No. 06-549

FILED
NOV 2 2 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*

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

BRIEF OF *AMICI CURIAE* STATES OF NEBRASKA, IDAHO, MISSOURI, TENNESSEE, UTAH, AND WYOMING IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

JON C. BRUNING
Nebraska Attorney General
DAVID D. COOKSON*
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

**Counsel of Record for the Amici States*

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Special Assistant Attorneys General
BLACKWELL SANDERS PEPER MARTIN LLP
206 South 13th Street
Suite 1400
Lincoln, NE 68508
(402) 458-1500

[Additional Appearances On Inside Cover]

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

LAWRENCE WASDIN
Idaho Attorney General
CLAY R. SMITH
Idaho Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-4118

JAY NIXON
Missouri Attorney General
207 W. High St.
P.O. Box 899
Jefferson City, MO 65102
(573) 751-0774

ROBERT E. COOPER, JR.
Tennessee Attorney General
ELIZABETH P. MCCARTER
Assistant Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-2582

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-2320
(801) 538-9600

PATRICK J. CRANK
Wyoming Attorney General
123 State Capitol
Cheyenne, WY 82002
(307) 777-7841

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*

The *Amici Curiae* States of Nebraska, Idaho, Missouri, Tennessee, Utah, and Wyoming submit this brief, pursuant to Sup. Ct. R. 37.4, in support of the petitioner, United States Environmental Protection Agency ("EPA"), urging this Court to grant the petition for a writ of certiorari and to reverse the judgment of the Ninth Circuit Court of Appeals in *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2006).

The *Amici* States have an interest in preserving the framework of cooperative federalism established by Congress in the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, and particularly CWA § 402(b), 33 U.S.C. § 1342(b). Nebraska, for example, has administered the National Pollutant Discharge Elimination System ("NPDES") under CWA § 402(b) for over three decades and oversees comparable programs under myriad federal environmental laws, wherein Congress explicitly provided for state administration. Due to the breadth of the Ninth Circuit's decision, however, the *Amici* States' interest obtains regardless of the extent to which an *Amici* State exercises regulatory primacy under the CWA. The decision places a cloud over all such programs by interpreting the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, as overriding and potentially precluding the transfer of certain authorities Congress intended the *Amici* States to receive and exercise under federal law. The *Amici* States submit this brief to urge a return to the plain language of the CWA and thereby to protect the longstanding, carefully drawn balance between federal and state interests in regulating the Nation's navigable waters.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 provides that a writ of certiorari will be granted only for "compelling reasons." By way of illustration, the rule explains the following things, among others, "indicate the character of the reasons" the Court will consider:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;
>
> * * *
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court
>
> . . .

Sup. Ct. R. 10. The petition should be granted for both of these reasons. The decision below not only skews the delicate balance of cooperative federalism embodied in the CWA (and, potentially, a suite of other environmental laws), under which the States are entitled to administer federal programs within their borders, but reaches that result in direct conflict with decisions from other federal circuit courts, thereby creating a balkanized regulatory scheme which, to function properly, requires national uniformity.

I. THE NINTH CIRCUIT'S DECISION CREATES A SPLIT IN THE CIRCUITS CONCERNING THE APPLICATION OF ESA § 7(a)(2) AND DECIDES AN ISSUE THAT SHOULD BE SETTLED IMMEDIATELY BY THIS COURT.

The CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). In material part, under that partnership:

> The CWA prohibits the discharge of pollutants into navigable waters without a permit. [Clean Water Act] Section 402, codified at 33 U.S.C. § 1342, gives primary authority to issue such permits to the United States Environmental Protection Agency (EPA), but allows EPA to authorize a State to supplant the federal permit program with one of its own, if the state scheme would include, among other features, sufficiently stringent regulatory standards and adequate

> provisions for penalties to enforce them. *See generally* 33 U.S.C. § 1342(b) (requirements and procedures for EPA approval of state water-pollution permit plans); *see also* 40 CFR §§ 123.1-123.64 (1991) (detailed requirements for state plans).

U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 611-12 (1992).

Clean Water Act § 402(b) provides that the EPA "*shall* approve each . . . submitted program unless" the agency "determines that adequate authority does not exist" to administer the program in compliance with nine specific criteria. 33 U.S.C. § 1342(b)(1)-(9) (emphasis supplied). *See also* 40 C.F.R. §§ 123.1(c), 123.61(b). Consistent with this plain language, numerous courts have found EPA lacks discretion to deny approval if a state's program meets these criteria. *See Environmental Protection Agency v. State of California*, 426 U.S. 200, 208 (1976); *American Forest and Paper Ass'n v. E.P.A.*, 137 F.3d 291, 297 (5th Cir. 1998); *Save the Bay, Inc. v. Adm'r of E.P.A.*, 556 F.2d 1282, 1285 (5th Cir. 1977); *Natural Resources Defense Council, Inc. v. E.P.A.*, 859 F.2d 156, 173-74 (D.C. Cir. 1988); *Citizens for a Better Env't v. E.P.A.*, 596 F.2d 720, 722 (7th Cir. 1979). Indeed, the majority panel below acknowledged "the [CWA] does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of all endangered species." *Defenders of Wildlife*, 420 F.3d at 973. That recognition should have ended the case. It did not.

The majority instead held that "the obligation of each agency to 'insure' that its covered actions are not likely to jeopardize listed species [under ESA § 7(a)(2)] is an obligation in addition to those created by the agencies' own governing statute." 420 F.3d at 967.[1] According to the

[1] *See also* 420 F.3d at 964 (relying on *TVA v. Hill*, 437 U.S. 153 (1978), for the proposition that "the authority conferred on agencies to protect listed species goes beyond that conferred by agencies' own governing statutes"); *id.* at 965 (relying on section 7(a)(1) for "the conclusion that section 7 includes an affirmative grant of authority to attend to protection of listed species within agencies' authority when they take actions covered by section 7(a)(2)"); *id.* (relying on 1973

(Continued on following page)

majority, therefore, EPA was bound to consult with the United States Fish and Wildlife Service ("Service") pursuant to ESA § 7(a)(2) regarding the impact on threatened and endangered species of transferring the NPDES Program to Arizona, notwithstanding 50 C.F.R. § 402.03 (Applicability), which expressly limits the application of ESA § 7 to those activities in which the action agency (here, EPA) has some modicum of discretion over its decision. *Id.* at 967-969.

The Ninth Circuit thereby created a split among the Circuits on this point. *Contrast American Forest & Paper Ass'n, supra*; *In re Operation of the Missouri River Sys. Litig.*, 421 F.3d 618 (8th Cir. 2005) ("Case law supports the contention that environmental and wildlife protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority."); *Platte River Whooping Crane Critical Habitat Maint. Trust v. F.E.R.C.*, 962 F.2d 27 (D.C. Cir. 1992); *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985) (the ESA "does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the Clean Water Act."); *see also Ground Zero Ctr. For Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082 (9th Cir. 2004) (concluding Section 7 does not apply to non-discretionary activities).

The Ninth Circuit, in short, has concluded that ESA § 7(a)(2) represents a font of new authority, which must be exercised by federal agencies to protect threatened and endangered species, even to the exclusion of complying with Congress' mandate to approve State programs under a statute like CWA § 402(b). As explained below, the court's holding has the effect of coercing the States into administering the ESA as a *quid pro quo* for receipt of

---

legislative history to identify a "distinction between using *existing* authority [in section 7(a)(1)] to promote conservation and conferring [in section 7(a)(2)] an *additional*, do-no-harm obligation – and reciprocal authority – applicable when the agency's *own* actions cause harm to endangered species").

such entitlements. States that have not yet received NPDES permitting authority are left with a choice of developing an ESA counterpart or forgoing their right to administer the NPDES Program. Programs previously transferred without ESA § 7 consultation may be revisited in light of federal agencies' omnipresent mandate to reinitiate consultation under 50 C.F.R. § 402.16. This Court should settle immediately the question whether ESA § 7 grants federal agencies independent authority (and imposes upon them a separate obligation to exercise that authority) to protect threatened and endangered species without regard to limitations imposed by their governing statutes.

II. THE NINTH CIRCUIT'S DECISION UNDERMINES PRINCIPLES OF COOPERATIVE FEDERALISM.

Certiorari is further warranted because the decision upsets the relationship Congress intended to engender among the several states and the Federal Government under two of this country's most important and pervasive environmental laws, the CWA and the ESA.

A. The Role of Cooperative Federalism in American Environmental Law.

Congress designed the CWA as "a partnership between the States and the Federal Government" designed to curb and control pollution of the Nation's waters. *Arkansas v. Oklahoma*, 503 U.S. at 101. This Court has termed such legal regimes "a program of cooperative federalism." *See New York v. United States*, 505 U.S. 144, 168 (1992), *citing Arkansas v. Oklahoma* among others. "Cooperative federalism rose with the New Deal, when the national government significantly heightened its presence in the operation of state programs." Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. Envt'l L. J. 179, 185 (2005) ("Fischman"). Since that time, "cooperative federalism typically appears as congressional or administrative efforts to induce (but not

coerce or commandeer) states to participate in a coordinated federal program." *Id.* at 184. Cooperative federalism has "emerged from its significant but transient status to become an enduring, organizing concept in environmental law[,]" which has "proven the most fertile ground for creating variations on the theme of cooperative federalism." *Id.* at 187, 188. "Starting most notably with the environmental protection statutes passed in the 1970's, federal regulatory programs increasingly have relied on state agencies to implement federal law." Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1695 (2001) ("Weiser").

"A critical feature of cooperative federalism statutes is the balance they strike between complete federal preemption (a preemptive federalism) and uncoordinated federal and state action in distinct regulatory spheres (a dual federalism)." Weiser at 1697. "Rather than preempting the authority of state agencies ... , cooperative federalism programs invite state agencies to superintend federal law." *Id.* As one scholar explains:

> [U]nder the foundational pollution laws, the Clean Air Act ("CAA") and the [CWA], cooperative federalism involves programs where federal monies are made available to each state contingent on its creation of a regulatory scheme that is at least as stringent as the federal floor. States may tailor federal standards (e.g., water quality criteria under the CWA), establish compliance strategies (e.g., state implementation plans under the CAA), implement permit programs (e.g., state pollutant discharge elimination systems under the CWA) and enforce rules (e.g., state administrative and judicial procedures.).

Fischman at 189.

There are two key elements to the brand of cooperative federalism embodied in the CWA: "(1) the fostering of state administrative programs, and (2) the delegation of tailored standard-setting." Fischman at 190. "In some

cases, the cooperative federalism statute takes the form of allowing state law to operate within a federal scheme. Under the [CWA] for example, state agencies ... are authorized to administer their own regulatory program under the mantle of federal law." Weiser at 1696, *citing* 33 U.S.C. § 1342. Under the "flagship pollution control programs" like the CWA, states are allowed "to implement their own permit schemes in place of a federal permit requirement." Fischman at 191, *citing* 33 U.S.C. § 1342. State programs offer "the convenience of working solely with the state agency for authorizations, without having to pursue either dual state/federal permits or sole federal permits issued at a more distant, less responsive office." *Id.* Cooperative federalism also fosters diversity in federal regulatory programs, which Congress has seen fit to promote for at least three reasons: "(1) to allow states to tailor federal regulatory programs to local conditions; (2) to promote competition within a federal regulatory framework; and (3) to permit experimentation with different approaches that may assist in determining the optimal regulatory strategy." Weiser at 1698.

B. Cooperative Federalism Embodied in CWA § 402(b).

To appreciate the brand of cooperative federalism at play in the CWA, it is critical to review the history of the act. That history illustrates Congress' intent to respect and promote the fundamental and primary role of the States to prevent water pollution. The original act, adopted in 1948, initially declared a congressional policy to "recognize, preserve, and protect the primary responsibilities and rights" of the states. Water Pollution Control Act of 1948, Pub. L. No. 80-845, § 1, 62 Stat. 1155 (1948). Under the 1948 act, the States were responsible for developing and enforcing "programs" in cooperation with the United States Surgeon General for the prevention of water pollution. *Id.* at § 2, 62 Stat. 1155-56. The primary role of the Federal Government was to provide funding and technical assistance to the States.

In 1956, the act was amended to enlarge the authority of the States to meet their responsibilities under the act, and to provide for increased cooperation between federal and state agencies toward that end. The amendments authorized the States, rather than the Surgeon General, to develop "plans," subject to approval of the Surgeon General, setting forth methods for improving water quality within the State. Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, § 5(f), 70 Stat. 498, 500 (1956). The federal role was again limited to assisting the States in developing plans, providing financial assistance to help localities in building treatment plants, and increasing research and technical assistance. *See, e.g.*, S. Rep. No. 92-414, at 2 (describing 1956 amendments). Congress repeated its admonition that the States carry the "primary responsibilities and rights" for preventing water pollution. Pub. L. No. 84-660, § 1, 70 Stat. 498.

Amendments in 1965 and 1966 strengthened and clarified the States' authority. The 1965 amendments required the States to adopt "water quality standards" for interstate navigable waters, which included both "water quality criteria" and a "plan" for the "implementation and enforcement" of the criteria. Water Quality Act of 1965, Pub. L. No. 89-234, § 5, 79 Stat. 903, 907-08 (1965). These standards were to be enforced by actions brought by state or federal officials. *Id.*, 79 Stat. at 909. The 1966 amendments intensified federal support of state efforts in water pollution control by increasing federal funding to assist with the development of plans and construction of waste treatment plants. Clean Water Restoration Act of 1966, Pub. L. No. 89-753, §§ 101, 201, 80 Stat. 1246, 1247 (1966).[2]

The Senate Committee on Public Works recognized and reiterated the historical preference for state control in adopting sweeping amendments to the act in 1972:

[2] Amendments in 1970 added new sections not relevant here. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970).

> For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States.

S. Rep. No. 92-414, at 1 (1971). The 1972 amendments, discussed next, furthered this Congressional policy, while intensifying federal efforts to ensure the adequacy of state programs.

The pre-1972 amendments to the CWA failed to provide an adequate response from the States to address the problem of water pollution. *See, e.g.*, S. Rep. No. 92-414, at 4-5 (discussing inadequacies of pre-1972 amendments). Many states failed to seek the development of standards for individual dischargers because the act did not establish any alternate federal standards and provided little incentive for the States to develop standards of their own. *Id.* at 8. As a result, federal officials over utilized the Refuse Act of 1899 to control water pollution, which prohibits the discharge of any matter into the nation's navigable water except pursuant to a federal permit. 33 U.S.C. § 407 (1899); S. Rep. No. 92-414, at 8.

This lack of success in water pollution control led the Senate Committee on Public Works to conclude, after two years of study, that "the Federal water pollution control program . . . has been inadequate in every vital aspect." *Id.* at 7. To balance more evenly federal and state control over water quality, Congress substantially reconstructed the CWA in 1972. *See, e.g.*, 117 Cong. Rec. 38797, 38845 (1971) (statement of Sen. Muskie). Two major amendments changed the method for setting and enforcing standards to abate and control water pollution. First, the 1972 amendments authorized the Administrator of the EPA and the States to develop "limitations" and "standards" for discharges of effluent, a shift from the pre-1972 focus on ambient water quality standards. 33 U.S.C. §§ 1311, 1312, 1313, 1316, 1317; S. Rep. No. 92-414, at 8. These

limitations, initially to be established by the Administrator, were to act as a floor on pollution control, requiring the States to enact standards at least as stringent as the federal floor in order to assume regulatory responsibility. 33 U.S.C. § 1370; 118 Cong. Rec. 33747, 33752 (Oct. 4, 1972) (statement of Rep. Jones) (explaining the CWA "directs the EPA Administrator to establish guidelines within which the separate States must operate their permit programs."). Second, the 1972 amendments established the NPDES Program, tailoring the limitations to individual dischargers and focusing on the quality of the effluent itself rather than the quality of the water receiving the discharge. 33 U.S.C. § 1342. Under the NPDES Program, it is unlawful to discharge pollutants into navigable waters without obtaining a permit. 33 U.S.C. § 1311(a). The NPDES Program is the central mechanism by which the CWA's objectives are to be achieved.

Notwithstanding its decision to establish a federal floor for pollution control, when adopting the 1972 amendments, Congress again declared: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b). Throughout the CWA, Congress recognized this primary role of the States to regulate pollution and to control the waters within their boundaries. *See, e.g.*, 33 U.S.C. § 1251(g) (States' authority to allocate water supply not abrogated by the CWA); 33 U.S.C. § 1288 (States' authority and role in waste treatment management); 33 U.S.C. § 1344(g)-(j) (States' authority to administer their own programs for discharge of dredged and fill material); 33 U.S.C. § 1370 (States' authority to control pollution, unless a State's standard is less stringent than that in the CWA).

The clearest proclamation of the congressional preference for state control is found in 33 U.S.C. § 1342, which creates the NPDES Program. Initially, EPA is responsible

for issuing permits for the discharge of pollutants. 33 U.S.C. § 1342(a)(1). However, under 33 U.S.C. § 1342(b), the States are primarily responsible for developing and administering particularized standards for individual dischargers by the NPDES Program; the EPA is to assume this responsibility only until it is assumed by the State, and only thereafter if the State fails to fulfill it. Senator Edmund Muskie, the Senate floor leader for the 1972 amendments, recognized this fundamental policy during congressional debate:

> What [the CWA] does is continue the Federal Government's authority with respect to major polluters . . . until such time as the States can develop permanent authority of their own. *At that time it is the expectation of this bill and of this administration to have the States assume that permanent authority and to administer the law directly.*

117 Cong. Rec. 38845 (emphasis supplied). Similarly, the Senate report commented on the States' role in the NPDES Program as follows:

> It is expected that the States will play a major role in the administration of this program. The Committee believes that, after a transition period during which the State program and capability will be upgraded, *the program should be administered by those States with programs which meet the requirements of this Act.* Therefore, the bill provides that after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall suspend his activity in such State under the Federal permit program. The Administrator would periodically assess the performance of the State program and have the authority to withdraw this delegation upon finding that the State is not carrying out its program properly.

S. Rep. No. 92-414, at 71 (emphasis supplied); *see also* 118 Cong. Rec. 33747, 33750 (Oct. 4, 1972) (statement of Rep.

Jones) ("Once guidelines are established for a State permit program under section 402 . . . it is intended that the State shall have primary responsibility for determining whether a discharge complies with the guidelines.").

Notably, the respective versions of the 1972 amendments in the Senate and House differed significantly on this issue prior to resolution by the joint committee. The Senate bill, S. 2770, provided that "[u]nder section 402, the Administrator *can* delegate permit authority to a State if the State program is adequate." H.R. Conf. Rep. No. 92-1465, at 138 (emphasis supplied). By contrast, the House amendment to S. 2770 provided for "a state to administer its own permit program in lieu of the Administrator's program, and *the Administrator is required to approve a submitted State program* unless he finds that there is not adequate authority to issue the permits in accordance with the requirements of [the CWA]." *Id.* at 139 (emphasis supplied). In resolving this conflict, the conference adopted the House amendment, providing that the Administrator "shall approve" the State program if he finds adequate authority exists to administer the NPDES. *Id.*; 33 U.S.C. § 1342(b).

Finally, Congress recognized and intended that once NPDES authority was transferred to a state, a permit issued by the State would be a state, not a federal, permit. *See, e.g.,* 118 Cong. Rec. at 33761 (statement of Rep. Wright) (explaining that, upon approval by the Administrator, "the States, under State law, could issue State discharge permits. These would be State, not Federal, actions, and thus . . . such permits would not require environmental impact statements."); 118 Cong. Rec. 10201, 10207 (Mar. 27, 1972) (statement of Rep. Jones) (describing the goal of Section 402 as "State administration of State programs").[3] Similarly, EPA must suspend the

[3] Congress also recognized Section 1341 does not apply to permits issued by a State under Section 1342(b) because "permits granted by States under section 402 *are not Federal permits – but State permits.*" H.R. Rep. No. 92-911, at 127 (1972) (emphasis supplied). Congress thus

(Continued on following page)

issuance of federal permits not later than 90 days after the date on which the State has submitted a program. 33 U.S.C. § 1342(c). All permits issued thereafter are State permits pursuant to the State program.

In contrast to the foregoing framework, Congress understood that the Federal Government was best suited to administer the ESA. Thus, only federal agencies are subject to ESA § 7. Section 6 of the ESA, 16 U.S.C. § 1535, " . . . establishes a mechanism for the development of cooperative endangered species programs with the individual States." However, "Section 6 [still] places the fundamental responsibility for establishing and overseeing an endangered species program in the Federal Government." A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979 AND 1980, U.S. Gov't Printing Office (1982) at 1461 ("Leg. Hist."). While the States may elect to work cooperatively with the Federal Government, programs entered under ESA § 6 are strictly voluntary. *See, e.g.*, Leg. Hist. at 359 (Cong. Rec., July 24, 1973) (statement of Sen. Tunney) ("This bill is designed to permit and encourage State endangered species programs that act in concert with the purposes of this act.").

C. The Ninth Circuit's Decision Runs Contrary to Congress' Vision of Cooperative Federalism.

The CWA states: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan

included a provision in Section 1342(b) that requires any permit program administered by a State to insure that any other State whose waters may be affected by the issuance of a permit have an opportunity to submit written recommendations with respect to the permit application. *Id.* Similarly, in *U.S. Dep't of Energy v. Ohio, supra*, this Court concluded that claims "arising under federal law" did not include penalties prescribed by state statutes approved by EPA and supplanting the CWA. 503 U.S. at 624.

the development and use ... of land and water resources. ... " 33 U.S.C. § 1251(b). As it relates to this case: "It is the policy of Congress that the States ... implement the permit programs under Sections 1342 and 1344 of this title." *Id.* Congress clearly intended that the States would be entitled to administer the NPDES Program, provided the State could meet the requirements of 33 U.S.C. § 1342(b)(1)-(9) and 40 C.F.R. §§ 123.1(c), 123.61(b). Congress expected that the NPDES Program would be implemented primarily under State law and the States would regulate activities under the CWA within their borders. In contrast, "the purpose of [the ESA] is to provide for conservation, protection and propagation of endangered species of fish and wildlife by Federal action and by encouraging the establishment of State endangered species conservation programs." S. Rep. No. 93-307 (1973) *reprinted in* Leg. Hist. at 300. Congress intended to encourage the states to work under voluntary, cooperative arrangements to complement the Federal agencies' primary role in ensuring the survival and recovery of threatened and endangered species.

Although it is undisputed that Arizona's NPDES Program application met all of the requirements enumerated in CWA § 402(b), triggering the "shall approve" mandate of the statute, the majority below concluded "EPA's decision authorized the transfer, thus [also] triggering section 7(a)(2)'s consultation and action requirements." 420 F.3d at 969. Inherent in the majority's analysis is its conclusion that EPA could not approve Arizona's program unless it found "sufficient substitutes for [ESA] section 7's consultation and mitigation mandates." *Id.* at 973. The majority then vacated EPA's approval of Arizona's program. *Id.* at 978.

In effect, the majority has concluded that ESA § 7 provides not only a source of new authority, but also creates an independent, affirmative obligation to impose additional conditions on EPA's approval of State programs under CWA § 402(b). Under the majority's reasoning, the only "sufficient substitute" that would likely suffice in lieu of ESA § 7 would be a comparable state program. But, as noted above, the Fifth Circuit has concluded that EPA

lacks authority to impose such a condition, which is outside the ambit of CWA § 402(b). *See Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 618 (7th Cir. 2003).

Even assuming EPA could impose such a requirement as a condition of receiving NPDES permitting authority, it is entirely unclear how the States would implement the state-equivalent of ESA § 7. Many state legislatures have not authorized state agencies to regulate the full suite of threatened and endangered species under state law.[4] It is equally uncertain how such a program would be staffed and funded. Section 7's consultation obligation is extraordinarily pervasive, applying to "all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02 (definition of "Action"). To further illustrate the breadth of the term, the regulatory definition offers "[e]xamples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air." *Id.*

[4] Congress became acutely aware of this problem in 1977 when only a handful of states had entered into cooperative agreements under the original version of ESA § 6, which required the states to possess blanket authority to protect all threatened and endangered species listed under federal law. *See, e.g.*, Leg. Hist. at 619 ("the goal of [Section 6] is clear. ... Unfortunately, we are not close to achieving this goal."); *id.* (" ... some of the States with the greatest number of species under their jurisdiction have not yet joined the program."). Many states were unwilling to grant their fish and game agencies the kind of sweeping regulatory authority necessary to satisfy the standards imposed by early version of ESA § 6 for approval of cooperative agreements. Amendments were thus made in 1977 to ease those requirements, and by 1980, thirty-four states had signed such agreements. Leg. Hist. at 1475 (Cong. Rec., May 5, 1980) (statement of Rep. Breaux).

To provide a sense of the magnitude of ESA § 7's impact at the administrative level, the General Accounting Office previously found that approximately 18,211 Section 7 consultations were conducted in the four years between 1987 and 1991. General Accounting Office, *Endangered Species Act, Types and Number of Actions* (May 1992). At that time, approximately 600 domestic species were listed as threatened or endangered. *Id.* at 2. There are now a little over twice that many species listed under the ESA. 50 C.F.R. § 17.11 (species list). However, there has been an inordinate increase in the number of Section 7 consultations undertaken since 1992. According to the Service, "from 1998-2002 the Service conducted *over 300,000* informal and formal consultations." United States Fish and Wildlife Service, Consultations with Federal Agencies, reproduced at http://www.fws.gov/endangered/consultations/consultations.pdf (visited September 28, 2006) (emphasis supplied). The States simply do not have the resources to enforce the ESA for the Federal Government. Moreover, as previously explained, Congress did not intend to co-opt the States into doing so.[5]

III. THE NINTH CIRCUIT'S DECISION HAS APPLICABILITY BEYOND THE CONTEXT OF NPDES PROGRAM APPROVAL.

While this case arises in the context of a single program under the CWA, the potential impact of the Ninth Circuit's holding could implicate all federal programs. "If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA,

[5] Any interpretation to the contrary threatens to offend protections retained to the States in the Tenth Amendment. *See, e.g.*, U.S. Const. Amend. 10; *Printz v. United States*, 521 U.S. 898, 925 (1997) ("Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs."); *see also New York v. United States*, 505 U.S. 144, 188 (1992). Similarly, the Federal Government may not force the States to regulate third parties in furtherance of a federal program. *Reno v. Condon*, 528 U.S. 141, 151 (2000).

but *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. E.P.A.*, 450 F.3d 394, 399, n.4 (9th Cir. 2006) (J. Kozinski, dissenting from denial of *en banc* rehearing) (emphasis original).

The States are authorized to assume a regulatory role under a number of federal environmental laws. Like the CWA, the Clean Air Act ("CAA") "places the primary responsibility for enforcement on state and local governments." *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 320 (2nd Cir. 2003). "It is to the States that the [CAA] assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources." *Hall v. E.P.A.*, 273 F.3d 1146, 1153 (9th Cir. 2001) *quoting Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 470-72 (2001). For example, similar to CWA § 402(b), Congress has authorized states to implement and enforce standards of performance for new sources of air pollution. 42 U.S.C. § 7411(c). The Resource Conservation and Recovery Act ("RCRA") allows state agencies to act in lieu of federal agencies to administer and enforce the hazardous waste program. 42 U.S.C. § 6926. As this Court has acknowledged, "RCRA regulates the disposal of hazardous waste in much the same way [as the CWA], with a permit program run by EPA but subject to displacement by an adequate state counterpart." *U.S. Dep't of Energy v. Ohio*, 503 U.S. at 611-12, *citing* 42 U.S.C. § 6926 (requirements and procedures for EPA approval of state hazardous-waste disposal permit plans) and 40 C.F.R. §§ 271.1-271.138 (1991) (detailed requirements for state plans). *See also Harmon Indus. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999) (noting that the RCRA gives state agencies prime responsibility for implementing its provisions).

Interference with the mechanics of these important environmental laws, however, constitutes only one aspect of the sea-change in the relationship between federal agencies and the States wrought by the decision below. The court of appeals, in construing ESA § 7(a)(2) to embody a substantive grant of power, has expanded significantly the ability of action agencies to exceed limits otherwise constraining their authority and of wildlife

agencies to formulate reasonable and prudent alternatives that, if implemented, would entail action beyond the action agency's organic powers. That interpretation threatens to disrupt other largely settled relationships with the Federal Government, such as, for example, the requirement that the U.S. Bureau of Reclamation comply with State water law – an issue of particular concern to the western states, many of which are in the Ninth Circuit. *See* Reclamation Act, ch. 1093, § 8, 30 Stat. 388, 390 (1902) (codified at 43 U.S.C. §§ 372, 383) and *California v. United States*, 438 U.S. 645, 665, 667 (1978).

In *California*, this Court stressed that § 8 of the Reclamation Act was not an anomaly. The Federal Government's relationship with the individual States has been interwoven with "the consistent thread of purposeful and continued deference to state water law by Congress." 438 U.S. at 653; *see also id.* at 656-63 (discussing adoption of the Homestead Act of 1862, ch. 75, 12 Stat. 392; the Mining Act of 1866, ch. 262, 14 Stat. 251; the Desert Land Act of 1877, ch. 107, 19 Stat. 377; and reclamation-related statutes enacted in 1888 (ch. 1069, 25 Stat. 505, 527), 1890 (ch. 837, 26 Stat. 371, 391), 1891 (ch. 561, 26 Stat. 1095, 1101), and 1897 (ch. 335, 29 Stat. 599)). Crediting the Ninth Circuit's reasoning would have the effect of adding a proviso to § 8 – akin to the "tenth criterion" which petitioner aptly observes has been appended to CWA § 402(b) – that exempts state-law compliance when necessary to "insure" the survival or recovery of ESA-listed species in the operation of federal reclamation projects. *Compare Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1158 (2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004) (J. Kelley, dissenting) (criticizing the majority for ignoring § 8 and transforming the ESA into a "Frankenstein" that, "despite the good intentions of its creators, has become a monster" by allowing "the federal government to overturn this established [Reclamation Act] precedent.").

The question presented here effectively asks whether the authority of the Bureau of Reclamation (and every other agency for that matter) has been enlarged *sub silentio* by ESA § 7(a)(2). If so, the balance of power

methodically created by Congress during the nineteenth and early twentieth centuries and relied upon by western States, federal agencies and countless private parties may contain a critical, wholly unanticipated exception from the ordinary primacy of local law: a new form of reserved water right to protect ESA-listed species and their habitats. The answer to this question, will resonate far beyond the reclamation context since as Judge Kozinski stressed, it would increase the scope of *every* federal agency's statutory authority in *every* context. Whether the ESA has effected that result is an issue whose resolution is critical to informed decision-making by the Federal Government, States and the public at large. This Court should not postpone resolving the issue because, most assuredly, it will arise repeatedly in myriad ways.

Finally, the Ninth Circuit's conclusion that ESA § 7(a)(2) provides additional authority for – and imposes a new obligation on – federal agencies already is being applied in the lower courts of the Ninth Circuit. *See, e.g., Southwest Center for Biological Diversity v. Bartel,* No. 98-CV-2234-BJMA, 2006 WL 2993210 (S.D. Cal. Oct. 13, 2006); *Salmon Spawning & Recovery Alliance v. Gutierrez*, No. C5-1877RSM, 2006 WL 2620421 (Sept. 12, 2006 W.D. Wash.); *Salmon Spawning and Recovery Alliance v. Spero*, No. CO5-1878Z, 2006 WL 1207909 (May 3, 2006 W.D. Wash.). Unless this Court intervenes immediately to clarify the meaning and scope of ESA § 7(a)(2), there is a very real threat that state-federal relations will be thrown out of balance in multiple contexts.

CONCLUSION

"Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance." *U.S. v. Morrison*, 529 U.S. 598, 660 (2000) (Justice Breyer dissenting, joined by Justices Stevens, Souter and Ginsburg), *citing Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985); and *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 93-94 (2000). "Congress often can better reflect state concerns for

autonomy in the details of sophisticated statutory schemes than can the Judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and categories." *U.S. v. Morrison*, 529 U.S. at 661, *citing* 42 U.S.C. § 7543(b) (Clean Air Act); 33 U.S.C. § 1251 *et seq.* (Clean Water Act); and *New York v. United States*, 505 U.S. at 167-168 (collecting examples of "cooperative federalism").

Congress has determined that the States are better suited to administer the NPDES Program, and ESA § 7 should not be interpreted to override that determination or to otherwise force federal agencies to choose between competing mandates. Section 7(a)(2) of the ESA does not act as a font of new authority that overrides clear congressional directives. The Ninth Circuit's decision sets a dangerous precedent that creates a conflict in the circuits and threatens to undermine, on a global scale, the principles of cooperative federalism embodied in America's environmental laws. Certiorari is warranted in this case to determine whether the Ninth Circuit's analysis may stand in light of Congress' clear intent to the contrary.

Respectfully submitted,

JON C. BRUNING
Nebraska Attorney General
DAVID D. COOKSON*
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

DONALD D. BLANKENAU
THOMAS R. WILMOTH
Special Assistant Attorneys General
BLACKWELL SANDERS PEPER MARTIN LLP
206 South 13th Street, Suite 1400
Lincoln, NE 68508
(402) 458-1500

**Counsel of Record*