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# SUPREME COURT REINS IN ENDANGERED SPECIES ACT

***(Nat'l Assoc. of Home Builders v. Defenders of Wildlife)***

The U.S. Supreme Court yesterday overturned an appeals court decision that had threatened to transform the Endangered Species Act (ESA) into a "super" statute whose provisions should be interpreted in all instances to trump all other federal laws.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in the case, *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, urging that the appeals court decision be overturned. The Court agreed with WLF that Congress did not intend the ESA to supersede other laws that mandate specific actions, simply because some fear that those actions might cause harm to an endangered species. WLF argued that the lower court decision interpreted the ESA in just that manner, and had the potential to disrupt all sorts of activities at all levels of government.

The Court ruled 5-4 that when, as here, the ESA appears to conflict with other provisions of federal law, courts should attempt to harmonize the statutes in a manner that attempts to give meaning to both. The Court ruled that the federal agencies whose actions were challenged in this case arrived at a reasonable interpretation of apparently conflicting statutes, and that the appeals court should have deferred to that reasonable interpretation.

The case was a challenge, brought by Defenders of Wildlife (Defenders) and other environmental groups, to a decision by the U.S. Environmental Protection Agency (EPA) to transfer to the State of Arizona authority under the Clean Water Act (CWA) to grant discharge permits within the State. The CWA allows States to apply to administer the permitting process within their borders, and to date EPA has granted such authority to 45 of the 50 States. The CWA states that EPA "shall" turn over permitting authority to a State that meets nine specified prerequisites, and there is no dispute that Arizona met all nine.

Defenders nonetheless challenged EPA's approval of Arizona's application, claiming that EPA's action violated § 7 of the ESA. Section 7 requires all federal agencies to ensure that "any action authorized, funded, or carried out" by the agency "is not likely to jeopardize the continued existence of any endangered or threatened species." Section 7 also requires all federal agencies to "consult" with the U.S. Fish & Wildlife

Service (FWS) to make sure that they are complying with their § 7 responsibilities. Defenders argued that EPA's transfer of CWA permitting authority to Arizona violated § 7 because: (1) so long as permitting authority remained with EPA, EPA would have to consult with FWS every time it issued a CWA discharge permit; (2) once authority was transferred to Arizona, consultation with FWS would cease because the § 7 consultation requirement applies only to federal agencies, not to state agencies; and (3) consultation with FWS is vital to ensuring that issuance of new CWA discharge permits does not threaten the survival of endangered species.

The National Association of Home Builders (NAHB) intervened in the case in support of EPA. Both NAHB and EPA asserted, in response to Defenders' claims, that § 7 of the ESA does not restrain EPA's authority to transfer permitting authority to a State because transfer is *mandated* by the CWA when, as here, the State has fulfilled all nine prerequisites set forth in the CWA. The Ninth Circuit disagreed, holding that Congress, when it adopted the ESA, intended to require federal agencies to take all possible steps necessary to ensure the survival of endangered species.

The Supreme Court agreed with WLF that the Ninth Circuit erred in failing to defer to the views of the FWS and EPA, the agencies charged with carrying out the ESA and the CWA. Those two agencies had concluded that ESA § 7 does not apply to non-discretionary acts of a federal agency. Because the CWA mandates approval of Arizona's application, EPA's approval is a non-discretionary act to which § 7 does not apply, the Supreme Court ruled. The Court ruled that any adverse impact on endangered species in Arizona is properly attributable to Congress's decision to mandate transfer of permitting authority under these circumstance, not to EPA's non-discretionary action.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States, including many in Arizona. WLF devotes a significant percentage of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF has regularly appeared in federal courts to support private property rights from encroachment based on overly broad interpretations of environmental statutes. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its website, www.wlf.org.