

Closely Divided U.S. Supreme Court Rejects Effort to Expand the Scope of the Endangered Species Act

June 27, 2007

On June 25, the U.S. Supreme Court issued a landmark decision that rejected an effort to expand the scope of § 7 of the Endangered Species Act (ESA). In *National Association of Home Builders v. Defenders of Wildlife*, Case No. 06-340, the Supreme Court (5-4) concluded that § 7(a)(2) of the ESA (§ 7(a)(2)) does not add additional requirements to statutory mandates or alter constraints placed on a federal agency's discretion by other Acts of Congress. The Court held that the requirements of § 7(a)(2) do not "attach to actions...that an agency is required by statute to undertake once certain specified triggering events have occurred." In doing so, the Court reversed a decision by the Ninth Circuit Court of Appeals and affirmed a long-standing U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) joint regulatory interpretation that the requirements of § 7(a)(2) are only triggered by discretionary federal agency action.

Background

This case began with a challenge to the decision of the Environmental Protection Agency (EPA) to transfer National Pollution Discharge Elimination System (NPDES) permitting authority to the State of Arizona under the Clean Water Act (CWA). The NPDES program regulates discharges of pollutants into waters of the United States. Under the CWA, the EPA must approve a state's request for transfer of NPDES permitting authority if the state satisfies nine criteria specified in the statute.

Prior to approving the transfer decision, the EPA initiated consultation with USFWS pursuant to § 7(a)(2). Under this section, federal agencies must consult with USFWS or NMFS (depending upon the species at issue) to ensure that a proposed agency action is not likely to jeopardize an ESA-listed species or adversely modify or destroy critical habitat. While the EPA initially determined that § 7(a)(2) applied to NPDES permit transfers, the EPA later reversed this determination and concluded that the mandatory nature of the CWA's transfer criteria prevented it from disproving a transfer based on any consideration outside the nine criteria required by statute. In the resulting biological opinion, USFWS essentially concluded that because the EPA lacked discretion in approving the transfer, the EPA's decision could not affect any ESA-listed species. EPA approved the transfer and relied upon the USFWS's biological opinion after concluding that the transfer satisfied the substantive requirements of the ESA.

Respondents, Defenders of Wildlife et al., challenged the EPA transfer decision by filing a petition for review in the Ninth Circuit. Defenders did not dispute that Arizona satisfied the nine transfer criteria. Instead, Defenders argued that the EPA had violated the ESA and acted arbitrarily and capriciously in changing its position regarding the applicability of § 7(a)(2) and further relying upon the USFWS opinion.

The Ninth Circuit concluded that the EPA acted arbitrarily and capriciously by reversing its determination regarding the applicability of the requirements of § 7(a)(2) to an NPDES permitting transfer decision. Rather than remanding the transfer decision to allow EPA to address this concern, the Ninth Circuit then held that the ESA required the EPA to determine whether its transfer decision would jeopardize ESA-listed species or adversely modify designated critical habitat. The Ninth Circuit rejected EPA's argument that the transfer decision was not subject to § 7(a)(2) because it was not a "discretionary action." The Ninth Circuit essentially concluded that the requirements of § 7(a)(2) apply to all agency actions that are authorized, funded, or carried out by the agency, regardless of discretion.

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Notably, the Ninth Circuit's construction of § 7(a)(2) conflicted with that of other Court of Appeals, such as *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C.

Cir. 1992). In *Platte River*, the D.C. Circuit determined that § 7(a)(2) did not apply because FERC's issuance of an annual license was not discretionary. After the Ninth Circuit denied rehearing and rehearing en banc, the Supreme Court granted certiorari to resolve the conflict.

Van Ness Feldman filed an amicus curiae brief urging the Supreme Court to recognize that the requirements of § 7(a)(2) are only triggered by discretionary agency action.

The Decision

In reversing the Ninth Circuit, the Supreme Court, in an opinion written by Justice Alito, concluded that because § 7(a)(2) covers only discretionary agency actions, it does not attach to actions (such as the NPDES permitting transfer authorization) that an agency is required by statute to undertake once certain specified triggering events have occurred.

The Court first recognized that the CWA and ESA contain statutory mandates that appeared to conflict with each other. The Court concluded that CWA § 402(b), the NPDES transfer criteria, "operates as a ceiling as well as a floor" by both setting the minimum requirements for the transfer of permitting authority and mandating the transfer if those requirements are met. The Court concluded that the Ninth Circuit's construction of the ESA would effectively repeal the CWA's statutory mandate by adding one additional requirement to the list of CWA considerations. The Court strongly asserted that repeals by implication are not favored and will not be presumed unless the legislative intent is clear and manifest, and declined to read § 7(a)(2) in such an expansive manner. The Court recognized that doing so 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."

Citing deference to agency interpretations under the *Chevron* doctrine, the Court also relied upon, and deferred to, an existing USFWS/NMFS regulation, 50 C.F.R. § 402.03, that interprets and implements § 7(a)(2). This regulation states that "Section 7...appl[ies] to all actions in which there is discretionary federal involvement or control." The Court stated that 50 C.F.R. § 402.03 "harmonizes the statutes by applying §7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates." The Court concluded that the requirements of § 7(a)(2) only apply to discretionary agency actions, and not to actions that an agency is required to undertake by statute.

In reaching its conclusion, the Court rejected the remainder of the respondents' arguments. First, the Court declined to apply its holding in *TVA v. Hill*, that the ESA "gives endangered species priority over the 'primary missions' of federal agencies," to the facts of this case. The Court stated that *TVA* was not applicable because the case was decided prior to the promulgation of the regulation at issue and the decision to build the dam (the federal agency action at issue in *TVA v. Hill*) was discretionary. Second, the Court disagreed with the respondents' argument that, even if § 7(a)(2) only applies to discretionary actions, the EPA's decision to transfer NPDES permitting authority involved some agency discretion. While recognizing that judgment does play a role in EPA's determination that a state has satisfied the criteria for the transfer of NPDES permitting authority, the Court concluded that the EPA clearly does not have the discretion to add an additional criterion to the nine criteria contained in § 402(b) of the CWA.

The dissenting opinion, written by Justice Stevens, relied upon *TVA v. Hill* and concluded that the Court's interpretation of 50 C.F.R. § 402.03 placed an impermissible "wholesale limitation" on the reach of the ESA. The dissent attempted to interpret the CWA and ESA in a manner that would avoid the statutory conflict identified by the majority while giving both statutes full effect. The dissent also concluded that the EPA's decision to transfer NPDES permitting authority was discretionary and within the reach of the ESA.

Implications of the Court's Decision

For projects that interact with ESA-listed species and involve a federal agency action, managing and understanding a federal agency's obligations under § 7(a)(2) is a critical component to successful project planning, development, and operation. This decision clarifies those obligations.

Since the USFWS and NMFS issued joint regulations interpreting § 7(a)(2) in 1986, federal courts have generally concurred with their interpretation that § 7(a)(2) is only triggered by discretionary federal agency actions. The Ninth Circuit opinion conflicted with these federal court decisions and represented a dramatic expansion of the scope of § 7(a)(2). The Supreme Court's decision is significant because it rejects the Ninth Circuit's expansive interpretation of the ESA and provides a definitive determination of the universe of federal agency actions that trigger § 7(a)(2) obligations. Moreover, the Court recognized that the ESA does not add additional requirements to an agency's nondiscretionary, statutory mandates.

For More Information

For additional information on this case or issues regarding threatened and endangered species, please contact Joe Nelson in our Washington, DC office at (202) 298-1800, or Matt Love in our Seattle office at (206) 623-9372, or any member of the firm at www.vnf.com.

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