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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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NATIONAL ASSOCIATION OF HOME BUILDERS ET AL. *v.* DEFENDERS OF WILDLIFE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–340. Argued April 17, 2007—Decided June 25, 2007*

Under the Clean Water Act (CWA), petitioner Environmental Protection Agency (EPA) initially administers each State's National Pollution Discharge Elimination System (NPDES) permitting program, but CWA §402(b) provides that the EPA "shall approve" transfer of permitting authority to a State upon application and a showing that the State has met nine specified criteria. Section 7(a)(2) of the Endangered Species Act of 1973 (ESA) requires federal agencies to consult with agencies designated by the Secretaries of Commerce and the Interior to "insure" that a proposed agency action is unlikely to jeopardize an endangered or threatened species. The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) administer the ESA. Once a consultation process is complete, a written biological opinion is issued, which may suggest alternative actions to protect a jeopardized species or its critical habitat. When Arizona officials sought EPA authorization to administer the State's NPDES program, the EPA initiated consultation with the FWS to determine whether the transfer would adversely affect any listed species. The FWS regional office wanted potential impacts taken into account, but the EPA disagreed, finding that §402(b)'s mandatory nature stripped it of authority to disapprove a transfer based on any other considerations. The dispute was referred to the agencies' national offices for resolution. The FWS's biological opinion concluded that the requested transfer would not jeopardize listed species. The EPA concluded that Arizona had met each of §402(b)'s

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*Together with No. 06–549, *Environmental Protection Agency* v. *Defenders of Wildlife et al.,* also on certiorari to the same court.

nine criteria and approved the transfer, noting that the biological opinion had concluded the consultation "required" by ESA §7(a)(2). Respondents sought review in the Ninth Circuit, petitioner National Association of Home Builders intervened, and part of respondent Defenders of Wildlife's separate action was consolidated with the suit. The court held that the EPA's transfer approval was arbitrary and capricious because the EPA had relied on contradictory positions regarding its §7(a)(2) responsibilities during the administrative process. Rather than remanding the case for the agency to explain its decision, however, the court reviewed the EPA's substantive construction of the statutes. It did not dispute that Arizona had met CWA §402(b)'s nine criteria, but nevertheless concluded that ESA §7(a)(2) required the EPA to determine whether its transfer decision would jeopardize listed species, in effect adding a tenth criterion. The court dismissed the argument that the EPA's approval was not subject to §7(a)(2) because it was not a "discretionary action" under 50 CFR §402.03, §7(a)(2)'s interpretative regulation. The court thus vacated the EPA's transfer decision.

Held:

1. The Ninth Circuit's determination that the EPA's action was arbitrary and capricious is not fairly supported by the record. This Court will not vacate an agency's decision under the arbitrary and capricious standard unless the agency "relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43. Here, the Ninth Circuit concluded that the EPA's decision was internally inconsistent in its statements during the review process. Federal courts ordinarily are empowered to review only an agency's *final* action, and the fact that a local agency representative's preliminary determination is later overruled at a higher agency level does not render the decisionmaking process arbitrary and capricious. The EPA's final approval notice stating that §7(a)(2)'s required consultation process had been concluded may be inconsistent with its previously expressed position—and position in this litigation—that §7(a)(2)'s consultation requirement is not triggered by a §402 transfer application, but that is not the type of error requiring a remand. By the time the statement was issued, the EPA and FWS had already consulted, and the question whether that consultation had been *required* was not germane to the final agency decision. Thus, this Court need not further delay the permitting authority transfer by

remanding to the agency for clarification. Respondents suggest that the EPA nullified their right to participate in the application proceedings by altering its legal position during the pendency of the transfer decision and its associated litigation, but they do not suggest that they were deprived of their right to comment during the comment period made available under the EPA's regulations. Pp. 10–14.

2. Because §7(a)(2)'s no-jeopardy duty covers only discretionary agency actions, it does not attach to actions (like the NPDES permitting transfer authorization) that an agency is *required* by statute to undertake once certain specified triggering events have occurred. Pp. 14–25.

(a) At first glance the legislative commands here are irreconcilable. Section 402(b)'s "shall approve" language is mandatory and its list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application. Section 7(a)(2)'s similarly imperative language would literally add a tenth criterion to §402(b). Pp. 14–15.

(b) While a later enacted statute (such as the ESA) can sometimes operate to amend or even repeal an earlier statutory provision (such as the CWA), "repeals by implication are not favored" and will not be presumed unless the legislature's intention "to repeal [is] clear and manifest." *Watt* v. *Alaska*, 451 U. S. 259, 267. Statutory repeal will not be inferred "unless the later statute ' "expressly contradict[s] the original act" ' or such a construction ' "is absolutely necessary [to give the later statute's words] any meaning at all." ' " *Traynor* v. *Turnage*, 485 U. S. 535, 548. Otherwise, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 153. The Ninth Circuit's reading of §7(a)(2) would effectively repeal §402(b)'s mandate that the EPA "shall" issue a permit whenever all nine exclusive statutory prerequisites are met. Section 402(b) does not just set *minimum* requirements; it affirmatively mandates a transfer's approval, thus operating as a ceiling as well as a floor. By adding an additional criterion, the Ninth Circuit raises that floor and alters the statute's command. Read broadly, the Ninth Circuit's construction would also partially override every federal statute mandating agency action by subjecting such action to the further condition that it not jeopardize listed species. Pp. 15–17.

(c) Title 50 CFR §402.03, promulgated by the NMFS and FWS and applying §7(a)(2) "to all actions in which there is *discretionary* Federal involvement or control" (emphasis added), harmonizes the CWA and ESA by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency

is forbidden from considering such extrastatutory factors. The Court owes "some degree of deference to the Secretary's reasonable interpretation" of the ESA, *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 703. Deference is not due if Congress has made its intent "clear" in the statutory text, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842, but "if the statute is silent or ambiguous . . . the question . . . is whether the agency's answer is based on a permissible construction of the statute," *id.*, at 843. Because the "meaning—or ambiguity—of certain words or phrases may only become evident . . . in context," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132, §7(a)(2) must be read against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal were it construed as broadly as the Ninth Circuit did below. Such a reading leaves a fundamental ambiguity. An agency cannot simultaneously obey the differing mandates of ESA §7(a)(2) and CWA §402(b), and consequently the statutory language—read in light of the canon against implied repeals—does not itself provide clear guidance as to which command must give way. Thus, it is appropriate to look to the implementing agency's expert interpretation, which harmonizes the statutes by applying §7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates. This interpretation is reasonable in light of the statute's text and the overall statutory scheme and is therefore entitled to *Chevron* deference. The regulation's focus on "discretionary" actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to "insure" that such action will not jeopardize listed species. The basic principle of *Department of Transportation* v. *Public Citizen*, 541 U. S. 752—that an agency cannot be considered the legal "cause" of an action that it has no statutory discretion *not* to take, *id.*, at 770—supports the reasonableness of the FWS's interpretation. Pp. 17–22.

(d) Respondents' contrary position is not supported by *TVA* v. *Hill*, 437 U. S. 153, which had no occasion to answer the question presented in these cases. Pp. 22–24.

(e) Also unavailing is the argument that EPA's decision to transfer NPDES permitting authority to Arizona represented a "discretionary" agency action. While the EPA may exercise some judgment in determining whether a State has shown that it can carry out §402(b)'s enumerated criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list. Nothing in §402(b) authorizes the EPA to consider the protection of listed species as an end in itself when evaluating a transfer application. And to the extent that some of §402(b)'s criteria may re-

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sult in environmental benefits to marine species, Arizona has satisfied each of those criteria. Respondents' argument has also been disclaimed by the FWS and the NMFS, the agencies primarily charged with administering §7(a)(2) and the drafters of the regulations implementing that section. Pp. 24–25.

420 F. 3d 946, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion.