

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.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	EDWIN S. KNEEDLER, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	ERIC R. GLITZENSTEIN, ESQ.	
7	On behalf of the Respondents	24
8	REBUTTAL ARGUMENT OF	
9	EDWIN S. KNEEDLER, ESQ.	
10	On behalf of Petitioners	53
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:18 a.m.)

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

8 Mr. Kneedler.

9 ORAL ARGUMENT OF EDWIN S. KNEEDLER

10 ON BEHALF OF THE PETITIONER

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

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

20 There's no dispute in this case that
21 Arizona's program satisfies those criteria. The Ninth
22 Circuit nonetheless set aside EPA's approval of
23 Arizona's program. The Ninth Circuit held that EPA
24 could not approve Arizona's application unless it first
25 insured that there would be in place under Arizona's

1 administration protections equivalent to those that
2 would be applicable under Section 7 of the Endangered
3 Species Act when EPA itself issues permits. That
4 holding is inconsistent not only with Section 402(b)'s
5 mandatory directive, it's also inconsistent with Section
6 7 of the ESA itself.

7 JUSTICE KENNEDY: Do we take the case and --
8 I'll ask the same question to your colleagues from the
9 other side -- on the assumption that if the nine -- the
10 factors in the statutes are met, that EPA has no
11 discretion to withhold the transfer?

12 MR. KNEEDLER: Yes. That is our position,
13 and that I think is clear from Section 402(b). It says
14 that the administrator shall approve unless he finds
15 that the state legal authority criteria are not
16 satisfied. I should also point out that that's
17 reinforced by 33 U.S.C. 1251(b), which expresses a
18 strong preference for State protection of waters and in
19 particular states that it's the policy of Congress that
20 the states administer the NPDES program.

21 JUSTICE STEVENS: How long has that been the
22 government's -- the EPA position? How long has that
23 been the EPA's interpretation of the statute?

24 MR. KNEEDLER: Well, until 1993 when the
25 vast majority -- by the time -- by that time the vast

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

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

20 JUSTICE STEVENS: Has that always been the
21 EPA's position? Because there's an allegation in one of
22 the briefs that you changed your position in this Court,
23 to change the position you took even in the lower courts
24 at issue. Is that --

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

1 different things that, referring to it. Section 7
2 imposes an obligation on Federal agencies in their own
3 actions not to jeopardize -- or to ensure that their
4 actions are not likely to jeopardize a species.
5 Ancillary to that, there is an obligation on Federal
6 agencies to consult with the fish and wildlife agencies.
7 As to the consultation obligation, as I mentioned, EPA
8 has engaged in consultation from 1993 until --

9 JUSTICE STEVENS: But your position was they
10 didn't have to?

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

17 CHIEF JUSTICE ROBERTS: So your position is
18 the consultation is a waste of time?

19 MR. KNEEDLER: Basically, yes. If in the
20 end EPA could not disapprove the State's application,
21 and since consultation is ancillary to the substantive
22 obligation not to jeopardize --

23 JUSTICE GINSBURG: Isn't there a difference
24 between denying the application because the Endangered
25 Species Act hasn't been attended to adequately, and

1 saying you meet the nine criteria, you're going to get
2 your application. But then, so it's not just automatic
3 that the thing becomes the State's domain rather than
4 the Federal. But isn't there something rather detailed
5 called a memorandum of agreement that's worked out, and
6 couldn't the Endangered Species Act concerns be
7 accommodated that way instead of saying one statute is
8 out the window, even though EPA in a number of states
9 has made an accommodation.

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

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

21 It's essentially procedural in order to
22 facilitate EPA's continuing oversight role. It's not a
23 vehicle for EPA to impose substantive obligations coming
24 from other statutes.

25 JUSTICE SOUTER: No, but the point is why

1 can't it be?

2 MR. KNEEDLER: Because we think that would
3 been consistent with Section 402(b), which requires,
4 which requires the EPA to approve the transfer.

5 Now, if a State agency chooses to cooperate
6 with Fish and Wildlife Service or NOAA in the Department
7 of Commerce with respect to species under its
8 jurisdiction, that is all fine. And I should point
9 out --

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

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

22 JUSTICE SOUTER: I realize that that's your
23 point. But doesn't that sort of beg the question?
24 Because it's not that anyone is suggesting here, I
25 think, that under the Endangered Species Act the Federal

1 Government can keep control or that the Federal
2 Government can in effect provide guarantees of what may
3 happen in response to some future development proposal.

4 What I think they're arguing is that when,
5 when, when the agency gives the approval, it should
6 require that there be some kind of procedure in place on
7 the part of the State so that when problems arise the
8 States will probably respond to them with the same
9 values in mind that the feds would.

10 And the question is why cannot the
11 Endangered Species Act be enforced in that way, to
12 require, in effect, an advanced mechanism before, in
13 effect, the whole business is turned over to the States?

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

17 JUSTICE SOUTER: I know you say you don't
18 think they can do it. But the problem is we've got two
19 statutes each of which is mandatory. And your response
20 seems to be, well, we'll give full effect to one and we
21 will ignore the other. And I don't see how that is a
22 tie breaker. And why do you not have an obligation to
23 do what you can with respect to the Endangered Species
24 Act?

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

1 the Endangered Species Act, the memorandum of agreement
2 that was entered into in 2001 between EPA and the two
3 Federal wildlife services does furnish a way in which
4 after the transfer EPA can take into account endangered
5 species considerations within the scope of its --

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

8 MR. KNEEDLER: No, that's not correct.
9 Under Section 402(d) EPA has the authority to object to
10 a State permit. And if the -- but to do so on, based on
11 a determination that the State permit would not satisfy
12 the guidelines and requirements of the Clean Water Act.
13 So if --

14 JUSTICE SOUTER: That begs the question
15 because the concern is the enforcement of the Endangered
16 Species Act.

17 MR. KNEEDLER: With respect to water quality
18 issues that might affect an endangered species, EPA
19 takes the position -- and I think it's correct -- that
20 EPA can object to a State permit where that permit would
21 not comply with State water quality standards that are
22 necessary to protect the endangered species.

23 JUSTICE SOUTER: Why don't they get that in
24 the memorandum of agreement up front?

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

1 agreement to object to a State permit. That is
2 authority --

3 JUSTICE SOUTER: Maybe it doesn't, but isn't
4 it the case that if it's in the agreement up front the
5 odds are better that the State will address it, as
6 opposed to the State ignoring the problem, requiring EPA
7 then to take affirmative action to object?

8 MR. KNEEDLER: And I wanted to get to the
9 further mechanisms that are in place under EPA
10 regulations and the memorandum of agreement.

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

16 I suppose. But let me, let me, let me
17 explain what is in place. EPA's regulations require
18 that a State furnish its draft permits to the public,
19 but also specifically to the Federal wildlife agencies.

20 That gives Fish and Wildlife Service an
21 opportunity to comment about endangered species concerns
22 that may be raised by the draft permit.

23 The regulations also require the State
24 agency to take into account the comments that are
25 submitted by anyone, including the Fish and Wildlife

1 Service and NOAA. Those provisions built in allow the
2 Federal agencies to bring their concerns to the State
3 agency, and I think there is every reason to believe
4 that the State agencies will --

5 JUSTICE SOUTER: Is there an obligation on
6 the part of the State agency to take reasonable action
7 in response to them, or can the State agency simply sit
8 there, listen with a tin ear and then do whatever it
9 wants to?

10 MR. KNEEDLER: Those regulations do not
11 because they are procedural. Then what happens if the
12 State agency does not respond to the concerns raised or
13 does not remedy the concerns raised by Fish and Wildlife
14 Service or NOAA, EPA is notified and EPA can then try to
15 work it out with the State agency, or, failing that, EPA
16 can object to the State permit if it does not satisfy
17 the Clean Water Act standards.

18 And again with respect to water quality,
19 those standards are set at a level that is necessary to
20 protect endangered species. So as far as water quality
21 impacts are concerned, EPA retains complete control
22 under its ability to object to the permit.

23 JUSTICE SOUTER: You are in effect saying
24 that the, that the, that the enforcement of water
25 quality standards is, in effect, the indirect answer to

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

3 MR. KNEEDLER: It is. EPA --

4 JUSTICE SCALIA: Except to the extent that a
5 project may be endangering a species, not by reason of
6 change in water quality but, for example, by destroying
7 habitat, constructing a dam or that sort of thing.

8 MR. KNEEDLER: Upland habitat, if it's water
9 habitat, water quality standards. EPA has to approve
10 State water quality standards. It consults with Fish
11 and Wildlife Service and NOAA in doing so to make sure
12 endangered species would be protected by the water
13 quality standards. And then each individual State
14 permit is measured against those water quality standards
15 to make sure they comply.

16 So therefore, with respect to water quality,
17 Fish and Wildlife Service agreed that the mechanisms I
18 have just described would take care of any Endangered
19 Species Act concerns.

20 JUSTICE GINSBURG: Are you referring to, in
21 what you just described about the cooperation among the
22 Federal agencies, to what has been called in their
23 brief, it's referred to as a coordination agreement?

24 MR. KNEEDLER: Yes, the 2001, February 22,
25 2001, agreement between EPA and --

1 JUSTICE GINSBURG: And that agreement, I
2 take it from what you just said, is in full force? EPA
3 hasn't retreated from that agreement and it will
4 continue to --

5 MR. KNEEDLER: That is correct. And some of
6 the things I described were embodied in EPA regulations
7 aside from the agreement, including an agreement that
8 State agencies furnish draft permits to Fish and
9 Wildlife Service and take into account comments that are
10 received in return.

11 Justice Scalia is correct that, that the
12 impacts that would not be covered by this would be
13 non-water quality-related impacts on upland habitat.
14 But in our view that simply reflects the nature of the
15 Clean Water Act and under 402(b) it is a Clean Water
16 Act. It deals with water quality, and we do not believe
17 that EPA is authorized to withhold the approval or
18 condition the approval of a transfer of permitting
19 authority to a State on the basis of what the State will
20 do with respect to upland, upland habitat.

21 JUSTICE SOUTER: Which is the -- the later
22 act is the Endangered Species Act?

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

1 JUSTICE SOUTER: Why doesn't that control?

2 MR. KNEEDLER: Because it is -- we do not
3 think it repeals -- it's essentially a repeal by
4 implication question.

5 JUSTICE SOUTER: No, but you can just as
6 well say that if it does not control then there is an
7 exception by implication, the exception being based on
8 the prior act. Neither of them is particularly
9 satisfactory, but neither answer gives you a reason to
10 ignore the problem.

11 MR. KNEEDLER: Beyond that, Section 7 of the
12 ESA is a generally applicable statute, whereas Section
13 402(b) speaks specifically and comprehensively to the
14 question of Federal approval of State programs. We also
15 think this would be a particularly unlikely candidate
16 for an exception to that because EPA's approval of the
17 State program does not result in any immediate
18 on-the-ground consequences. That would only happen --
19 or in-the-water consequences. That would only happen if
20 after the transfer the State agency actually issued,
21 issued a permit. So what we're talking about is --

22 JUSTICE SOUTER: Well, but by that very
23 reasoning you could say that if assurance are required
24 that the Endangered Species Act is going to be honored,
25 that does not in and of itself prevent any development

1 program. Each, in effect, is a kind of mechanism for
2 dealing with something that may happen in the future.

3 MR. KNEEDLER: Well, if I could go back to
4 the point I was making earlier, that we think that the
5 central thrust of the court of appeals' opinion and
6 Respondent's position here is that EPA could not
7 transfer the authority unless it and the State together
8 replicated the sort of protections that were in place
9 when EPA itself administered the Endangered Species Act.
10 And as I said, that's inconsistent not only with 402(b),
11 but with Congress's federalism-sensitive judgment, to
12 impose the sort of substantive and procedural
13 administrative requirements in Section 7 of the ESA only
14 on Federal agencies, not on State agencies.

15 And let me also stress that this does not
16 mean that the rest of the ESA is inapplicable once a
17 permitting program of the State is approved. The
18 central provision of the ESA, the prohibition against
19 taking endangered species act and other provisions
20 against trading in them and importing, exporting, all
21 those remain applicable. Those are the generally
22 applicable provisions that prohibit the taking
23 of endangered species.

24 JUSTICE BREYER: I understand very well your
25 argument that if the EPA is going to transfer this, they

1 transfer it to Arizona and the first thing they say is,
2 we look at Arizona's laws and they protect everything.
3 And now we look at our own authority and if they get --
4 start mucking around with this, we can refuse the
5 permit. And besides that, we have a memorandum of
6 understanding and the memorandum of understanding or
7 whatever it is, agreement or something, is going to be
8 they're going to pay as much attention as we are. So
9 they'll pay attention to this, too, and if they don't we
10 have an enforcement mechanism. So no problem; we are
11 not putting any species in jeopardy. We satisfy the
12 standard. I've got that part of the argument. I think
13 I paraphrased it pretty well.

14 The part I don't get is then you say,
15 anyway, we don't have to do any of this because it says
16 "shall transfer," therefore, it's not discretionary,
17 it's mandatory. That part I don't get because there are
18 nine standards there and it seems to me to say that is
19 rather like saying, well, the ICC used to say you shall
20 let the railroad build a spur, provided it's in the
21 public interest, convenience, and necessity.

22 I mean, are you suddenly saying every
23 statute that uses the word "shall" is not subject to the
24 ESA?

25 MR. KNEEDLER: Well, I think it would

1 require a statute by statute evaluation.

2 JUSTICE BREYER: All right, fine.

3 MR. KNEEDLER: But we think this one is
4 particularly clear.

5 JUSTICE BREYER: Now, my problem with saying
6 it's clear is that they have nine criteria. One of the
7 criteria is you look to five other statutes, which they
8 have their own criteria and one of those criteria is you
9 have to be certain that the State will assure the
10 protection and propagation of a balanced population of
11 shellfish, fish, and wildlife.

12 And by the time you get through those nine
13 criteria, I don't think you'd have to be too imaginative
14 a lawyer to figure out ways that they involve everything
15 the ESA involves. So if there ever was an act prefaced
16 by the word "shall" where the ESA would apply, you would
17 think it would this be this one, which has to do with
18 water, environmental protection, nine criteria, many
19 vague, and they use words like "wildlife," "shellfish,"
20 et cetera.

21 MR. KNEEDLER: Several, several responses to
22 that. Those cross-references -- first of all, 402(b)
23 looks only to whether the State has the legal report
24 under State it law. Among other things, it requires a
25 certification or determination by the attorney general

1 of the State to establish that the State actually has
2 the authority to administer.

3 And the references to, cross-references to
4 fish and wildlife that come from incorporating other
5 provisions have to do with the setting of the standards
6 or setting -- under section 302, which EPA has never
7 invoked, setting certain supplementary effluent
8 standards to protect fish and wildlife. Those are the
9 standards. EPA does not evaluate the state's water
10 quality standards in deciding whether the State has the
11 legal authority under 402(b) to administer the program.

12 JUSTICE ALITO: Of the states to whom a
13 transfer has been made how many have agreed to comply
14 with this provision of the Endangered Species Act?

15 MR. KNEEDLER: I'm not sure. I don't think
16 --

17 JUSTICE ALITO: In the memorandum of
18 agreement with the states to whom transfers have been
19 made, in some of them, is there not language in which
20 the State has agreed that we'll consult with Fish and
21 Wildlife --

22 MR. KNEEDLER: There was, there was in the
23 Louisiana memorandum of agreement that was involved in
24 the Fifth Circuit's American Forestry decision, and it
25 was that provision that the Fifth Circuit held was

1 unlawful on two grounds. That, that memorandum of
2 agreement basically said we're trying to do something
3 analogous to Section 7 of the ESA when the State is
4 administering the program; and the Fifth Circuit said
5 that went beyond EPA's authority by conditioning the
6 approval on the State putting in place a compensation
7 arrangement.

8 JUSTICE GINSBURG: You mentioned a whole
9 string of states, I think, Texas, Florida, Maine were
10 mentioned as states that -- in connection with the
11 transfer of the permitting authority had conditions that
12 made the Endangered Species Act applicable.

13 MR. KNEEDLER: That's not correct,
14 Justice -- Justice Ginsburg. What, after the Fifth
15 Circuit's decision, EPA never tried to impose on a State
16 an obligation to go forward in the same way that EPA, or
17 even in a similar way that EPA would under Section 7 of
18 the Endangered Species Act.

19 JUSTICE GINSBURG: So what was done in
20 Texas, Florida and Maine?

21 MR. KNEEDLER: They all provided what I've
22 described to Justice Souter, that -- that the
23 pre-existing ESA, EPA regulations require that draft
24 permits be furnished to the, to Fish and Wildlife and to
25 NOAA, and that they take into account the comments by

1 Fish and Wildlife and NOAA. That doesn't come from the
2 memorandum of agreement or -- or -- or EPA's memorandum
3 of agreement with the states. That's something that
4 comes from the regulations. Everything else --

5 JUSTICE GINSBURG: So that, would that apply
6 in this case? Would that apply to Arizona?

7 MR. KNEEDLER: Yes. And, and the
8 biological, the memorandum of agreement in this case
9 applies to all State-administered programs including
10 those that were approved by EPA before 1993. This is a
11 nationwide memorandum of agreement.

12 And the basis --

13 JUSTICE STEVENS: Mr. Kneedler, may I ask a
14 question about the memorandum of agreement? That's kind
15 of a new concept that I have a little difficulty
16 following.

17 Is there -- is that, is one of the nine
18 conditions of approval that the State enter into a
19 memorandum of agreement?

20 MR. KNEEDLER: No, it is -- no it is not.
21 The memorandum of --

22 JUSTICE STEVENS: Is there not a regulation
23 that issues, that requires the states --

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

25 JUSTICE STEVENS: What's the statutory

1 authority for the regulation?

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

6 JUSTICE STEVENS: What if -- what if the
7 State just refused to enter into a memorandum of
8 agreement? Would that, could that be a ground for
9 refusing to transfer decision?

10 MR. KNEEDLER: If, if the, if its refusal
11 was based on an objection to things that are within the,
12 within the legitimate scope of a memorandum of
13 agreement. I think that --

14 JUSTICE STEVENS: Just says don't want -- it
15 just says we don't want to enter into a memorandum of
16 agreement, period.

17 MR. KNEEDLER: Yeah. I -- I think -- I
18 don't think EPA has ever confronted that. But I think
19 it probably, it probably could be denied, but the
20 regulations do not -- as I recall -- specifically
21 condition the approval of the program on the memorandum
22 of agreement.

23 JUSTICE STEVENS: -- that require the making
24 of a memorandum of agreement.

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

1 hesitate to say that EPA could not -- could not insist
2 on that, but it's important again to come back to the --

3 JUSTICE STEVENS: But how can that be
4 consistent with your shall argument?

5 MR. KNEEDLER: Because there's a separate
6 authority for the, for the, for EPA to issue guidelines
7 for minimum, minimum standards for State programs, but
8 those have to do with -- with communications with EPA
9 and sort of running a program. And it's not a vehicle
10 as I said before for EPA to impose new substantive
11 requirements outside the Clean Water Act on the State.
12 And that's why if -- that's why if EPA insisted that a
13 State enter into a memorandum of understanding that
14 basically said we will, we will act like EPA does under
15 Section 7 of the Endangered Species Act under the
16 administration of the program, I think the, I think the
17 State agency would be entitled to decline to enter into
18 that agreement. And again that's essentially what the
19 Fifth Circuit held in the American Forestry case, and to
20 what extent we agree with the American Forestry
21 decision.

22 If I may, I'd like to reserve the balance of
23 my time.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Kneedler.

1 Mr. Glitzenstein?

2 ORAL ARGUMENT OF ERIC R. GLITZENSTEIN,

3 ON BEHALF OF RESPONDENTS

4 MR. GLITZENSTEIN: Mr. Chief Justice, and
5 may it please the Court.

6 I particularly start off with the memorandum
7 of agreement that was just being discussed, and to, I
8 think, at least try to clarify an answer, I think, to
9 Justice Ginsburg's question about compliance with that
10 memorandum of agreement. If you look at page 260 of the
11 NAHB appendix that was filed along with the petition,
12 one of the elements of that memorandum of agreement is
13 that there would be compliance with Section 7 of the
14 Endangered Species Act when there were transfer
15 decisions being made by the EPA. And --

16 JUSTICE SCALIA: Where is this? Would you
17 --

18 MR. GLITZENSTEIN: This is page 260.

19 JUSTICE SCALIA: Of --

20 MR. GLITZENSTEIN: Of the NAHB appendix,
21 which is -- there are two volumes of that appendix,
22 Justice Scalia. Volume one was pages 1 to 317, which is
23 the white cover volume, and I can quote from the
24 paragraph that I was referring to. And it's the first
25 full paragraph and it reads --

1 JUSTICE SCALIA: 270 you say?

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

3 JUSTICE SCALIA: 260.

4 MR. GLITZENSTEIN: 260, around.

5 JUSTICE SCALIA: I got it.

6 MR. GLITZENSTEIN: And it's the first full
7 paragraph and it says: "EPA's current practice is to
8 consult with the Services where EPA determines that
9 approval of a State's or a Tribe's application to
10 administer the NPDES program may affect federally listed
11 species." And they actually complied with that
12 memorandum of agreement in this case when they consulted
13 in response to the Arizona application.

14 Now, this memorandum of agreement which
15 Mr. Kneedler just represented to the Court is continuing
16 to be complied with, specifically provides the
17 mechanisms by which the Clean Water Act and the
18 Endangered Species Act will be reconciled and will be
19 harmonized. This language was adopted after notice and
20 comment proceedings. It is reflected not only in the
21 application and the final decision made in this case,
22 where once again the EPA said point blank, we are
23 required to comply with Section 7 of the Endangered
24 Species Act; but essentially the same understanding of
25 the Agency's legal duties and how they would be

1 reconciled was set forth in all these past consultation
2 decisions that are described in the decisions below and
3 our brief.

4 JUSTICE SCALIA: Can that be read just to
5 apply to any, any State permits that -- that violate
6 Clean Water requirements? As opposed to upland habitat
7 which -- which might be affected?

8 MR. GLITZENSTEIN: There's certainly there's
9 nothing in the memorandum of agreement that says that.
10 But can I just add a critical point on that,
11 Justice Scalia? The Government's position now is that
12 it doesn't matter. Their new position in response to
13 Justice Stevens's question about the change in position,
14 before the Government came to this Court, they never
15 previously suggested what they're now saying, which is
16 that Section 7(A)(2) consultation obligations and the
17 no-jeopardy prohibition don't apply at all to these
18 transfer decisions.

19 So this distinction between aquatic species
20 and upland species, which may be an interesting one to
21 explore, we would submit on remand, is not the current
22 reflection of their position. Their position now is we
23 could have something causing the extinction of aquatic
24 species as a result of a pollution impact but we are
25 under no obligation to even take a look at that under

1 the seemingly mandatory requirement of Section 7.

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

3 CHIEF JUSTICE ROBERTS: That's not quite
4 right. They would look at that in the context of
5 reviewing the permits that are issued by the State
6 agencies.

7 MR. GLITZENSTEIN: Your Honor, and I think
8 that's where we seem to have a little bit of a
9 disconnect. The assumption that Mr. Kneedler seems to
10 be making is the end of the consultation process that
11 Section 7 requires, not the beginning of it. The
12 purpose of the consultation process is to avoid
13 conflicts with other statutory obligations, not to
14 create them, and indeed as that memorandum of agreement
15 language suggests, the consultation process has been
16 used precisely --

17 CHIEF JUSTICE ROBERTS: No, what he's
18 suggesting is there isn't going to be any impact on any
19 endangered species until a particular permit is issued
20 by the State agency, and that those permits are
21 submitted to the Fish and Wildlife Service for their
22 review.

23 MR. GLITZENSTEIN: That's correct, Your
24 Honor. But to go back to the suggestion that I think
25 Justice Souter made, what the agencies have done in the

1 past, and this is a situation where we don't have to
2 speculate about whether the agencies can comply with
3 those statutes. They have done it. They've worked
4 these problems out. And what they have done when
5 they've consulted, if you go back and look at the
6 underlying consultation documents, they've spelled out
7 exactly what Your Honor just suggested should be the
8 approach. They've said, all right, when we issue these
9 permits under Section 402 -- under 402(b) and do we
10 exercise our oversight responsibilities under 402(d),
11 here are the species we are going to pay special
12 attention to. For example, in the Maine delegation, one
13 of the principal species of concern was the Atlantic
14 salmon, which they were concerned about because of
15 impacts from the aquaculture industry. What they did in
16 the biological opinion prepared as a consequence of that
17 consultation was not say, we're not going to let this
18 transfer go through. They said we have this oversight
19 ability. We're going to work out with the Fish and
20 Wildlife Service the mechanism by when those permits
21 come to our attention, as they must under section
22 402(d), we will discuss the circumstances and criteria
23 for objecting to those, we will go to the State under
24 the following circumstances, and say we think this
25 permit is going to cause the jeopardy of the species --

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

3 JUSTICE SCALIA: I thought that those are in
4 place. As I understood Mr. Kneedler to say that that's
5 exactly what they, what they continue to do.

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

7 JUSTICE SCALIA: But that has nothing to do,
8 as the Chief was about to say before I interrupted him,
9 that has nothing to do with, with whether they have to
10 issue the NPDES authorization.

11 MR. GLITZENSTEIN: And I guess the point I'm
12 trying to make, Your Honor, is that the Court's
13 fundamental obligation when it has two statutes that
14 have shall provisions, is to see if there's a way they
15 can be reconciled and worked out. And What I'm saying
16 is that the consultation process has been and should be
17 precisely the process where those kinds of issues will
18 be reconciled and that's exactly how this process is
19 working. So for the Government to come in and say let's
20 not use the process that 7(a)(2) calls for, in order to
21 try to avoid the problems, is to really put the cart
22 before the horse in the most, I think, obvious way
23 imaginable.

24 JUSTICE SCALIA: Could I get back to the
25 memorandum of agreement that you've called our attention

1 to on page 260? I read that paragraph, and I don't see
2 anything in it that imposes any obligation whatever on
3 the State. It is just a description of what -- what EPA
4 is, is going to do.

5 MR. GLITZENSTEIN: Right.

6 JUSTICE SCALIA: The same kind of
7 consultation with Fish and Wildlife that, that
8 Mr. Kneedler described to us.

9 MR. GLITZENSTEIN: I think, Your Honor, and
10 I think that's critical. I think we're making some
11 assumptions here that, at least on our side, we're not
12 making. We're not assuming that the outcome of the
13 consultation process has to be to impose new conditions
14 on the State. One of the outcomes of the prior
15 consultation process with Maine, with Texas, for
16 example, was to spell out how the Service and EPA would
17 address their post-transfer concerns.

18 JUSTICE SCALIA: But this is talking about
19 consultation when the permit is -- the permit
20 application is issued. Not consultation at the, at the
21 stage of approving the State plan.

22 MR. GLITZENSTEIN: With all deference, Your
23 Honor, it says: "The current practice to consult with
24 the Services where EPA determines that approval of a
25 State's or Tribe's application to administer the

1 program. And I think there is concession by the other
2 side that that in fact was a reflection of what the
3 practice was. They were consulting on the actual
4 transfer of the programs, and the reason they were doing
5 that, Chief Justice Roberts, was to do exactly what Your
6 Honor is suggesting, that is to work out a mechanism
7 beforehand, so that when the State permits are being
8 issued, the agencies would know how to address their
9 concerns.

10 CHIEF JUSTICE ROBERTS: But the point -- the
11 point is that it's the issuance of a permit under the
12 program, whether administered by the Federal Government
13 or the State government that has the potential for
14 jeopardizing endangered species. It is not the
15 administration of the program. And EPA has in place the
16 procedures to allow them to review the particular
17 permits, which what is what might jeopardize an
18 endangered species. And they don't need to leverage
19 their limited authority, their non-discretionary
20 authority to approve a transfer, to have that authority
21 to review the actual act that might jeopardize an
22 endangered species.

23 MR. GLITZENSTEIN: That's true, Your Honor,
24 but again I think what the Court may be doing is
25 assuming that this consultation process is somewhat more

1 draconian than it frequently turns out to be. If the
2 only outcome of the consultation process under Section
3 7(a)(2) is for the Fish and Wildlife Service to reach
4 some understanding with EPA, it says when these permits
5 are issued by the states, here are the circumstances
6 under which you're going to lodge objections, because
7 we're the expert agency on species. And I think this
8 record shows what we're talking about.

9 JUSTICE KENNEDY: Are you -- are you saying
10 that the consultation does beyond the nine factors that
11 are listed in the statute?

12 MR. GLITZENSTEIN: No, Your Honor. I think
13 what we're saying is that consultation goes to the
14 separate obligation under 7(a)(2) of the Endangered
15 Species Act to address the impacts on a listed species.
16 And if I could --

17 JUSTICE KENNEDY: But isn't that beyond the
18 nine factors?

19 MR. GLITZENSTEIN: I don't think -- I think
20 what it is is an effort, as there's been discussion
21 here, to reconcile two obligations, both of which
22 Congress felt were important. And that's exactly what
23 the agency has done in other circumstances.

24 JUSTICE KENNEDY: I -- I understand that.
25 But when they sit down and they have the consultation,

1 is it proper for the EPA to say now, we're consulting
2 with you, but only with respect to the nine factors, as
3 to permits that are issued by the states afterwards, but
4 then that's something else.

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

22 JUSTICE KENNEDY: But what is your position
23 as to the propriety of the EPA's saying what I've said
24 in my hypothetical instance? If they -- they say we're
25 going to consult with you but we want to make it clear

1 we're only talking about the nine factors.

2 MR. GLITZENSTEIN: I think that my argument
3 is that the Endangered Species Act on its face says that
4 it prohibits jeopardy or the result of habitat
5 destruction, critical habitat destruction, for any
6 agency action that is authorized, funded or carried out.
7 Our view is that they should first look to the Clean
8 Water Act criteria and factors. We think --

9 JUSTICE KENNEDY: Well, I think you are at
10 issue with the government on that point.

11 MR. GLITZENSTEIN: We are, Your Honor. What
12 I will say to you, with all respect, Justice Kennedy,
13 and the reason I bring up their other legal obligations,
14 and I think it also reinforces the value of a remand in
15 this case, so some of the issues raised by the
16 government's new position would be flushed out in the
17 administrative process. If you look at joint appendix,
18 page 203, when Native American tribes wrote to the
19 agency and said we are concerned about the impact of
20 this transfer on Native American historic properties and
21 cultural and religious attributes, the EPA did not write
22 back and say well, we're sorry, Native American tribes,
23 that doesn't fall within the nine criteria.

24 CHIEF JUSTICE ROBERTS: So what is -- is
25 there any limitation? Let's say that EPA says we're all

1 set to approve this transfer, except OSHA sent us a
2 letter and they don't like the occupational safety rules
3 you have at the State environmental agency; so until you
4 change those rules, or enter a memorandum of agreement
5 that you're going to change those rules, we're not going
6 to approve the transfer.

7 MR. GLITZENSTEIN: I think the line, Your
8 Honor, is whether you've got another crosscutting
9 obligation --

10 CHIEF JUSTICE ROBERTS: Yeah, like the OSHA
11 act. It says, you know, the states should do this, and
12 they're not doing it. So EPA can leverage their
13 approval into any area of law?

14 MR. GLITZENSTEIN: Again, Your Honor, I
15 think the first problem is, with that question is that,
16 I don't mean to be evasive, but I think the problem is
17 you're assuming the outcome of the analysis, which is
18 that they'll have to impose some new condition on the
19 State. With the Native American tribes, they didn't do
20 that. They didn't impose any condition on the State.
21 They said we'll have an agreement with the Native
22 American tribes that when we exercise our oversight
23 authority, we will look at the impact upon --

24 CHIEF JUSTICE ROBERTS: But sometimes states
25 say no. So if they say no, presumably they're going to

1 have to impose the obligation as a condition of
2 approval.

3 MR. GLITZENSTEIN: Yeah. And what I will
4 say, Your Honor, is we think that in the past they have
5 been able to work these problems out. But if they
6 can't, I think it's important to recognize that Congress
7 created a mechanism precisely for the very
8 rare situation where there is --

9 JUSTICE BREYER: That isn't the -- what I'm
10 trying to figure out with Justice Kennedy's questions
11 and your answers is, is there really an issue here? And
12 I'm beginning to see maybe there is an issue when you
13 said what are they talking about. Can you -- it's a
14 cactus. They're kidnapping cactus, as apparently
15 happens. And if in fact this cactus, if the thing is
16 transferred to the State, that cactus is going to
17 disappear. Now that isn't fish. It isn't wildlife. It
18 isn't water. It's a cactus.

19 So can you take that into account? Is that
20 theoretical? I think they're trying to raise this
21 question of, suppose you know the IRS, that if you mail
22 a refund check at the time, the person who gets it is
23 going to use the \$500 to destroy the last salamander in
24 the world. Okay? Now there we are, endangered species.
25 Does the Act apply to the IRS? I would have thought the

1 answer's no.

2 MR. GLITZENSTEIN: The answer is no, Your
3 Honor.

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

9 And now I wonder if with that approach, is
10 it possible that even the cactus could fall within the
11 nine criteria? You're not going to depart from them but
12 you're going to read them generously in light of the
13 objective of the Endangered Species Act, which is itself
14 an environmental objective. Now how does that work?
15 Can you do that? You're an imaginative lawyer. Can you
16 do it?

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

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

23 Two, that means they consult.

24 But three, the result of the consultation
25 here which has been done means there's no real objection

1 to the transfer, because it's virtually inconceivable
2 given the weapon that the EPA has, withdrawing permits,
3 given a memorandum of agreement, given the possibility
4 of supervision, given the fact that the wildlife service
5 will object, writing them a letter or a phone call
6 immediately, given all that stuff, there's simply no
7 reason to believe that Arizona will fail to protect
8 endangered species.

9 MR. GLITZENSTEIN: I think that's a good
10 summary of what has happened with these consultations,
11 and on the cactus --

12 JUSTICE BREYER: So what's your view of an
13 opinion that roughly wrote what I just said?

14 MR. GLITZENSTEIN: Well, I think the concern
15 I would have is that I think it goes beyond what's
16 necessary here because we're not dealing, everybody
17 agrees, with some purely ministerial situation like that
18 one.

19 I think the other critical factor here, Your
20 Honor, that we haven't talked about, is the funding of
21 this program. And it's very interesting when the
22 government points out, if I can just get across to the
23 Court I think a critical citation, because the
24 government says funding is not before us. And the
25 reason they say that is because it didn't need to be

1 before us when they took the position that authorization
2 of the program was sufficient to trigger their
3 consultation duties. And in a footnote in their reply
4 brief, they say pay no attention to funding, which is of
5 course a discretionary activity, because that's
6 completely separate from the decision to authorize. If
7 you look at 40 C.F.R. Section 123.23(3), and I
8 apologize -- this is a response to their reply brief
9 point so there's not any appendix before the Court --
10 but it specifically provides that funding opportunities
11 are part and parcel of the decision to authorize the
12 program.

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

15 MR. GLITZENSTEIN: Funding of the NPDES
16 program carried out by Arizona that had to be approved
17 in order to allow --

18 JUSTICE SCALIA: How does the government
19 fund it?

20 MR. GLITZENSTEIN: They have to -- there's a
21 -- Section 106 of the Clean Water Act provides the EPA
22 with an opportunity, and it's certainly not mandatory,
23 to provide funding to a State. And this is 40
24 percent Federal -- we're not talking about de minimis
25 funding. So it's one thing for the State to say well,

1 it should get the program. It's another thing to say
2 funding. And just to be clear about this, this is an
3 argument we're making to reinforce the propriety of
4 remand in this case.

5 JUSTICE SCALIA: Well, you -- you have
6 other -- let's assume that I disagree with you on
7 whether they could withhold approval of the NPDES
8 transfer. Even so, I think you -- the point you're
9 making now is that apart from that approval, there were
10 other discretionary actions taken here, one of which is
11 this funding; and another one of which, I believe, is
12 whether -- never mind the MOAs, but -- I have it written
13 down here, one of the other ones. Oh, whether existing
14 permits would be transferred to State authority or not.
15 And that is apparently discretionary and can be -- what
16 do we do about that?

17 MR. GLITZENSTEIN: Well, we suggest, Your
18 Honor -- and I think this goes back to Justice Stevens's
19 question about the change in position. I think we're in
20 an odd position in this Court quite frankly because we
21 have an administrative record where the administrator
22 conceded a duty to comply with Section 7 of the
23 Endangered Species Act. We have a new position here
24 saying they don't. And we think funding and the other
25 example you came up with is a good reason why a common

1 sense result in this case is to say we have a change in
2 position, there are new issues brought to the fore. As
3 a consequence of that --

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

7 MR. GLITZENSTEIN: We have --

8 JUSTICE STEVENS: You shift back and forth
9 on that point.

10 MR. GLITZENSTEIN: Your Honor, let me be
11 clear about that. We never conceded that. What
12 happened --

13 JUSTICE STEVENS: What is your view now?
14 Are they or are they not?

15 MR. GLITZENSTEIN: I think that there are
16 actually arguments that, especially with regard to the
17 wildlife related parts of the criteria, that are not
18 satisfied. Let me -- let me try to explain why we
19 didn't feel it necessary to argue that in the court of
20 appeals.

21 JUSTICE BREYER: Before you say why you
22 didn't argue it, it's exactly that point I sort of
23 expected you might agree when I thought maybe you have
24 hooks to hang the NSA, the Endangered Species Act on.
25 But it was the other half, which I think is what

1 Justice Stevens is saying now. I read through this
2 record, not completely but pretty well, and I couldn't
3 find a single thing that would suggest that Arizona
4 presents any risk to you. And so, what is the risk to
5 an endangered species that you're actually worried about
6 there? And you rather -- I didn't think you'd like to
7 agree with that, but I want to press you to find out
8 what actually is the problem.

9 MR. GLITZENSTEIN: If I can give Your Honor
10 some citations to the record, I think it will help
11 answer that. On page 54 of the joint appendix, the Fish
12 and Wildlife Service biologists, the expert agency
13 employees, said that there would be significant effects
14 to survival and recovery of listed species through a
15 destruction, degradation and fragmentation of habitats.
16 They specifically pinpointed the flycatcher, the
17 southwestern willow flycatcher is a species that could
18 be devastated. That's at page --

19 JUSTICE BREYER: And how would that happen?
20 How would it happen that they would get rid of the
21 flycatcher in Arizona, considering the fact that they
22 have laws themselves that protect endangered species,
23 and that's a bird, and a bird is wildlife; and so if
24 they decide they want to kill all their flycatchers,
25 which I would doubt, you could intervene at EPA and stop

1 them. So how is that actually a problem?

2 MR. GLITZENSTEIN: Your Honor, the concern
3 that they had was that the mechanism that had been used
4 to protect these wildlife species, and particularly
5 plant species, which I want to get to in a moment,
6 because I think actually the concern is even greater
7 with plants, was that the consultation on federally
8 issued permits had in effect been used, and this was not
9 conjectural, they had been used to safeguard
10 considerable habitat for these species. And if I could
11 turn actually to the water level, which is I think
12 actually our best example, and --

13 JUSTICE SCALIA: I mean, that's not enough.
14 Why wouldn't -- what would lead you to believe that it
15 wouldn't -- that the same would not happen when the
16 State issued the permits? I mean, you have to show some
17 reason why we don't trust Arizona to do what the Federal
18 government's doing.

19 MR. GLITZENSTEIN: Your Honor, it is not a
20 question of trusting them. I think part of the outcome
21 of the consultation --

22 JUSTICE SCALIA: Well then, you have to
23 establish jeopardy. You have to establish jeopardy.
24 And the mere fact that you're giving it to a State which
25 Congress has been willing to trust with implementing

1 this law is not enough to show that there's jeopardy.
2 Prima facie, we would expect Arizona to do the right
3 thing.

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

6 MR. GLITZENSTEIN: Yes, Your Honor. The
7 burden is on the Agency in the consultation process.
8 And it's at, as TVA versus Hill makes clear, the benefit
9 of the doubt is accorded to the species. But, could I
10 try to answer that question?

11 CHIEF JUSTICE ROBERTS: Yes.

12 MR. GLITZENSTEIN: We're not saying we don't
13 trust the State. And In fact, one of the outcomes of
14 one these prior consultation processes has been where
15 it's appropriate, the service works had an agreement
16 with the State where it says here are our concerns where
17 the expert Federal agency, we listed these species, you
18 didn't. Part of it's expertise, not trust. And in
19 fact, if the State comes back and says we understand,
20 we'll deal with that problem, that is one aspect of a
21 consultation process that the government is now saying
22 we should never have to go through.

23 On the plants however, Your Honor, there is
24 a very serious concern. In this respect the service
25 biologists said we have protected these plants' habitats

1 through the Section 7 mechanism. The State of Arizona
2 acknowledges that it has no law or regulation which
3 forbids the destruction of federally listed plant
4 species.

5 Section 9 of the Endangered Species Act,
6 which Mr. Kneedler brought up and said it was the most
7 important provision, and I would beg to differ. I think
8 Sweet Home, both the majority and dissenting opinions
9 agree that Section 7 -- and Hill -- that Section 7 is
10 the most important provision. But plant species are not
11 protected generally by Section 9 of the Endangered
12 Species Act, the take provision, except when they're on
13 Federal lands.

14 So we have a situation where the service
15 biologists were saying, and this is how I read the
16 record, and if I can give a couple more citations, page
17 128 and 139 of the joint appendix. On one plant
18 species, joint appendix page 436. On the water on both,
19 they were essentially predicting jeopardy, unless
20 additional protections could be worked out in this
21 process.

22 CHIEF JUSTICE ROBERTS: Jeopardy from the
23 issuance of a prospective future issuance of a permit by
24 Arizona if they get the delegated authority. And that
25 issuance of the permit would be subject to objection and

1 review by EPA and the Fish and Wildlife Service.

2 MR. GLITZENSTEIN: With regard to the plant,
3 Your Honor, EPA's position to date has been that they do
4 not have the authority to protect that plant species
5 under their Clean Water Act authorities. Now we may
6 disagree with that, but that is the position they've
7 taken so far.

8 CHIEF JUSTICE ROBERTS: The position that
9 EPA has taken.

10 MR. GLITZENSTEIN: That's correct, Your
11 Honor.

12 CHIEF JUSTICE ROBERTS: Under their
13 authority.

14 MR. GLITZENSTEIN: Under their Clean Water
15 Act authority, which is what informs their oversight
16 activities.

17 CHIEF JUSTICE ROBERTS: So how does it
18 matter whether they have it or if it's transferred to
19 Arizona?

20 MR. GLITZENSTEIN: Because again, what the
21 consultation process is designed to accomplish, either
22 through the funding, discretionary decision that was
23 made, other mechanisms that can come into play, the idea
24 behind the consultation on the transfer -- and I think
25 this is critical to our position -- is to say if we're

1 not going to be able to protect the species through the
2 State issuance of the permits and the other authorities
3 we have, what understanding can we come to, consistent
4 with our --

5 JUSTICE SCALIA: I don't understand --

6 MR. GLITZENSTEIN: -- other obligations to
7 protect the plant species.

8 JUSTICE SCALIA: I don't understand that
9 answer. The Chief Justice is asking, if EPA cannot do
10 it itself, how is it creating any jeopardy in
11 transferring the authority to somebody else who can't do
12 it?

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

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

18 MR. GLITZENSTEIN: Well, I should just first
19 say that we disagree with the premise of that question.
20 In terms of EPA's position, we happen to think that EPA
21 can protect those kind of plant species, and I think
22 that's one of the additional bases s for a remand.

23 But I think the more important answer to
24 Your Honor's question is that the Fish and Wildlife
25 Service biologist said in this administrative record

1 that the loss of those protections was an indirect
2 effect of the transfer, that because we have used these
3 protections when we've issued Federal permits to prevent
4 species like these plant species from going extinction
5 -- and this was not speculative --

6 JUSTICE KENNEDY: If the EPA can protect the
7 plants when the permit is under its own jurisdiction,
8 why can't it use that same basis for objecting when it's
9 under the State's jurisdiction?

10 MR. GLITZENSTEIN: Your Honor, that's an
11 awfully good question. And in fact we believe that
12 should have been one of the outcomes of the
13 consultations.

14 On the transfer. If one of the results of
15 the transfer -- and I think this was -- I think what's
16 happening is that the government has basically assumed
17 the answer to the consultation before we've gotten to
18 that point. They've assumed --

19 JUSTICE ALITO: What's the difference
20 between Arizona's situation and all the other States
21 that can issue permits? Are they under legal obligation
22 to consult?

23 MR. GLITZENSTEIN: I believe that --

24 JUSTICE ALITO: And where is --

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

1 obligation to consult, Your Honor. Just to be clear,
2 Section 67 imposes no obligation on the State. We
3 completely agree with that. It imposes an obligation on
4 a Federal agency.

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

7 MR. GLITZENSTEIN: We don't disagree with
8 that either, Your Honor. We believe that there are
9 mechanisms that have been used in past consultations,
10 especially after the Louisiana decision that came down,
11 which involve the State not at all, which involve only
12 the Fish and Wildlife Service and the EPA recognizing
13 how they would exercise their --

14 JUSTICE ALITO: I still don't understand the
15 difference between what you think is going to happen in
16 Arizona and what is happening in all the other States
17 that issue permits.

18 MR. GLITZENSTEIN: Your Honor, we're not
19 saying that -- particularly with regard to Texas,
20 Florida, Oklahoma, Louisiana and other States that have
21 gone through the consultation process, we're not saying
22 that anything different should happen. We're saying go
23 through a full consultation process, agree on mechanisms
24 that can protect these species.

25 JUSTICE ALITO: No, in the issuance of a

1 permit in any of these States, pick any State you like,
2 what is the difference between what you envision would
3 happen in Arizona, if Arizona can issue permits, and
4 what's happening in these other States?

5 MR. GLITZENSTEIN: Again, with regard to
6 consultation with Arizona, all we're asking for and all
7 we've ever asked for in this case, and this was what the
8 service biologist said, was use the consultation process
9 to agree on measures that can be put in place
10 post-transfer that will prevent the species from going
11 extinct. That's what happened --

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

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

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

25 JUSTICE SOUTER: No, tell me substantively,

1 what do you want? What substantively do you want at the
2 end of this case?

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

10 JUSTICE SOUTER: And how will they put those
11 mechanisms in legal form?

12 MR. GLITZENSTEIN: They would put those
13 mechanisms in legal form either through memorandum of
14 agreement, which is what's been used in the past,
15 separate agreements between EPA and the Fish and
16 Wildlife Service --

17 JUSTICE SCALIA: By coercing, by coercing
18 the States to sign those agreements on pain of not
19 getting NPDES authority?

20 MR. GLITZENSTEIN: No, Your Honor. In fact
21 --

22 JUSTICE SCALIA: What do they do then? They
23 just whistle and this comes forth? States don't sign
24 stuff just, just for the sake of it.

25 MR. GLITZENSTEIN: Your Honor, I think part

1 of this, these agreements, wouldn't have to be signed by
2 the State at all.

3 JUSTICE SOUTER: Justice Scalia's got a fair
4 point. What if the States say, we don't want a
5 memorandum of agreement? What does the Federal
6 Government do at that point? Doesn't the Federal
7 Government at that point say, okay, we're not going to
8 issue the transfer under Clean Water because we have an
9 independent obligation under Endangered Species and
10 there's got to be both or there will be neither? Isn't
11 that the Federal Government's position?

12 MR. GLITZENSTEIN: At the end of the day I
13 think it is. And there is an endangered species
14 committee. Once again --

15 JUSTICE SCALIA: It's your position, not the
16 Federal Government's position. It's your position of
17 what the Federal Government's position ought to be,
18 right?

19 MR. GLITZENSTEIN: What I was trying to
20 suggest was -- I think if in the end of the day you look
21 at all of these opportunities to protect species and you
22 say there's nothing we can do about it and the State
23 refuses to cooperate, you have what's called jeopardy or
24 destruction of critical habitat, and Congress said that
25 the mechanism for working out the conflict with another

1 law is the endangered species committee, which we have
2 not talked about very much. That was Congress's answer.

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

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 MR. GLITZENSTEIN: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Kneedler, you
15 have four minutes remaining.

16 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

17 ON BEHALF OF THE PETITIONERS

18 MR. KNEEDLER: Mr. Chief Justice:

19 First, with respect, stepping back and
20 looking at the legal theory, we think that this case is
21 really on all fours with the Public Citizen case. In
22 fact, the court of appeals recognized that the operative
23 regulation here, the definition of "indirect effect,"
24 meaning something caused by the agency, is just like the
25 one in Public Citizen. In Public Citizen this Court

1 held that where an agency has a mandatory duty and does
2 not have the ability to control subsequent events, that
3 the agency cannot be regarded as the legal cause of
4 whatever effects happen. That is exactly the case here.

5 Section 402(b) mandates that EPA approve the
6 State's application. EPA therefore, EPA's decision
7 therefore is not the legal cause of any effects that
8 might happen with respect to endangered species.

9 I should point out that in this Court's
10 decision in Sweet Home this Court in footnotes 9 and 13
11 read the other principal provision of the ESA, the take
12 provision, to incorporation a proximate cause
13 limitation. We think it follows that the jeopardize
14 prohibition in Section 7 also incorporates a proximate
15 cause or here legal cause restriction.

16 JUSTICE SCALIA: Mr. Kneeder, I hate to eat
17 up any of your rebuttal time, but would you state
18 briefly what -- how you would treat these other matters
19 that were resolved by the agency and that were not
20 mandatory, its decision to transfer prior certificate
21 authority to the States, for example, and the other
22 instance raised by opposing counsel? What if I agree
23 with you on whether you can deny the NPDES permit, but
24 I'm concerned about these other actions by the agency
25 that were discretionary?

1 MR. KNEEDLER: There has been no challenge
2 to that, so I'm not in a position to give a definitive
3 answer. But I believe to the extent it would be
4 discretionary that Section 7 may well kick in.

5 JUSTICE SCALIA: Should we remand?

6 MR. KNEEDLER: No, because there was no
7 challenge to that. There was no challenge to that
8 aspect of it. This was a challenge to the transfer of
9 authority, not ancillary matters addressed under the
10 agreement.

11 Also, footnote 18 of the court of appeals
12 opinion makes clear that Respondents did not challenge
13 anything to do with funding, which is an entirely
14 separate administrative determination that there's a
15 regulatory set of criteria for how funding gets
16 distributed, it is not dependent on whether the State
17 has NPDES authority. Section 106 of the Clean Water Act
18 has a separate funding mechanism for Clean Water Act
19 authority generally. So funding is simply not, it's
20 simply not in the case.

21 JUSTICE STEVENS: And it's in your
22 discretion -- your distinction to the snail darter case
23 is that the decision to built the dam is discretionary,
24 not mandatory?

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

1 decision in Hill can't be understood in any other day
2 because the Court went out of its way to say that, while
3 Congress committee reports indicated, for the
4 appropriations bills, indicated an expectation that the
5 dam would be built, the Court emphasized the fact that
6 there was no mandate in the appropriations statute
7 itself. That would have been --

8 JUSTICE SCALIA: Do you mean the executive
9 can ignore earmarks?

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

12 JUSTICE BREYER: What's a mandatory
13 decision? No, what's a discretionary decision? I mean,
14 in the sense you're using it. I've never heard of an
15 agency that could just give out money to whoever they
16 want, like you or me. There are always criteria. Write
17 a "shall"; there are always criteria.

18 MR. KNEEDLER: But there are few statutes
19 like this, that say the agency shall unless certain
20 things happen.

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

25 MR. KNEEDLER: There may be particular

1 applications of the standard, but that did not deter
2 this Court in Public Citizen, where the Court applied
3 the same principle and said where the agency has a
4 mandatory duty and no discretion it is not the legal
5 cause. That's the general principle. If there are
6 other cases where that general principle has to be
7 applied, there will be time enough for that
8 consideration to arise.

9 Another important aspect of Hill is this
10 Court quoted Representative Dingell, the sponsor of it,
11 saying that agencies are to take actions within their
12 power, which suggest that -- and we think it's clear
13 through the history, as we recite in our brief at pages
14 27 and 28, from the text of the Act and from the
15 evolution of Section 7, it was always understood to
16 apply to situations where the agencies had the existing
17 authority to take action, not to require them to
18 countermand statutory directives the way the Department
19 of Transportation could not countermand statutory
20 directives in Public Citizen.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 The case is submitted.

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

A	activities 46:16	32:7,23 34:6	American 5:7	36:25 57:16
ability 12:22	activity 39:5	34:19 35:3	5:15 19:24	approach 28:8
28:19 54:2	actual 31:3,21	42:12 44:7,17	23:19,20 34:18	37:9
able 36:5 47:1	add 26:10	49:4 51:6	34:20,22 35:19	appropriate
above-entitled	additional 45:20	53:24 54:1,3	35:22	44:15
1:17 57:25	47:22	54:19,24 56:15	analogous 20:3	appropriations
acceptable	address 7:17	56:19 57:3	analogy 33:16	56:4,6
53:10	11:5 30:17	agency's 8:17	analysis 35:17	approval 3:22
accommodated	31:8 32:15	25:25	ancillary 6:5,21	5:14 6:13,16
7:7	addressed 3:17	ago 50:15	55:9	8:13 9:5 14:17
accommodation	55:9	agree 23:20	answer 11:11	14:18 15:14,16
7:9	adequately 6:25	37:21 41:23	12:25 15:9	20:6 21:18
accomplish	administer 3:15	42:7 45:9 49:3	24:8 37:2,18	22:21 25:9
46:21	4:20 19:2,11	49:23 50:9	42:11 44:10	30:24 35:13
accorded 33:20	25:10 30:25	54:22	47:9,23 48:17	36:2 40:7,9
44:9	administered	agreed 13:17	53:2,11 55:3	approvals 5:1
account 10:4	16:9 31:12	19:13,20 41:5	answers 36:11	approve 3:15,24
11:24 14:9	administering	agreement 7:5	answer's 37:1	4:14 8:4 13:9
20:25 36:19	7:16 20:4	7:11,13 10:1	anyway 17:15	31:20 35:1,6
acknowledges	administration	10:24 11:1,4	apart 40:9	54:5
33:8 45:2	4:1 23:16	11:10,14 13:23	apologize 39:8	approved 16:17
act 3:13 4:3 5:4	31:15	13:25 14:1,3,7	apparently	21:10 39:16
5:9 6:25 7:6,10	administrative	14:7 17:7	36:14 40:15	approving 30:21
8:13,14,25	16:13 33:19	19:18,23 20:2	appeals 16:5	April 1:15
9:11,24 10:1,7	34:17 40:21	21:2,3,8,11,14	41:20 53:22	aquaculture
10:12,16 12:17	47:25 55:14	21:19 22:8,13	55:11	28:15
13:19 14:15,16	administrator	22:16,22,24	APPEARAN...	aquatic 26:19,23
14:22,22 15:8	4:14 40:21	23:18 24:7,10	1:20	area 35:13
15:24 16:9,19	adopted 25:19	24:12 25:12,14	appendix 24:11	argue 41:19,22
18:15 19:14	advanced 9:12	26:9 27:14	24:20,21 34:17	arguing 9:4
20:12,18 23:11	affect 10:18	29:25 35:4,21	39:9 42:11	33:12
23:14,15 24:14	25:10	38:3 44:15	45:17,18	argument 1:18
25:17,18,24	affirmative 11:7	51:14 52:5	applicable 4:2	2:2,5,8 3:3,9
31:21 32:15	agencies 5:4 6:2	55:10	15:12 16:21,22	16:25 17:12
33:17 34:3,8	6:6,6 8:20,20	agreements	20:12	23:4 24:2 34:2
35:11 36:25	11:19 12:2,4	51:15,18 52:1	application 3:15	40:3 53:16
37:6,13 39:21	13:22 14:8	agrees 38:17	3:24 6:14,20	arguments
40:23 41:24	16:14,14 27:6	AL 1:4,7,12	6:24 7:2 25:9	41:16
45:5,12 46:5	27:25 28:2	ALITO 19:12	25:13,21 30:20	Arizona 17:1
46:15 51:6	31:8 51:5	19:17 48:19,24	30:25 54:6	21:6 25:13
53:6 55:17,18	57:11,16	49:5,14,25	applications	38:7 39:16
57:14	agency 1:9 3:6	allegation 5:21	57:1	42:3,21 43:17
action 11:7 12:6	3:14 7:15,17	allow 12:1 31:16	applied 57:2,7	44:2 45:1,24
34:6 57:17	7:20 8:5,17 9:5	39:17	applies 21:9	46:19 49:16
actions 6:3,4	11:24 12:3,6,7	allows 22:2	37:22	50:3,3,6
8:16 40:10	12:12,15 15:20	amendment	apply 18:16 21:5	Arizona's 3:21
54:24 57:11	23:17 27:20	14:24	21:6 26:5,17	3:23,24,25

17:2 48:20 arrangement 20:7 arrangements 5:12 aside 3:22 14:7 asked 50:7 asking 47:9 50:6 aspect 44:20 55:8 57:9 Association 1:3 3:4 assume 40:6 47:14 assumed 48:16 48:18 assuming 30:12 31:25 35:17 assumption 4:9 27:9 assumptions 30:11 assurance 15:23 assure 18:9 Atlantic 28:13 attended 6:25 attention 17:8,9 28:12,21 29:25 39:4 attorney 18:25 attributes 34:21 authorities 46:5 47:2 authority 3:18 4:15 6:15 10:7 10:9 11:2 14:19 16:7 17:3 19:2,11 20:5,11 22:1 23:6 31:19,20 31:20 35:23 37:6 40:14 45:24 46:4,13 46:15 47:11,17 51:19 53:6 54:21 55:9,17 55:19 57:17	authorization 29:10 39:1 authorize 39:6 39:11 authorized 14:17 34:6 automatic 7:2 avoid 27:12 29:21 aware 5:3 awfully 48:11 a.m 1:19 3:2 57:24 <hr/> B back 16:3 23:2 27:24 28:5 29:24 34:22 40:18 41:8 44:19 50:15 53:19 balance 23:22 balanced 18:10 based 10:10 15:7 22:11 bases 47:22 basic 22:4 basically 6:19 20:2 23:14 48:16 basis 14:19 21:12 48:8 beg 8:23 45:7 beginning 27:11 36:12 begs 10:14 behalf 1:22,25 2:4,7,10 3:10 24:3 53:17 believe 9:15 12:3 14:16 38:7 40:11 43:14 48:11,23 49:8 55:3 benefit 44:8 best 43:12 better 11:5	beyond 15:11 20:5 32:10,17 38:15 bills 56:4 biological 21:8 28:16 biologist 47:25 50:8 biologists 42:12 44:25 45:15 bird 42:23,23 bit 27:8 33:7 blank 25:22 breaker 9:22 Breyer 16:24 18:2,5 33:8 36:9 37:4,18 38:12 41:21 42:19 50:16 56:12,21 brief 13:23 26:3 33:6 39:4,8 57:13 briefly 54:18 briefs 5:22 bring 12:2 34:13 bringing 33:15 broad 56:22 brought 41:2 45:6 build 17:20 Builders 1:4 3:5 built 12:1 55:23 56:5 burden 44:7 business 9:13 <hr/> C C 2:1 3:1 cactus 36:14,14 36:15,16,18 37:10 38:11 call 38:5 called 7:5,13 13:22 29:25 52:23 calls 29:20	candidate 15:15 care 13:18 carried 34:6 39:16 carry 3:19 53:9 cart 29:21 case 3:20 4:7 5:7 11:4 21:6,8 23:19 25:12,21 34:15 40:4 41:1 50:7,21 50:24 51:2 53:20,21 54:4 55:20,22 57:23 57:24 cases 57:6 cause 8:18 28:25 54:3,7,12,15 54:15 57:5 caused 53:24 causing 26:23 central 16:5,18 certain 5:11,16 18:9 19:7 56:19 certainly 26:8 39:22 certificate 54:20 certification 18:25 cetera 18:20 37:8 challenge 55:1,7 55:7,8,12 change 5:23 13:6 26:13 35:4,5 40:19 41:1 changed 5:22 50:23 changing 41:5 characterize 5:17 check 36:22 Chief 3:3,11 6:17 23:24 24:4 27:3,17	29:1,8 31:5,10 34:24 35:10,24 44:11 45:22 46:8,12,17 47:9 53:12,14 53:18 57:22 chooses 8:5 Circuit 3:22,23 5:5,19 19:25 20:4 23:19 Circuit's 5:6 19:24 20:15 circumstances 28:22,24 32:5 32:23 citation 38:23 citations 42:10 45:16 Citizen 53:21,25 53:25 57:2,20 clarify 24:8 Clean 3:13 8:13 10:7,12 12:17 14:15,15 23:11 25:17 26:6 34:7 39:21 46:5,14 51:5 52:8 53:6 55:17,18 clear 4:13 18:4,6 33:25 40:2 41:11 44:8 49:1 55:12 57:12 coercing 51:17 51:17 colleagues 4:8 come 19:4 21:1 23:2 28:21 29:19 46:23 47:3 53:8 comes 21:4 44:19 51:23 coming 7:23 comment 11:21 25:20 comments 11:24
--	--	--	--	--

14:9 20:25 Commerce 8:7 committee 52:14 53:1 56:3 common 40:25 communicatio... 23:8 compare 33:11 compensation 20:6 complete 12:21 completely 39:6 42:2 49:3 compliance 24:9 24:13 complied 25:11 25:16 comply 10:21 13:15 19:13 25:23 28:2 40:22 comprehensiv... 15:13 conceded 40:22 41:5,11 concept 21:15 concern 10:15 28:13 38:14 43:2,6 44:24 concerned 12:21 28:14 34:19 54:24 concerns 7:6,11 11:21 12:2,12 12:13 13:19 30:17 31:9 44:16 concession 31:1 condition 5:18 9:15 14:18 22:21 35:18,20 36:1 conditioned 5:13 conditioning 20:5	conditions 20:11 21:18 30:13 conflict 52:25 conflicts 27:13 confronted 22:18 Congress 4:19 32:22 36:6 43:25 51:7 52:24 56:3 Congress's 16:11 53:2 conjectural 43:9 connection 20:10 consequence 28:16 41:3 consequences 8:17 15:18,19 considerable 43:10 consideration 33:10 57:8 considerations 5:13 10:5 considering 42:21 consistent 8:3 23:4 33:7 47:3 constructing 13:7 consult 5:4 6:6 19:20 25:8 30:23 33:25 37:23 48:22 49:1,6 consultation 5:2 6:7,8,18,21 26:1,16 27:10 27:12,15 28:6 28:17 29:16 30:7,13,15,19 30:20 31:25 32:2,10,13,25 37:24 39:3 43:7,21 44:7 44:14,21 46:21	46:24 48:17 49:21,23 50:6 50:8 51:8 consultations 38:10 48:13 49:9 consulted 25:12 28:5 consulting 31:3 33:1 consults 13:10 contact 7:19 context 27:4 continue 14:4 29:5 continuing 7:22 25:15 control 9:1 12:21 15:1,6 54:2 convenience 17:21 cooperate 8:5 52:23 cooperation 8:11 13:21 coordination 13:23 correct 10:8,19 14:5,11 20:13 27:23 46:10 counsel 53:12 54:22 57:22 countermand 57:18,19 couple 45:16 course 39:5 court 1:1,18 3:12 5:22 16:5 24:5 25:15 26:14 31:24 37:20 38:23 39:9 40:20 41:19 53:22,25 54:10 55:11 56:2,5 57:2,2 57:10	courts 5:23 Court's 29:12 54:9 55:25 56:11 cover 24:23 covered 14:12 create 27:14 created 36:7 creating 47:10 criteria 3:17,21 4:15 6:15 7:1 18:6,7,8,13 18:18 28:22 34:8,23 37:11 41:6,17 55:15 56:16,17 critical 26:10 30:10 34:5 38:19,23 46:25 52:24 crosscutting 35:8 cross-cutting 33:13,20 cross-references 18:22 19:3 cultural 34:21 current 25:7 26:21 30:23 C.F.R 39:7	decision 5:7,15 19:24 20:15 22:9 23:21 25:21 39:6,11 46:22 49:10 50:23 54:6,10 54:20 55:23 56:1,11,13,13 decisions 24:15 26:2,2,18 decline 23:17 Defenders 1:7 1:12 3:5,6 deference 30:22 definition 53:23 definitive 55:2 degradation 42:15 delegated 45:24 delegation 28:12 denied 22:19 deny 54:23 denying 6:24 depart 37:11 Department 1:22 8:6 57:18 dependent 55:16 Deputy 1:21 described 13:18 13:21 14:6 20:22 26:2 30:8 description 30:3 designed 46:21 destroy 36:23 destroying 13:6 destruction 34:5 34:5 42:15 45:3 52:24 detailed 7:4 deter 57:1 determination 10:11 18:25 55:14 determines 25:8 30:24
--	--	--	--	--

devastated 42:18	draft 7:18 11:18 11:22 14:8 20:23	31:14,18,22 32:14 33:17 34:3 36:24 37:7,13,22 38:8 40:23 41:24 42:5,22 45:5,11 52:9 52:13 53:1 54:8	34:21,25 35:12 38:2 39:21 42:25 46:1,9 47:9,15,20 48:6 49:6,12 51:15 53:8,9 54:5,6	example 13:6 28:12 30:16 33:14 40:25 43:12 54:21
develop 9:3 15:25	duties 25:25 39:3	37:7,13,22 38:8 40:23 41:24 42:5,22 45:5,11 52:9 52:13 53:1 54:8	47:9,15,20 48:6 49:6,12 51:15 53:8,9 54:5,6	exception 15:7,7 15:16
devise 51:9	duty 40:22 54:1 57:4	41:24 42:5,22 45:5,11 52:9 52:13 53:1 54:8	EPA's 3:22 4:23 5:21 7:13,22 11:17 15:16 20:5 21:2 25:7 33:23 46:3 47:20 54:6	excuse 22:3
differ 45:7	D.C 1:14,22,24	41:24 42:5,22 45:5,11 52:9 52:13 53:1 54:8	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	executive 56:8
difference 6:23 48:19 49:15 50:2	E	endangering 13:5	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	exercise 28:10 35:22 49:13
different 6:1 49:22	E 2:1 3:1,1	endangering 13:5	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	existing 37:6 40:13 57:16
difficulty 21:15	ear 12:8	enforced 9:11	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	expect 44:2
Dingell 57:10	earlier 16:4	enforcement 10:15 12:24 17:10	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	expectation 56:4 expected 41:23
directive 4:5	earmarks 56:9	enforcement 10:15 12:24 17:10	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	expert 32:7 42:12 44:17
directives 57:18 57:20	eat 54:16	engaged 6:8 ensure 6:3	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	expertise 44:18
disagree 40:6 46:6 47:19 49:7	EDWIN 1:21 2:3,9 3:9 53:16	enter 21:18 22:7 22:15 23:13,17 35:4	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	explain 11:17 41:18
disappear 36:17	effect 9:2,12,13 9:20 12:23,25 16:1 43:8 48:2 50:16 53:23	entered 10:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	explore 26:21
disapprove 6:20	effects 42:13 54:4,7	entirely 55:13	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	exporting 16:20
disconnect 27:9	effluent 19:7	entitled 23:17	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	expresses 4:17
discretion 4:11 8:17 55:22 57:4	effort 32:20 51:8	environmental 1:9 3:6,14 18:18 35:3 37:14	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	extent 13:4 23:20 55:3
discretionary 17:16 39:5 40:10,15 46:22 54:25 55:4,23 56:13	either 46:21 49:8 51:13	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	extinct 50:11
discuss 28:22	elements 24:12	EPA 3:16,23 4:3 4:10,22 5:4,7 5:10,12,17 6:7 6:15,20 7:8,14 7:18,19,23 8:4 9:15 10:2,4,6,9 10:18,20,25 11:6,9 12:14 12:14,15,21 13:3,9,25 14:2 14:6,17 16:6,9 16:25 19:6,9 20:15,16,17,23 21:10 22:3,18 23:1,6,8,10,12 23:14 24:15 25:8,22 30:3 30:16,24 31:15 32:4 33:1	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	extinction 26:23 48:4
discussed 24:7	elevate 33:17	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	face 34:3
discussion 32:20	embodied 14:6	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	facie 44:2
dispute 3:20	emphasize 8:12	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	facilitate 7:22
dissenting 45:8	emphasized 56:5	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	fact 5:17 31:2 33:18 36:15 38:4 42:21 43:24 44:13,19 48:11 51:20 53:9,22 55:25 56:5
distinction 26:19 55:22	employees 42:13	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	factor 38:19
distributed 55:16	encompass 33:9	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	factors 4:10 32:10,18 33:2 33:9 34:1,8
documents 28:6	endangered 4:2 5:3,9,12 6:24 7:6,10 8:13,25 9:11,23 10:1,4 10:15,18,22 11:21 12:20 13:12,18 14:22 14:23 15:24 16:9,19,23 19:14 20:12,18 23:15 24:14 25:18,23 27:19	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	fail 38:7
doing 13:11 31:4 31:24 35:12 43:18	endangered 4:2 5:3,9,12 6:24 7:6,10 8:13,25 9:11,23 10:1,4 10:15,18,22 11:21 12:20 13:12,18 14:22 14:23 15:24 16:9,19,23 19:14 20:12,18 23:15 24:14 25:18,23 27:19	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	failing 12:15
domain 7:3	endangered 4:2 5:3,9,12 6:24 7:6,10 8:13,25 9:11,23 10:1,4 10:15,18,22 11:21 12:20 13:12,18 14:22 14:23 15:24 16:9,19,23 19:14 20:12,18 23:15 24:14 25:18,23 27:19	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	fair 52:3
doubt 42:25 44:9	endangered 4:2 5:3,9,12 6:24 7:6,10 8:13,25 9:11,23 10:1,4 10:15,18,22 11:21 12:20 13:12,18 14:22 14:23 15:24 16:9,19,23 19:14 20:12,18 23:15 24:14 25:18,23 27:19	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	
draconian 32:1	endangered 4:2 5:3,9,12 6:24 7:6,10 8:13,25 9:11,23 10:1,4 10:15,18,22 11:21 12:20 13:12,18 14:22 14:23 15:24 16:9,19,23 19:14 20:12,18 23:15 24:14 25:18,23 27:19	envision 50:2	equally 8:14 equivalent 4:1 ERIC 1:24 2:6 24:2	

faith 51:6,7	51:15	40:2,11,24	38:14 39:15,20	guess 29:11
fall 34:23 37:10	five 18:7	46:22 55:13,15	40:17 41:7,10	50:13
far 12:20 46:7	Florida 20:9,20	55:18,19 56:23	41:15 42:9	guidelines 10:12
February 13:24	49:20	furnish 7:17	43:2,19 44:6	22:4,4 23:6
Federal 6:2,5	flushed 34:16	10:3 11:18	44:12 46:2,10	
7:4 8:19,25 9:1	flycatcher 42:16	14:8	46:14,20 47:6	H
10:3 11:19	42:17,21	furnished 20:24	47:13,18 48:10	habitat 13:7,8,9
12:2 13:22	flycatchers	further 11:9	48:23,25 49:7	14:13,20 26:6
15:14 16:14	42:24	future 9:3 16:2	49:18 50:5,22	34:4,5 43:10
31:12 39:24	follow 50:12	45:23	51:3,12,20,25	52:24
43:17 44:17	following 21:16		52:12,19 53:13	habitats 42:15
45:13 48:3	28:24	G	go 16:3 20:16	44:25
49:4 51:5 52:5	follows 54:13	G 3:1	27:24 28:5,18	half 41:25
52:6,11,16,17	footnote 39:3	general 1:21	28:23 44:22	hang 41:24
federalism-se...	55:11	18:25 50:15	49:22	happen 9:3
8:21 16:11	footnotes 54:10	57:5,6	goes 32:13 38:15	15:18,19 16:2
federally 25:10	forbids 45:3	generally 15:12	40:18	42:19,20 43:15
43:7 45:3	force 14:2	16:21 45:11	going 7:1 11:13	47:20 49:15,22
feds 9:9	fore 41:2	55:19	15:24 16:25	50:3 54:4,8
feel 27:2 41:19	Forestry 5:7,15	generously	17:7,8 27:18	56:20
felt 32:22	19:24 23:19,20	37:12	28:11,17,19,25	happened 38:10
Fifth 5:5,6,19	form 51:11,13	getting 50:13	30:4 32:6	41:12 50:11
19:24,25 20:4	forth 26:1 41:8	51:19	33:25 35:5,5	happening
20:14 23:19	51:23	Ginsburg 6:23	35:25 36:16,23	48:16 49:16
figure 18:14	forward 3:19	13:20 14:1	37:11,12,21	50:4
36:10	20:16	20:8,14,19	47:1 48:4	happens 12:11
filed 24:11	found 33:6	21:5	49:15 50:10	36:15
final 25:21	four 53:15	Ginsburg's 24:9	52:7	harm 47:16
find 42:3,7	fours 53:21	give 9:20 42:9	good 38:9 40:25	harmonized
finds 3:16 4:14	fragmentation	45:16 55:2	48:11 51:6,7	25:19
fine 8:8 18:2	42:15	56:15	gotten 48:17	hate 54:16
first 3:4,24 9:25	frankly 40:20	given 38:2,3,3,4	government 9:1	hear 3:3
11:12 17:1	frequently 32:1	38:6	9:2 26:14	heard 56:14
18:22 24:24	front 10:24 11:4	gives 9:5 11:20	29:19 31:12,13	held 3:23 19:25
25:6 33:9 34:7	11:15	15:9	34:10 38:22,24	23:19 54:1
35:15 47:18	full 9:20 14:2	giving 43:24	39:18 44:21	help 42:10
53:19	24:25 25:6	Glitzenstein	48:16 50:23	hesitate 23:1
fish 5:10 6:6 8:6	49:23	1:24 2:6 24:1,2	52:6,7	Hill 44:8 45:9
11:20,25 12:13	fund 39:19	24:4,18,20	government's	56:1 57:9
13:10,17 14:8	fundamental	25:2,4,6 26:8	4:22 26:11	historic 34:20
18:11 19:4,8	29:13	27:7,23 29:6	33:6,16 34:16	history 57:13
19:20 20:24	fundamentally	29:11 30:5,9	43:18 52:11,16	holding 4:4
21:1 27:21	6:12 8:18	30:22 31:23	52:17	Home 1:3 3:4
28:19 30:7	funded 34:6	32:12,19 33:5	greater 43:6	45:8 54:10
32:3 36:17	funding 38:20	34:2,11 35:7	ground 22:8	Honor 27:7,24
42:11 46:1	38:24 39:4,10	35:14 36:3	grounds 20:1	28:7 29:6,12
47:24 49:12	39:14,15,23,25	37:2,17 38:9	guarantees 9:2	30:9,23 31:6

31:23 32:12 33:5 34:11 35:8,14 36:4 37:3 38:20 40:18 41:10 42:9 43:2,19 44:6,23 46:3 46:11 47:13 48:10 49:1,8 49:18 51:3,20 51:25 honored 15:24 Honor's 47:24 hooks 41:24 horse 29:22 hypothetical 33:24	impose 5:8 7:23 16:12 20:15 23:10 30:13 35:18,20 36:1 imposes 6:2 8:19 30:2 49:2,3,5 51:4 imposing 53:4 inapplicable 16:16 including 11:25 14:7 21:9 inconceivable 38:1 inconsistent 4:4 4:5 16:10 incorporates 54:14 incorporating 19:4 incorporation 54:12 independent 52:9 Indian 33:14 indicated 56:3,4 indirect 12:25 48:1 53:23 individual 13:13 industry 28:15 informed 37:7 informs 46:15 insist 23:1 insisted 23:12 instance 33:24 54:22 insured 3:25 interest 17:21 interesting 26:20 38:21 interpretation 4:23 interrupted 29:8 intervene 42:25 invoked 19:7 involve 18:14	49:11,11 involved 19:23 involves 18:15 in-the-water 15:19 IRS 36:21,25 issuance 31:11 45:23,23,25 47:2 49:25 issue 5:24 23:6 28:8 29:10 34:10 36:11,12 48:21 49:17 50:3 52:8 issued 15:20,21 27:5,19 30:20 31:8 32:5 33:3 43:8,16 48:3 issues 4:3 10:18 21:23 29:17 34:15 41:2	15:22 16:24 18:2,5 19:12 19:17 20:8,14 20:14,19,22 21:5,13,22,25 22:6,14,23 23:3,24 24:4,9 24:16,19,22 25:1,3,5 26:4 26:11,13 27:2 27:3,17,25 29:1,3,7,24 30:6,18 31:5 31:10 32:9,17 32:24 33:8,22 34:9,12,24 35:10,24 36:9 36:10 37:4,18 38:12 39:13,18 40:5,18 41:4,8 41:13,21 42:1 42:19 43:13,22 44:4,11 45:22 46:8,12,17 47:5,8,9,14 48:6,19,24 49:5,14,25 50:12,16,25 51:10,17,22 52:3,3,15 53:12,14,18 54:16 55:5,21 56:8,12,21 57:22	kind 9:6 16:1 21:14 30:6 47:21 kinds 29:17 Kneedler 1:21 2:3,9 3:8,9,11 4:12,24 5:25 6:11,19 7:12 8:2,15 9:14,25 10:8,17,25 11:8 12:10 13:3,8,24 14:5 14:23 15:2,11 16:3 17:25 18:3,21 19:15 19:22 20:13,21 21:7,13,20,24 22:2,10,17,25 23:5,25 25:15 27:9 29:4 30:8 45:6 53:14,16 53:18 54:16 55:1,6,25 56:10,18,25 know 9:17 31:8 35:11 36:21 39:13
<hr/> I <hr/> ICC 17:19 idea 46:23 ignore 9:21 15:10 56:9 ignoring 11:6 imaginable 29:23 imaginative 18:13 37:15 immediate 15:17 immediately 38:6 impact 26:24 27:18 34:19 35:23 impacts 12:21 14:12,13 28:15 32:15 33:10 implementing 43:25 implication 15:4 15:7 important 23:2 32:22 33:11 36:6 45:7,10 47:23 57:9 importing 16:20		<hr/> J <hr/> jeopardize 6:3,4 6:22 31:17,21 54:13 jeopardizing 31:14 jeopardy 17:11 28:25 34:4 43:23,23 44:1 44:5 45:19,22 47:10 52:23 joint 34:17 42:11 45:17,18 judgment 16:11 jurisdiction 8:8 48:7,9 Justice 1:22 3:3 3:11 4:7,21 5:20 6:9,17,23 7:25 8:10,22 9:17 10:6,14 10:23 11:3,11 12:5,23 13:4 13:20 14:1,11 14:21 15:1,5	<hr/> K <hr/> keep 9:1 Kennedy 4:7 32:9,17,24 33:22 34:9,12 48:6 Kennedy's 36:10 kick 55:4 kidnapping 36:14 kill 42:24	<hr/> L <hr/> lands 45:13 language 19:19 25:19 27:15 37:8 law 3:19 18:24 35:13 44:1 45:2 53:1 laws 17:2 42:22 lawyer 18:14 37:15 lead 43:14 left 10:7 legal 3:18 4:15 6:14 18:23 19:11 25:25 33:13,20 34:13 48:21 51:11,13 53:20 54:3,7

54:15 57:4 legislation 47:16 legitimate 22:12 letter 35:2 38:5 let's 29:19 34:25 40:6 level 12:19 43:11 leverage 31:18 35:12 light 37:7,12 limitation 34:25 54:13 limitations 7:19 limited 31:19 line 35:7 listed 25:10 32:11,15 42:14 44:17 45:3 listen 12:8 little 21:15 27:8 33:7 lodge 32:6 long 4:21,22 53:3 look 5:12 7:19 17:2,3 18:7 24:10 26:25 27:4 28:5 33:13 34:7,17 35:23 39:7 52:20 looking 53:20 looks 18:23 loss 48:1 Louisiana 5:14 5:18 19:23 49:10,20 lower 5:23	22:23 27:10 30:10,12 40:3 40:9 mandate 8:14 56:6 mandates 54:5 mandatory 4:5 6:14 8:12 9:19 17:17 27:1 39:22 54:1,20 55:24 56:12 57:4 matter 1:17 26:12 44:4 46:18 57:25 matters 54:18 55:9 mean 8:11 16:16 17:22 35:16 43:13,16 47:14 56:8,13,21 meaning 53:24 means 37:23,25 measured 13:14 measures 50:9 mechanism 7:14 9:12 16:1 17:10 28:20 31:6 36:7 43:3 45:1 52:25 55:18 mechanisms 11:9 13:17 25:17 46:23 49:9,23 51:9 51:11,13 meet 7:1 memorandum 7:5,11,12,13 10:1,24 11:10 11:14 17:5,6 19:17,23 20:1 21:2,2,8,11,14 21:19,21 22:7 22:12,15,21,24 23:13 24:6,10 24:12 25:12,14	26:9 27:14 29:25 35:4 38:3 51:13 52:5 mentioned 6:7 20:8,10 mere 43:24 met 4:10 mind 9:9 40:12 56:24 minimis 39:24 minimum 22:4 23:7,7 ministerial 38:17 minute 50:15 minutes 50:13 53:15 MOAs 40:12 moment 43:5 money 56:15 mucking 17:4	56:14 new 21:15 23:10 26:12 30:13 34:16 35:18 40:23 41:2 nine 3:17 4:9 6:14 7:1 17:18 18:6,12,18 21:17 32:10,18 33:2 34:1,23 37:11 41:6 56:22 Ninth 3:21,23 NOAA 8:6 12:1 12:14 13:11 20:25 21:1 non-discretio... 31:19 non-water 14:13 note 27:13 notice 25:19 notified 12:14 no-jeopardy 26:17 NPDES 3:16 4:20 25:10 29:10 39:15 40:7 51:19 54:23 55:17 NSA 41:24 number 7:8	11:14 12:5 20:16 26:25 29:13 30:2 32:14 35:9 36:1 48:21 49:1,2,3,6 52:9 53:5 obligations 5:8 7:23 8:19 26:16 27:13 32:21 33:13,21 34:13 47:6 51:5 obvious 29:22 occupational 35:2 odd 33:7 40:20 odds 11:5 offered 50:16 oh 33:17 40:13 okay 36:24 52:7 Oklahoma 49:20 once 16:16 25:22 52:14 ones 40:13 on-the-ground 15:18 operative 53:22 opinion 16:5 28:16 38:13 50:16 55:12 opinions 45:8 opportunities 39:10 52:21 opportunity 11:21 39:22 53:7 opposed 11:6 26:6 opposing 54:22 oral 1:17 2:2,5 3:9 24:2 order 7:21 29:20 39:17 OSHA 35:1,10 ought 52:17
<hr/> M <hr/> mail 36:21 Maine 20:9,20 28:12 30:15 majority 4:25 5:1 45:8 making 16:4				
		<hr/> N <hr/> N 2:1,1 3:1 NAHB 24:11,20 narrowest 50:22 National 1:3 3:4 nationwide 21:11 Native 34:18,20 34:22 35:19,21 nature 8:12 14:14 necessary 10:22 12:19 38:16 41:19 necessity 17:21 need 10:25 31:18 38:25 50:19,21,23 neither 15:8,9 52:10 never 5:2,7,13 19:6 20:15 26:14 40:12 41:11 44:22	<hr/> O <hr/> O 2:1 3:1 object 10:9,20 11:1,7 12:16 12:22 38:5 objecting 28:23 48:8 objection 22:11 37:25 45:25 objections 32:6 objective 37:13 37:14 objectives 37:8 obligation 6:2,5 6:7,22 9:22	

outcome 30:12 32:2 35:17 43:20	28:25 30:19,19 31:11 45:23,25 48:7 50:1 54:23	39:9 40:8 41:9 41:22 48:18 50:20 52:4,6,7 53:4 54:9	48:3 50:10 previously 26:15	31:1,12,15 38:21 39:2,12 39:16 40:1
outcomes 30:14 44:13 48:12	permits 4:3 7:18 11:18 14:8	points 38:22	pre-existing 20:23	programs 5:5,18 15:14 21:9
outside 23:11	20:24 26:5	policy 4:19	Prima 44:2	22:5 23:7 31:4
oversight 7:22 28:10,18 35:22 46:15 53:7	27:5,20 28:9 28:20 31:7,17 32:4 33:3 38:2 40:14 43:8,16 47:2 48:3,21 49:17 50:3	pollution 26:24	principal 28:13 54:11	prohibit 16:22
<hr/> P <hr/>	person 36:22	population 18:10	principle 57:3,5 57:6	prohibition 16:18 26:17 54:14
P 3:1	petition 24:11	position 4:12,22 5:21,22,23 6:9 6:11,13,17 10:19 16:6 26:11,12,13,22 26:22 33:16,22 34:16 39:1 40:19,20,23 41:2,5 46:3,6,8 46:25 47:20 50:24 52:11,15 52:16,16,17 55:2	prior 15:8 30:14 44:14 54:20	prohibits 34:4
page 2:2 24:10 24:18 30:1 34:18 42:11,18 45:16,18	permitting 14:18 16:17 20:11	possible 37:10	probably 9:8 22:19,19 56:23	project 13:5
pages 24:22 57:13	person 36:22	post-transfer 30:17 50:10 53:9	problem 9:18 11:6,13 13:1 15:10 17:10 18:5 35:15,16 42:8 43:1 44:20	propagation 18:10
pain 51:18	Petitioner 1:10 1:23 3:10	possibility 38:3	problems 9:7 28:4 29:21 36:5	proper 33:1
paragraph 24:24,25 25:7 30:1	Petitioners 1:5 2:4,10 53:17	possible 37:10	procedural 7:14 7:21 12:11 16:12	properties 34:20
paraphrased 17:13	phone 38:5	post-transfer 30:17 50:10 53:9	procedure 9:6	proposal 9:3
parcel 39:11	pick 50:1	potential 31:13	procedures 31:16	propriety 33:23 40:3
part 9:7 12:6 17:12,14,17 22:5 39:11 43:20 44:18 51:25 56:10	pinpointed 42:16	post-transfer 30:17 50:10 53:9	proceedings 25:20	prospective 45:23
particular 4:19 27:19 31:16 56:25	place 3:25 5:2 5:16 9:6 11:9 11:17 16:8 20:6 29:4 31:15 50:9	post-transfer 30:17 50:10 53:9	process 27:10,12 27:15 29:16,17 29:18,20 30:13 30:15 31:25 32:2 34:17 44:7,21 45:21 46:21 49:21,23 50:8 51:8	protect 10:22 12:20 17:2 19:8 38:7 42:22 43:4 46:4 47:1,7,15 47:17,21 48:6 49:24 51:9 52:21
particularly 15:8,15 18:4 24:6 43:4 49:19	plan 30:21	practice 25:7 30:23 31:3	proceedings 25:20	protected 13:12 44:25 45:11
parts 41:17	plant 43:5 45:3 45:10,17 46:2 46:4 47:7,15 47:21 48:4	precisely 27:16 29:17 36:7	process 27:10,12 27:15 29:16,17 29:18,20 30:13 30:15 31:25 32:2 34:17 44:7,21 45:21 46:21 49:21,23 50:8 51:8	protection 1:9 3:6,14 4:18 18:10,18
pay 17:8,9 28:11 39:4	plants 43:7 44:23,25 48:7	predicting 45:19	procedures 31:16	protections 4:1 5:16 16:8 45:20 48:1,3
percent 39:24	play 46:23	prefaced 18:15	proceedings 25:20	provide 9:2 39:23
period 22:16	please 3:12 24:5 50:20	preference 4:18	processes 44:14	provided 17:20 20:21 51:8
permit 10:10,11 10:20,20 11:1 11:22 12:16,22 13:14 15:21 17:5 27:19	point 4:16 7:25 8:8,23 9:16 10:6 16:4 25:22 26:10 29:11 31:10,11 33:6 34:10	premise 47:19	program 3:16 3:16,19,21,23 4:20 5:14,14 7:16 15:17 16:1,17 19:11 20:4 22:21 23:9,16 25:10	provides 3:14 22:3 25:16 39:10,21 53:7
		prepared 28:16		provision 16:18 19:14,25 45:7 45:10,12 54:11
		presents 42:4		
		press 42:7		
		presumably 35:25		
		pretty 17:13 42:2		
		prevent 15:25		

54:12 provisions 12:1 16:19,22 19:5 29:14 proximate 54:12 54:14 public 11:18 17:21 53:21,25 53:25 57:2,20 purely 38:17 purpose 27:12 purposes 14:25 put 29:21 50:9 50:17 51:10,12 putting 17:11 20:6 33:10	raised 11:22 12:12,13 34:15 54:22 raises 13:1 rare 36:8 reach 32:3 read 26:4 30:1 37:6,7,12,20 37:21 42:1 45:15 54:11 reads 24:25 real 37:25 realize 8:22 really 7:14 29:21 36:11 50:18 53:21 reason 12:3 13:5 15:9 31:4 34:13 38:7,25 40:25 43:17 reasonable 12:6 reasoning 15:23 37:5 rebuttal 2:8 53:16 54:17 recall 22:20 received 14:10 recite 57:13 recognize 36:6 recognized 53:22 recognizing 49:12 reconcile 32:21 reconciled 25:18 26:1 29:15,18 record 32:8 33:19 40:21 42:2,10 45:16 47:25 recovery 42:14 references 19:3 referred 13:23 referring 6:1 13:20 24:24 reflected 7:11 25:20	reflection 26:22 31:2 reflects 14:14 refund 36:22 refusal 22:10 refuse 17:4 refused 22:7 refuses 52:23 refusing 22:9 regard 41:16 46:2 49:19 50:5 regarded 54:3 regulation 21:22 22:1 45:2 53:23 regulations 7:14 11:10,17,23 12:10 14:6 20:23 21:4 22:20 regulatory 55:15 reinforce 40:3 reinforced 4:17 reinforces 34:14 related 41:17 religious 34:21 remain 16:21 remaining 53:15 remand 26:21 34:14 40:4 47:22 55:5 remanded 50:24 remedy 12:13 repeal 15:3 repeals 15:3 replicated 16:8 reply 33:6 39:3 39:8 report 18:23 reports 56:3 Representative 57:10 represented 25:15 require 8:10 9:6	9:12 11:17,23 18:1 20:23 22:23 49:6 57:17 required 15:23 25:23 requirement 27:1 requirements 10:12 16:13 23:11 26:6 requires 8:3,4 18:24 21:23 27:11 requiring 11:6 reserve 23:22 resolved 54:19 respect 8:7,16 9:23,25 10:17 12:18 13:16 14:20 33:2 34:12 44:24 53:19 54:8 respond 9:8 11:13 12:12 Respondents 1:25 2:7 24:3 55:12 Respondent's 16:6 response 8:18 9:3,19 12:7 25:13 26:12 39:8 responses 18:21 responsibilities 28:10 responsibility 33:15 rest 16:16 restriction 54:15 result 15:17 26:24 34:4 37:19,24 41:1 results 48:14 retains 12:21	retreated 14:3 return 14:10 review 27:22 31:16,21 46:1 53:9 reviewing 27:5 rid 42:20 right 11:14 18:2 27:4 28:8 30:5 37:18 44:2 52:18 rightly 8:12 risk 42:4,4 Roberts 3:3 6:17 23:24 27:3,17 29:1 31:5,10 34:24 35:10,24 44:11 45:22 46:8,12,17 53:12,14 57:22 role 7:22 roughly 38:13 rules 35:2,4,5 ruling 51:4 running 23:9
<hr/> Q <hr/> quality 10:17,21 12:18,20,25 13:6,9,10,13 13:14,16 14:16 19:10 quality-related 14:13 question 4:8 8:19,23 9:10 10:14 11:12 15:4,14 21:14 24:9 26:13 35:15 36:21 40:19 41:4 43:20 44:10 47:19,24 48:11 53:11 questioning 33:8 questions 36:10 quite 8:12 27:3 40:20 quote 24:23 quoted 57:10	<hr/> R <hr/> R 1:24 2:6 3:1 24:2 railroad 17:20 raise 36:20			<hr/> S <hr/> s 1:21 2:1,3,9 3:1,9 47:22 53:16 safeguard 43:9 safety 35:2 sake 51:24 salamander 36:23 salmon 28:14 satisfactory 15:9 satisfied 4:16 6:15 37:19 41:6,18 satisfies 3:21 satisfy 3:17 10:11 12:16 17:11 saying 7:1,7 12:23 17:19,22

18:5 26:15 29:15 32:9,13 33:18,23 40:24 42:1 44:12,21 45:15 49:19,21 49:22 57:11 says 4:13 17:15 22:14,15 25:7 26:9 30:23 32:4 34:3,25 35:11 38:24 44:16,19 51:4 Scalia 13:4 14:11 24:16,19 24:22 25:1,3,5 26:4,11 27:2 29:3,7,24 30:6 30:18 39:13,18 40:5 43:13,22 47:5,8,14 51:17,22 52:15 54:16 55:5 56:8 Scalia's 52:3 scope 10:5 22:12 section 3:13 4:2 4:4,5,13 5:3,8 6:1 8:3,19 10:9 15:11,12 16:13 19:6 20:3,17 23:15 24:13 25:23 26:16 27:1,11 28:9 28:21 32:2 39:7,21 40:22 45:1,5,9,11 49:2 54:5,14 55:4,17 57:15 see 9:21 29:14 30:1 36:12 seemingly 27:1 sense 41:1 56:14 sent 35:1 separate 23:5 32:14 39:6 51:15 55:14,18 serious 44:24	service 5:11 8:6 11:20 12:1,14 13:11,17 14:9 27:21 28:20 30:16 32:3 38:4 42:12 44:15,24 45:14 46:1 47:25 49:12 50:8 51:16 53:7 services 10:3 25:8 30:24 set 3:22 12:19 26:1 35:1 55:15 setting 19:5,6,7 shellfish 18:11 18:19 shift 41:8 short 50:14 show 43:16 44:1 44:5 shows 32:8 side 4:9 13:1 30:11 31:2 33:11 sign 51:18,23 signed 52:1 significant 42:13 similar 20:17 simply 12:7 14:14 38:6 50:23 53:5 55:19,20 single 42:3 53:5 sit 12:7 32:25 situation 28:1 36:8 38:17 45:14 48:20 situations 57:16 six 5:4 snail 55:22 Solicitor 1:21 somebody 47:11 47:17 somewhat 31:25	sorry 25:2 29:2 34:22 sort 5:18 7:18 8:23 13:7 16:8 16:12 23:9 41:22 SOUR 11:11 Souter 7:25 8:10 8:22 9:17 10:6 10:14,23 11:3 12:5,23 14:21 15:1,5,22 20:22 27:25 44:4 50:12,25 51:10 52:3 southwestern 42:17 speaks 15:13 special 28:11 species 4:3 5:3,9 5:13 6:4,25 7:6 7:10 8:7,14,25 9:11,23 10:1,5 10:16,18,22 11:21 12:20 13:5,12,19 14:22,24 15:24 16:9,19,23 17:11 19:14 20:12,18 23:15 24:14 25:11,18 25:24 26:19,20 26:24 27:19 28:11,13,25 31:14,18,22 32:7,15,15 33:17 34:3 36:24 37:7,13 38:8 40:23 41:24 42:5,14 42:17,22 43:4 43:5,10 44:9 44:17 45:4,5 45:10,12,18 46:4 47:1,7,15 47:21 48:4,4 49:24 50:10	51:9 52:9,13 52:21 53:1 54:8 specifically 11:19 15:13 22:20 25:16 39:10 42:16 specifics 50:15 speculate 28:2 speculative 48:5 spell 30:16 spelled 28:6 50:17 sponsor 57:10 spur 17:20 stage 30:21 standard 17:12 57:1 standards 10:21 12:17,19,25 13:9,10,13,14 17:18 19:5,8,9 19:10 22:4 23:7 start 17:4 24:6 state 3:15,18,18 4:15,18 5:8,14 6:14 7:15,17 7:20 8:5,20 9:7 10:10,11,20,21 11:1,5,6,18,23 12:2,4,6,7,12 12:15,16 13:10 13:13 14:8,19 14:19 15:14,17 15:20 16:7,14 16:17 18:9,23 18:24 19:1,1 19:10,20 20:3 20:6,15 21:18 22:5,7 23:7,11 23:13,17 26:5 27:5,20 28:23 30:3,14,21 31:7,13 35:3 35:19,20 36:16 39:23,25 40:14	43:16,24 44:13 44:16,19 45:1 47:2 49:2,11 50:1 52:2,22 53:5 54:17 55:16 states 1:1,18 4:19,20 5:16 7:8 9:8,13 11:12 19:12,18 20:9,10 21:3 21:23 32:5 33:3 35:11,24 48:20 49:6,16 49:20 50:1,4 51:18,23 52:4 54:21 state's 3:16 6:20 7:3,16 10:25 19:9 25:9 30:25 48:9,25 54:6 State-adminis... 21:9 status 33:18,19 statute 4:23 7:7 15:12 17:23 18:1,1 32:11 56:6 statutes 4:10 7:24 9:19 18:7 28:3 29:13 56:18 statutory 21:25 27:13 41:6 57:18,19 stepping 53:19 Stevens 4:21 5:20 6:9 21:13 21:22,25 22:6 22:14,23 23:3 41:4,8,13 42:1 55:21 Stevens's 26:13 40:18 stop 42:25 stress 16:15
---	--	---	--	--

string 20:9	11:7,24 12:6	30:10 31:1,24	46:18	25:24 32:4
strong 4:18	13:18 14:2,9	32:7,12,19,19	transferring	47:3 53:8
struck 5:15	20:25 26:25	33:7,11,16	47:11,16	understood 5:19
stuff 38:6 51:24	36:19 45:12	34:2,8,9,14	transfers 5:1	29:4 56:1
subject 17:23	54:11 57:11,17	35:7,15,16	19:18	57:15
45:25	taken 5:1 40:10	36:4,6,20	Transportation	United 1:1,18
submit 26:21	46:7,9	37:17 38:9,14	57:19	unlawful 20:1
submitted 11:25	takes 10:19	38:15,19,23	treat 54:18	unnecessary
27:21 57:23,25	talked 38:20	40:8,18,19,24	tribes 34:18,22	56:11
subsequent	53:2	41:15,25 42:6	35:19,22	upland 13:8
14:24 54:2	talking 15:21	42:10 43:6,11	Tribe's 25:9	14:13,20,20
substantive 6:21	30:18 32:8	43:20 45:7	30:25	26:6,20
7:23 16:12	34:1 36:13	46:24 47:20,21	tried 5:7 20:15	use 18:19 29:20
23:10	39:14,24	47:23 48:15,15	trigger 39:2	36:23 48:8
substantively	technical 44:4	49:15 51:25	true 31:23 37:5	50:8 51:8
50:25 51:1	tell 50:25	52:13,20 53:10	trust 33:14	uses 17:23
succinctly 50:21	tells 37:6	53:20 54:13	43:17,25 44:13	U.S.C 4:17 22:2
suddenly 17:22	TER 11:11	57:12	44:18	
sufficient 39:2	terms 47:20	thought 29:3	trusting 43:20	V
suggest 40:17	Texas 20:9,20	36:25 37:5	try 12:14 24:8	v 1:6,11
42:3 52:20	30:15 49:19	three 37:24	29:21 41:18	vague 18:19
53:3 57:12	text 57:14	thrust 16:5	44:10	value 34:14
suggested 26:15	Thank 23:24	tie 9:22	trying 20:2	values 9:9
28:7	53:12,13 57:21	time 4:25,25	29:12 33:17	vast 4:25,25
suggesting 8:24	57:22	6:18 7:18	36:10,20 52:19	vehicle 7:23
27:18 31:6	theoretical	18:12 23:23	53:3	23:9
suggestion	36:20	33:9 36:22	Tuesday 1:15	versus 3:5,6
27:24	theory 53:20	50:13 54:17	turn 43:11	44:8
suggests 27:15	thing 7:3,18	57:7	turned 9:13	view 8:16 14:14
summarize	13:7 17:1	tin 12:8	turns 32:1	34:7 38:12
50:20	36:15 39:25	today 3:4	TVA 44:8	41:13
summary 38:10	40:1 42:3 44:3	trading 16:20	two 5:25 9:18	violate 26:5
supervision 38:4	50:22	transfer 4:11	10:2 20:1	virtually 38:1
supplementary	things 6:1 7:17	6:13 8:4 9:15	24:21 29:13	volume 24:22,23
19:7	14:6 18:24	10:4 14:18	32:21 37:23	volumes 24:21
suppose 11:16	22:11 56:20	15:20 16:7,25	typically 7:16	voluntary 8:11
36:21	think 4:13 5:17	17:1,16 19:13		
Supreme 1:1,18	8:2,25 9:4,18	20:11 22:9	U	W
sure 13:11,15	10:19 12:3	24:14 26:18	unconditional	want 22:14,15
19:15	15:3,15 16:4	28:18 31:4,20	8:14,15	33:25 42:7,24
survival 42:14	17:12,25 18:3	34:20 35:1,6	underlying 28:6	43:5 50:18
Sweet 45:8	18:13,17 19:15	38:1 40:8	understand	51:1,1 52:4
54:10	20:9 22:13,17	46:24 48:2,14	16:24 32:24	56:16
	22:18,18 23:16	48:15 52:8	44:19 47:5,8	wanted 11:8
T	23:16 24:8,8	54:20 55:8	49:14	wants 12:9
T 2:1,1	27:7,24 28:24	transferred	understanding	Washington
take 4:7 10:4	29:22 30:9,10	36:16 40:14	17:6,6 23:13	1:14,22,24
				waste 6:18

water 3:13 8:13 10:7,12,17,21 12:17,18,20,24 13:6,8,9,10,12 13:14,16 14:15 14:15,16 18:18 19:9 23:11 25:17 26:6 34:8 36:18 39:21 43:11 45:18 46:5,14 51:6 52:8 53:6 55:17,18	19:4,8,21 20:24 21:1 27:21 28:20 30:7 32:3 33:10 36:17 38:4 41:17 42:12,23 43:4 46:1 47:24 49:12 51:16	Yeah 22:17 35:10 36:3	4
waters 4:18	willing 43:25	\$	40 39:7,23
way 7:7 9:11 10:3 13:1 20:16,17 29:14 29:22 33:15 37:20,21 56:2 57:18	willow 42:17	\$500 36:23	402 28:9
ways 18:14	win 50:21	0	402(b) 3:13 4:13 8:3,20 14:15 14:24 15:13 16:10 18:22 19:11 28:9 54:5
weapon 38:2	window 7:8	1	402(b)'s 4:4
went 20:5 56:2	withdrawing 38:2	1 24:22	402(d) 10:9 28:10,22 53:6
we'll 3:3 9:20 19:20 35:21 44:20	withhold 4:11 6:15 14:17 40:7	10:18 1:19 3:2	436 45:18
we're 5:3 15:21 20:2 28:17,19 30:10,11,12 32:7,8,13 33:1 33:17,18,24 34:1,22,25 35:5 38:16 39:24 40:3,19 44:12 46:25 49:18,21,22 50:6 52:7	wonder 37:9	106 39:21 55:17	5
we've 9:18 48:3 48:17 50:7	word 17:23 18:16 56:21	11:19 57:24	53 2:10
whistle 51:23	words 18:19 51:7	123.23(3) 39:7	54 42:11
white 24:23	work 7:15 12:15 28:19 31:6 36:5 37:14	1251(b) 4:17	6
wildlife 1:7,12 3:5,7 5:4,11 6:6 8:6 10:3 11:19,20,25 12:13 13:11,17 14:9 18:11,19	worked 5:11 7:5 28:3 29:15 45:20	128 45:17	67 49:2
	working 29:19 52:25	13 54:10	7
	works 44:15	1314(i) 22:2	7 4:2,6 5:3,8 6:1 8:19 15:11 16:13 20:3,17 23:15 24:13 25:23 27:1,11 40:22 45:1,9,9 54:14 55:4 57:15
	world 36:24	139 45:17	7(a)(2) 26:16 29:20 32:3,14 51:4,9
	worried 42:5	14 56:24	9
	wouldn't 43:14 43:15 52:1	17 1:15	9 45:5,11 54:10
	write 34:21 56:16	18 55:11	
	writing 38:5 50:17	1993 4:24 6:8 21:10	
	written 40:12	1998 5:15	
	wrote 34:18 38:13	2	
	X	2001 9:16 10:2 13:24,25	
	x 1:2,13	2007 1:15	
	Y	203 34:18	
		22 13:24	
		24 2:7	
		260 24:10,18 25:2,3,4 30:1	
		27 57:14	
		270 25:1	
		28 57:14	
		3	
		3 2:4	
		302 19:6	
		317 24:22	
		32 56:23	
		33 4:17 22:2	