Ninth Circuit Expands Scope Of ESA Obligations For Federal Agencies

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Defenders of Wildlife v. U.S. Environmental Protection Agency

On June 8, 2006, the Ninth Circuit denied en banc review in *Defenders of Wildlife v. US Environmental Protection Agency*. Environmentalists contend, and industry representatives fear, that the decision forces federal agencies to consider the effects of their non-discretionary actions on endangered species even when the agency does not have the authority to consider such effects. While the United States has not decided whether it will seek review in the Supreme Court, given the significance of the decision and its conflict with decisions in other Courts of Appeal, it seems likely that intervenors, including the National Association of Home Builders and the Arizona Chamber of Commerce, will seek Supreme Court review.

At issue in *Defenders* was EPA's decision to approve the State of Arizona's application to administer the National Pollution Discharge Elimination System (NPDES) program under section 402 of the Clean Water Act (CWA). The CWA identifies nine criteria for approval of a state NPDES program and requires EPA to delegate the program if those criteria are met. None of these criteria include endangered species considerations. Environmental groups sued alleging that EPA had not properly consulted with the Fish and Wildlife Service under section 7(a)(2) of the Endangered Species Act (ESA) and that EPA had relied on an inadequate biological opinion. While it was required to consult with the Fish and Wildlife Service, EPA contended that it had no discretion under the CWA to deny or condition approval of Arizona's NPDES program based on any effects on endangered species.

On August 22, 2005, a split panel of the Ninth Circuit agreed with the environmental plaintiffs and vacated EPA's approval of Arizona's application based on adverse impacts to listed species. The majority concluded that the biological opinion was fatally deficient and that the requirement imposed by section 7(a)(2) to avoid jeopardy and adverse modification of critical habitat was "in addition to those [obligations] created by an agencies' own governing statute." Moreover, the majority found that EPA was arbitrary and capricious in relying on the analyses in the biological opinion because it failed to evaluate the loss of ESA consultation that would result from the transfer of the NPDES program. Since ESA consultation obligations do not apply to States, once the NPDES program is transferred to the State of Arizona, there would be no ongoing obligation to consider the effects on endangered species or their habitat caused by

an activity authorized by a state issued NPDES permit or to mitigate such effects.

The United States filed for rehearing of the decision arguing that the majority's opinion allowed the ESA to trump the mandatory obligations of the Clean Water Act. As it has in other ESA cases, the United States argued that the ESA only applies to "actions in which there is discretionary Federal involvement or control." The Ninth Circuit denied both requests. Judge Kozinski wrote a sharply worded dissent from the denial noting:

> The majority's opinion has far-reaching effects on the scope of the Endangered Species Act. Its holding – that the ESA imposes an affirmative duty on a federal agency to protect endangered species, even in the face of a governing statute that explicitly precludes the agency from doing so – contradicts FWS's statutory interpretation, ignores the very recent instruction of the Supreme Court, and creates a conflict with two other circuits.

Defenders of Wildlife v. USEPA, No. 03-714390 at 6299 (9th Cir. June 8, 2006). Requests for Supreme Court review would be due at the beginning of September.
