

6 JUSTICE GINSBURG: So what was done in
7 Texas, Florida and Maine?

8 MR. KNEEDLER: They all provided what I've
9 described to Justice Souter, that -- that the
10 preexisting ESA -- EPA regulations require that draft
11 permits be furnished to the, to Fish and Wildlife and to
12 NOAA, and that they take into account the comments by
13 Fish and Wildlife and NOAA. That doesn't come from the
14 memorandum of agreement or -- or -- or EPA's memorandum
15 of agreement with the States. That's something that
16 comes from the regulations. Everything else --

17 JUSTICE GINSBURG: So that, would that apply
18 in this case? Would that apply to Arizona?

19 MR. KNEEDLER: Yes. And, and the
20 biological -- the memorandum of agreement in this case
21 applies to all State-administered programs including
22 those that were approved by EPA before 1993. This is a
23 nationwide memorandum of agreement.

24 And the basis --

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

1 question about the memorandum of agreement? That's kind
2 of a new concept that I have a little difficulty
3 following.

4 Is there -- is that -- is one of the nine
5 conditions of approval that the State enter into a
6 memorandum of agreement?

7 MR. KNEEDLER: No, it is -- no it is not.
8 The memorandum of --

9 JUSTICE STEVENS: Is there not a regulation
10 that issues, that requires the States --

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

12 JUSTICE STEVENS: What's the statutory
13 authority for the regulation?

14 MR. KNEEDLER: 33 U.S.C. 1314(i) allows --
15 provides -- excuse me -- for EPA to establish
16 guidelines, basic guidelines, minimum standards for
17 State programs and -- part of that --

18 JUSTICE STEVENS: What if -- what if the
19 State just refused to enter into a memorandum of
20 agreement? Would that, could that be a ground for
21 refusing the transfer decision?

22 MR. KNEEDLER: If -- if the -- if its refusal
23 was based on an objection to things that are within the,
24 within the legitimate scope of a memorandum of
25 agreement. I think that --

1 JUSTICE STEVENS: Just says don't want -- it
2 just says we don't want to enter into a memorandum of
3 agreement, period.

4 MR. KNEEDLER: I -- I think -- I don't think
5 PA has ever confronted that. But I think it probably -- it
6 probably could be denied, but the regulations do not -- as
7 I recall -- specifically condition the approval of the
8 program on the memorandum of agreement.

9 JUSTICE STEVENS: -- regulations that require
10 the making of a memorandum of agreement.

11 MR. KNEEDLER: Yes. I would -- I would
12 hesitate to say that EPA could not -- could not insist
13 on that, but it's important again to come back to the --

14 JUSTICE STEVENS: But how can that be
15 consistent with your "shall" argument?

16 MR. KNEEDLER: Because there's a separate
17 authority for the -- for the -- for EPA to issue
18 guidelines for minimum, minimum standards for State
19 programs, but those have to do with -- with communications
20 with EPA and sort of running a program. And it's not a
21 vehicle as I said before for EPA to impose new substantive
22 requirements outside the Clean Water Act on the State.
23 And that's why if -- that's why if EPA insisted that a
24 State enter into a memorandum of understanding that
25 basically said we will, we will act like EPA does under

1 section 7 of the Endangered Species Act under the
2 administration of the program, I think the -- I think the
3 State Agency would be entitled to decline to enter into
4 that agreement. And again that's essentially what the
5 Fifth Circuit held in the American Forestry case, and to
6 that extent we agree with the American Forestry
7 decision.

8 If I may, I'd like to reserve the balance of
9 my time.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Kneedler.

12 Mr. Glitzenstein.

13 ORAL ARGUMENT OF ERIC R. GLITZENSTEIN,
14 ON BEHALF OF RESPONDENTS

15 MR. GLITZENSTEIN: Mr. Chief Justice, and
16 may it please the Court:

17 If I could simply start off with the
18 memorandum of agreement that was just being discussed,
19 and to, I think, at least try to clarify an answer, I
20 think, to Justice Ginsburg's question about compliance
21 with that memorandum of agreement. If you look at page
22 260 of the NAHB appendix that was filed along with the
23 petition, one of the elements of that memorandum of
24 agreement is that there would be compliance with section
25 7 of the Endangered Species Act when there were transfer

1 decisions being made by the EPA. And --

2 JUSTICE SCALIA: Where is this? Would you

3 --

4 MR. GLITZENSTEIN: This is page 260.

5 JUSTICE SCALIA: Of --

6 MR. GLITZENSTEIN: Of the NAHB appendix,
7 which is -- there are two volumes to that appendix,
8 Justice Scalia. Volume one was pages 1 to 317 -- it's
9 the white covered volume, and I can quote from the
10 paragraph that I was referring to. And it's the first
11 full paragraph and it reads --

12 JUSTICE SCALIA: 270 you say?

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

14 JUSTICE SCALIA: 260.

15 MR. GLITZENSTEIN: 260, Your Honor.

16 JUSTICE SCALIA: I got it.

17 MR. GLITZENSTEIN: And it's the first full
18 paragraph and it says: "EPA's current practice is to
19 consult with the Services where EPA determines that
20 approval of a State's or a Tribe's application to
21 administer the NPDES program may affect federally listed
22 species." And they actually complied with that
23 memorandum of agreement in this case when they consulted
24 in response to the Arizona application.

25 Now, this memorandum of agreement which

1 Mr. Kneedler just represented to the Court is continuing
2 to be complied with, specifically provides the
3 mechanisms by which the Clean Water Act and the
4 Endangered Species Act will be reconciled and will be
5 harmonized. This language was adopted after notice-and-
6 comment proceedings. It is reflected not only in the
7 application and the final decision made in this case,
8 where once again the EPA said point blank, we are
9 required to comply with section 7 of the Endangered
10 Species Act; but essentially the same understanding of
11 the Agency's legal duties and how they would be
12 reconciled was set forth in all these past consultation
13 decisions that are described in the decisions below and
14 our brief.

15 JUSTICE SCALIA: Can that be read just to
16 apply to any -- any State permits that -- that violate
17 Clean Water requirements, as opposed to upland habitat
18 which -- which might be affected?

19 MR. GLITZENSTEIN: There's certainly nothing
20 in the memorandum of agreement that says that. But can I
21 just add a critical point on that, Justice Scalia? The
22 Government's position now is that it doesn't matter.
23 Their new position in response to Justice Stevens'
24 question about the change in position, before the
25 Government came to this Court, they never previously

1 suggested what they're now saying, which is that section
2 7(a)(2) consultation obligations and the no-jeopardy
3 prohibition don't apply at all to these transfer decisions.

4 So this distinction between aquatic species
5 and upland species, which may be an interesting one to
6 explore, we would submit on remand, is not the current
7 reflection of their position. Their position now is we
8 could have something causing the extinction of aquatic
9 species as a result of a pollution impact but we are
10 under no obligation to even take a look at that under
11 the seemingly mandatory requirement of section 7.

12 JUSTICE SCALIA: How do you feel --

13 CHIEF JUSTICE ROBERTS: Well, that's not
14 quite right. They would look at that in the context of
15 reviewing the permits that are issued by the State
16 agencies.

17 MR. GLITZENSTEIN: Your Honor, and I think
18 that's where we seem to have a little bit of a
19 disconnect. The assumption that Mr. Kneedler seems to
20 be making is the end of the consultation process that
21 section 7 requires, not the beginning of it. The
22 purpose of the consultation process is to avoid
23 conflicts with other statutory obligations, not to
24 create them, and indeed as that memorandum-of-agreement
25 language suggests, the consultation process has been

1 used precisely --

2 CHIEF JUSTICE ROBERTS: What he's suggesting
3 is there isn't going to be any impact on any endangered
4 species until a particular permit is issued by the State
5 Agency, and that those permits are submitted to the Fish
6 and Wildlife Service for their review.

7 MR. GLITZENSTEIN: That's correct, Your
8 Honor. But to go back to the suggestion that I think
9 Justice Souter made, what the agencies have done in the
10 past, and this is a situation where we don't have to
11 speculate about whether the agencies can comply with
12 those statutes. They have done it. They've worked
13 these problems out. And what they have done when
14 they've consulted, if you go back and look at the
15 underlying consultation documents, they've spelled out
16 exactly what Your Honor just suggested should be the
17 approach. They've said, all right, when we issue these
18 permits under section 402 -- under 402(b) and then we
19 exercise our oversight responsibility under 402(d),
20 here are the species we are going to pay special
21 attention to. For example, in the Maine delegation, one
22 of the principal species of concern was the Atlantic
23 salmon, which they were concerned about because of
24 impacts from the aquaculture industry. What they did in
25 the biological opinion prepared as a consequence of that

1 consultation was not say, we're not going to let this
2 transfer go through. They said we have this oversight
3 ability. We're going to work out with the Fish and
4 Wildlife Service a mechanism by when those permits
5 come to our attention, as they must under section
6 402(d), we will discuss the circumstances and criteria
7 for objecting to those, we will go to the State under
8 the following circumstances, and say we think this
9 permit is going to cause the jeopardy of the species --

10 CHIEF JUSTICE ROBERTS: What does that have
11 to do with the -- I'm sorry.

12 JUSTICE SCALIA: I thought that those are in
13 place. As I understood Mr. Kneedler to say that that's
14 exactly what they -- what they continue to do.

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

16 JUSTICE SCALIA: But that has nothing to do,
17 as the Chief was about to say before I interrupted him,
18 that has nothing to do with, with whether they have to
19 issue the NPDES authorization.

20 MR. GLITZENSTEIN: And I guess the point I'm
21 trying to make, Your Honor, is that the Court's
22 fundamental obligation when it has two statutes that
23 have "shall" provisions, is to see if there's a way they
24 can be reconciled and worked out. And what I'm saying
25 is that the consultation process has been and should be

1 precisely the process where those kinds of issues will
2 be reconciled and that's exactly how this process has
3 working. So for the Government to come in and say let's
4 not use the process that section 7(a)(2) calls for, in
5 order to try to avoid the problems, is to really put the
6 cart before the horse in the most, I think, obvious way
7 imaginable.

8 JUSTICE SCALIA: Could I get back to the
9 memorandum of agreement that you've called our attention
10 to on page 260? I read that paragraph, and I don't see
11 anything in it that imposes any obligation whatever on
12 the State. It is just a description of what -- what EPA
13 is, is going to do.

14 MR. GLITZENSTEIN: Right.

15 JUSTICE SCALIA: The same kind of
16 consultation with Fish and Wildlife that -- that
17 Mr. Kneedler described to us.

18 MR. GLITZENSTEIN: I think, Your Honor, and
19 I think that's critical. I think we're making some
20 assumptions here that, at least on our side, we're not
21 making. We're not assuming that the outcome of the
22 consultation process has to be to impose new conditions
23 on the State. One of the outcomes of the prior
24 consultation process with Maine, with Texas, for
25 example, was to spell out how the Service and EPA would

1 address their post-transfer concerns.

2 JUSTICE SCALIA: But this is talking about
3 consultation when the permit is -- the permit
4 application is issued. Not consultation at the -- at the
5 stage of approving the State plan.

6 MR. GLITZENSTEIN: With all deference, Your
7 Honor, it says: "The current practice to consult with
8 the Services where EPA determines that approval of a
9 State's or Tribe's application to administer the
10 program." And I think there is concession by the other
11 side that that in fact was a reflection of what the
12 practice was. They were consulting on the actual
13 transfer of the programs, and the reason they were doing
14 that, Chief Justice Roberts, was to do exactly what Your
15 Honor is suggesting, that is to work out a mechanism
16 beforehand, so that when the State permits are being
17 issued, the agencies would know how to address their
18 concerns.

19 CHIEF JUSTICE ROBERTS: But the point -- the
20 point is that it's the issuance of a permit under the
21 program, whether administered by the Federal Government
22 or the State government that has the potential for
23 jeopardizing an endangered species. It is not the
24 administration of the program. And EPA has in place the
25 procedures to allow them to review the particular

1 permits, which is what might jeopardize an endangered
2 species. And they don't need to leverage their limited
3 authority, their non-discretionary authority to approve
4 a transfer, to have that authority to review the actual
5 act that might jeopardize an endangered species.

6 MR. GLITZENSTEIN: That's true, Your Honor,
7 but again I think what the Court may be doing is
8 assuming that this consultation process is somewhat more
9 draconian than it frequently turns out to be. If the
10 only outcome of the consultation process under section
11 7(a)(2) is for the Fish and Wildlife Service to reach
12 some understanding with EPA, it says when these permits
13 are issued by the State, here are the circumstances
14 under which you're going to lodge objections, because
15 we're the expert Agency on species. And I think this
16 record shows what we're talking about.

17 JUSTICE KENNEDY: Are you -- are you saying
18 that the consultation goes beyond the nine factors that
19 are listed in the statute?

20 MR. GLITZENSTEIN: No, Your Honor. I think
21 what we're saying is that consultation goes to the
22 separate obligation under section 7(a)(2) of the
23 Endangered Species Act to address the impacts on a listed
24 species. And if I could --

25 JUSTICE KENNEDY: But isn't that beyond the

1 nine factors?

2 MR. GLITZENSTEIN: I don't think -- I think
3 what it is is an effort, as there's been some discussion
4 here, to reconcile two obligations, both of which
5 Congress thought were important. And that's exactly what
6 the Agency has done in other circumstances.

7 JUSTICE KENNEDY: I -- I understand that.
8 But when they sit down and they have the consultation,
9 is it proper for the EPA to say now, we're consulting
10 with you, but only with respect to the nine factors, as
11 to permits that are issued by the States afterwards, but
12 then that's something else?

13 MR. GLITZENSTEIN: Well, and Your Honor,
14 just on that point, I found the Government's reply brief
15 a little bit odd, because I think consistent with the
16 questioning from Justice Breyer, it acknowledges for the
17 first time that these factors do encompass some
18 consideration of wildlife impacts. But putting that to
19 one side, I think it's very important to compare what
20 they're arguing now with how they dealt with other
21 cross-cutting legal obligations. If you look, for
22 example, at how they dealt with the Indian trust
23 responsibility -- I'm only bringing this up by way of
24 analogy, because I think the Government's position is,
25 oh, we're trying to elevate the Endangered Species Act

1 to some exalted status, and in fact all we're saying on
2 this administrative record is that ESA should have exactly
3 the same status that they accorded to other cross-cutting
4 legal obligations.

5 CHIEF JUSTICE ROBERTS: Is there any limitation
6 --

7 JUSTICE KENNEDY: But what is your position
8 as to the propriety of the EPA's saying what I've said
9 in my hypothetical instance? They -- they say we're
10 going to consult with you but we want to make it clear
11 we're only talking about the nine factors.

12 MR. GLITZENSTEIN: I think that my -- our view
13 is that the Endangered Species Act on its face says that
14 it prohibits jeopardy or the result of habitat
15 destruction, critical habitat destruction, for any
16 Agency action that is authorized, funded or carried out.
17 Our view is that they should first look to the Clean
18 Water Act criteria and factors. We think --

19 JUSTICE KENNEDY: Well, I think you are at
20 issue with the Government on that point.

21 MR. GLITZENSTEIN: We are, Your Honor. What
22 I will say to you, with all respect, Justice Kennedy,
23 and the reason I bring up their other legal obligations,
24 and I think it also reinforces the value of a remand in
25 this case, so some of these issues raised by the

1 Government's new position could be flushed out in the
2 administrative process. If you look at joint appendix
3 page 203, when Native American tribes wrote to the
4 Agency and said we are concerned about the impact of
5 this transfer on Native American historic properties and
6 cultural and religious attributes, the EPA did not write
7 back and say well, we're sorry, Native American tribes,
8 that doesn't fall within the nine criteria.

9 CHIEF JUSTICE ROBERTS: So what is -- is
10 there any limitation? Let's say that EPA says we're all
11 set to approve this transfer, except OSHA sent us a
12 letter and they don't like the occupational safety rules
13 you have at the State environmental Agency; so until you
14 change those rules, or enter a memorandum of agreement
15 that you're going to change those rules, we're not going
16 to approve the transfer.

17 MR. GLITZENSTEIN: I think the line, Your
18 Honor, is whether you've got another cross-cutting
19 obligation imposed by Congress --

20 CHIEF JUSTICE ROBERTS: Yes, there's the OSHA
21 Act. It says, you know, the States should do this, and
22 they're not doing it. So EPA can leverage their
23 approval into any area of law?

24 MR. GLITZENSTEIN: Again, Your Honor, I
25 think the first problem is, with that question is that

1 -- I don't mean to be evasive -- but I think the problem
2 is you're assuming the outcome of the analysis, which is
3 that they'll have to impose some new condition on the
4 State. With the Native American tribes, they didn't do
5 that. They didn't impose any condition on the State.
6 They said we'll have an agreement with the Native
7 American tribes that when we exercise our oversight
8 authority, we will look at the impact upon --

9 CHIEF JUSTICE ROBERTS: But sometimes States
10 say no. So if they say no, presumably they're going to
11 have to impose the obligation as a condition of
12 approval.

13 MR. GLITZENSTEIN: Yes. And what I will
14 say, Your Honor, is we think that in the past they have
15 been able to work these problems out. But if they
16 can't, I think it's important to recognize that Congress
17 created a mechanism precisely for the very
18 rare situation where there is an irreconcilable conflict.

19 JUSTICE BREYER: That isn't the -- what I'm
20 trying to figure out with Justice Kennedy's questions
21 and your answers is, is there really an issue here? And
22 I'm beginning to see maybe there is an issue when you
23 said what are they talking about. Can you -- it's a
24 cactus. They're kidnapping cactuses, as apparently
25 happens. And if in fact this cactus, if the thing is

1 transferred to the State, that cactus is going to
2 disappear. Now that isn't fish. It isn't wildlife. It
3 isn't water. It's a cactus.

4 So can you take that into account? Is that
5 theoretical? I think they're trying to raise this
6 question of, suppose you know the IRS, that if you mail
7 a refund check at the time, the person who gets it is
8 going to use the \$500 to destroy the last salamander in
9 the world. Okay? Now there we are, endangered species.
10 Does the Act apply to the IRS? I would have thought the
11 answer's no.

12 MR. GLITZENSTEIN: The answer is no, Your
13 Honor.

14 JUSTICE BREYER: And then I would have
15 thought the same reasoning is true here, but what the
16 Act tells you to do is read your existing authority, but
17 read it in light of informed by the endangered species
18 objectives, language, et cetera.

19 And now I wonder if with that approach, is
20 it possible that even the cactus could fall within the
21 nine criteria? You're not going to depart from them but
22 you're going to read them generously in light of the
23 objective of the Endangered Species Act, which is itself
24 an environmental objective. Now how does that work?
25 Can you do that? You're an imaginative lawyer. Can you

1 do it?

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

3 JUSTICE BREYER: All right. The answer is
4 you can. Then are you satisfied with this result in
5 this Court? One, it can be read that way. They're not
6 going to agree with that. It can be read that way, and
7 therefore, it applies. The ESA, the Endangered --

8 Two, that means they consult.

9 But three, the result of the consultation
10 here which has been done means there's no real objection
11 to the transfer, because it's virtually inconceivable
12 given the weapon that the EPA has, withdrawing permits,
13 given a memorandum of agreement, given the possibility
14 of supervision, given the fact that the wildlife service
15 will object, writing them a letter or a phone call
16 immediately, given all that stuff, there's simply no
17 reason to believe that Arizona will fail to protect
18 endangered species.

19 MR. GLITZENSTEIN: I think that's a good
20 summary of what has happened with these consultations,
21 and on the cactus, could I just --

22 JUSTICE BREYER: What's your view of an
23 opinion that roughly wrote what I just said?

24 MR. GLITZENSTEIN: Well, I think the concern
25 I would have is that I think it goes beyond what's

1 necessary here because we're not dealing, everybody
2 agrees, with some purely ministerial situation like that
3 one.

4 I think the other critical factor here, Your
5 Honor, that we haven't talked about, is the funding of
6 this program. And it's very interesting when the
7 Government points out, if I can just get across to the
8 Court I think a critical citation, because the
9 Government says funding is not before us. And the
10 reason they say that is because it didn't need to be
11 before us when they took the position that authorization
12 of the program was sufficient to trigger their
13 consultation duties. And in a footnote in their reply
14 brief, they say pay no attention to funding, which is of
15 course a discretionary activity, because that's
16 completely separate from the decision to authorize. If
17 you look at 40 C.F.R. section 123.23(3), and I
18 apologize -- this is a response to their reply brief
19 point so this is not in any appendix before the Court --
20 but it specifically provides that funding opportunities
21 are part and parcel of the decision to authorize the
22 program.

23 JUSTICE SCALIA: I don't know what you're
24 talking about. Funding of what?

25 MR. GLITZENSTEIN: Funding of the NPDES

1 program carried out by Arizona that had to be approved
2 in order to allow --

3 JUSTICE SCALIA: How does the government
4 fund it?

5 MR. GLITZENSTEIN: They have -- there's a
6 -- section 106 of the Clean Water Act provides the EPA
7 with an opportunity, and it's certainly not mandatory,
8 to provide funding to a State. And this is 40
9 percent Federal -- we're not talking about de minimis
10 funding. So it's one thing for the State to say well,
11 it should get the program. It's another thing to say
12 funding. And just to be clear about this, this is an
13 argument we're making to reinforce the propriety of
14 remand in this case.

15 JUSTICE SCALIA: Well, you -- you have
16 other -- let's assume that I disagree with you on
17 whether they could withhold approval of the NPDES
18 transfer. Even so, I think you -- the point you're
19 making now is that apart from that approval, there were
20 other discretionary actions taken here, one of which is
21 this funding; and another one of which, I believe, is
22 whether -- never mind the MOAs, but -- I have it written
23 down here, one of the other ones. Oh, whether existing
24 permits would be transferred to State authority or not.
25 And that is apparently discretionary and can be -- what

1 do we do about that?

2 MR. GLITZENSTEIN: Well, we suggest, Your
3 Honor -- and I think this goes back to Justice Stevens'
4 question about the change in position. We think we're in
5 an odd position in this Court quite frankly because we
6 have an administrative record where the Agency conceded a
7 duty to comply with section 7 of the Endangered Species Act.
8 We have a new position here saying they don't. And we think
9 funding and the other example you came up with is a good
10 reason why a common-sense result in this case is to say we
11 have a change in position, there are new issues brought to
12 the fore. As a consequence of that --

13 JUSTICE STEVENS: May I ask this question
14 about changing position? Have you agreed and conceded
15 that the nine statutory criteria are satisfied?

16 MR. GLITZENSTEIN: We have --

17 JUSTICE STEVENS: Because it seems to me you
18 shift back and forth on that point.

19 MR. GLITZENSTEIN: Your Honor, let me be
20 clear about that. We never conceded that. What
21 happened --

22 JUSTICE STEVENS: What is your view now?
23 Are they or are they not?

24 MR. GLITZENSTEIN: I think that there are
25 actually arguments that, especially with regard to the

1 wildlife related parts of the criteria, that are not
2 satisfied. Let me -- let me try to explain why we
3 didn't feel it necessary to argue that in the court of
4 appeals.

5 JUSTICE BREYER: Before you say why you
6 didn't argue it, it's exactly that point I sort of
7 expected you might agree when I thought maybe you have
8 hooks to hang the NSA -- the Endangered Species Act on.
9 But it was the other half, which I think is what
10 Justice Stevens is saying now. I read through this
11 record, not completely but pretty well, and I couldn't
12 find a single thing that would suggest that Arizona
13 presents any risk to you. And so, what is the risk to
14 an endangered species that you're actually worried about
15 there? And you rather -- I didn't think you'd like to
16 agree with that, but I want to press you to find out
17 what actually is the problem.

18 MR. GLITZENSTEIN: If I can give Your Honor
19 some citations to the record, I think it will help
20 answer that. On page 54 of the joint appendix, the Fish
21 and Wildlife Service biologists, the expert Agency
22 employees, said that there would be significant effects
23 to survival and recovery of listed species through a
24 destruction, degradation and fragmentation of habitats.
25 They specifically pinpointed the flycatcher, the

1 southwestern willow flycatcher is a species that could
2 be devastated. That's at page --

3 JUSTICE BREYER: And how would that happen?
4 How would it happen that they would get rid of the
5 flycatcher in Arizona, considering the fact that they
6 have laws themselves that protect endangered species,
7 and that's a bird, and a bird is wildlife; and so if
8 they decide they want to kill all their flycatchers,
9 which I would doubt, you could intervene at EPA and stop
10 them. So how is that actually a problem?

11 MR. GLITZENSTEIN: Your Honor, the concern
12 that they had was that the mechanism that had been used
13 to protect these wildlife species, and particularly
14 plant species, which I want to get to in a moment,
15 because I think actually the concern is even greater
16 with plants, was that the consultation on federally-
17 issued permits had in effect been used -- and this was
18 not conjectural -- they had been used to safeguard
19 considerable habitat for these species. And if I could
20 turn actually to the water umbel which is I think
21 actually our best example, and --

22 JUSTICE SCALIA: I mean, that's not enough.
23 Why wouldn't -- what would lead you to believe that it
24 wouldn't -- that the same would not happen when the
25 State issued the permits? I mean, you have to show some

1 reason why we don't trust Arizona to do what the Federal
2 Government's doing.

3 MR. GLITZENSTEIN: Your Honor, it is not a
4 question of trusting them. I think part of the outcome
5 of the consultation --

6 JUSTICE SCALIA: Well no, you have to establish
7 jeopardy. You have to establish jeopardy. And the mere
8 fact that you're giving it to a State which Congress has
9 been willing to trust with implementing this law is not
10 enough to show that there's jeopardy. Prima facie, we
11 would expect Arizona to do the right thing.

12 JUSTICE SOUTER: Just as a technical matter,
13 don't they have to show there's no jeopardy?

14 MR. GLITZENSTEIN: Yes, Your Honor. The
15 burden is on the Agency in the consultation process.
16 And in fact, as TVA versus Hill makes clear, the benefit
17 of the doubt is accorded to the species. But, could I
18 try to answer that question?

19 CHIEF JUSTICE ROBERTS: Yes.

20 MR. GLITZENSTEIN: We're not saying we don't
21 trust the State. And in fact, one of the outcomes of
22 one these prior consultation processes has been where
23 it's appropriate, the Service works out an agreement
24 with the State where it says here are our concerns, we're
25 the expert Federal Agency, we listed these species, you

1 didn't. Part of it is expertise, not trust. And in
2 fact, if the State comes back and says we understand,
3 we'll deal with that problem, that is one aspect of a
4 consultation process that the Government is now saying
5 we should never have to go through.

6 On the plants however, Your Honor, there is
7 a very serious concern. And in fact, the Service
8 biologists said we have protected these plants' habitats
9 through the section 7 mechanism. The State of Arizona
10 acknowledges that it has no law or regulation which
11 forbids the destruction of federally listed plant species.

12 section 9 of the Endangered Species Act,
13 which Mr. Kneedler brought up and said it was the most
14 important provision, and I would beg to differ. I think
15 Sweet Home, both the majority and dissenting opinions
16 agree that section 7 -- and Hill -- that section 7 is
17 the most important provision. But plant species are not
18 protected generally by section 9 of the Endangered
19 Species Act, the take prohibition, except when they're on
20 Federal lands.

21 So we have a situation where the Service
22 biologists were saying, and this is how I read the
23 record, and if I can give a couple more citations, page
24 128 and 139 of the joint appendix. On one plant
25 species, joint appendix page 46. On the water umbel,

1 they were essentially predicting jeopardy, unless
2 additional protections could be worked out in this
3 process.

4 CHIEF JUSTICE ROBERTS: Jeopardy from the
5 issuance of a prospective future issuance of a permit by
6 Arizona if they get the delegated authority. And that
7 issuance of the permit would be subject to objection and
8 review by EPA and the Fish and Wildlife Service.

9 MR. GLITZENSTEIN: With regard to the plant,
10 Your Honor, EPA's position to date has been that they do
11 not have the authority to protect that plant species
12 under their Clean Water Act authorities. Now we may
13 disagree with that, but that is the position they've
14 taken so far.

15 CHIEF JUSTICE ROBERTS: The position that
16 EPA has taken?

17 MR. GLITZENSTEIN: That's correct, Your
18 Honor.

19 CHIEF JUSTICE ROBERTS: Under their
20 authority?

21 MR. GLITZENSTEIN: Under their Clean Water
22 Act authority, which is what informs their oversight
23 activities.

24 CHIEF JUSTICE ROBERTS: So how does it
25 matter whether they have it or if it's transferred to

1 Arizona?

2 MR. GLITZENSTEIN: Because again, what the
3 consultation process is designed to accomplish, either
4 through the funding, discretionary decision that was
5 made, other mechanisms that can come into play, the idea
6 behind the consultation on the transfer -- and I think
7 this is critical to our position -- is to say if we're
8 not going to be able to protect the species through the
9 State issuance of the permits and the other authorities
10 that we have, what understanding can we come to,
11 consistent with our --

12 JUSTICE SCALIA: I don't understand --

13 MR. GLITZENSTEIN: -- other obligations to
14 protect the plant species.

15 JUSTICE SCALIA: I don't understand that
16 answer. The Chief Justice is asking, if EPA cannot do
17 it itself, how is it creating any jeopardy in
18 transferring the authority to somebody else who can't do
19 it?

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

21 JUSTICE SCALIA: I mean, if you assume that
22 EPA can't protect these plant species under its
23 legislation, what harm is there in transferring the
24 authority to somebody else who can't protect it?

25 MR. GLITZENSTEIN: Well, I should just first

1 say that we disagree with the premise of that question.
2 In terms of EPA's position, we happen to think that EPA
3 can protect those kinds of plant species, and I think
4 that's one of the additional bases for a remand.

5 But I think the more important answer to
6 Your Honor's question is that the Fish and Wildlife
7 Service biologist said in this administrative record
8 that the loss of those protections was an indirect
9 effect of the transfer, that because we have used these
10 protections when we've issued Federal permits to prevent
11 species like these plant species from going extinct
12 -- and this was not speculative --

13 JUSTICE KENNEDY: If the EPA can protect the
14 plants when the permit is under its own jurisdiction,
15 why can't it use that same basis for objecting when it's
16 under the State's jurisdiction?

17 MR. GLITZENSTEIN: Your Honor, that's an
18 awfully good question. And in fact we believe that
19 should have been one of the outcomes of the
20 consultation on the transfe. If one of the results of
21 the transfer -- and I think this was -- I think what's
22 happening is that the Government has basically assumed
23 the answer to the consultation before we've gotten to
24 that point. They've assumed --

25 JUSTICE ALITO: What is the difference

1 between Arizona's situation and all the other States
2 that can issue permits? Are they under legal obligation
3 to consult?

4 MR. GLITZENSTEIN: I believe that --

5 JUSTICE ALITO: And where is --

6 MR. GLITZENSTEIN: It's not the State's
7 obligation to consult, Your Honor. Just to be clear,
8 section 7 imposes no obligation on the State. We
9 completely agree with that. It imposes an obligation on
10 a Federal Agency.

11 JUSTICE ALITO: You say it imposes an
12 obligation on EPA to require the States to consult.

13 MR. GLITZENSTEIN: We don't agree with
14 that either, Your Honor. We believe that there are
15 mechanisms that have been used in past consultations,
16 especially after this Louisiana decision that came down,
17 which involved the State not at all, which involved only
18 the Fish and Wildlife Service and the EPA recognizing
19 how they would exercise their post-transfer --

20 JUSTICE ALITO: I still don't understand the
21 difference between what you think is going to happen in
22 Arizona and what is happening in all the other States
23 that issue permits.

24 MR. GLITZENSTEIN: Your Honor, we're not
25 saying that -- particularly with regard to Texas,

1 Florida, Oklahoma, Louisiana and other States that have
2 gone through the consultation process -- we're not saying
3 that anything different should happen. We're saying go
4 through a full consultation process, agree on mechanisms
5 that can protect these species.

6 JUSTICE ALITO: No, in the issuance of a
7 permit in any of these States, pick any State you like,
8 what is the difference between what you envision would
9 happen in Arizona, if Arizona can issue permits, and
10 what's happening in these other States?

11 MR. GLITZENSTEIN: Again, with regard to the
12 ones that have gone through consultation with Arizona,
13 all we're asking for and all we've ever asked for in this
14 case, and this was what the Service biologist said, was
15 use the consultation process to agree on measures that can
16 be put in place post-transfer that will prevent the species
17 from going extinct. That's what happened --

18 JUSTICE SOUTER: May I ask you to follow up
19 on that? A few minutes -- I guess your time is getting
20 short and I'd like to get away from some of the
21 specifics and back to the general. A minute ago,
22 Justice Breyer in effect offered you an opinion and he
23 spelled it out and he said, if I put that in writing is
24 that what you want? You said, well, it's really more
25 than we need.

1 Would you please at this point summarize as
2 succinctly as you can what you need to win this case?

3 MR. GLITZENSTEIN: Well, the narrowest thing
4 we need is simply a decision that the government changed
5 its position and the case should be remanded.

6 JUSTICE SOUTER: No, tell me substantively,
7 what do you want? What substantively do you want at the
8 end of this case?

9 MR. GLITZENSTEIN: Your Honor, what we would
10 like is a ruling that says that 7(a)(2) imposes
11 obligations on Federal agencies just like the Clean
12 Water Act does, that the Agency should make a good faith
13 -- and this is the words of Congress -- "a good-faith
14 effort" to use the consultation process provided by
15 7(a)(2) to devise mechanisms to protect species.

16 JUSTICE SOUTER: And how will they put those
17 mechanisms in legal form?

18 MR. GLITZENSTEIN: They would put those
19 mechanisms in legal form either through memorandum of
20 agreement, which is what's been used in the past,
21 separate agreements between EPA and the Fish and
22 Wildlife Service --

23 JUSTICE SCALIA: By coercing, by coercing
24 the States to sign those agreements on pain of not
25 getting NPDES authority?

1 MR. GLITZENSTEIN: No, Your Honor. In fact
2 --

3 JUSTICE SCALIA: What do they do? They
4 just whistle and this comes forth? States don't sign
5 stuff just -- just for the sake of it.

6 MR. GLITZENSTEIN: Your Honor, I think part
7 of this, these agreements, wouldn't have to be signed by
8 the State at all.

9 JUSTICE SOUTER: No, but -- I mean, Justice
10 Scalia's got a fair point. What if the States say, we
11 don't want a memorandum of agreement? What does the
12 Federal Government do at that point? Doesn't the Federal
13 Government at that point say, okay, we're not going to
14 issue the transfer under Clean Water because we have an
15 independent obligation under Endangered Species and
16 there's got to be both or there will be neither? Isn't
17 that the Federal Government's position?

18 MR. GLITZENSTEIN: At the end of the day I
19 think it is. And there is an endangered species
20 committee. Once again --

21 JUSTICE SCALIA: It's your position, not the
22 Federal Government's position. It's your position of
23 what the Federal Government's position ought to be,
24 right?

25 MR. GLITZENSTEIN: What I was trying to

1 suggest was -- I think if in the end of the day you look
2 at all of these opportunities to protect species and you
3 say there's nothing we can do about it and the State
4 refuses to cooperate, you have what's called jeopardy or
5 destruction of critical habitat, and Congress said that
6 the mechanism for working out the conflict with another
7 law is the endangered species committee, which we have
8 not talked about very much. That was Congress's answer.

9 But what I was trying to suggest was, long
10 before you get to that point and without imposing a
11 single obligation on the State, simply using the
12 authority under 402(d) of the Clean Water Act, which
13 provides for this oversight opportunity, the Service and
14 the EPA can come to their own understanding as to how
15 EPA will in fact carry out its post-transfer review of
16 these. And we think that is -- that is an acceptable
17 answer to the question.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. GLITZENSTEIN: Thank you.

20 CHIEF JUSTICE ROBERTS: Mr. Kneedler, you
21 have four minutes remaining.

22 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

23 ON BEHALF OF THE PETITIONERS

24 MR. KNEEDLER: Mr. Chief Justice:

25 First, with respect, stepping back and

1 looking at the legal theory, we think that this case is
2 really on all fours with the Public Citizen case. In
3 fact, the court of appeals recognized that the operative
4 regulation here, the definition of "indirect effects,"
5 meaning something caused by the Agency, is just like the
6 one in Public Citizen. In Public Citizen this Court
7 held that where an Agency has a mandatory duty and does
8 not have the ability to control subsequent events, that
9 the Agency cannot be regarded as the legal cause of
10 whatever effects happen. That is exactly the case here.

11 section 402(b) mandates that EPA approve the
12 State's application. EPA therefore -- EPA's decision
13 therefore is not the legal cause of any effects that
14 might happen with respect to endangered species.

15 I should point out that in this Court's
16 decision in Sweet Home this Court in footnotes 9 and 13
17 read the other principal provision of the ESA, the take
18 provision, to incorporation a proximate-cause
19 limitation. We think it follows that the jeopardize
20 prohibition in section 7 also incorporates a proximate-
21 cause, or here, legal-cause restriction.

22 JUSTICE SCALIA: Mr. Kneeder, I hate to eat
23 up any of your rebuttal time, but would you state
24 briefly what -- how you would treat these other matters
25 that were resolved by the Agency and that were not

1 mandatory, its decision to transfer prior certificate
2 authority to the States, for example, and the other
3 instance raised by opposing counsel? What if I agree
4 with you on whether you can deny the NPDES permit, but
5 I'm concerned about these other actions by the Agency
6 that were discretionary?

7 MR. KNEEDLER: There has been no challenge
8 to that, so I'm not in a position to give a definitive
9 answer. But I believe to the extent it would be
10 discretionary that section 7 may well kick in.

11 JUSTICE SCALIA: Should we remand?

12 MR. KNEEDLER: No, because there was no
13 challenge to that. There was no challenge to that
14 aspect of it. This was a challenge to the transfer of
15 authority, not ancillary matters addressed under the
16 agreement.

17 Also, footnote 18 of the court of appeals'
18 opinion makes clear that Respondents did not challenge
19 anything to do with funding, which is an entirely
20 separate administrative determination that there's a
21 regulatory set of criteria for how funding gets
22 distributed, it is not dependent on whether the State
23 has NPDES authority. section 106 of the Clean Water Act
24 has a separate funding mechanism for Clean Water Act
25 authority generally. So funding is simply not, it's

1 simply not in the case.

2 JUSTICE STEVENS: And in your discretion --
3 your distinction to the snail darter case is that the
4 decision to build the dam was discretionary, not
5 mandatory?

6 MR. KNEEDLER: Yes, and in fact this Court's
7 decision in Hill can't be understood in any other way
8 because the Court went out of its way to say that, while
9 Congress committee reports indicated, for the
10 appropriations bills, indicated an expectation that the
11 dam would be built, the Court emphasized the fact that
12 there was no mandate in the appropriations statute
13 itself. That would have been --

14 JUSTICE SCALIA: Do you mean the executive
15 can ignore earmarks?

16 MR. KNEEDLER: Yes. That part of the
17 Court's decision would have been unnecessary.

18 JUSTICE BREYER: What's a mandatory
19 decision? No, what's a discretionary decision? I mean,
20 in the sense you're using it. I've never heard of an
21 Agency that could just give out money to whoever they
22 want, like you or me. There are always criteria. Write
23 a "shall"; there are always criteria.

24 MR. KNEEDLER: But there are few statutes
25 like this, that say the Agency shall unless certain

1 things happen.

2 JUSTICE BREYER: You mean is it the word
3 "unless," because here we have nine and they're broad.
4 Probably with funding we have 32. Maybe with some
5 others we have 14. But I can't get my mind around --

6 MR. KNEEDLER: There may be particular
7 applications of the standard, but that did not deter
8 this Court in Public Citizen, where the Court applied
9 the same principle and said where the Agency has a
10 mandatory duty and no discretion it is not the legal
11 cause. That's the general principle. If there are
12 other cases where that general principle has to be
13 applied, there will be time enough for that
14 consideration to arise.

15 Another important aspect of Hill is this
16 Court quoted Representative Dingell, the sponsor of it,
17 saying that agencies are to take actions within their
18 power, which suggests that -- and we think it's clear
19 through the history, as we recite in our brief at pages
20 27 and 28, from the text of the Act and from the
21 evolution of section 7 -- it was always understood to
22 apply to situations where the agencies had the existing
23 authority to take action, not to require them to
24 countermand statutory directives the way the Department
25 of Transportation could not countermand statutory

1 directives in Public Citizen.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 11:19 a.m., the case in the
6 above-entitled matter was submitted.)

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