Team No. 38

CA. NO. 19-000987

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION OYSTERCATCHERS, INC.,

Plaintiff – Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant – Appellee,

and

CITY OF GREENLAWN, NEW UNION,

Defendant – Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
NEW UNION IN NO. 66-CV-2017 (RMN),
JUDGE ROMULUS N. REMUS

BRIEF OF UNITED STATES ARMY CORPS OF ENGINEERS
Defendant – Appellee

Oral Argument Requested

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STATEMENT OF JURISDICTION

The United States Army Corps of Engineers ("ACOE") responds to an appeal from an Opinion and Order entered May 15, 2019, by the honorable Judge Romulus N. Remus in the United States District Court of New Union, No. 66-CV-2017. Following the issuance of this Opinion, the City of Greenlawn, New Union ("Greenlawn") and the New Union Oystercatchers, Inc. ("NUO") filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4 (2017). This court has jurisdiction under 28 U.S.C. § 1291 (2018).

STATEMENT OF THE ISSUES

I. Does Greenlawn, as a riparian landowner, have the right to continue water withdrawals for municipal purposes during a drought without any water conservation measures?

II. Is ACOE's operation of Howard Runnet Dam Works during drought conditions to provide flow to Greenlawn a discretionary action subject to the consultation requirement within Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. §1536?

III. Is Greenlawn's withdrawal of nearly all drought-reduced flow from the Howard Runnet Dam Works a "take" of the endangered oval pigtoe mussel ("mussel") in violation of Section 9 of the ESA, 16 U.S.C. § 1538?

IV. Must the District Court balance the equities before enjoining a beneficial municipal activity, when the activity in question will cause the extirpation of an entire population of an endangered species?

STATEMENT OF THE CASE

I. Factual Background

In 1947, ACOE was authorized by Congress to build the Howard Runnet Dam Works, comprised of the Green River Diversion Dam and the Howard Runnet Dam located on the Howard Runnet Lake, which in turn created the Green River Bypass Reach ("Bypass Reach"). Record (R.) at 5. When building, ACOE did not consult with the Fish and Wildlife Service ("FWS") about how the operation could impact the mussel population. R. at 9. Greenlawn owns the riverfront and underlying riverbed of the Bypass Reach within its city limits and has

maintained municipal water intakes since the city was founded. R. at 5. Because the Howard Runnet Dam would cut off the natural flow to the Bypass Reach and therefore, Greenlawn's water supply, ACOE and Greenlawn entered into an agreement ("Agreement") to maintain flows in the Bypass Reach that allowed Greenlawn to continue water withdrawals "in such quantities and at such rates and times as it is entitled to as a riparian property owner under the laws of the State of New Union." R. at 6. This Agreement was then incorporated into the Water Control Manual ("WCM") through a provision stating that "[a]t all times the Howard Runnet Dam Works shall be operated in a manner that complies with any water supply agreements entered into by the United States Army Corps of Engineers, and with the riparian rights of property owners established under New Union law." ("WCM Provision") R. at 7.

ACOE's operation of the Howard Runnet Dam Works is governed by the WCM. R. at 6. The WCM establishes parameters for releasing water from the dams in order to maintain flood control storage capacity and recreation levels, provide for hydroelectric generation, and maintain flow for Greenlawn's water intake facilities on the Bypass Reach. R. at 6. The WCM provides target lake elevations based on historical flow and water demands. R. at 6. However, the WCM has not been updated since 1968, which was when it was originally adopted. R. at 6, 7. In the 1960s, Greenlawn was connected to Progress City through an interstate highway and experienced a massive housing boom, leading it to expand its municipal water system. R. at 5.

The Greenlawn Water Agency provides water supply to customers within the city limits at an annual average of 6 million gallons per day (MGD), but during the summer months of July and August, peak withdrawal is around 20 MGD due to summer lawn and ornamental plant watering. R. at 5. The WCM provides that during normal summer operations (when peak withdrawal occurs), ACOE will release 50 cubic feet per second ("CFS") from the Diversion

Dam into the Bypass Reach. R. at 6, 7. The WCM also provides for 200 CFS to the hydroelectric turbine and 200 CFS for recreational flow on Saturday mornings. R. at 7. However, when target lake levels are not met, the WCM demands curtailment of releases, ranging from Zone 1 to Zone 3 requirements. R. at 7. At Zone 2, which is considered a Drought Warning, the WCM states that recreational releases should be completely curtailed, the Bypass Reach flow from the Diversion Dam should be reduced to 7 CFS, but the 200 CFS for the hydroelectric power should be maintained for 3 hours a day. R. at 7. At Zone 3, which is considered a Drought Emergency, the WCM states that all recreational releases should be curtailed, that the flow of 7 CFS from the Diversion Dam to the Bypass Reach should be maintained, and that the releases for hydroelectric power should be curtailed. R. at 7. These Drought Warning and Drought Emergency-reduced-flows are based on the annual water demands from 1968 when there was almost no consumptive uses of water upstream of Howard Runnet Lake. R. at 7.

In the 1980s, multiple upstream agricultural operations in the Green River valley created diversions of water for irrigation, which caused evaporative water losses to the system. R. at 7, 8. Additionally, it is estimated that less than 5% of the water withdrawn by Greenlawn is returned to the Green River. R. at 6. This is because Greenlawn's sewage treatment plant discharges into the Progress River, which is in a different watershed than the Green River, and water used for lawn irrigation by residents is largely lost to evaporation and ground absorption. R. at 5.

ACOE was rarely forced to apply water flow restrictions and only enforced Zone 1 restrictions once in the 20th Century. R. at 8. But starting in 2006, ACOE has been forced to apply Zone 1 Drought Watch conditions in 2006, 2007, 2008, 2009, 2010, 2012, and 2016. R. at 8. The 2016 drought conditions became so persistent that in the Spring of 2017 ACOE enforced Zone 2 Drought Warning restrictions, including a reduced 7 CFS flow to the Bypass Reach,

which Greenlawn protested. R. at 8. After exchanges between Greenlawn and the ACOE District Commander in April of 2017, the District Commander directed the increase of water releases to the Bypass Reach from 7 CFS to 30 CFS on April 23 because Greenlawn asserted that its riparian rights entitled it to reasonable use of water for domestic and commercial purposes, including for watering lawns and ornamental plants. R. at 8. After increasing the flow to 30 CFS, the lake level lowered to Zone 3 Drought Emergency levels on May 15. R. at 8. The District Commander curtailed hydroelectric power releases but kept the water flow to the Bypass Reach at 30 CFS for Greenlawn's water supply. R. at 8, 9.

The curtailment of hydroelectric power releases and Greenlawn's continued water withdrawals decreased Green River's downstream flows. R. at 9. Greenlawn's withdrawals consumed almost all of the flows through the Bypass Reach, and there was an average of 25 CFS over twenty-four hours in Green River *before* the May 15 enforcement of Zone 3 curtailments. R. at 9. After May 15, when hydroelectric peaking was curtailed, downstream flow rates dropped to almost zero. R. at 9. Downstream of the Howard Runnet Dam, the Green River turned into narrow trickles of water and exposed sand and gravel. R. at 9.

The reduced level of water in the river exposed beds of oval pigtoe mussels downstream of the Bypass Reach and the Howard Runnet Dam tailrace. R. at 9. The mussels are a federally listed endangered species and require a silty or gravel sand bed with slow to moderate currents, as well as a healthy population of a host species, the sailfin shiner, in order to spawn and survive. R. at 9. When water in the river is stagnant, siltation occurs, smothering mussel populations and harming their necessary habitat, and the low water levels prevent migration of sailfin shiner populations. R. at 9. Severely reduced river flow in the Spring of 2017 prevented the mussels from remaining completely submerged or migrating to more submerged areas. R at 9. The

mussel's habitat was exposed from the confluence of the Bypass Reach and the tailrace all the way down to the estuary. R. at 9. These conditions resulted in the death of approximately 25% of the Green River mussel's population and undisputed expert testimony established that if conditions were allowed to persist, the Green River mussel population would be eradicated. R. at 9. The expert's deposition testimony also stated that in order to prevent extirpation of the mussel population, there needed to be a minimum flow of 25 CFS over a twenty-four-hour period at the confluence of the tailrace and the Green River. R. at 10. Furthermore, Greenlawn does not have an incidental take permit under ESA Section 10, 16 U.S.C. § 1539. R. at 9, 10.

NUO became involved with this suit due to their members decreased oyster harvests, due in part to the Green River's reduced flows over the past few decades. R. at 10. However, none of NUO's members own waterfront property on Green Bay or the Green River. R. at 10.

II. Procedural History

On May 17, 2017 Plaintiff NUO served a Notice of Intent to sue ACOE and Greenlawn under ESA Section 13(g), 16 U.S.C. § 1540(g) (2018). R. at 10. After waiting sixty days, NUO filed a complaint on July 17, 2017. R. at 10. The complaint alleged violations based on flow reductions in the Green River caused by ACOE's hydroelectric peaking curtailment and Greenlawn's water withdrawals. R. at 10. Additionally, NUO claimed common law riparian rights against Greenlawn. R. at 10. ACOE then filed a cross claim against Greenlawn, joining NUO's claim that Greenlawn's water withdrawals were an illegal "take" of the mussels under ESA Section 9, 16 U.S.C. § 1538(a)(1)(B) (2018). R. at 10. Greenlawn then filed a counterclaim against ACOE seeking a declaration of its right as a riparian landowner to have continued flows in the Bypass Reach that meet its municipal water needs. R. at 10, 11.

On May 15, 2019, Judge Remus issued an Opinion and Order granting ACOE's motion for summary judgment to dismiss the ESA claims against it, denying Greenlawn's motion for

summary judgment to dismiss the ESA claims against it, granting Greenlawn's motion for summary judgment to declare its rights as a riparian landowner, dismissing ACOE's cross claim, and granting NUO's motion for summary judgment declaring Greenlawn in violation of Section 9 of the ESA. R. at 1, 4, 5. The District Court also granted an injunction prohibiting Greenlawn from making water withdrawals that cause the flow of the Green River downstream of the Howard Runnet Dam Works to drop below 25 CFS over a twenty-four-hour period. R. at 5. Appellants filed a timely Notice of Appeal, granted by this Court. R. at 1.

STANDARD OF REVIEW

After a trial court has granted summary judgment on an issue or dismisses an issue, a circuit court reviews the judgment de novo. *Mitnaul v. Fairmount Presbyterian Church*, 778 N.E.2d 1093, 1098 (Ohio Ct. App. 8th Dist. 2002); *Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 720 F.3d 939, 945 (D.C. Cir. 2013). Additionally, the question of whether to balance equities before ordering an injunction is a matter of law and is subject to de novo review. De novo review requires that this court gives little to no deference to the District Court's legal conclusions.

SUMMARY OF ARGUMENT

ACOE agrees with all but one holding of the United States District Court for New Union. First, ACOE agrees with the District Court that as a riparian landowner, Greenlawn has a right to 30 CFS or 20 MGD from the Bypass Reach for municipal withdrawals, including domestic uses for lawn and plant irrigation. New Union recognizes the reasonable use rule under riparian law as well as the right of a municipality to be a riparian landowner and make withdrawals for use by parcels in its jurisdiction. Additionally, NUO's assertion of a competing riparian right is without merit as neither the organization nor its members own any riparian land, and without this ownership, NUO lacks standing to assert a common law riparian claim. Furthermore, NUO has

no legal right to challenge the reasonableness of Greenlawn's water use on behalf of ACOE, but even it if did have such a right, Greenlawn's withdrawals for domestic uses are superior to all other riparian uses, including ACOE's hydroelectric generation use. Finally, Greenlawn's withdrawals are reasonable under riparian law regardless of Greenlawn's diversion of water into a different watershed.

Second, ACOE agrees with the District Court that ACOE's increase of flow from 7 CFS to 30 CFS was not a discretionary "action" subject to the consultation requirements of ESA §7(a), 16 U.S.C. § 1536(a) (2018). The Section 7 consultation requirement applies only to "actions in which there is discretionary federal involvement or control." 50 C.F.R. § 402.03 (2019) (2019). Furthermore, the consultation requirement does not attach to actions that an agency is required by statute to undertake once certain specified triggering events have occurred nor when an agency acts in order to comply with a contractual obligation. According to the Agreement and the WCM, ACOE is required to maintain flows to the Bypass Reach to meet Greenlawn's riparian water needs. Therefore, ACOE's action of increasing the flow to 30 CFS was triggered by Greenlawn's riparian right to increased flow. Additionally, there is no discretion when a regulation directs an agency to operate in a way that complies with an agreement, and this is reinforced by the mandatory language of the WCM, stating that the Howard Runnet Dam Works "shall be operated in a manner that complies with any water supply agreements." Furthermore, ACOE's action was not an "ongoing agency action" that required Section 7 consultation because it was merely implementing an already existing provision that it was bound by. Finally, this Court should defer to ACOE's reasonable interpretation that, considering its obligations under the Agreement and the WCM, it lacked discretion to act to benefit the mussels.

Third, ACOE agrees with the District Court that Greenlawn's withdrawal of nearly all of the drought-reduced flow from the Howard Runnet Dam Works constitutes a "take" of the endangered oval pigtoe mussel in violation of Section 9 of the ESA, 16 U.S.C. §1538 (2018). To establish liability under Section 9, the ordinary requirements of but-for causation, proximate causation, and foreseeability must be proved. It is undisputed that Greenlawn's withdrawals consumed nearly all of the flows in the Bypass Reach resulting in severe effects on downstream Green River flows and the mussels' habitat. The reduced flows resulted in the death of approximately 25% of the Green River mussel population. Not only would the harm to the mussels not have occurred but for Greenlawn's water withdrawals, but the harm was entirely foreseeable. Furthermore, the fact that Greenlawn's activities occurred outside of the mussels' habitat is irrelevant, especially in the context of waterbody.

Lastly, ACOE argues that the District Court erred in issuing injunctive relief under ESA Section 9, enjoining Greenlawn's water withdrawals, because the court must balance the equities before enjoining a beneficial municipal activity, even if the activity will cause the extirpation of a population of an endangered species. Notwithstanding the long-established traditional injunction test, some courts have precluded equity balancing in issuing injunctive relief in ESA cases by relying on the language in *TVA v. Hill* that "examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities," and "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." 437 U.S. 153, 174, 184 (1978). However, *TVA* should be read narrowly as it only applies to specific facts in limited situations. Furthermore, many courts have considered the *TVA* limitation and clarified that the traditional injunctive relief standard still requires balancing

equities in ESA cases. Finally, the *TVA*-induced injunctive relief standard is inappropriate as to non-federal actors, and the traditional standard affords more protection for property owners' interests and beneficial municipal activities under the ESA.

I. GREENLAWN HAS A VESTED RIPARIAN WATER RIGHT TO 30 CFS OR 20 MGD FROM THE BYPASS REACH FOR ITS DOMESTIC WATER USES.

Greenlawn has a vested riparian water right to 30 CFS or 20 MGD water withdrawals from the Green River Bypass Reach for its domestic water uses. The State of New Union applies common law riparian rights doctrine to the resolution of competing claims to water. *New Union Oystercatchers (NUO) v. U.S. Army Corps. of Eng'rs*, No. 66-2017, slip op. at 9 (D.N.U. May 15, 2019); *see also Tubbs v. Potts*, 45 N.U. 999 (1909). The basic tenet of the riparian doctrine is that a party owning land abutting a watercourse is a riparian landowner and has the right to make "reasonable" uses of the water in that watercourse for the benefit of his riparian land. *Stratton v. Mt. Hermon Boys' Sch.*, 103 N.E. 87, 87–88 (Mass. 1913); *Bouris v. Largent*, 236 N.E.2d 15, 17 (Ill. App. Ct. 3d Dist. 1968). And because riparian rights arise as incidents to ownership of land abutting a watercourse, they generally are considered to be vested property rights and a riparian landowner cannot be deprived of them without due process. *Dunlap v. Carolina Power & Light Co.*, 195 S.E. 43, 46 (N.C. 1938) ("Every riparian owner has a property right to the reasonable use of running water for manufacturing purposes as well as for domestic and agricultural purposes conformable to the uses and needs of the community"); *Adams v. Greenwich Water Co.*, 83 A.2d 177, 184 (Conn. 1951) (noting that plaintiff riparian landowners had a property right to the accustomed flow of the river and ought not to be deprived permanently of those rights without compensation).

Although the right to use water upon a watercourse is generally restricted to riparian land, New Union follows the minority rule and recognizes the right of a municipality to be a riparian

landowner and withdraw water as a supply to the benefit of non-riparian parcels within the municipality. *See Tubbs v. Potts*, 45 N.U. 999 (1909) (citing *City of Canton v. Shock*, 63 N.E. 600 (Ohio 1902); *City of Philadelphia v. Collins*, 68 Pa. 106 (1871); *Barre Water Co. v. Carnes*, 27 A. 609 (Vt. 1893)). Because Greenlawn owns the riverfront on both sides of the Bypass Reach within city limits, as well as the underlying riverbed, it is a riparian landowner. As such, Greenlawn has a vested property right in its continued use of water from the Bypass Reach for the benefit if its citizens.

A. NUO Lacks Standing to Assert Any Common Law Riparian Rights Claim Against Greenlawn.

As the District Court properly noted, NUO lacks common law standing to assert any unreasonable use claim against Greenlawn. *NUO*, No. 66-2017 at 10–11. The riparian rights doctrine serves only to balance competing rights and interests between riparian owners. *Gunther v. Apap*, No. 333169, 2017 WL 4654975, at *6 (Mich. Ct. App. Oct. 17, 2017); *see Dunlap*, 195 S.E. at 46 (noting that a riparian's right to use water is "qualified only by the requirement that it must be enjoyed with reference to the similar rights of other riparian owners."). The riparian rights of property owners abutting on the same body of water are co-equal and no riparian owner can exercise his riparian rights in such a way as to prevent the exercise of the same right by the owners of other riparian rights. *Bouris*, 236 N.E.2d at 17. Because the riparian doctrine and its attendant water rights apply only to riparian landowners, a non-riparian has no standing to challenge the reasonableness of a riparian's water use. *Portage Cty. Bd. of Commrs. v. Akron*, 846 N.E.2d 478, 486 (Ohio 2006) (finding that Portage County did not own any riparian property and therefore lacked standing to present an unreasonable-use claim); *see also Gunther*, No. 333169, 2017 WL 4654975, at *6 (in case involving a riparian rights dispute, court noted that it is "central to the resolution of this case whether defendants have riparian rights"). Because NUO

is not a riparian landowner, and none of its members own any riparian land, it has no right to complain of Greenlawn's water use under riparian law.

In seeming acknowledgment of its own lack of standing to assert a riparian claim on its own behalf, NUO asserts an unreasonable use claim against Greenlawn on behalf of ACOE, which is a riparian landowner in its own right. While this approach is creative, it is without merit. Article III courts are restricted in their judicial capacity to hearing cases and controversies that exist between adverse litigants. *Muskrat v. United States,* 219 U.S. 346, 361 (1911). In line with this proposition, a party to a case may only assert its own interests and may not challenge an action of another because it infringes the protectable rights of someone else. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party generally must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties."). Because ACOE, as a riparian landowner, does not contest the reasonableness of Greenlawn's water use, and NUO has no standing to asserts its own riparian rights claim, NUO has no legal right to challenge the reasonableness of Greenlawn's water use.

B. Greenlawn's Use of Water for Domestic Purposes, Including Lawn and Ornamental Plan Irrigation, is Both Reasonable and Absolutely Preferred Over ACOE's Use for Hydroelectric Generation.

Even if NUO's riparian claim could stand, Greenlawn's use of water for domestic purposes, including lawn and ornamental plan irrigation, is both reasonable and absolutely preferred over ACOE's use for hydroelectric generation. Domestic use is considered a "natural use" allowed to riparian owners without regard to the impact on other riparian landowners. *See Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955) ("The right to use water for strictly domestic purposes—such as for household use—is superior to many other uses of water—such as for fishing, recreation and irrigation."); *F. Arthur Stone & Sons v. Gibson,* 630 P.2d 1164, 1168 (Kan. 1981) ("Domestic use has historically been classified as ordinary use while all other uses

were artificial or extraordinary."); Barton Thompson Jr. et al., *Legal Control of Water Resources* 32, 33 (6th Ed. 2018) (noting that courts consider domestic water uses to be an "absolute right" in the sense that it may be exercised without regard to co-riparians). Furthermore, each riparian user in his turn may, if necessary, consume all the water for these purposes. *Evans v. Merriweather*, 4 Ill. 492, 496 (1842); *see also City of Philadelphia v. Collins*, 68 Pa. 106, 123 (1871) (holding that no restriction could be placed by legislation upon taking water for the citizens of the city for domestic purposes); Thompson, *supra*, at 32 (noting that a riparian may exhaust an entire stream for domestic uses, even if it means that fellow riparians will receive no water whatsoever); Restatement (Second) of Torts § 850A cmt. c (1979) ("The preference for domestic purposes may be exercised at any time, and a householder need not reduce his withdrawals in time of drought to accommodate users for other purposes.").

Domestic water use encompasses the irrigation of lawns and ornamental plants. Today, about half of the states that were once committed to traditional riparian rights have now enacted new regulatory systems that both codify and modernize common law riparianism. *See* Joseph W. Dellapenna, *The Evolution of Riparianism in the United States*, 95 Marq. L. Rev. 53, 86 (2011). While New Union, as the District Court noted, has not adopted legislation or any sort of permitting authority to resolve competing riparian claims to water, a survey of legislation from other riparian jurisdictions illustrates the broad definition of "domestic use" applicable under riparian law. For example, a Kansas statute defines the term "domestic use" to include "the irrigation of lands . . . for the growing of gardens, orchards and lawns." Kan. Stat. Ann. § 82a-701(c) (2019). Oklahoma's Water Rights statute similarly includes water use for the growing of gardens, orchards, and lawns in its definition. Okla. Stat. Ann. tit. 82, § 105.1(2) (2019). Mississippi likewise defines "domestic use" as "the use of water for ordinary household

purposes, the watering of farm livestock, poultry and domestic animals and the irrigation of home gardens and lawns." Miss. Code Ann. § 51-3-3(c) (West 2019). The Restatement (2nd) of Torts also defines domestic water use to include "the irrigation of a small noncommercial garden." Restatement (Second) of Torts § 850A cmt. c (1979).

Domestic water use is thus preferred over hydroelectric power generation. In *City of Canton v. Shock*, the court analyzed competing claims to surface water between a city and the downstream owners of a water-power mill. 63 N.E. at 603. In comparing the domestic water use of the city with the power generation use of the mill owner, the court stated:

> From the earliest dawn of history to the present time, the primary use of water has been for domestic purposes, and its secondary use for the purposes of power. People on the upper stream have the right to quench their thirst, and the thirst of their flocks and herds, even though by so doing the wheels of every mill on the lower stream should stand still. And the same right in the use of water as to quenching thirst *extends to all uses for domestic purposes*, and the right of a lower proprietor to the use of the waters of a stream for power purposes is subject to the superior right of all upper proprietors for domestic purposes, and must yield thereto.

Id. at 31 (emphasis added) (internal citations omitted). The court concluded by stating that "if the upper proprietors have grown so large or become so numerous as to consume most or all of the water, the lower proprietors have no cause of complaint, because it is only what they should have reasonably expected in the growth and development of the country." *Id*.

Greenlawn's water use for lawn and ornamental plant irrigation is thus a domestic use, which is a "natural use" that is absolutely preferred over all other "artificial uses." Therefore, while Greenlawn has no obligations to make a reasonable use of its water vis a vis NUO, which asserts no cognizable riparian rights and cannot legally bring an unreasonable use claim on behalf of ACOE, Greenlawn's water use is nonetheless reasonable and absolutely preferred over other, non-domestic uses, including ACOE's use for power generation. As such, any lower

proprietors have "no cause of complaint" even where Greenlawn consumes most or all of the water in the river. *Id*. at 603.

C. Greenlawn's Diversion of Water Out of the Watershed is Irrelevant to Whether its Water Use is Reasonable.

Greenlawn's diversion of water outside of the Green River watershed is irrelevant to whether it's water use is reasonable. Under riparian law, it is ordinarily the obligation of the water user to return any unconsumed water back into the same watershed from which it was diverted. *Shock*, 63 N.E. at 603; *see Stratton*, 103 N.E. at 88 ("In the main, the use by a riparian owner by virtue of his right as such must be within the watershed of the stream, or at least that the current of the stream shall be returned to its original bed before leaving the land of the user."). However, this principle is subject to the modification that the diversion outside of the watershed "must cause actual perceptible damage to the present or potential enjoyment of the property of the lower riparian proprietor before a cause of action arises in his favor." *Stratton*, 103 N.E. at 88; *see also Elliot v. Fitchburg R.R.*, 64 Mass. 191, 191 (1852) ("One riparian proprietor cannot maintain an action against an upper proprietor for a diversion of part of the water of a natural watercourse flowing through their lands, unless such diversion causes the plaintiff actual perceptible damage."); *Virginia Hot Springs Co. v. Hoover*, 130 S.E. 408, 410 (Va. 1925) (stating that where there is a diversion out of the watershed, "the only question is whether there is actual injury to the lower estate for any present or future reasonable use.").

Greenlawn discharges its used water through its sewage treatment plant into Progress River, which lies in a different watershed. Moreover, the water at issue in this case—that which is used to irrigate lawns and ornamental plants—is lost mainly through evaporation and ground absorption. As a result, very little water returns to the Green River. This result, however, has no impact on ACOE's ability to use any returned water flows for hydroelectric power generation

because it never had any such ability to begin with. The Bypass Reach lies to the east of the Howard Runnet Dam Works and the hydroelectric turbine. Even if Greenlawn were to return all of its unused water from its treatment plant back into the Bypass Reach, none of it would reach the hydroelectric generation turbine because the return flows would not enter the Howard Runnet Dam Works. Thus, because the majority of Greenlawn's unused water is lost due to evaporation and ground absorption and any unused water returned to the stream would not reach the hydroelectric generation turbine regardless, there is no "actual perceptible damage" to ACOE's riparian interest, and thus there can be no cause of action against Greenlawn for its out-of-basin diversion. *See Stratton,* 103 N.E. at 88.

Thus, while there is no justiciable common law riparian claim against Greenlawn, Greenlawn nonetheless has a right to 30 CFS or 20 MGD from the Bypass Reach for municipal withdrawals, including domestic uses for lawn and plant irrigation.

II. ACOE'S ACTION TO INCREASE WATER FLOW FROM 7 CFS TO 30 CFS DURING THE 2017 DROUGHT WARNING WAS NOT A DISCRETIONARY ACTION, AND THEREFORE, WAS NOT SUBJECT TO THE ESA SECTION 7 CONSULTATION REQUIREMENT.

The District Court was correct in holding that ACOE's action to increase waterflow from 7 CFS to 30 CFS during the 2017 drought warning was non-discretionary and therefore not subject to the ESA Section 7 consultation requirement. *NUO*, No. 66-2017 at 12. ESA § 7(a)(2) requires federal agencies to consult with the Secretary of the Interior and the appropriate agency about any potential impacts of their actions on endangered species. 16 U.S.C. § 1536(a) (2018). Furthermore, Section 7 requires agencies to insure that its action is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat. *Id.* § 1536(a)(2). The consultation requirement generally involves drafting a detailed study of the effects of the action on the species or its

habitat as well as an opinion that reflects whether the action is safe to take or if the action will place the species in jeopardy. *Id.* § 1536. Determining the meaning of "action" described in Section 7 is essential in deciding whether the action taken by a federal agency falls within the requirements of Section 7. The statute itself describes "action" as "any action authorized, funded, or carried out by such agency." *Id.* § 1536(a)(2).

Relevant case law and federal regulation strongly indicate that ACOE's action was not the type of "action" contemplated by Section 7 because the consultation requirement does not apply to non-discretionary agency action. A U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) regulation clarifies that the Section 7 consultation requirement applies only to "actions in which there is discretionary federal involvement or control." 50 C.F.R. § 402.03 (2019). The negative implication of this rule is that the consultation requirement does not apply to non-discretionary agency actions. *See National Association of Homes Builders v. Defenders of Wildlife (NAHB),* 551 U.S. 644 (2007) (upholding 50 C.F.R. § 402.03). The reasoning goes that if the agency lacks the power to implement changes that would benefit endangered species, consultation isn't triggered because it would be merely a "meaningless exercise." *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1219 (9th Cir. 2016) (citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995).

A. ACOE Was Required to Increase Flows to the Bypass Reach Under its Agreement with Greenlawn and the WCM.

The Supreme Court further clarified 50 C.F.R. § 402.03 by holding that the consultation requirement "does not attach to actions…that an agency is required by statute to undertake once certain specified triggering events have occurred." *NAHB,* 551 U.S. at 646. The issue in *NAHB* was whether the EPA's transfer of National Pollutant Discharge Elimination System ("NPDES") permitting authority to a State under the Clean Water Act (CWA) was discretionary. *Id.* The

Court reasoned that the mandatory nature of CWA § 402(b)—which directs that the EPA "shall approve" a transfer request if that section's nine statutory criteria are met—stripped it of authority to disapprove a transfer based on any other considerations, and thus the action was non-discretionary and did not trigger the Section 7 consultation requirement. *Id.* at 654. In other words, discretionary action arises only when an agency, acting in furtherance of a broad mandate, decides to take an action that is not explicitly mandated and is not specifically necessitated by the broad mandate. *Friends of River v. National Marine Fisheries Service*, 293 F. Supp. 3d 1151, 1168 (E.D. Cal. 2018), *aff'd in part, rev'd in part*, No. 18-15623, 2019 WL 4887136 (9th Cir. Oct. 3, 2019).

Moreover, when an agency acts in order to comply with a contractual obligation, it is not exerting discretion. In *Natural Resources Defense Council v. Norton*, the court held that even though an agency retained *some* discretion over how to implement the terms of its contracts, because it could not unilaterally alter the contract in order to benefit an endangered species, there was no discretionary action that required re-consultation. 236 F. Supp. 3d 1198, 1212 (E.D. Cali. 2017); *see also California Sportfishing Prot. All. v. F.E.R.C.*, 472 F.3d 593, 599 (9th Cir. 2006) (finding that contractual provisions giving FERC discretionary authority to require changes in operation of project merely gave the agency discretion to decide whether to exercise discretion, and thus were not sufficient to constitute discretionary agency "involvement or control" mandating consultation).

The instant case is comparable to *NAHB* because in both cases, specific triggering events occurred mandating non-discretionary action by the federal agency. Greenlawn riparian landowner rights entitled it to increased flow in the Bypass Reach to meet its municipal water needs. According to the Agreement and the WCM, ACOE is required to maintain flows to the

Bypass Reach to meet Greenlawn's riparian water needs. Therefore, ACOE's action of increasing the flow to 30 CFS was triggered by Greenlawn's riparian right to increased flow.

Additionally, in both *NAHB* and the instant case, the CWA and the WCM use the word "shall" to mandate action. The statute under scrutiny in *NAHB* dealt with a provision of the CWA that stated the Governor of a State could submit a description of the program it proposes and that the EPA "*shall* approve each submitted program" for transfer of permitting authority to a State "unless [it] determines that adequate authority does not exist" to ensure that nine specified criteria are satisfied." 551 U.S. at 650 (emphasis added). Here, the WCM states that the Howard Runnet Dam Works "*shall* be operated in a manner that complies with any water supply agreements." R. at 7 (emphasis added). There is no discretion when a regulation directs an agency to operate in a way that complies with an agreement, and this is reinforced by the mandatory nature of the word "shall." Furthermore, the broad and sweeping provision of the WCM provision suggests that the riparian rights of Greenlawn are more essential than maintaining Drought Warning operations that mandate cutting off flow to the Bypass Reach because the drought operation provisions lack any similarly compulsive language.

B. ACOE's Implementation of the WCM Was Not an Ongoing Agency Action That Required Consultation.

Past agency action is not subject to the consultation requirement. In *Western Watersheds Project v. Matejko* the court held that the agency's failure to exercise any discretion that it might have had to regulate river and stream diversions on public lands for irrigation purposes by private parties holding vested rights-of-way to divert water was not "agency action" for purposes of ESA § 7. 468 F.3d 1099, 1109 (9th Cir. 2006). The court reasoned that there is no "ongoing agency action" requiring consultation where the agency has acted earlier but specifically did not retain authority or was otherwise constrained by statute, rule, or contract. *Id*.

The reasoning by the court in *Watersheds* is applicable to the action in the instant case. ACOE adopted the WCM in 1968 and was merely implementing the already existing provisions it was bound by when it increased flow from 7 CFS to 30 CFS. Just as the agency in *Watersheds* was constrained by an earlier action it had taken, ACOE was constrained by the Agreement and WCM it had earlier adopted. Thus, ACOE's action was not an "ongoing agency action" that required Section 7 consultation.

C. This Court Should Defer to ACOE's Determination That It Lacked Discretion To Deny Greenlawn's Request For Increased Flow.

Finally, this Court should defer to ACOE's determination that is lacked discretion to deny Greenlawn's water demands after considering its obligations under the Agreement and the WCM. An agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Furthermore, an agency's determination that there is no discretionary action to which Section 7 applies is also subject to deference. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (deferring to agency's finding that, considering its obligations under a right-of-way agreement and its regulations, it had no discretion to act to benefit the endangered species).

Here ACOE interpreted its own regulation, the WCM, as affording ACOE no discretion to deny Greenlawn's requests for more water. This interpretation is not "plainly erroneous" nor "inconsistent" with the WCM as the WCM explicitly provides that "[a]t all times" ACOE must comply with the Agreement and with Greenlawn's riparian rights. *See Auer*, 519 U.S. at 461; R. at 7. Thus, this Court should defer to ACOE's reasonable interpretation that, considering its obligations under the Agreement and the WCM, it lacked discretion to act to benefit the mussels.

ACOE's action of increasing water flow from 7 CFS to 30 CFS was a non-discretionary action and therefore, is not subject to the consultation requirements in ESA Section 7. Because

ACOE lacks the power under its own regulations and agreements to act to benefit the endangered mussels, consultation would be a "meaningless exercise." *Alaska Wilderness League,* 788 F.3d at 1219. The United States Court of Appeals for the Twelfth District should affirm the District Court's holding.

III. GREENLAWN'S WITHDRAWAL OF NEARLY ALL OF THE DROUGHT-REDUCED FLOW FROM THE HOWARD RUNNET DAM WORKS CONSTITUTES A "TAKE" OF THE ENDANGERED OVAL PIGTOE MUSSEL IN VIOLATION OF §9 OF THE ENDANGERED SPECIES ACT, 16 U.S.C. §1538.

The ESA § 9 makes it unlawful for "any person" to "take any [federally listed endangered] species within the United States or the territorial seas of the United States." 16 U.S.C. § 1538(a)(1)(B) (2018). To "take" a species, as defined by the ESA, is "to harass, harm, pursue, hunt, shoot, would, kill, trap capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (2018). The U.S. Fish & Wildlife Service (FWS) further defines "harm" to mean "an act which actually kills or injures wildlife" and includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2019). Under this definition, Section 9 has been held to apply to indirect as well as direct injuries to listed species. *See Babbitt v. Sweet Home Chapter of Communities for a Great Ore.*, 515 U.S. 687, 697–98 (1995). It matters not how much of the "taking" occurred; "any taking and every taking—even of a single individual of the protected species—is prohibited by the Act." *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995). To establish liability under the ESA, causation must be proved. *See Sweet Home,* 515 U.S. at 700 n.13 (noting the ESA's take prohibition includes the "ordinary requirements" of but-for causation, proximate causation, and foreseeability).

It is undisputed that reduced flow in the Green River resulted in the death of approximately 25% of the federally listed endangered oval pigtoe mussel population in the Green River. It also undisputed that should the conditions in the river be allowed to persist, the entire Green River population of oval pigtoe mussels will be extirpated.

A. But for Greenlawn's Water Withdrawals From the Bypass Reach, the Harm to Oval Pigtoe Mussels Would Not Have Occurred.

In applying the take prohibition of Section 9, courts apply causation concepts from tort law, whereby the actual cause or causation in fact must be established first. *Nat. Res. Def. Council v. Zinke*, 347 F. Supp. 3d 465, 486 (E.D. Cal. 2018) (citing *Sweet Home*, 515 U.S. at 700 n.13; *Paroline v. United States*, 572 U.S. 434, 444 (2014)). The traditional way to prove that one event was the factual cause of another is to show that the latter would not have occurred "but for" the former. *Zinke*, 347 F. Supp. 3d at 487. However, a relaxed but-for causation standard may apply in a situation where "the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event." *Id*. at 488, 492 (citing *Paroline*, 572 U.S. at 451).

In *Nat. Res. Def. Council v. Zinke*, the Court found that strict but-for causation cannot be required under the ESA Section 9, as "any other finding would exclude categorically from Section 9 liability any party whose conduct is individually insignificant, but is collectively significant, no matter how foreseeable to each of the individual actors the collective consequences of their actions." *Id*. at 491. In that case, environmental interest groups alleged that water contract holders and the U.S. Bureau of Reclamation violated ESA's prohibition against taking listed species when they caused substantial temperature-dependent mortality of listed salmon in a river as result of water transfers. *Id*. at 473. The court had to decide what standard of but-for causation should apply where impacts to listed species likely are measurable (if at all)

only as the result of aggregate diversions by a group of defendants. *Id*. at 487. The court rejected a strict but-for causation standard in these situations and instead adopted the relaxed but-for causation standard articulated in *Paroline*. *Id*. at 488. The court explained that the *Paroline* standard harmonized with the Supreme Court's interpretation in *Sweet Home* that, in light of the broad purposes of the ESA, "take" ought to be interpreted in the "broadest possible terms." *Id*. at 489–90 (citing *Sweet Home*, 515 U.S. at 704). Furthermore, a looser standard is consistent with the NMFS's position that "whenever an action alone or in combination with, or in concert with other actions is reasonably certain to injure or kill listed species, it will constitute a take . . . [and a]n action which contributes to injury can be a 'take' even if it is not the only cause of the injury." *Id.* at 490–92 (citing 64 Fed. Reg. 60727, 60,728 (Nov. 8, 1999)). Under the relaxed standard, each individual factor is a but-for cause of the harm. *Id.* at 488. *See also Aransas Project v. Shaw*, 775 F.3d 641, 660 (5th Cir. 2014) (noting that the district court correctly found government agency's issuance of water withdrawal licenses was a but-for cause of the death of whooping cranes, despite fact that uncontrollable forces of nature, such as severe drought, were contributing factors).

Here, the predicament faced by the mussels rests decidedly at the feet of the Greenlawn. It is known that the severe drought conditions during the Spring of 2017 triggered Zone 2 Drought Warning operations outlined in ACOE's WCM. Instead of accepting the 7 CFS restricted flow under Zone 2 operations, Greenlawn demanded more water to irrigate their lawns and ornamental plants. Acceding to Greenlawn's demands, ACOE increased the water released to the Bypass Reach to 30 CFS. The increase resulted in further lowering the lake level which triggered application of Zone 3 Drought Emergency operations and the curtailment of hydroelectric power releases. It is undisputed that this curtailment, along with Greenlawn water

withdrawals, had severe effects on downstream Green River flows. In fact, Greenlawn's withdrawals consumed nearly all of the flows in the Bypass Reach. The record indicates that Greenlawn withdraws only 3.14 MGD (4.86 CFS)[1] in the spring. Thus, the authorized 30 CFS would have afforded Greenlawn an adequate water supply while allowing the 25 CFS necessary to sustain the mussels to flow downstream. Alternatively, should Greenlawn have accepted the 7 CFS flow restriction provided by the WCM under Zone 2 operations, the lake level would not have lowered to a level triggering Zone 3 operations and the daily hydroelectric power operation would have continued. This alone would have provided an average daily flow of 25 CFS downstream.[2] In either case, the harm to the mussels would not have occurred but for Greenlawn's actions.

Furthermore, Greenlawn's actions clearly satisfied the relaxed but-for causation standard applied under the ESA. Greenlawn's actions, persistent drought conditions, increased upstream agricultural withdrawals, and the curtailment of the hydroelectric operations are so related to the reduced river flows and resultant mussel deaths that their combined conduct, viewed as a whole, is a but-for cause of the harm. Therefore, applying the relaxed but-for causation standard, each individual factor is a but-for cause for the harm, including Greenlawn's water withdrawals.

B. Greenlawn's Water Withdrawal Was the Proximate Cause of the Deaths of Oval Pigtoe Mussels.

[1] Approximately 0.646 MGP = 1 CFS. The record indicates Greenlawn withdrawals averaged 6 MGD annually, but peaked at 20 MGD during July and August due to lawn and ornamental watering demands. Thus, looking at Greenlawn's average withdrawals outside of July and August when needs for lawn watering are down, Greenlawn only uses on average 3.14 MGD (4.86 CFS). Calculations: Total withdrawals annually: 6 MGD *365 days = 2190 MG; total withdrawals for the months of July and August: 20 MGD*62 days=1240 MG; total withdrawals for other months altogether: 2190 MG -1240 MG = 950 MG. Thus, average daily withdrawals (excluding July and August): 950 MG / 303 days = 3.14 MGD (4.86 CFS).

[2] The daily hydroelectric power releases up to 200 CFS for up to 3 hours per day, that 600 CFS total divided by 24 hours, would result average 25 CFS per hour.

It is well established that the principles of proximate cause apply to Section 9 claims. *Sweet Home,* 515 U.S. at 700 n.13. In the context of the ESA, "the proximate cause inquiry requires determining whether the alleged injury is fairly traceable to the challenged action of the defendants." *Zinke*, 347 F. Supp. 3d. at 492–93 (citing *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1084 (D. Or. 2012)). As the Supreme Court noted in *Sweet Home*, the ESA prohibits "takes" so long as they are "foreseeable" rather than merely "accidental." *Sweet Home,* 515 U.S. at 700, 713 (O'Connor J. concurring). The requirement of proximate cause serves to "preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline*, 572 U.S. at 445. However, actions that directly harm listed species or modify their habitat should not escape liability. *Sweet Home,* 515 U.S. at 699–700 (hypothesizing that an actor would be liable under Section 9 if he knowingly drains a pond that housed endangered fish); *see also Sierra Club v. Yeutter,* 926 F.2d 429, 432–33 (5th Cir. 1991) (proximate cause established where the Forest Service permitted excessive timber removal in Texas forests whose trees are home to red cockaded woodpeckers); *Loggerhead Turtle,* 148 F.3d at 1250–51 (the court accepted for standing purposes a theory that county's refusal to ban nocturnal vehicular traffic light could directly result in killing the newly hatched turtles by misleading them away from the sea); *see also* 4 Fed. Reg. at 60,730 (NMFS provided a list of several examples of "habitat-modifying activities that may fall within the scope" of the definition of "harm," including "[r]emoving water or otherwise altering streamflow when it significantly impairs spawning, migration, feeding or other essential behavioral patterns.").

Here, Greenlawn's water withdrawals directly harmed the mussels by modifying their downstream habitat, and it was entirely foreseeable. Similar to the examples noted in *Sweet*

Home and the NMFS regulation, Greenlawn's actions that reduced the Green River's downstream flow where endangered mussels lived is no different than draining the pond where protected fish lived. When Zone 3 operations were triggered because of the increased releases to the Bypass Reach, daily hydroelectric power releases were curtailed leaving the Bypass Reach as the only source of water going downstream. Greenlawn's water withdrawals drained the entire Bypass Reach, which effectively drained the entire Green River downstream. With little to no water flow downstream, the beds of the mussels were exposed, they struggled to stay submerged, and death was certain to result. The reduced flows also impaired spawning by preventing migration of an essential host fish species, the sailfin shiner.

Moreover, Greenlawn could have foreseen this result. It was aware of the drought conditions; it knew that the hydroelectric power releases were curtailed on May 15, such that there was no water flowing downstream from the tailrace; it knew that the Green River downstream water flows would be reduced as a result; and it knew that fish could not migrate and that mussels could not survive without adequate water flows. Despite the foreseeability of this harm, Greenlawn drained the Bypass Reach anyway. The causal link between Greenlawn's actions and the harm to the mussels is not attenuated or accidental. The water withdrawals clearly modified the mussel's habitat, and the harm was clearly foreseeable. Therefore, Greenlawn's conduct was the proximate cause of the harm.

C. Greenlawn is Guilty of Habitat Modification Regardless of Whether its Activities Occurred Outside of the Habitat in Question.

The District Court correctly noted that Greenlawn's assertion that it cannot be guilty of habitat modification because the water withdrawal occurred entirely outside of the mussel's habitat is without merit. As the Supreme Court noted in *Sweet Home*, the term "harm" ought to be interpreted in the broadest manner possible, and it incorporates direct as well as indirect

injuries to the species. *Sweet Home*, 515 U.S at 697–98, 704. Under the tort causation concept, as long as the harm is foreseeable, it is irrelevant where it occurred geographically as long as the action is fairly traceable to the defendant and the action in fact harms the species. *Zinke*, 347 F. Supp. 3d at 492–93.

In the context of habitat modification, this is especially true with regard to water habitats. Consider the pond hypothetical discussed above, but with the addition of a net dividing the pond, relegating the endangered fish to one half of the pond. The actor would not be free of liability if he put a draining pipe only on the side of the pond where endangered fish are not present simply because "the activity occurred entirely outside the habitat in question." Waterbodies, unlike other environments, are inherently dynamic and connected. Authorities cited by NUO only discuss comparatively static environments, such as forests. *See e.g.*, *Envtl. Prot. Info. Ctr. V. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (holding that direct physical habitat destruction, such as logging, is prohibited). However, static environments are distinctive from dynamic and connected environment like waterbodies. Draining one side of the pond drains the entire pond, whereas logging trees in one part of a forest does not eliminate the rest of the forest. Similarly, draining the upstream of the Green River, upon which the downstream flow rate depends, is effectively draining the entirety of the Green River. Therefore, Greenlawn is still liable for the mussel's habitat modification even though its conduct occurred outside of the mussel's habitat.

In sum, the causation between Greenlawn's water withdrawals and the harm to the mussels is properly established. First, under either traditional or a relaxed but-for causation standard, but for Greenlawn's water withdrawals, the harm would not have occurred. Second, Greenlawn proximately and foreseeably caused the harm, because draining the entire Bypass Reach and leaving no water flowing downstream was a direct cause of the deaths and habitat

modification of the mussels. Lastly, it matters not that Greenlawn's activities occurred outside of the mussels' habitat, especially in the context of waterbody. The District Court correctly determined that Greenlawn's withdrawal of nearly all of the flow from the Bypass Reach constituted a "take" of the endangered mussel in violation of § 9 of the ESA, 16. U.S.C. §1538.

IV. THE DISTRICT COURT ERRED IN ISSUING INJUNCTIVE RELIEF BECAUSE IT MUST BALANCE THE EQUITIES BEFORE ENJOINING A BENEFICIAL MUNICIPAL ACTIVITY, EVEN IF THE ACTIVITY WILL CAUSE THE EXTIRPATION OF A POPULATION OF AN ENDANGERED SPECIES.

ESA Section 11(g) provides in part that "any person may commence a civil suit on his own behalf. . . to enjoin any person, including the United States and any other governmental instrumentality or agency. . . who is alleged to be in violation of any provision of this [Act] or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)*; see also, TVA v. Hill,* 437 U.S. 153, 180–81 (1978) ("Citizen involvement was encouraged by the Act, with provisions allowing interested persons to petition the Secretary to list a species as endangered or threatened and . . . bring civil suits in United States district courts to force compliance with any provision of the Act.") (citing 16 U.S.C. §§ 1533(c)(2), 1540(c), (g)). Injunctive relief is an extraordinary remedy that requires utmost caution, deliberation, and sound discretion. *Bonaparte v. Camden & A.R. Co.,* 3 F. Cas. 821, 827 (C.C.D. N.J. 1830). A traditional four prong test is applied to the issuance of a preliminary injunction that requires a plaintiff to establish that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of such injunction; (3) the balance of equities tips in his favor, and; (4) the injunction serves the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A. *TVA* Should Not Be So Broadly Interpreted as to Prevent Courts from Engaging in Equity Balancing in the Context of the ESA.

Notwithstanding the long-established traditional injunction test, some courts have precluded equity balancing in issuing injunctive relief in ESA cases by relying on the language in *TVA v. Hill* that "examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities," and "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." 437 U.S. at 174, 184. Thus, some courts have concluded that the ESA demonstrates Congress' determination that the balance of hardships and the public interest tip heavily in favor of protected species, precluding application of equity balancing. *see e.g., Nat'l Wildlife Fed'n v. Burlington N. R.R.,* 23 F.3d 1508, 1511 (9th Cir. 1994) ("In cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests"); *Sierra Club v. Marsh,* 816 F.2d 1376, 1386 (9th Cir. 1987) (Congress clearly intended that the ACOE give "the highest of priorities" and the "benefit of the doubt" to preserving endangered species); *Strahan v. Coxe,* 127 F.3d 155, 171 (1st Cir. 1997) (in the context of ESA litigation, that balancing has been answered by Congress' determination that the "balance of hardships and the public interest tips heavily in favor of protected species."). However, such an expansive reading of *TVA* to preclude equity balancing was not intended by the Supreme Court.

1. *TVA* Should Be Read Narrowly as it Only Applies to Specific Facts in Limited Situations.

TVA addressed a very specific and narrow issue: "whether the Endangered Species Act of 1973 requires a court to enjoin the operation of a virtually completed federal dam . . . [which] would eradicate an endangered species." *TVA,* 437 U.S. at 156, 196. In a 45-page opinion, the Court did not address how federal courts should balance the equities in each and every circumstance, nor did the opinion hint that no equity balancing is needed whenever an

endangered species is involved. This narrow reading is only intended to address the unique legal issue presented in *TVA*, which was later confirmed in *NAHB v. Defenders of Wildlife*.

In *NAHB*, the Environmental Protection Agency (EPA) sought to avoid Section 7 consultation when it transferred authority over pollution discharges into the nation's water pursuant to the CWA. 551 U.S. at 649. In finding that the EPA's action was not subject to the ESA consultation requirement, the Supreme Court rejected the respondents' reliance on *TVA*'s language and noted that "*TVA* had no occasion to answer the question presented in these cases." *NAHB*, 551 U.S. at 670. If *TVA* language was meant to apply as broadly as the respondents in that case intended, because the consultation requirement would help and "halt and reverse the trend towards species extinction, whatever the cost," the Supreme Court would not have held against application of the ESA. *TVA*, 436 U.S. at 184; *NAHB*, 551 U.S. at 673. *NAHB* demonstrated the language from *TVA* should not be read so broadly because that case only applies to the specific facts presented.

2. Many Courts Have Considered the *TVA* Limitation and Clarified the Injunctive Relief Standard Still Requires Balancing Equities.

Even before *NAHB*, some courts have considered the limitation imposed by *TVA*, and refused to abstain from *any* balancing. For example, notwithstanding its own ruling in prior cases, the First Circuit noted that "while these precedents direct us to give the endangerment of species . . . the utmost consideration, we do not think that they can blindly compel our decision in this case" because national security concerns deserve greater weight. *Water Keeper Alliance v. United States Department of Defense*, 271 F.3d 21, 34 (1st Cir. 2001). The District Court of Maine likewise found that while the balance of hardships and the public interest tips heavily in favor of protected species, "the advantage given to the endangered species is not necessarily dispositive, and the presumption is rebuttable." *Animal Prot. Inst. v. Martin* 511 F. Supp. 2d 196,

197–98 (D. Me. 2007) (holding that the court could not conclude that impact of preliminary injunction on other parties' interest was inadmissible as a matter of law). In a case involving a challenge to the Army Corps of Engineers' allocation of reservoir water on environmental grounds, the Northern District of Alabama noted that in issuing an injunction in the context of ESA, a special deference must be given to Congressional balancing of equities in favor of an endangered species, but the traditional four prong test still applies. *Alabama v. U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1132 (N.D. Ala. 2006). Though the court did not actually balance equities because the plaintiff failed to establish causation, the court did not exclude consideration of the hardship to defendants or the effect of the impact on the public interest, and wrote:

> The court is relieved that the results previously reached do not necessitate that the court make such difficult balancing decisions in this case. However, as previously noted, the court acknowledges that the purpose and policy embodied in the ESA weigh heavily in favor of protecting endangered species and must be given deference. The court is also cognizant of the water needs of the upstream users, including municipalities, industries, agriculture, and power plants.

Id. at 1137.

The D.C. District Court has similarly continued to apply the four-part balancing test in ESA cases. *See e.g., Fund for Animals v. Turner*, 1991 WL 206232 at *1 (D.D.C. 1991); *North Slope Borough v. Andrus*, 486 F. Supp. 326, 329–32 (D.D.C. 1979). In a case in which ACOE's operation of the Missouri River's dam and reservoir system was alleged to have adversely affected three protected species, the court chose to apply the four-part test, stating:

> While this Court concludes that Congress has spoken clearly in the ESA and that the balance has been struck in favor of affording endangered species the highest of priorities, it is also true that our Circuit has not definitively ruled on the issue. Consequently, out of an abundance of caution, this Court will choose the most conservative alternative and apply the four-part test.

American Rivers v. United States Army Corps of Eng'rs, 271 F. Supp. 2d 230, 249 (D.D.C. 2003) (internal citation and quotation marks omitted).

With respect to non-federal actors, the Western District of Texas in *Hamilton v. City of Austin* considered balancing equities in an ESA case. 8 F. Supp. 2d 886 (W.D. Tex. 1998). In *Hamilton,* the plaintiffs sought to preliminarily enjoin the cleaning of Barton Spring Pool to protect an endangered species of salamander. *Id.* at 889. When city officials wanted to clean up the silt and algae for the protection of swimmers, the plaintiffs claimed the clean-up process would negatively impact protected salamanders. *Id.* at 891–92. Though the case largely rested on plaintiff's failure to show likelihood of success on the merits or any evidence of irreparable harm, the court notably refused to abandon the traditional equitable principles and found that "the harm to the defendants and the public interest also weigh heavily against granting the injunction. . . . It would be quite a tragedy if a swimmer drowned or was injured because the pool could not be cleaned due to the 'stress' caused to salamanders by moving them during cleaning." *Id.* at 894–97.

TVA's application is limited, and as discussed above, should not be read so broadly as to preclude *any* equity balancing except for some specific circumstances presented in *TVA.* It is doubtful the *TVA* court wanted to eliminate half of the preliminary injunction test to only require the plaintiffs to show (1) that the wildlife at issue is protected under the ESA, and (2) that there is a reasonable likelihood that the defendant will commit future violation of the ESA. *Loggerhead Turtle,* 896 F. Supp. at 1180. Afterall, injunctive relief is an extraordinary remedy that requires careful consideration. *Bonaparte,* 3 F. Cas. at 827.

B. <u>The *TVA*-Induced Injunctive Relief Standard is Inappropriate as to Non-Federal Actors, and the Traditional Standard Affords More Protection for Property Owners' Interests Under the ESA.</u>

Section 9 of the ESA prohibits any person from "taking" listed species, and under this provision, not only actual taking is illegal, but it is also illegal to cause any "harm" to listed species, which includes making any changes to species' habitat. *See Sweet Home*, 515 U.S. at 687. This interpretation can impose upon property owners significant hardships and impede their ability to make beneficial use of their property or any rights they are entitled to.

Because Section 9 applies to federal actors as well as non-federal actors, it "shifts the burden of species conservation to private property owners . . . [and] has caused people to fear species conservation instead of encouraging property owners to become part of the solution by conserving species on their own property." *See* Diana Kirchheim, *The Endangered Species Act: Does 'Endangered' Refer to Species, Private Property Rights, the Act Itself, or All of the Above*, 22 Seattle U. L. Rev. 803, 805 (1999). Not only they will be enjoined for properly using their property if any of their actions would harm the endangered species, but also they are left uncompensated for any actions they take to help the species. *See.* Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights & Environmental Protection*, 1 N.Y.U J. L. & Liberty 987, 997–1001 (2005). It certainly does not help private citizens when courts preclude balancing equities because the scales automatically tip in favor of endangered species such that any legitimate economic hardship becomes irrelevant. Though it is hard to imagine the economic impact of an injunction on constitutionally protected property rights to be irrelevant, it is likely to be the sad truth if courts are not required to balance equities in the context of the ESA. *See.* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

A proper balance of harms and consideration of public interest would in no way preclude an injunction against non-federal actors, but it would at least ensure all interests are taken into

account, interests that are pivotal to an area or even the survival of a city, such as water use for irrigation, beneficial municipal activities, and other valuable activities. Traditional equity balancing would afford property owners more protection and consideration for their constitutionally protected property rights.

In sum, *TVA* should not be read so broadly, and courts that have precluded equity balancing in injunctive relief considerations should reexamine the language and apply *TVA* only to limited circumstances. Moreover, courts should be required to balance equities when considering an injunction against non-federal actors in order to better strike a balance between statutorily protected endangered species and property owners' constitutional rights.

CONCLUSION

For the reasons stated above, ACOE respectfully requests that this Court: (1) affirm the District Court's order granting Greenlawn's motion for summary judgment and declaring its rights as a riparian landowner; (2) affirm the District Court's order granting ACOE's motion for summary judgment to dismiss the ESA claims against it; (3) affirm the District Court's order granting NUO's motion for summary judgment declaring Greenlawn in violation of Section 9 of the ESA and denying Greenlawn's motion for summary judgment to dismiss the ESA claims against it; and (4) reverse the District Court's decision granting an injunction enjoining Greenlawn's water withdrawals and remand for further consideration of the balance of equities.