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Editor's Note: In this issue, ***Ian Whitlock*** *analyzes a recent United States Supreme Court decision,* National Association of Homebuilders v. Defenders of Wildlife*, which discusses the interaction of Section 7 consultation under the Endangered Species Act within the Clean Water Act permitting delegation. Mr. Whitlock is an Assistant General Counsel for the Port of Portland. The views expressed in this article are strictly those of his, and not necessarily those of the Port.*

UNITED STATES LIMITS SECTION 7 CONSULTATION UNDER THE ESA ON CWA PERMITTING

[In *National Association of Homebuilders v. Defenders of Wildlife*, 2007 WL 1801745 (June 25, 2007), the Supreme Court was asked to resolve a conflict between two powerful regulatory mandates: the Clean Water Act's discharge permit delegation scheme and the Endangered Species Act's consultation requirements. The Court held that the Endangered Species Act does not add additional regulatory steps to the process Congress established in the Clean Water Act for transferring permitting authority from the EPA to the states.

The Clean Water Act (CWA) prohibits discharges of pollutants into navigable waters without a National Pollutant Discharge Elimination System (NPDES) permit. Congress contemplated that the states would take the leading role in implementing this water pollution control scheme. Consequently, while NPDES permitting authority resides initially with EPA, Section 402(b) requires EPA to transfer the authority to any requesting state that demonstrates its qualifications. Specifically, the EPA Administrator "*shall* approve [a state's] program unless he determines that adequate authority does not exist" to meet a list of nine criteria. 33 USC §1342(b).

The Endangered Species Act (ESA) does not establish a similar regulatory role for the states. Instead, the primary regulatory duties are assigned to fish and wildlife authorities in the Commerce and Interior Departments (the NOAA Fisheries Service (NOAA Fisheries) and the Fish & Wildlife Service (FWS)). Under Section 7, all federal agencies must consult with the appropriate Service to "insure that any action authorized, funded, or carried out" by the agency sufficiently protects threatened or endangered species and their critical habitat. 16 USC §1536(a)(2). A joint NOAA Fisheries and FWS regulation provides that Section 7 applies to "actions in which there is discretionary Federal involvement or control." 50 CFR §402.03. In the consultation process, the Services routinely impose conditions to mitigate the harmful effects of agency action on species listed as threatened or endangered.

The question before the court was whether the consultation requirement (and the conditions that may be imposed on agency action), effectively adds a tenth criterion to the list of nine required for NPDES permit delegation under the CWA.

In 2002 the State of Arizona submitted to EPA an application to assume NPDES permitting authority. EPA had by this time already transferred permitting authority to some 44 states and territories. EPA initially took the position that transfer actions triggered ESA's Section 7 consultation requirement, and initiated consultation with the FWS. FWS concluded that

the transfer of permitting authority would not directly cause any adverse effect on listed species. But FWS was concerned that the transfer would enable urban development, which would in turn adversely affect upland species such as the cactus ferruginous pygmy-owl and the Pima pineapple cactus, and that Arizona officials would issue individual permits without considering and mitigating these impacts. In discussions with FWS, EPA contended that the indirect effects argument was factually tenuous and legally irrelevant because EPA had no authority to deny the transfer if Arizona's application satisfied the nine CWA criteria, which it did.

Ultimately the FWS issued a biological opinion stating that the absence of ESA consultations on individual permits would not cause any loss of protection for listed species because Congress had already made the decision to allow states to administer the permit programs on their own. Having completed the consultation, EPA approved the transfer to Arizona.

Environmental groups challenged the transfer action by petition for review in the Ninth Circuit. With some difficulty, EPA attempted to distance itself from its original position that Section 7 consultation was required, and argued the futility of consultation in light of the CWA's seemingly exclusive transfer provisions. The court concluded that EPA's equivocation rendered the transfer decision arbitrary and capricious. Rather than remanding the case to allow EPA an opportunity to more clearly articulate its reasoning, the court ruled that the ESA does indeed require consultation, together with the imposition of whatever mitigating measures the Services deem appropriate. The court vacated the transfer decision, returning permitting authority to EPA.

The EPA and various intervenors (including the National Association of Homebuilders), sought review in the Supreme Court. They argued that the CWA's exclusive list of nine criteria made it impossible for the EPA to deny transfer to Arizona, which had clearly met all those criteria. Decisions in two circuit courts of appeal cases and one Supreme Court case supported this position. The two circuit court decisions set up a direct conflict with the Ninth Circuit's decision: *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 962 F2d 27* (DC Cir 1992), and *American Forest & Paper Association v. EPA,* 137 F3d 291 (5th Cir 1998). In *Platte River* the court ruled that ESA Section 7 did not override the Federal Power Act's prohibition on amending annual power licenses, and in *American Forest & Paper Association* the court ruled that EPA could not impose Section 7 consultation duties on a state as a condition to transferring NPDES permitting authority. The more important precedent from a theoretical point of view was the Supreme Court's own *Department of Transportation (DOT) v. Public Citizen,* 541 US 752 (2004), a case involving the National Environmental Policy Act (NEPA). Here the court ruled that DOT was not required to write an environmental impact statement on the possible effects of increased Mexican truck traffic when the traffic was a result of Presidential decree, not agency action. The case established the principle that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant action, the agency cannot be considered a legally relevant cause of the effect.

In *National Association of Homebuilders v. Defenders of Wildlife*, writing for the five justice majority, Justice Alito began by dismissing the issue of the EPA's inconsistent interpretations of its Section 7 obligations. The majority noted that EPA and the Services had agreed that consultation was not required and would not be conducted in the future. Further, the agency's vacillation was irrelevant in light of the final action taken on the Arizona application, *i.e.*, approval without the imposition of any mitigating measures developed through Section 7 consultation. The majority then held that the ESA did not impliedly repeal CWA Section 402(b), rewriting the law to add a tenth element to Congress's original nine. The Court noted that the Ninth Circuit's broad interpretation would "partially override every

federal statute mandating action by subjecting such action to the further condition that it pose no jeopardy to endangered species." In light of the conflict between the two statutes, the majority held that deference to the Services' interpretation was appropriate. The Court thus deferred to the Services' regulatory interpretation that consultation applies only to *discretionary* action, and not to actions such as the mandatory NPDES permit program transfers. Finally, the majority held that the landmark "snail darter" case, *Tennessee Valley Authority v. Hill*, 437 US 153 (1978), did not compel a different result. In that case, the dispute was over the completion of a federal dam project which threatened to eliminate the endangered fish. The Court held that the project could not proceed, despite the fact that construction was already funded and virtually complete. The majority distinguished the case on grounds that the dam in *TVA v. Hill*, though nearly complete, was still a discretionary project.

Writing for the dissent, Justice Stevens emphasized the expansive language of the ESA and argued that *Tennessee Valley Authority* could not be distinguished as a case limited to discretionary action. Justice Stevens also argued that the Services' rule, 50 CFR §402.03, did not limit the reach of the ESA and that the Section 7 consultation process was not antithetical to the purposes of CWA permitting delegation.

On its surface the court's decision seems unlikely to have substantial impact on CWA matters, particularly in states (like Oregon) that already implement their own permitting programs. The decision may lend support to arguments under both NEPA and the ESA that federal agencies ought not be required to account for the environmental consequences of actions taken by Congress – either through mandatory statutory language or by historical decisions such as authorizing dam construction. The decision may also establish a bulwark against expansive readings of the ESA to extend obligations and liabilities based on theories of remote causation. Had the decision gone the other way, the regulatory consequences could have been substantial. Consultation requirements would likely have become a necessary part of NPDES permitting in "delegated" states, and many of EPA's previous transfer decisions could have been reopened through the "reconsultation" process.

If you would like to contribute or have comments, please contact the E-OutLook Editor, Hong Huynh at hong.huynh@millernash.com or (503) 205-2485.