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Press Release

For Immediate Release

U.S. Supreme Court Reaffirms Arizona's Clean Water Act Permitting Program

PHOENIX, AZ (June 25, 2007) - The Arizona Department of Environmental Quality will continue to administer Arizona's Clean Water Act permitting program, under an opinion issued by the United States Supreme Court earlier today.

The decision is a victory for the Home Builders Association of Central Arizona, the Southern Arizona Home Builders Association and the National Home Builders Association, who asked the Supreme Court to reverse a Ninth Circuit Court of Appeals decision that struck down the Environmental Protection Agency's approval of Arizona's permitting program more than two years ago.

"This is an important win for the regulated community in Arizona," said Norman James, a Fennemore Craig attorney in Phoenix who has been representing the home builders in this case. "First, the Clean Water Act program will continue to be administered locally by ADEQ, not by the Environmental Protection Agency in San Francisco. Second, the Supreme Court has made it clear that the Endangered Species Act is not a super statute that overrides other federal programs," James said. "Arizona's program satisfied the requirements established by Congress in the Clean Water Act. The Supreme Court has said that the Endangered Species Act does not impose additional requirements that states must also meet."

Arizona's Clean Water Act permitting program was approved by the EPA in December 2002. Prior to that, 44 states were authorized to administer the program under a provision of the Act that allows states to take over the program if they meet certain statutory criteria.

Permits issued by ADEQ, the agency responsible for administering Arizona's environmental laws, are not subject to the Endangered Species Act. Environmental groups challenged the approval of Arizona's program, contending that transferring permitting authority to Arizona would result in the loss of "conservation benefits" resulting from restrictions imposed on landowners by the Fish and Wildlife service during the consultation process.

The Ninth Circuit Court of Appeals, agreeing with the environmentalists, held that the EPA failed to consider the effects on federally protected species when it approved Arizona's program and in an opinion issued in 2005, struck down Arizona's Clean Water Act permitting program.

The Southern Arizona Home Builders Association, the Home Builders Association of Central Arizona and the National Association of Home Builders asked the Ninth Circuit to stay its decision so that Arizona's program would remain in place during appeal, and filed a petition at the Supreme Court last September. The Supreme Court agreed to hear the case last January.

The home builders argued that the Ninth Circuit's decision conflicted with other federal circuit court decisions and undermined states' rights to administer the permitting program.

In its decision authored by Justice Alito, the Supreme Court agreed with the home builders, concluding that "[the Endangered Species Act's] no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that an agency is *required* by statute to undertake once certain specified triggering events have occurred."

This is the first time the Supreme Court has addressed the inter-agency consultation requirements imposed by the Endangered Species Act since 1978, when the court upheld an injunction preventing the completion of the Tellico Dam because of its impact on the snail darter, a federally protected species of minnow. The present case, however, differs significantly from the Tellico Dam scenario because, as the Supreme Court recognized, the construction project at issue there was discretionary. By contrast, "the transfer of NPDES permitting authority is not discretionary, but rather is mandated once a State has met the criteria" set forth in the Clean Water Act.

"This decision upholds the purpose of the Clean Water Act and Congress's preference for State implementation of the permitting program," said James. "It provides local control over local impacts, a situation highly favored by the regulated community," he added.

The Supreme Court's opinion is available at <http://www.supremecourtus.gov/opinions/06slipopinion.html>. An article about the case appears at <http://www.msnbc.msn.com/id/19414694/>

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