



American Bar Association
Section of Environment, Energy, and Resources
Endangered Species Committee



Presents a "Quick Teleconference" program

The Supreme Court Decision on *National Home Builders Association v. Defenders of Wildlife*

Friday, July 13, 2007

1:00 p.m. – 2:30 p.m. Eastern Time / 12:00 p.m. – 1:30 p.m. Central Time
11:00 a.m. – 12:30 p.m. Mountain Time / 10:00 a.m. – 11:30 a.m. Pacific Time

Program Overview:

On June 25, 2007 the Supreme Court announced a major and split (5-4) decision governing the intersection of two environmental statutes: the Clean Water Act (CWA) and the Endangered Species Act (ESA). Section 402 of the CWA requires the EPA to transfer jurisdiction over the National Pollution Discharge Elimination System (NPDES) permit system where nine criteria are met. At the same time, section 7(a)(2) of the ESA requires federal agencies to "insure" that any action they carry out will not likely jeopardize the continued existence of a threatened or endangered species. At issue in this case was whether EPA was required to follow the 7(a)(2) procedures in turning over the NPDES permit system to the State of Arizona. The Ninth Circuit concluded that compliance with 7(a)(2) was necessary, and moreover, that EPA had failed in its duty to "insure" the protection of listed species because EPA had relied on contradictory positions regarding its 7(a)(2) responsibilities during the administrative process. The Supreme Court reversed in a 5-4 decision. First, the court concluded that the Ninth Circuit's opinion was not supported by the record. More importantly, the Court concluded that the requirements of 7(a)(2) simply did not apply to section 402 transfers because the agency had no discretion in the transfer decision. Transfer under 402 is mandatory when the required conditions are met, and EPA simply lacks the power to insure that such action will not jeopardize listed species. This decision could have broader implications for the applicability of 7(a)(2) to non "discretionary" actions. This teleconference brings the two attorneys who argued the case to the audience to provide a briefing and discussion of the case.

Educational Objectives:

- Provide a brief overview of CWA Section 402 transfers of the NPES permit system
- Provide a brief overview of ESA Section 7(a)(2) duties on federal agencies
- Provide in depth discussion of the Court's decision

Faculty:

Moderator:

Eric Laschever, Stoel Rives LLP, Seattle, WA

Panelists:

Michael Senatore, Defenders of Wildlife, Washington, DC (counsel for Defenders of Wildlife)

Norman D. James, Fennemore Craig, P.C., Phoenix, AZ (counsel for National Association of Home Builders)

Questions?

Do you have a question that you would like the panel to address? Please email your question to Eric Laschever at eslaschever@stoel.com July 12, 2007 at noon Eastern Time and the panel will make every effort to address your inquiry.

