NOTES

National Ass'n of Home Builders v. Defenders of Wildlife: The Supreme Court Narrows the Scope of the ESA

I. OVERVIEW OF THE CASE

Arizona applied to the Environmental Protection Agency (EPA) for a transfer of National Pollution Discharge Elimination System (NPDES) permitting authority to state officials.[1] The EPA consulted with Fish and Wildlife Services (FWS) to determine whether the transfer of permitting authorities would adversely affect any species listed in the Endangered Species Act (ESA).[2] FWS eventually concluded that the EPA's continuing oversight of Arizona's permitting program would adequately protect listed species.[3] After determining that the ESA did not apply, the EPA granted the transfer in accordance with the Clean Water Act (CWA).[4] Defenders of Wildlife filed suit, alleging that the opinion issued by FWS did not comply with the ESA's standards.[5] The EPA argued that the mandatory nature of CWA section 402(b) prevented the agency from disapproving a transfer based on any considerations not listed in the statute.[6]

The United States Court of Appeals for the Ninth Circuit did not agree with EPA's assessment. The court held that EPA's approval of the transfer was arbitrary and capricious because EPA relied on "legally contradictory positions regarding its section 7 obligations."[7] The Ninth Circuit then went on to conclude that the ESA granted EPA both the power and the duty to determine whether its transfer decision would

1. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2526 (2007).
2. *Id.* at 2526-27.
3. *Id.* at 2527.
4. *Id.*
5. Defenders of Wildlife v. EPA, 420 F.3d 946, 955 (9th Cir. 2005).
6. *Id.* at 959.
7. *Id.*

jeopardize threatened or endangered species.[8] After granting certiorari, the Supreme Court of the United States reversed.[9] The Supreme Court *held* that the no-jeopardy duty under the ESA only applied to discretionary actions and thus it did not apply to the permitting transfer approval, which was mandatory under the CWA once the specified triggering criteria were met. *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007).

II. BACKGROUND

Amidst the turbulence of the early 1970s, a different kind of battle was being fought on home soil: a crusade to save the environment. On April 22, 1970, thousands of Americans celebrated the first Earth Day by holding rallies and demonstrations for clean air, clean water, and the preservation of nature.[10] Congress's response was swift. The EPA was created in 1970, followed by the Water Quality Improvement Act that same year and the Marine Mammal Protection Act in 1972.[11]

Congress passed the CWA in 1972 with the stated purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[12] The Act established the NPDES to prevent harmful discharges into the Nation's waters.[13] The EPA initially administers each state's NPDES permitting program, but CWA section 402(b) provides that the EPA "shall approve" transfer of permitting authority to a state upon application and a showing that the state has met nine specified criteria.[14]

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8. *Id.* at 967-70.

9. *Home Builders*, 127 S. Ct. at 2524.

10. RICHARD N.L. ANDREWS, MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY 225 (1999).

11. *Id.* at 387-88.

12. Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2000).

13. *Id.* § 1342.

14. *See id.* § 1342(b)(1)-(9). The State must demonstrate that it has the ability: (1) to issue fixed-term permits that apply and ensure compliance with the CWA's substantive requirements and which are revocable for cause; (2) to inspect, monitor, and enter facilities and to require reports to the extent required by the CWA; (3) to provide for public notice and public hearings; (4) to ensure that the EPA receives notice of each permit application; (5) to ensure that any other State whose waters may be affected by the issuance of a permit may submit written recommendations and that written reasons be provided if such recommendations are not accepted; (6) to ensure that no permit is issued if the Army Corps of Engineers concludes that it would substantially impair the anchoring and navigation of navigable waters; (7) to abate violations of permits or the permit program, including through civil and criminal penalties; (8) to ensure that any permit for a discharge from a publicly owned treatment works includes conditions requiring the identification of the type and volume of certain pollutants; and (9) to ensure that any industrial user of any publicly owned treatment works will comply with certain of the CWA's substantive provisions. *Id.*

The protection of endangered species was also an increasing concern of the American people.[15] Congress passed the Endangered Species Preservation Act in 1966[16] but it was not enough to satisfy the public: Congress rewrote it as the Endangered Species Conservation Act in 1969,[17] this time allowing the Secretary of the Interior to list foreign species and prohibited imports of products made from such species. It still was not enough: Responding to President Nixon's call for an even stronger law to protect wildlife, Congress passed the ESA in 1973,[18] to be administered by the FWS and National Marine Fisheries Service (NMFS).[19] The new law distinguished threatened from endangered species and authorized unlimited funds for species protection. Section 7(a)(2) further required federal agencies to consult with agencies designated by the Secretaries of Commerce and the Interior to "insure that any action authorized, funded, or carried out" by a federal agency is "not likely to jeopardize the continued existence of any endangered species or threatened species."[20]

In *Tennessee Valley Authority v. Hill*, the Supreme Court found itself interpreting this very provision.[21] Noting that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in section 7 of the Endangered Species Act," the Court held that the ESA required construction of the dam to be halted because it might jeopardize the threatened snail darter, despite the fact that Congress had expended and continued to appropriate large sums of public money to build the dam:

> It may seem curious to some that the survival of a relatively small number of three-inch fish . . . would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million. . . . We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.[22]

The language of section 7, according to the Court, "admits of no exception."[23] Every agency action must comply with section 7, regardless of expense or inconvenience. Furthermore, "[t]he pointed omission of the type of qualifying language previously included in endangered

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15. STANFORD ENVTL. LAW SOC'Y, THE ENDANGERED SPECIES ACT 17 (2001).
16. Pub. L. No. 89-669, § 80 Stat. 926 (1966).
17. Pub. L. No. 91-135, § 83 Stat. 275 (1969).
18. Endangered Species Act § 2, 16 U.S.C. § 1531 (2000).
19. *See* STANFORD ENVTL. LAW SOC'Y, *supra* note 15, at 20-21.
20. 16 U.S.C. § 1536(a)(2).
21. TVA v. Hill, 437 U.S. 153, 159-60 (1977).
22. *Id.* at 172-73.
23. *Id.*

species legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies."[24]

Historically, lower courts have been reluctant to interpret the Court's holding as broadly as it might allow, perhaps in part due to 50 C.F.R. § 402.03, which was passed in 1986.[25] Section 402.03 simply states "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."[26] Thus began the battle to determine which agency actions are discretionary. Generally, courts will defer to an agency's interpretation of its own formative statutes unless Congress has addressed the precise issue in question.[27] In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court held that where Congress has not spoken directly on the issue in question, the courts must defer to an agency's interpretation of its own formative statute when the interpretation is based on "a permissible construction of the statute," regardless of whether the court agrees with the interpretation.[28] The agency's interpretation is "given controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute," or it does not represent "a reasonable accommodation of conflicting policies . . . committed to the agency's care by the statute."[29]

In *Motor Vehicles Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court elaborated on the arbitrary and capricious standard of review.[30] A court may find an agency's interpretation to be "arbitrary and capricious" if the agency relied on factors which Congress did not intend to be considered, completely omitted the consideration of an important aspect of the problem, offered an explanation that is contrary to the evidence before the agency, or the interpretation is so implausible that it cannot be ascribed to a different view or the result of the agency's expertise.[31] "[A]n agency must cogently explain why it has exercised its discretion in a given manner."[32]

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24. *Id.* at 185.
25. 50 C.F.R. § 402.03 (1986).
26. *Id.*
27. *See* FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745-46 (1973); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130-31 (1944).
28. 467 U.S. 837, 843 & n.11 (1984).
29. *Id.* at 844-45.
30. 463 U.S. 29, 43 (1983).
31. *Id.*
32. *Id.* at 48-49.

Statutory construction and the Court's holding in *TVA* continued to be at the forefront of any ESA dispute. In *Platte River Whooping Crane Maintenance & Trust v. FERC*, the United States Court of Appeals for the District of Columbia held that section 7(a)(2) did not override the Federal Power Act's mandate to only alter licenses upon mutual agreement of the licensee and the Federal Energy Regulatory Commission (FERC).[33] The Trust, relying on *TVA*, argued that section 7 required FERC to do "whatever it takes" to protect the endangered species.[34] The D.C. Circuit asserted that this interpretation of section 7 and *TVA* was misguided: The ESA only allows "agencies to 'utilize their authorities' . . . it does not *expand* the powers conferred on an agency by its enabling act."[35] Furthermore, *TVA* does not apply in this case because the Court "did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA."[36]

In *American Forest & Paper Ass'n v. EPA*, the United States Court of Appeals for the Fifth Circuit held that the EPA erred in transferring NPDES authority to Louisiana with the provision that the state consult with federal agencies regarding the impact on endangered species before it could issue a discharge permit, or face veto by the EPA.[37] EPA argued that CWA section 304(i), which allows the agency to "promulgate guidelines establishing the minimum procedural and other elements,"[38] should be construed as authorizing the EPA to regard the nine requirements of section 402(b) as minimum, not exhaustive, criteria.[39] The EPA further contended that because "nothing in § 402(b) prohibits EPA from adding additional criteria," the EPA's interpretation should be given deference under *Chevron*.[40] The court concluded that, given the plain language of the statute, Congress had "spoken directly to the precise question at issue," and therefore the court would not defer to the EPA's interpretation.[41] "Congress could have, but did not, grant EPA an analogous veto power to protect endangered species."[42] Like *Platte River*, the court reasoned that *TVA* could not be interpreted as compelling an

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33. Platte River Whooping Crane Critical Habitat Maint. & Trust v. FERC, 962 F.2d 27 (D.C. Cir. 1989).
34. *Id.* at 34.
35. *Id.*
36. *Id.*
37. Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291 (5th Cir. 1998).
38. Clean Water Act § 304(i), 33 U.S.C. § 1314(i) (2000).
39. *Am. Forest*, 137 F.3d at 297.
40. *Id.*
41. *Id.* at 298.
42. *Id.*

agency to act beyond its enabling act, noting that "if EPA lacks the power to add additional criteria to CWA § 402(b), nothing in the ESA grants the agency the authority to do so."[43]

The Ninth Circuit, however, went in a different direction in *Defenders of Wildlife v. EPA*.[44] After noting that the "EPA's lawyers have taken varying stances on the same issue" in previous cases, the court remanded to the agency for "a plausible explanation of its decision, based on a single, coherent interpretation" of section 402(b).[45] The court then analyzed whether the NPDES transfer was permitted under section 7 of the ESA. Construing *TVA* broadly to confirm that "the authority conferred on agencies to protect listed species goes beyond that conferred by agencies' own governing statutes," the Ninth Circuit held that the transfer violated the ESA.[46] The court further determined that 50 C.F.R. § 402.03 did not prohibit such an interpretation of *TVA*.[47] Because there is no statutory reference to "discretionary involvement or control,"[48] the "only possible source" for the regulation's "discretionary" qualification is section 7's reference to actions "authorized, funded, or carried out" by agencies.[49] The ESA duty to "insure" that an agency's decision is not likely to jeopardize protected species or adversely modify their habitat exists alongside CWA provisions.[50]

III. THE COURT'S DECISION

In the noted case, the Supreme Court reversed the Ninth Circuit's ruling that the EPA must comply with the ESA when transferring NPDES authority to a state.[51] Defenders of Wildlife had successfully argued, in addition to determining that Arizona's NPDES plan met the nine criteria laid out in CWA section 402(b), the EPA must insure that transferring NPDES authority would not be likely to jeopardize the continued existence of any endangered or threatened species in compliance with ESA section 7(a)(2).[52] In a 5-4 decision, the Court held that section 7(a)(2) only applied to discretionary agency actions, and because the EPA "must" transfer permitting authority to a state if the

43. *Id.*
44. Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2005).
45. *Id.* at 960, 962.
46. *Id.* at 964.
47. *Id.* at 967.
48. 50 C.F.R. § 402.03 (2007).
49. *Defenders of Wildlife*, 420 F.3d at 967.
50. *Id.* at 971.
51. Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 127 S. Ct. 2518, 2524 (2007).
52. *Defenders of Wildlife*, 420 F.3d at 971.

state meets the nine criteria, the agency's transfer of permitting authority to Arizona was proper.[53]

The Court began by stating that it did not matter whether the EPA's previous views regarding ESA section 7(a)(2) were inconsistent with its current view; agencies are "fully entitled" to change their minds, so long as proper procedures are followed.[54] Furthermore, the fact that the agency's current view is inconsistent with previous statements does not constitute "the type of error that requires a remand."[55] Altering its legal position did not prevent participation in the comment period and had no bearing on the final agency action that Defenders of Wildlife challenged.[56]

Turning to the substantive statutory question, the Court, like the lower courts that had faced this issue, recognized that both CWA section 402(b) and ESA section 7(a)(2) use language that is "mandatory" and "imperative."[57] If the Court were to apply the language of section 7(a)(2) literally, a "tenth criterion" would be added to CWA's list of considerations.[58] Justice Alito, writing for the majority, concluded that this "would effectively repeal the mandatory and exclusive list of criteria set forth in § 402(b), and replace it with a new, expanded list that includes § 7(a)(2)'s no-jeopardy requirement."[59] Although a later enacted statute (such as the ESA) can operate to amend or repeal an earlier enacted statute or provision (such as the CWA), the Court would only interpret such a meaning in a statute if it found Congress's intention to do so was "clear and manifest."[60] Such a finding here, Justice Alito asserted, would "partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species."[61]

To determine how section 7(a)(2) should be construed, the Court first turned to the NMFS and FWS joint regulation that section 7 requirements "apply to all actions in which there is discretionary Federal involvement or control."[62] The Court rejected the Ninth Circuit's interpretation of "discretionary," instead concluding that discretionary

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53. *Home Builders*, 127 S. Ct. 2524.
54. *Id.* at 2530.
55. *Id.*
56. *Id.* at 2531.
57. *Id.*
58. *Id.* at 2532.
59. *Id.*
60. *Id.*
61. *Id.* at 2533.
62. 50 C.F.R. § 402.03 (2007).

Federal involvement did not include agency actions when the agency is "required by statute to undertake once certain specified triggering events have occurred."[63] The Ninth Circuit's reasoning that a discretionary action was any action authorized, funded, or carried out by a federal agency did not jive with the mandatory language of section 402(b).[64] Because only some statutory provisions are mandatory, "not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion."[65]

The Court also found the dissent's interpretation implausible.[66] Justice Stevens argued that 50 C.F.R. § 402.03 should not be interpreted as "limiting the reach of § 7(a)(2) to *only* discretionary federal actions."[67] Given the fact that there was no explanation for the word "discretionary," it should not be interpreted "to limit the pre-existing understanding of the scope of the coverage" as determined by *TVA*.[68] Rather, 50 C.F.R. § 402.03 should be read as including discretionary action, but not limiting section 7(a)(2) to discretionary action.[69] Justice Alito rejected this conclusion, arguing that this reading would render 50 C.F.R. § 402.03's reference to "discretionary" "mere surplusage," which would be directly the Supreme Court caution against "reading a text in a way that makes part of it redundant."[70]

The Court likewise rejected the Ninth Court's reliance on *TVA*.[71] The Court stated that in deciding *TVA*, the Supreme Court did not consider the question presented in the noted case.[72] Furthermore, that case was decided nearly a decade before the adoption of 50 C.F.R. § 402.03 and the construction of the dam was a discretionary action, not mandatory.[73] Although the dissent argued that the construction was mandatory because the TVA would have been obligated to spend the funds appropriated to the project by Congress if the snail darter had not been declared an endangered species, the Court determined that the acts appropriating the funds did not "*require*" the agency to use the funds for

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63. *Home Builders*, 127 S. Ct. at 2536.
64. *Id.* at 2535.
65. *Id.*
66. *Id.*
67. *Id.* at 2538 (Stevens, J., dissenting).
68. *Id.* at 2542.
69. *Id.*
70. *See id.* at 2536 (arguing that a contract provision should not be interpreted in such a way as to render it superfluous).
71. *Id.*
72. *Id.* (noting that *TVA* did not consider whether ESA section 7(a)(2) applied to mandatory agency actions).
73. *Id.*

the completion of the dam.[74] Therefore, the *TVA* decision actually "supports the position . . . that the ESA's no-jeopardy mandate applies to every *discretionary* agency action."[75]

The Court found no merit in Defenders of Wildlife's claim that, even if section 7(a)(2) only applies to discretionary actions, it applies here because the decision to transfer NPDES permitting authority to Arizona was such an exercise of discretion.[76] According to the Court, the EPA may exercise "some judgment" in determining whether a state has met the criteria of CWA 402(b), but "the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list."[77] The EPA itself, along with the FWS and NMFS, issued a formal letter stating that the authorization of an NPDES permitting transfer is not the kind of discretionary agency action that is covered by 50 C.F.R. § 402.03.[78] Applying *Chevron*, the EPA's interpretation is entitled to deference because it is a reasonable interpretation.[79]

IV. ANALYSIS

The Supreme Court's decision reflects a growing trend of courts to narrow the scope of the ESA. Future courts could use the decision to narrow it further still. Environmentalists worry that the holding could create a "loophole" in the ESA, allowing agencies to ignore the ESA when faced with a specific mandate in their enabling acts.[80] On the other end of the spectrum, property rights groups argue that affirming the Ninth Circuit decision would make the ESA an "uber-statute."[81] The Court itself seems to fear this result and ignores any legislative history or case law that would undermine its conclusion.[82]

The Court did not overturn *TVA*; in fact, the Court tried to ignore it completely.[83] Yet the decision in *TVA* could not be clearer: Congress intended the protection of endangered species "to be afforded the highest

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74. *Id.* at 2537 n.9.
75. *Id.* at 2537.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 2538.
80. Allison Winter, *Enviros Fear Supreme Court Ruling Creates ESA 'Loopholes,'* E&E NEWS PM, June 28, 2007, *available at* LEXIS.
81. *Home Builders & EPA Prevail in Supreme Ct. CWA/ESA Ruling*, ENEWSUSA, June 26, 2007, http://eneews.usa.blogspot.com/2007/06/home_builders_epa_prevail_in_supreme-ct.html.
82. *Home Builders*, 127 S. Ct. at 2533 (noting that reading the statute broadly would "partially override every federal statute mandating agency action").
83. *Id.* at 2536.

of priorities."[84] The Supreme Court in *TVA* found that the language of section 7(a)(2) "admits of no exception."[85] This intent does indeed have bearing on the noted case, and the Court's argument that *TVA* was not presented with the same legal question has little merit in the face of the Court's unequivocal language. "No exception" means precisely what it says, and there is no doubt that the Court's holding creates an exception to section 7(a)(2). The Court should have strived to interpret the statute in light of *TVA* rather than creating such an enormous ideological inconsistency.

The Court's conclusion that the EPA's interpretation that the statute only applies to discretionary agency actions was "reasonable in light of the statute's text and the overall statutory scheme" was itself unreasonable.[86] Traditional rules of statutory construction dictate that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."[87] ESA section 7(a)(1), which imposes an obligation on federal agencies to implement programs for the conservation of endangered or threatened species, is specifically limited to agencies' own "authorities."[88] Section 7(a)(2),[89] however, instead applies to any action "authorized, funded, or carried out" by an agency—a broader range of agency conduct.[90] If Congress had intended to limit the scope of section 7(a)(2) in much the same way as it limited section 7(a)(1), it would have done so.

But Congress did *not* do so, and the legislative history tells us that this omission was intentional and purposeful. In passing the 1978 amendments to the ESA, Congress noted that the Court in *TVA* interpreted section 7(a)(2) as indicative of Congress's intention that endangered species have "priority over the primary missions of Federal agencies" in order to "halt and reverse the trend toward species extinction—whatever the cost."[91] Congress realized that this rigidness

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84. TVA v. Hill, 437 U.S. 153, 174 (1977).

85. *Id.* at 173.

86. *Home Builders*, 127 S. Ct. at 2534.

87. Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).

88. Endangered Species Act § 7(a)(1), 16 U.S.C. § 1536(a)(1) (2000).

89. *Id.* § 1536(a)(2).

90. Brief of Respondent-Appellee at 35-36, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) (No. 06-340) [hereinafter Respondent's Brief].

91. H.R. REP. NO. 95-1625, at 10 (1978), *reprinted in* A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 734 (1982).

would inevitably cause problems in situations where an agency's "objectives cannot be met without directly conflicting with the requirements of Section 7"—which is precisely the predicament the EPA found itself in the noted case.[92] After "vigorous debate," Congress amended the ESA to include an exemption procedure in order to give "some flexibility" to the act's "stringent requirements."[93]

The Court's decision could create a "gaping loophole."[94] Because Congress often delineates factors for agencies to consider in making decisions, in the future many decisions that have a grave impact on an endangered species may be exempt from ESA considerations. For example, as Justice Stevens noted in his dissent, federal electricity law mandates permits for pipelines when they meet certain requirements.[95] Pipelines could result in significant damage to endangered and threatened species, yet compliance with the ESA is not a requirement in the law. This outcome is a direct affront to Congress's intent, as indicated by the clear and unambiguous language of section 7. Such a loophole cannot exist side by side with a determination that endangered species are to be the "highest of priorities."[96]

V. CONCLUSION

The Court's decision creates a loophole in the effectiveness of the ESA and ignores the unequivocal language of both the statute and the Supreme Court's holding in *TVA*. Considering the potential for devastating effects on endangered and threatened species, this decision should be interpreted in light of the Court's holding in *TVA* and applied very narrowly.

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92. *Id.* at 737.
93. *Id.* at 737-38.
94. Respondent's Brief, *supra* note 90, at 22.
95. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. at 2553.
96. TVA v. Hill, 437 U.S. 153, 174 (1978).

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