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## Natural Resources and Environmental Update: Home Builders Win at the Supreme Court

By Norman D. James

### The Supreme Court limits the applicability of the Endangered Species Act

The Arizona Department of Environmental Quality will continue to administer Arizona's Clean Water Act NPDES permitting program, under an opinion issued by the United States Supreme Court on Monday. In *National Association of Home Builders v. Defenders of Wildlife*, \_\_\_ U.S. \_\_\_, 2007 WL 1801745 (June 25, 2007), the court held that the Endangered Species Act (ESA) did not apply to the approval of Arizona's permitting program because the federal agency that administers the Clean Water Act, the Environmental Protection Agency, lacked discretion to consider impacts on endangered species when it approved the state's program.

The National Association of Home Builders, the Home Builders Association of Central Arizona, the Southern Arizona Home Builders Association and other trade associations had asked the Supreme Court to reverse a Ninth Circuit Court of Appeals' decision that struck down the EPA's approval of Arizona's NPDES program.

Fennemore Craig attorney Norman James was counsel for the Home Builders in this case. Mr. James, who specializes in natural resources and environmental law, was the Home Builders' counsel of record before the Supreme Court, and argued the case before the Ninth Circuit Court of Appeals.

This is an important victory for the regulated community in Arizona. The decision upholds the purpose of the Clean Water Act and Congress's express preference for State administration of the permitting program, providing local control over local impacts. As a result of the Supreme Court's ruling, the Clean Water Act program will continue to be administered locally by ADEQ, not by EPA Region 9 in San Francisco.

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, 33 U.S.C. § 1342(b). Section 402(b) states that EPA "shall approve each submitted program unless" the EPA determines that one or more of nine specified criteria are not satisfied. Arizona's program was approved by the EPA in December 2002. Previously, 44 States had been authorized to administer the NPDES program.

There was no dispute that Arizona's program satisfied the criteria in the Clean Water Act. Defenders of Wildlife and Center for Biological Diversity instead contended that EPA violated section 7(a)(2) of the ESA by failing to properly consult with the Fish and Wildlife Service and by relying on an inadequate biological opinion. The environmental groups argued that transferring permitting authority to Arizona would eliminate the Fish and Wildlife Service's ability to impose restrictions on landowners seeking Clean Water Act permits, resulting in a loss of "conservation benefits" for protected species.

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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 Fish and Wildlife Service (or, in the case of marine species, NOAA Fisheries), following the procedures in ESA section 7(a)(2) and its implementing regulations, codified at 50 C.F.R. part 402.

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. *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005). The circuit court effectively expanded 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 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, asking that court to review the Ninth Circuit’s decision. They argued that the Ninth Circuit’s decision conflicted with a prior Ninth Circuit decisions as well as decisions from other federal circuit courts, and undermined States’ rights to administer the NPDES program. The Supreme Court agreed to hear the case last January.

In its June 25th opinion, authored by Justice Alito, the Supreme Court agreed with 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 requirements imposed by section 7 of the ESA since 1978, when in *TVA v. Hill*, 437 U.S. 153, 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 from the Tellico Dam case because, as the Supreme Court recognized, the construction project at issue in that case was discretionary. By contrast, the court explained, “the transfer of NPDES permitting authority is not discretionary, but rather is mandated once a State has met the criteria” set forth in Section 402(b) of the Clean Water Act.

Justice Alito was joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas. Four justices dissented, joining in an opinion authored by Justice Stevens, who was a member of the court when it decided *TVA v. Hill* in 1978. Justice Breyer also wrote a brief dissenting opinion.

The Supreme Court’s opinion is currently available on the court’s Web site at <http://www.supremecourtus.gov/opinions/06slipopinion.html>

*Norman D. James focuses his practice in natural resources and environmental law and public utility regulation. He represents private and public land and resource users in matters involving the Endangered Species Act, National Environmental Policy Act, Clean Water Act, National Forest Management Act and other environmental and land use statutes. He has represented clients in litigation concerning protected wildlife and fish species, natural resources planning and land use management, and other environmental matters before federal and state courts, including appeals. He also represents private water and wastewater utilities on various legal and regulatory matters, including rate cases and other proceedings before the Arizona Corporation Commission. He earned his B.A., (1977) from Stanford University and his J.D., (1981) from the University of Utah College of Law.*



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