

Endangered Species Committee Newsletter

Vol. 9, No. 1

June 2007

SUPREME COURT CONSIDERS WHETHER EPA MUST CONSULT ON DELEGATION OF NPDES PROGRAM TO STATES

Karma B. Brown
Hunton & Williams LLP

On April 17, 2007, the U.S. Supreme Court heard argument in *Defenders of Wildlife v. United States Environmental Protection Agency and National Homebuilders Association v. Defenders of Wildlife*. This is the first ESA case to reach the Court since its landmark standing decision in *Bennett v. Spear*, a decision rendered over ten years ago. At issue was a decision by the Environmental Protection Agency (EPA) approving the State of Arizona's application to administer EPA's National Pollutant Discharge Elimination System (NPDES) program pursuant to Section 402(b) of the Clean Water Act (CWA). The Court considered whether EPA was required to consult with the U.S. Fish & Wildlife Service (Service) under Section 7(a)(2) of the ESA prior to transferring the NPDES program to ensure no jeopardy to listed species.

Section 402(b) of the CWA sets forth nine exclusive criteria that a state program must satisfy in order to qualify for transfer of EPA's NPDES program. For example, the state must demonstrate that there are provisions in the submitted program to insure that EPA "receives notice of each application . . . for a permit" and that authority exists to "abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of

enforcement." 33 U.S.C. §§ 1342(b)(4), (b)(7). If those criteria are satisfied, EPA must approve the state's program. *See, e.g., American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998). Under the ESA, federal agencies have a duty to consult with the Service to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence" of any listed species or result in the "destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). This duty does not apply to non-discretionary actions. In its review of the State of Arizona's application, EPA concluded that it had no legal authority to withhold or otherwise condition the transfer so long as the conditions set forth in CWA section 402(b) were met. EPA therefore approved Arizona's permitting program.

Defenders of Wildlife and other environmental groups sued, arguing that EPA violated Section 7(a)(2) of the ESA by failing to insure that Arizona's program would not jeopardize listed species or critical habitat. A majority of the Ninth Circuit panel agreed with Defenders and ordered that Arizona's NPDES program be vacated. *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005). Though the majority found that Section 402(b) of the CWA foreclosed EPA's discretion to take into consideration effects on listed species, the court held that Section 7(a)(2) of the ESA grants independent authority to federal agencies. As the majority reasoned, Section 7(a)(2) is "an obligation in addition to those created by the agencies' own governing statute."

**Endangered Species
Committee Newsletter
Vol. 9, No. 1, June 2007
Christian L. Marsh, Editor**

In this issue:

Supreme Court Considers Whether
EPA Must Consult on Delegation of
NPDES Program to States
Karma B. Brown 1

The Ninth Circuit Fills Two Gaps in ESA
and Critical Habitat Jurisprudence
*Paul S. Weiland and
Hadassah M. Reimer* 3

Ninth Circuit Rules That Without
Affirmative Action, BLM Has No Duty
to Consult
David G. Scott 5

District Court Enjoins Portion of
San Diego MSCP Related to Vernal
Pool Habitat
Anne C. Arnold 6

© 2007. American Bar Association. All rights reserved. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors and, accordingly should not be construed as representing the policy of the ABA.

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



In an interesting turn of events, when the petition for en banc review was denied, the denial sparked a series of conflicting and impassioned dissenting and concurring opinions. *Defenders of Wildlife v. EPA*, 450 F.3d 394 (9th Cir. 2006). The main dissent authored by Judge Kozinski and joined by four other judges took issue with the Ninth Circuit’s earlier majority opinion, arguing that the majority “transformed the ESA into an overriding mandate that trumps an agency’s obligations under its own governing statute.” The Service’s regulations establish that the ESA applies only to discretionary actions. The dissent reasoned, “EPA had no discretion under the CWA to prevent the transfer of permitting authority to Arizona, [thus] it did not need to consider the transfer’s effects on endangered species.” The dissent also chastised the majority opinion as “tone-deaf” to the Supreme Court’s decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), which imposed a causal relationship between agency action and environmental harm in order to trigger review under the National Environmental Policy Act (NEPA).

The author of the original majority opinion, Judge Berzon, authored a concurring opinion, which separately responded to Judge Kozinski’s dissent. Judge Berzon argued that the “assertion that section 402 of the Clean Water Act ‘precludes’ application of the plain language of section 7 of the after-enacted Endangered Species Act” is wrong because the pertinent part of the CWA does not mention the ESA. Section 7(a)(2), by its own language, applies to any federal action, and not just discretionary actions as argued in the dissent. Further, she distinguished Judge Kozinski’s reliance on *Public Citizen* because that case dealt solely with NEPA, an entirely different environmental statute.

After the Ninth Circuit’s denial of the en banc petition, EPA and the National Association of Homebuilders filed petitions for writ of certiorari to the U.S. Supreme Court. On Jan. 5, 2007, the Court granted those petitions. *Defenders of Wildlife v. United State Environmental Protection Agency*, 127 S. Ct. 853 (2007); *National Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 852 (2007).

Oral argument in the consolidated cases was heard on April 17, 2007. Deputy Solicitor General Edwin Kneedler argued that EPA has no discretion to withhold transfer and therefore no duty under ESA Section 7(a)(2) to consult with the Service. But Justice Ginsburg questioned the automatic nature of the EPA's duty to transfer its NPDES program: "Isn't there a difference between denying the application because the Endangered Species Act hasn't been attended to adequately, and saying you meet the nine criteria, you're going to get your application. But then, so it's not just automatic that the thing becomes the State's domain rather than Federal." And Justice Souter emphasized that "the Endangered Species Act mandate seems equally unconditional." Likewise, Justice Breyer urged that the interpretation given by the federal government would mean that "every statute that uses the word 'shall' is not subject to the ESA." Moreover, the very criteria EPA must evaluate in approving a transfer includes one that requires EPA to "assure the protection and propagation of a balanced population of shellfish, fish, and wildlife." According to Justice Breyer, the two mandatory statutes did not appear inconsistent.

Justice Roberts, on the other hand, was troubled by the lack of apparent harm in transferring administration of the NPDES program: "the point is that it's the issuance of a permit under the program, whether administered by the Federal Government or the State government that has the potential for jeopardizing the species. It is not the administration of the program." Several Justices seemed to echo this comment, including Justice Breyer, in asking Defenders' counsel: "[W]hat is the risk to an endangered species that you're actually worried about there?" Justice Scalia, in particular, suggested that Defenders needed "to show some reason why we don't trust Arizona to do what the Federal government's doing. . . . You have to establish jeopardy."

On rebuttal, the government argued that the case was "on all fours with the *Public Citizen* case," which held that "where an agency has a mandatory duty and does not have the ability to control subsequent events, . . . the agency cannot be regarded as the legal cause of whatever effects happen." Because CWA Section

402(b) mandates transfer once the nine criteria are met, EPA's decision "is not the legal cause of any effects that might happen with respect to endangered species," and consequently there is no duty to consult under ESA Section 7(a)(2).

With the case submitted, a decision from the Court is expected at any time. Whether the government will prevail is another matter, particularly with the Justices seeming equally divided at oral argument. What is clear is that this decision will change the landscape, either by significantly broadening the application and scope of an agency's duty to consult under the ESA, or by narrowing the types of federal agency actions and remedies available under the ESA. Stay tuned.

THE NINTH CIRCUIT FILLS TWO GAPS IN ESA AND CRITICAL HABITAT JURISPRUDENCE

Paul S. Weiland
Nossaman Guthner Knox & Elliott LLP

Hadassah M. Reimer
Holland & Hart LLP

In June 2006, in a case that presented two principal issues on appeal—whether the U.S. Fish & Wildlife Service (Service) erred when it made a finding that critical habitat should not be designated for the endangered unarmored threespine stickleback and whether the Service erred when it issued an incidental take statement for the stickleback—the U.S. Court of Appeals for the Ninth Circuit held in favor of the United States. *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 450 F.3d 930 (9th Cir. 2006). Specifically, the Ninth Circuit held that the Service had discretion to forego designation of critical habitat for the stickleback, a species listed under the Endangered Species Act (ESA) prior to the 1982 amendments which mandated critical habitat designations. The court also found that the Service has no duty to independently insure that a particular activity is "otherwise lawful" when issuing an incidental take statement. This is a case of first impression in the circuit

courts with respect to both issues and the court's decision has significant implications for approximately 272 species listed prior to 1982.

Center for Biological Diversity v. U.S. Fish and Wildlife Service is one of a number of administrative and judicial challenges to the proposed expansion of the Soledad Canyon Sand and Gravel Mine in east Los Angeles County, California. The mining rights were awarded in 1990 to the project proponent, Transit Mixed Concrete (aka, Cemex), by the Bureau of Land Management (BLM), which owns the subsurface estate. As part of the expansion of the mine, Cemex proposed to divert water from the Santa Clara River in which the stickleback resides. In light of the potential impact to the stickleback, BLM initiated consultation with the Service as required by Section 7 of the ESA. After the Service issued a Biological Opinion and Incidental Take Statement for the proposed project, the Center for Biological Diversity and Friends of the Santa Clara River (CBD) filed the apposite lawsuit. On cross-motions for summary judgment, the United States District Court for the Central District of California held in favor of the Service and intervenor-defendant Cemex.

The Service had listed the stickleback as endangered in 1970 and proposed to designate three stream zones in California (including parts of the Santa Clara River) as critical habitat in 1980, but the final rule designating critical habitat was never issued. In 2002, the Service made its final determination that critical habitat for the stickleback was not warranted. CBD challenged the decision, claiming that designation of critical habitat was mandated by the ESA, particularly since the Service had proposed to designate critical habitat back in 1980. The United States countered that (1) the stickleback was listed in 1970 under a predecessor to the ESA, and (2) when the ESA was amended in 1982 to require the Service to designate critical habitat concurrent with listing, Congress provided that species such as the stickleback that were already listed would be subject to the provisions of the ESA regarding critical habitat "revisions" (as opposed to critical habitat "designations"). Furthermore, the United States argued that the Service acted within its discretion, as prescribed by Section 4(b)(6)(A)(i) of the ESA, regarding critical habitat revisions, when it made a

finding that critical habitat should not be designated for the stickleback.

A unanimous panel in the Ninth Circuit held that the ESA does not mandate the designation of critical habitat for species listed prior to the 1982 ESA amendments, which provided that critical habitat designations, "to the maximum extent prudent or determinable," shall occur "concurrently" with the listing decision. 16 U.S.C. § 1533(a)(3)(A). In the amending legislation, Congress clarified that for species listed before 1982, the regulations governing revisions to critical habitat would apply, rather than those governing designations in the first instance. *See* Pub. L. No. 97-304, 96 Stat. 1411 § 2(b)(2) (1982). Thus, the Service's decision to designate critical habitat was governed by the provision that it "may" revise critical habitat designations "from time-to-time . . . as appropriate." Consequently, "the Service has discretion in choosing a course of action with respect to [the proposed rule to designate critical habitat], just as it does in deciding whether or not to propose a designation [for species listed prior to the 1982 amendments]." Applying the arbitrary and capricious standard of review to the Service's decision, the Ninth Circuit ruled that the Service had considered the relevant factors and made a reasoned decision not to designate critical habitat.

The court also rejected CBD's contention that Section 4(a)(3)(A), which requires the Service to designate critical habitat to the maximum extent prudent and determinable, applied to the proposed rule. The court held that applying Section 4(a)(3)(A) to both critical habitat revisions and designations would eliminate the separate treatment of the two and thereby render the distinction meaningless. As a result, at least in the Ninth Circuit, the Service need not designate critical habitat for species listed prior to the 1982 amendments, even if the Service has proposed to do so. *C.f.*, *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999) (designation of critical habitat must occur within the 12-month statutory period following a species listing).

CBD also argued that the Service could not issue an incidental take statement pursuant to Section 7(b)(4)(C) of the ESA unless the Service first

determines that the action will comply with all applicable legal requirements. CBD based this argument on its interpretation of Service regulations that define “incidental take” as “takings that result from, but are not the purpose of, carrying out an *otherwise lawful activity*.” 50 C.F.R. § 402.02. In this instance, CBD reasoned, the Service erred by issuing an incidental take statement for the stickleback because the “take” of stickleback would have violated California’s “fully protected species” laws. (California’s fully protected species laws prohibit, without exception, the take of certain species. It is noteworthy that the term “take” has different meanings under the ESA and California’s fully protected species laws.) CBD argued that this requirement placed an affirmative duty on the Service to ensure compliance by the action agency with all state and federal laws.

The Ninth Circuit rejected CBD’s argument and agreed with the United States. The language cited by CBD was included in the regulations to emphasize that an incidental take statement does not relieve the action agency of its independent obligation to comply with applicable state and federal laws, but it is not the regulation itself that requires actual compliance with those other laws. The Ninth Circuit refused to accept the CBD’s contention that the Service has a sweeping duty under the ESA “to ensure compliance with a farrago of zoning laws and permitting requirements that are completely unrelated to preservation and conservation efforts.” The Court concluded that “[s]uch a requirement would impose an enormous burden on the Service.” The decision recognized the practical limitations on the Service’s responsibility in issuing an Incidental Take Statement, and clarified that the Service may allow incidental “take” of an endangered species without first making a determination that the activity in question is allowed under any other federal or state laws.

NINTH CIRCUIT RULES THAT WITHOUT AFFIRMATIVE ACTION, BLM HAS NO DUTY TO CONSULT

David G. Scott
Hunton & Williams LLP

Under Section 7(a)(2) of the Endangered Species Act (ESA), federal agencies must consult with either NOAA Fisheries (NOAA) or the U.S. Fish & Wildlife Service (Service) whenever a federal action “may affect” a listed species or designated critical habitat. But in a ruling issued by the Ninth Circuit on July 24, 2006, the court qualified that a federal agency’s duty to consult is triggered only by affirmative actions, and not by the mere existence of the discretionary authority to act. *Western Watersheds Project v. Majeiko*, 468 F.3d 1099 (9th Cir. 2006). In *Western Watersheds*, the court found that since no federal action had occurred when the United States Bureau of Land Management (BLM) failed to add conditions to pre-existing water diversions, no consultation was necessary.

Western Watersheds involved private rights-of-way across federal lands authorized under federal law in the late-1800s. On BLM lands in Idaho, ranchers and farmers use ditches and pipes to divert water from streams for irrigation and livestock. The rights-of-way at issue in the case existed prior to the enactment of the Federal Land Policy and Management Act of 1976 (FLPMA). While FLPMA established a single process for establishing rights-of-way across federal land, it grandfathered existing rights-of-way such as those involved in Idaho. BLM policy and regulations provide for the existence of these rights-of-way in perpetuity, absent a “substantial deviation” in location or authorized use by the holder.

In this instance, BLM had decided not to impose any new conditions on the operation and normal maintenance of grandfathered rights-of-way unless activities were undertaken that significantly altered the alignment of those rights-of-way. Plaintiffs filed suit and argued in the district court that BLM’s decision not to impose maintenance and operational conditions amounted to an “action” for the purposes of the ESA, and therefore triggered the consultation requirements

15TH SECTION FALL MEETING
SEPT. 26-29, 2007
PITTSBURGH, PENNSYLVANIA

SAVE THE DATE!

under Section 7(a)(2). The district court agreed, holding that the word “action” includes not only an agency action that itself may affect a listed species, but also “an agency decision to ignore actions by others” that might have the same effect.

The Ninth Circuit reversed, and instead determined that the BLM’s decision to forego its conditioning of the rights-of-way did not constitute an “agency action” for purposes of the ESA since BLM did not “authorize, fund, or carry out” the diversions. “[B]ecause the . . . diversions did not result from affirmative BLM actions authorizing, funding, or carrying out the activity, there is no duty to consult.” The court likewise rejected a claim that the BLM’s failure to exercise its regulatory discretion amounted to an “ongoing agency action,” which itself would trigger the duty to consult. “Even if the BLM could have retained the power to regulate the pre-FLPMA diversions, its determination made years ago to limit such power is not an ‘ongoing agency action.’” This limit is in contrast to the many instances where agencies have been required to consult on affirmative decisions rendered by those agencies. *See, e.g., Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998) (federal agency decision to renew water contracts triggered Section 7 consultation requirements).

In decisions issued since *Western Watersheds*, the courts have affirmed this limitation on a federal agency’s duty to consult. *See California Sportfishing Protection Alliance v. Federal Energy Regulatory Commission*, 472 F.3d 593 (9th Cir. 2006); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 2006 U.S. Dist. LEXIS 68955 (no “agency action” and thus no duty to consult when State Department declined to negotiate with a foreign sovereign on salmon harvest limits). In *California Sportfishing Protection Alliance*, for example, the Ninth Circuit held that the Federal Energy Regulatory Commission (FERC) had no duty to consult with NOAA Fisheries about the ongoing operations of a hydroelectric project, even though FERC had retained discretionary authority to unilaterally institute proceedings to amend the operations license so that it might “reflect changing environmental concerns.” Again, the court held, the ESA does not mandate consultation when the agency takes “no affirmative action.”

DISTRICT COURT ENJOINS PORTION OF SAN DIEGO MSCP RELATED TO VERNAL POOL HABITAT

Anne C. Arnold
Briscoe Ivester & Bazel LLP

In *Southwest Center for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118 (S.D. Ca. 2006), Judge Rudi M. Brewster ruled that San Diego’s Multiple Species Conservation Plan (MSCP) failed to adequately protect seven vernal pool species listed as threatened or endangered under the Endangered Species Act (ESA). Judge Brewster ordered the U.S. Fish & Wildlife Service (Service) to reinstate consultation proceedings on the city’s incidental take permit (ITP) and to scrutinize the MSCP to ensure satisfaction of the legal and biological requirements of the ESA. Separately, based on the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001)—which held that the Army Corps of Engineers (Corps) does not have jurisdiction over isolated waters—Judge Brewster found that the MSCP could not rely on the treatment of vernal pools as wetlands under the federal Clean Water Act (CWA).

In 1998, a coalition of more than a dozen conservation and environmental groups brought suit in federal district court to challenge the Service’s decision to issue an ITP to the City of San Diego for the MSCP. Originally approved under Section 10(a)(1)(B) of the ESA in 1997, the MSCP covers a number of activities (including residential development) that might incidentally “take” threatened or endangered species on 543,243 acres (or roughly 848 square miles) within Southwestern San Diego County. Though the MSCP addressed eighty-five species, the lawsuit focused on seven vernal pool species—two small aquatic crustacean species (San Diego fairy shrimp and Riverside fairy shrimp) and five plant species (Otay mesa mint, California Orcutt grass, San Diego button celery, San Diego mesa mint, and spreading navarretia)—all listed as “endangered.”

The MSCP treated vernal pools as wetlands under the CWA and required project proponents to apply for a

Section 404 permit from the Corps for any development that would impact vernal pools. (Prior to SWANCC, the Corps' regulations would have included isolated waters under the migratory bird rule, for example.) Project proponents were also required to establish mitigation measures in consultation the Corps and the Service. Significantly, the district court held that the Supreme Court's SWANCC decision defeated the assumption that the Corps would regulate vernal pools and determined that the effects of anticipated development on vernal pool species (and other rare species and habitats in Southern California) were not adequately considered in the MSCP.

Judge Brewster based his decision largely on the fragility of the vernal pool habitat: "This permit, with its massive development of vernal pool habitat and highly questionable mitigation techniques for a species that cannot be simply gathered and moved to another location, violates the fundamental objective of the ESA to conserve listed species to bring them to the point at which statutory protection is no longer necessary." Judge Brewster soundly rejected the argument that impacts to vernal pool habitats would be evaluated "in future permit procedures." Endangered species habitat loss must be viewed cumulatively: "if this type of destruction is treated on a case-by-case basis as an unimportant loss, it does not take long before life on this planet is in jeopardy."

Judge Brewster's decision highlights an active debate surrounding habitat conservation plans (HCPs) generally, and whether the purpose of those plans is to forestall the extinction of a species, or instead to foster recovery to a point where delisting may occur. Brewster's decision suggests that in order to comply with the ESA, HCPs must do both. Despite this adverse ruling, however, the conservation plan is continuing to function.

Nonetheless, a number of regionally-based conservation plans could be vulnerable to similar attacks should they fail to minimize and mitigate adverse impact, as well as provide for the "conservation" of listed species. Here, the court was particularly troubled by the fact that the MSCP created a permanent natural preserve, but did not actually

"establish the Preserve; rather it roughly delineate[d] target boundaries," while the exact acreage would be "dedicated over the next fifty years." The court did not tolerate anything other than useful mitigation measures that would be immediately implemented in the MSCP.



LIKE TO WRITE?

The Endangered Species Committee welcomes the participation of members who are interested in preparing this newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor Christian L. Marsh at 415/402-2703 or cmarsh@briscoelaw.net.

VISIT US ON THE WEB!

To learn more about the ABA, Section and Committee, please visit:

American Bar Association:
www.abanet.org

Section of Environment, Energy, and Resources:
www.abanet.org/environ/

Endangered Species Committee:
www.abanet.org/environ/committees/endangered/home.html

Books from the Section and ABA Publishing:
www.ababooks.org

NEW FROM ABA PUBLISHING AND THE SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Global Climate Change and U.S. Law

Michael B. Gerrard, Editor

Because global climate change presents extraordinary challenges to the environment and the economy of United States as well as those of other nations, the debate about how to effectively implement more climate-friendly policies is sure to continue and amplify. The scientific case for strong action is becoming more compelling every month, and opinion polls show that the American public increasingly agrees. The law will play an important part in developing mechanisms to protect the climate, such as conserving energy, using renewable sources of energy, and implementing emission caps and trading programs.



Global Climate Change and U.S. Law provides comprehensive coverage of the country's law as it relates to global climate change. After a summary of the factual and scientific background, Part I outlines the international and national legal framework of climate change regulation and associated litigation. Part II describes emerging regional, state and local actions, and includes a 50-state survey. Part III covers issues of concern to corporations, including disclosure, fiduciary duties, insurance, and subsidies. Part IV examines the legal aspects of efforts to reduce greenhouse gases, such as voluntary efforts, emissions trading, and carbon sequestration. *Global Climate Change and U.S. Law* includes key resource aids, including a glossary of climate related terms; a list of acronyms; extensive endnotes; and a comprehensive index.

2007 784 pages 7x10 paperback

Product Code: 5350156

Regular Price: \$59.95

Section of Environment, Energy, and Resources Member Price: \$49.95

**TO ORDER ABA BOOKS, CALL 1-800-285-2221 OR
VISIT THE ABA PUBLISHING
WEB SITE AT WWW.ABABOOKS.ORG
QUESTIONS? E-MAIL: SERVICE@ABANET.ORG**