

# SUPREME COURT ISSUES MAJOR DECISION IN ENDANGERED SPECIES CASE

## INTRODUCTION

On June 25, 2007, the Supreme Court issued its decision in *National Association of Homebuilders, et al., v. Defenders of Wildlife, et al.*, no. 06-340, resolving the potential conflict between the Endangered Species Act and the Clean Water Act as applied to federal agency actions that affect endangered species. (The case had been consolidated with *EPA v. Defenders of Wildlife*, no. 06-549). The Court, in a 5-4 decision written by Justice Samuel Alito, held that the Clean Water Act imposes specific criteria that the Environmental Protection Agency must apply in deciding whether to approve state permit programs under the Clean Water Act, and that the Endangered Species Act cannot be construed as imposing additional criteria relating to protection of endangered species. In effect, the decision holds that the Endangered Species Act does not limit and override other federal laws that mandate federal agencies to take specific actions even though such actions may affect endangered species.

The link to the decision is:

[http://www.scotusblog.com/movabletype/archives/06-340\\_All.pdf](http://www.scotusblog.com/movabletype/archives/06-340_All.pdf)

## FACTS

The State of Arizona applied to the Environmental Protection Agency (EPA) for permission to administer its National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA). The CWA provides that the EPA “shall” approve a state’s application to administer the NPDES program if the program meets nine specific criteria in the CWA. The EPA determined that the Arizona program met the nine statutory criteria and accordingly approved it.

The Ninth Circuit overturned EPA’s approval of the Arizona program, on grounds that the EPA was required under section 7(a)(2) of the Endangered Species Act (ESA) to consult with the Fish and Wildlife Service before approving the Arizona program. Under section 7(a)(2), federal agencies shall “insure” that all actions “authorized, funded, or carried out” by them do not jeopardize listed endangered species or impair their critical habitats. To that end, federal agencies must consult with either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (depending on the nature of the affected species) before taking any action that may affect an endangered species, and, if the action may cause jeopardy, FWS or NMFS must adopt reasonable and prudent alternatives to avoid such jeopardy. The Ninth Circuit determined that the transfer of the NPDES program from federal to state control in Arizona may potentially jeopardize some endangered species in Arizona, by lessening protections for the species that had been created while the program was under federal control. The Ninth Circuit concluded that the EPA must consult with the FWS under section 7(a)(2) before approving the Arizona program, because the provision imposes “additional” obligations on federal agencies beyond those imposed by the agencies’ governing statutes, such as the CWA in this case. In effect, the Ninth Circuit held that the consultation and jeopardy-avoidance requirements of the ESA limit, and to that extent override, other federal statutes that may require agencies to take the specified action.

## SUPREME COURT DECISION

The Supreme Court reversed the Ninth Circuit decision. The Court held that section 7(a)(2) of the ESA does not apply to the EPA's action in approving the Arizona permit program, and therefore that the EPA properly approved the Arizona program because it met the criteria of the CWA. The Court essentially adopted a two-step approach in its analysis. First, the Court held that the consultation and jeopardy-avoidance requirements of the ESA do not, by the terms of the statute itself, apply to the EPA's approval of the Arizona program, according to traditional rules governing the interpretation of potentially-conflicting statutes. Second, the Court held that a regulation adopted by the Secretaries of Interior and Commerce in 1986 interprets section 7(a)(2) as applicable only to discretionary federal action, and that the Court should properly defer to the Secretaries' regulation interpreting the statute.

First, in analyzing the statutes, the Court stated that "the case involves "a clash of seemingly categorical—and, at first glance, irreconcilable—legislative commands." Slip Op. 14. The Court stated that the CWA imposes nine specific criteria that the EPA must apply in deciding whether to approve state NPDES programs, and that "the statutory language is mandatory and the list exclusive." *Id.* at 14. The Ninth Circuit decision, the Court stated, would impose a "tenth criterion" in place of the nine criteria mentioned in the CWA. *Id.* at 15. According to the Court, the CWA provision establishing these nine criteria "operates as a ceiling as well as a floor," and the Ninth Circuit decision "raises that floor." *Id.* at 16. The Ninth Circuit decision, the Court said, would amount to an "implied repeal" of the criteria set forth in the CWA. Under principles of statutory construction, repeals by implication are not favored and will be upheld only if consistent with the "clear and manifest" purpose of Congress. *Id.* at 15. If the Ninth Circuit view were adopted, section 7(a)(2) of the ESA would override virtually every federal statute requiring federal agencies to take action of any kind that may affect endangered species. *Id.* at 17. Therefore, the Ninth Circuit decision is inconsistent with the ESA according to the traditional principles for construing potentially-conflicting statutes. *Id.* at 17.

Second, the Secretaries of Interior and Commerce in 1986 adopted a joint regulation interpreting section 7 of the ESA, which provides that the provision applies to "discretionary" federal action. 50 C.F.R. § 402.03. The Court stated that this regulation "harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors." Slip Op. 18. The Court noted that it had earlier held, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that the courts should generally defer to federal regulations that provide a reasonable interpretation of an ambiguous statute. Slip Op. 18. The Court stated that the Secretaries' regulation provides a "reasonable" interpretation of section 7, because an agency is unable to "insure" that its action will avoid jeopardy to endangered species, as required by the provision, if the agency is required to take the action under its governing statute. Slip Op. 19-20. This conclusion, the Court stated, is supported by its earlier decisions in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), which had held that an agency does not have discretion to preclude Mexican trucks from operating in the United States since the President had issued an executive order allowing such operations, and *California v. United States*, 438 U.S. 645 (1978), which had held that the United States is required to comply

with state laws under the Reclamation Act of 1902 to the extent state laws are not inconsistent with “clear congressional directives.” Slip Op. 20-21.

Finally, the Court stated that its earlier opinion in *TVA v. Hill*, 437 U.S. 153 (1978), did not mandate an opposite outcome. First, the Court stated that *Hill* was rendered before the Secretaries of Interior and Commerce adopted their regulation in 1986 interpreting section 7 of the ESA. Slip Op. 23. Second, the Court stated that the construction project in *Hill* was discretionary in any event, because Congress did not mandate that the TVA put the dam into operation. *Id.*<sup>1</sup>

## IMPACT

Several water agencies located in California and elsewhere in the West submitted an amicus brief arguing, as the Supreme Court held, that the ESA should not be construed as overriding federal agency obligations under other federal statutes, and that the Ninth Circuit decision should be reversed.<sup>2</sup> The water agencies filed their brief because of their concerns that the Ninth Circuit decision might be construed as authorizing, and in fact requiring, federal agencies to modify their water rights contracts with western water users and reallocate contracted-for water supplies for the benefit of endangered species, even though the contracts may not authorize the water to be reallocated for this purpose. As the amicus brief noted, the Bureau of Reclamation operates several major water projects on the Colorado River, and has entered into contracts with urban and agricultural users promising the delivery of Colorado River water to the users. Under the Ninth Circuit decision, the Bureau may have the option, and even the responsibility, of reallocating Colorado River water supplies from the contractors in order to benefit endangered species, even though the contracts themselves may not authorize such reallocations. The Supreme Court’s decision holds that the ESA requirements do not override the obligations of federal agencies under their governing statutes and other authorities, which indicates that the Bureau does not have authority to reallocate water supplies from contractors to benefit endangered species, unless such authority is found in the contracts themselves or other federal statutes.

More immediately, the Supreme Court undermines the basis of another recent Ninth Circuit decision relating to federal agency obligations in operating the Federal Columbia River Power System (FCRPS). *National Wildlife Federation v. National Marine Fisheries Service*, 2007 U.S. App. LEXIS 8181 (9<sup>th</sup> Cir. 2007). Under the FCRPS, the Bureau of Reclamation and the Army Corps of Engineers operate various projects on the Columbia River and Snake River,

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<sup>1</sup> The Court also rejected the environmental respondent’s additional argument that the EPA had “discretion” in deciding whether to approve the Arizona NPDES program, stating that although the EPA has some discretion in deciding whether the state program meets the statutory criteria of the CWA, the CWA does not grant discretion to the EPA to add another criterion to the list. Slip Op. 24-25.

<sup>2</sup> The amicus brief was filed by the Association of California Water Agencies, Metropolitan Water District of Southern California, Westlands Water District, Imperial Irrigation District, San Diego County Water Authority, the National Water Resources Association, and the Northern Colorado Water Conservancy District.

and have entered into contracts with water users for delivery of FCRPS water to the users. The Ninth Circuit, affirming the decision of Judge Redden of the federal district court in Oregon, held that section 7(a)(2) of the ESA requires the Bureau and Corps to reduce water deliveries to the contractors as necessary to protect the endangered salmon species in the rivers. The Ninth Circuit substantially relied on its earlier decision in *Defenders of Wildlife v. EPA*, no. 06-549, which the Supreme Court overturned in its decision issued on June 25, 2007. Presumably the Ninth Circuit will reconsider its decision in the *National Marine Fisheries Service* case, in light of the Supreme Court decision. The United States had requested that the Ninth Circuit extend the time for the United States to file a petition for rehearing en banc, so that the United States could decide whether to file such a petition after the Supreme Court issues its decision in the pending case. Presumably the United States will now file a petition for rehearing en banc.

### **CONTRIBUTION OF WATER AGENCIES' BRIEF**

The Supreme Court decision upholds the position advocated in the water agencies' amicus brief, in that the Court held, as the water agencies argued, that the ESA does not override the obligations of federal agencies under other statutes. In fact, the Supreme Court's analysis was very similar to the analysis in the water agencies' brief. The water agencies' brief advanced the same two-step approach as that taken by the Court in its decision; the brief argued, first, that the ESA should not be construed as overriding other federal laws according to traditional principles of statutory construction, and, second, that under *Chevron* the Court should defer to the Secretaries' regulation interpreting the statute. Additionally, the water agencies argued that the Supreme Court's decision in *TVA v. Hill* was not apposite because the decision had been rendered before the Secretaries' regulation was adopted, and also because the decision did not suggest that Congress had mandated the dam to be put into effect. The Supreme Court's analysis of all of these questions closely parallels that set forth in the water agencies' amicus brief.

Indeed, the water agencies' brief made some points and offered some citations that appeared in the Court's decision but apparently did not appear in any other brief filed with the Court. In particular, the Court cited its earlier decision in *California v. United States*, 438 U.S. 645 (1978), which had reconciled conflicting congressional policies in the reclamation context and had held that state laws apply to federal reclamation projects unless such laws are inconsistent with "other congressional directives." Slip Op. 20-21. The Court also cited its earlier decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), which had interpreted the word "discretion" in the Administrative Procedures Act context and had equated discretion with "judgment." Slip Op. 21.

Thus, the Supreme Court appeared to very aware of the arguments advanced by the water agencies in their amicus brief, and adopted many of the arguments and followed the analytical approach that had been suggested in the brief. I believe that the water agencies' participation made an important contribution to the Court's analysis of the issues and its ultimate decision in this important national case.