THE NINTH CIRCUIT REDEFINES THE SCOPE OF SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT

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In an important new decision, the Ninth Circuit Court of Appeals has expanded the obligations of federal agencies under section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), holding that section 7(a)(2) independently grants agencies authority to act for the benefit of listed species and that any "authorizing action" creates an obligation to exercise that authority. *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005).

This litigation arose from EPA's approval of Arizona's application to administer the National Pollutant Discharge Elimination System (NPDES) program under section 402(b) of the Clean Water Act (CWA), 33 U.S.C. § 1342(b). Section 402(b) states that EPA "*shall* approve each submitted program unless" EPA determines that one or more of nine specified criteria are not satisfied. *See, e.g., EPA v. California ex rel. State Water Resources Control Bd.,* 426 U.S. 200, 208 (1976); *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998). In addition, under Section 402(c), EPA must act on a state's application within 90 days and suspend the issuance of federal permits "unless the [EPA] determines that the State permit program does not meet the requirements of subsection (b)." Prior to Arizona's application, 44 states had been authorized to administer the NPDES program.

In this case, there was no dispute that Arizona's program satisfied the criteria in CWA section 402(b). The petitioners, Defenders of Wildlife and Center for Biological Diversity,

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instead contended that EPA violated section 7(a)(2) of the ESA by failing to properly consult with the Fish and Wildlife Service (Service) and by relying on an inadequate biological opinion. The Ninth Circuit panel, by a 2-1 vote, vacated EPA's approval of Arizona's application based on adverse impacts to listed species. Petitions for rehearing are presently pending.

Section 7(a)(2) of the ESA applies to actions undertaken by federal agencies, and prohibits actions that are likely to jeopardize the continued existence of listed species or adversely modify their critical habitat. If a proposed federal action is likely to affect listed species or their critical habitat, then the agency must consult with the Service (or, in the case of marine species, the NOAA Fisheries), following the procedures in ESA section 7(a)(2) and its implementing regulations, codified at 50 C.F.R. part 402. *See, e.g., Defenders of Wildlife v. Flowers,* 414 F.3d 1066 (9th Cir. 2005) (affirming "no effect" determinations made by the Corps of Engineers in issuing CWA section 404 permits to developers).

In this case, the petitioners' primary argument was that the transfer of NPDES permitting authority to Arizona would result in a significant loss of "conservation benefits" produced by the section 7(a)(2) consultation process. This argument was supported by various documents in the administrative record prepared by Service employees in the Arizona field office, who objected to the impact Arizona's program would have on their ability to use the section 7 consultation process to regulate real estate development.[2] EPA, in contrast, contended approval of Arizona's program constituted an administrative shift in authority and future real estate development was not an effect of the action. *See* 50 C.F.R § 402.02 (definition of "effects of the action").

This disagreement was elevated under the 2001 Memorandum of Agreement on

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[2] For example, in a briefing statement to the Region 2 director (copy attached), Service employees argued that approval of Arizona's program would allow "unchecked" development to occur, reducing the conservation status of the cactus ferruginous pygmy-owl, Pima pineapple cactus and Huachuca water umbel.

coordination between the CWA and ESA, 66 Fed Reg. 11202 (Feb. 22, 2001). In the interagency elevation document (copy attached), the agencies' positions were summarized as follows:

> FWS is concerned that, following EPA Region 9's approval action, endangered species, in particular, the cactus ferruginous pygmy-owl, the Pima pineapple cactus, and perhaps other species, will be adversely impacted in the future by projects that will require State NPDES permits issued by the State of Arizona. The FWS's concerns involve the indirect effects of permit issuance from non-water-quality-related impacts from these projects, such as construction, water usage, and similar activities that affect individuals of the species either directly or through disturbance of their habitat. . . .
>
> EPA Region 9 believes that it does not have legal authority to regulate the non-water-quality-related impacts associated with State NPDES-permitted projects that are of concern to FWS, ...
>
> EPA Region 9 also believes that its approval action, which is an administrative transfer of authority, is not the cause of future non-discharge-related impacts on endangered species from projects requiring State NPDES permits.

Ultimately, the Service issued a biological opinion concluding that approval of Arizona's program was not likely to jeopardize listed species on several different grounds, including EPA's arguments that it CWA authority is limited and future real estate development in Arizona was not an indirect effect of the action.[3]

The majority of the panel agreed with the petitioners and held that the biological opinion is "fatally deficient." *Defenders of Wildlife*, 420 F.3d at 971. The majority acknowledged that "the Clean Water Act does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of all endangered species; the EPA has that authority only when one

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[3] The Service's biological opinion, issued on December 3, 2002, is available at http://www.fws.gov/arizonaes/Documents/Biol_Opin/020268_EPA_approval_of_AZ_ AZPDES.pdf.

also considers the Endangered Species Act." *Id.*, 420 F.3d at 974. The majority concluded instead that the obligation imposed on federal agencies under section 7(a)(2) to avoid jeopardy and adverse modification of critical habitat "is an obligation in addition to those created by the agencies' own governing statute." *Id.*, 420 F.3d at 967. This holding expands the scope of section 7(a)(2) by treating the statute as providing independent authority, as well as creating an affirmative obligation, to regulate non-federal activities for the benefit of listed species.

The majority focused on the phrase "insure that any action . . . is not likely to jeopardize" in section 7(a)(2), concluding Congress intended this phrase to grant authority to act, rather than prohibiting actions that jeopardize species. *Id.*, 420 F.3d at 963-67. It found support for this reading of the statute in *TVA v. Hill*, 437 U.S. 153 (1978), and in the distinction between sections 7(a)(2) and 7(a)(1), which directs agencies to "utilize their authorities" to carry out programs for the conservation of species. The majority also discussed the exemption process enacted in the 1978 ESA amendments, codified at 16 U.S.C. § 1536(g) and (h), concluding that Congress elected to maintain the section 7(a)(2) limitations on agency actions discussed in *Hill* in subsequent amendments of the ESA.

Senior Circuit Judge Thompson dissented, stating that the Ninth Circuit has "consistently recognized that an agency may have decisionmaking authority and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered and threatened species." *Defenders of Wildlife*, 420 F.3d at 979. For example, in *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995), the court held section 7(a)(2) did not apply to BLM's approval to construct a logging road because a reciprocal right-of-way agreement limited the

agency's approval rights.[4] In other cases, such as *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005), the court determined that section 7(a)(2) applied to a federal action.[5] However, in each case, the Ninth Circuit analyzed the agency's enabling statutes to determine whether sufficient discretionary authority existed, an approach consistent with 50 C.F.R. § 402.03.

In *Defenders of Wildlife*, in contrast, the majority concluded that whenever a federal agency authorizes, funds or carries out an action, Section 7(a)(2) applies: "the EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application. The EPA's decision authorized the transfer, thus triggering section 7(a)(2)'s consultation and action requirements." 420 F.3d at 969. The majority marginalized 50 C.F.R. § 402.03, promulgated in 1986, which limits the application of section 7(a)(2) to actions in which there is "discretionary Federal involvement or control," characterizing the rule as a "gloss" on the statute. Under the majority's interpretation, the limitation on the obligation to consult codified in 50 C.F.R. § 402.03 will rarely apply because all federal agencies have an independent, affirmative obligation to act for the benefit of species under section 7(a)(2).

The majority's reading of section 7(a)(2) conflicts with *American Forest and Paper* and *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992), both of which held that ESA section 7 does not grant additional authority to federal agencies. In *American Forest and Paper*, for example, the Fifth Circuit held EPA lacked authority to impose conditions to protect listed species in approving Louisiana's NPDES

[4] *See also Ground Zero Center v. Dep't of the Navy*, 383 F.3d 1082 (9th Cir. 2004) (the Navy lacked sufficient discretion to trigger consultation in connection with expanding and operating a submarine base).

[5] *See also Turtle Island Restoration Network v. NMFS*, 340 F.3d 969 (9th Cir. 2003) (NMFS was required to consult when issuing permits to fishing vessels under the High Seas Fishing Compliance Act because the agency was granted sufficient discretion to condition permits to benefit listed species).

program under CWA section 402(b). The majority rejected both decisions as unpersuasive, and instead followed decisions from two other circuits, *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989), and *Conservation Law Found. v. Andrus*, 623 F.2d 712 (1st Cir. 1979), neither of which addressed the issue decided in this case. The former was an ESA section 9 case, while the latter involved the continued application of section 7(a)(2) to staged decision-making in the context of offshore oil and gas leases.

As the remedy, the majority vacated EPA's decision to approve Arizona's program based on its concern with the possible risk of species' extinction (using the pygmy-owl as an example). The majority noted that normally when an agency action violates the Administrative Procedure Act and ESA, the action is vacated and remanded back to the agency "to act in compliance with its statutory obligations." The majority recognized that Arizona had "expended significant funds" and has issued a number of permits. It also recognized the "administrative difficulties" in transferring the program to EPA and, possibly, back to Arizona again. However, the majority concluded those factors were outweighed by the potential impacts on listed species caused by private real estate developments proceeding without consultation. The risk to species such as the pygmy-owl (which, the majority noted, "numbers less than 100") is simply too great.

Petitions for rehearing have been filed by EPA and the Service, Arizona, and various trade associations that intervened in the proceeding. Amicus briefs supporting rehearing were filed by Alaska, which intends to implement its own NPDES program next year, and a coalition of western water users, including Metropolitan Water District, Southern Nevada Water Authority, and Central Arizona Water Conservation District. In November, the petitioners were ordered to answer the petitions.

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