Legal Backgrounder

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HIGH COURT ADDRESSES INTERPLAY BETWEEN FEDERAL WATER AND SPECIES ACTS

by

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Near the end of its most recent term, the U.S. Supreme Court addressed a lingering issue with regard to the interplay between the Endangered Species Act ("ESA") and other federal statutes. Ever since the ESA's enactment, courts have struggled to determine the extent to which the ESA trumps other laws. Specifically, establishing the circumstances in which federal agencies must "consult" in accordance with section 7(a)(2) of the ESA, 16 U.S.C. § 1538(a)(2), with the U.S. Fish &Wildlife Service ("FWS") or National Marine Fisheries Services ("NMFS") (collectively "FWS" for purposes of this article) has long been a point of contention. This tends to arise most commonly with respect to property development that impacts wetlands and the circumstances under which the Army Corps of Engineers, when issuing wetland permits under section 404 of the Clean Water Act, must consult under the ESA.

Although the Supreme Court's decision in *National Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2510 (2007), on its face addressed a fairly narrow issue, its consequences, as discussed below, extend beyond the confines of that case.

Section 7(a)(2) of the ESA contains the primary federal agency consultation provisions that each agency must comply with. In accordance with that part of the Act, "each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . ."

The regulations implementing section 7 consultations set forth a full protocol for federal agency consultations, including stages of consultations and associated procedures. *See* 50 C.F.R. part 402. In those regulations, the current form of which became final in 1986, the FWS also set forth thresholds establishing when consultation would be required in the first instance. One threshold is that a federal agency need not consult with the FWS unless its action "may affect" an endangered or threatened species. *See* 50 C.F.R. §

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402.14(a); 51 Fed. Reg. 19926, 19929 (1986). *See also Endangered Species Consultation Handbook*, FWS/NMFS (1988), at pp. xvi, 2-6, 4-1 ("If an action agency determines a proposed action 'may affect' listed species or designated critical habitat, formal consultation is required.").

Even more basic, however, the FWS regulations provide that, notwithstanding the fact that federal action "may affect" a listed species or critical habitat, ESA consultation applies with respect to "actions in which there is discretionary Federal involvement or control." *Id.* § 402.03. That "discretion" threshold is not found in the language of the ESA. Further, whether under the FWS's regulations consultation applies *only* to discretionary actions was a subject of disagreement, discussed below, between the majority and dissenters in *National Association of Home Builders*.

The Supreme Court's 5-4 decision in *National Association of Home Builders*, written by Justice Alito, and joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas, upheld the FWS's interpretation of the section 7 consultation requirement, ruling that notwithstanding the ESA's mandatory requirement that federal agencies "consult" with the FWS, that requirement does not apply to non-discretionary agency actions, and further, that the consultation requirement applies *only* to discretionary actions.

The specific issue in the *National Association of Home Builders* case was whether the U.S. Environmental Protection Agency ("EPA"), in determining whether to delegate to the State of Arizona permitting authority under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES"), was required to consult with the FWS under the ESA. The Court noted that the question "requires us to mediate a clash of seemingly categorical – and, at first glance, irreconcilable – legislative commands." Specifically, the Clean Water Act provides that the EPA "shall" transfer to a state NPDES permitting if the state meets nine enumerated criteria under Section 402(b) of the Act. None of those nine criteria relates to ESA consultation. On the other hand, section 7(a)(2) the ESA requires that each federal agency "shall", in consultation with the FWS or NMFS, insure that "any action authorized" by the agency meets the "no jeopardy" requirement.

The Court noted that if the section 7 consultation requirement was imposed on EPA's NPDES transfer decision, it would effectively "repeal the mandatory and exclusive list" of criteria under section 402(b) of the Clean Water Act and "replace it with a new, expanded list that includes §7(a)(2)'s no-jeopardy requirement." The Court reaffirmed its presumption in the absence of express statutory language against "implied" repeals, even in a case such as this where the ESA was enacted after the Clean Water Act.

The Court's more general concern, however, was not limited to section 402(b) of the Clean Water Act. In considering the potentially wide-ranging impacts of permitting the section 7 consultation requirement to trump non-discretionary agency actions, the Court noted that "[r]eading the provision broadly would thus partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species."

The Court looked to the relevant section 7 regulations, in which the FWS interpreted section 7 to apply to "discretionary" federal agency actions. 50 C.F.R. § 402.3 ("Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control."). The Court considered section 402.3 as the FWS's attempt to reconcile the tension between section 7 of the ESA and other mandatory federal agency actions. It is noteworthy, however, that the regulation as initially proposed would have provided that the requirement apply to "*all* actions in which there is Federal involvement or control," and did not distinguish between discretionary and non-discretionary actions. *See* 48 Fed. Reg. 29,999 (1983); 51 Fed. Reg. 19,958 (1986) (emphasis added). The preamble to the final rule does not offer insight into the reasons for that shift. The Court, however, determined that the FWS's interpretation "harmonizes the statutes by applying §7(a)(2) to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates."

Interestingly, the FWS in that 1986 regulation seems to contradict itself – on the one hand, it promulgated section 402.3 and the "discretionary" parameter bounding consultation obligations; on the other, it expressly states in describing the scope of the section 7 consultation requirements that it "cautions that *all* Federal actions including 'conservation programs' are subject to the consultation requirements of Section 7(a)(2) if they 'may affect' listed species or their critical habitats." 51 Fed. Reg. at 19,929 (emphasis added). The Court did not address this apparent contradiction in its opinion.

Under the analysis set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court held that the FWS's interpretation, limiting section 7 consultation to discretionary agency actions, was entitled to deference. The Court pointed to a few principles in support of its conclusion. First, it turned its direction to the language of section 7(a)(2), which requires each agency to "insure" that its action does not jeopardize listed species or their habitats. According to the Court, when an agency does not have discretion but instead is required to take an action, "it simply lacks the power to 'insure' that such action will not jeopardize endangered species." Second, relying on its decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Court reiterated that "an agency cannot be considered the legal 'cause' of an action that it has no statutory authority *not* to take . . . ." Finally, as noted above, the Court considered that limiting section 7 requirements to discretionary actions *only* reconciles the conflict between competing statutory mandates.

On that basis, and because it considered EPA's NPDES permitting transfer mandatory and nondiscretionary once EPA concluded that the nine statutory criteria had been satisfied, the Court held that the section 7 consultation requirement did not apply to EPA's non-discretionary action.

The dissent by Justice Stevens, and joined by Justices Souter, Ginsberg and Breyer, took strong exception to Justice Alito's analysis and conclusion. The dissent noted that "[w]hen faced with competing statutory mandates, it is our duty to give full effect to both if at all possible." Justice Stevens further pointed out that in the seminal ESA case of *TVA v. Hill*, 437 U.S. 153 (1978), the Court explained that section 7 "admits no exceptions" and that the ESA "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." Justice Stevens further noted that nowhere in *TVA v. Hill* did the Court discuss implied repeals, and that case "contained our definitive interpretation of the ESA, in which we concluded that 'the language, history and structure of the [ESA] indicated beyond doubt that Congress intended endangered species to be afforded the highest of priorities.'" Moreover, the dissent noted that although in *TVA v. Hill* the Court concluded that "there are no exemptions in the Endangered Species Act for federal agencies," the *National Association of Home Builders* majority "countenances such an exemption" and "erroneously concludes that the ESA contains an unmentioned exception for nondiscretionary agency action . . . ."

According to the dissent, the majority "whittles away at Congress' comprehensive effort to protect endangered species from the risk of extinction and fails to give the [ESA] its intended effect." The dissent would have applied the mandatory statutory language of the ESA to require consultation in this instance, and taken a broader view of the section 7 regulations. Justice Stevens pointed out that 50 C.F.R. § 402.03, while providing that the consultation requirement applies to discretionary actions, does not limit the requirement to *only* discretionary actions, noting that the word "only" is not contained in that section of the regulation, and was effectively inserted by the majority opinion.

The Court's decision in *National Association of Home Builders* has implications beyond EPA's consultation obligations when transferring to states NPDES permitting authority. Absent legislative action amending the ESA, any federal agency can now clearly avoid section 7 consultation requirements with respect to any agency action considered nondiscretionary. More pointedly, and as noted above, an essential issue for the Court was that because EPA's NPDES permit authority transfer decision was nondiscretionary, any ability to insure no jeopardy was effectively beyond the scope of EPA's underlying statutory authority. This conclusion confirms the boundaries set by lower courts over the years, suggesting a limitation on section 7 consultation obligations for impacts over which an agency has no statutory authority to control.

Even before *National Association of Home Builders*, it was understood that an agency's duty to both consult and conserve species is "tempered by the actual authorities of each agency." *Sierra Club v. Glicklman*, 156 F.3d 606 (5th Cir. 1998), *citing Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992). Furthermore, consultation would be required only for *affirmative* discretionary acts, meaning that failure to exercise discretion in the first place is not a final agency action that triggers the section 7 consultation requirement. *See Western Watersheds Project v. Matejko*, 468 F.3d 1099 (9th Cir. 2006). Therefore, even though an agency action may result in impacts to species or critical habitat, it is arguable that the agency cannot consider those "effects of the action" in assessing its section 7 obligations if those impacts are beyond the agency's jurisdictional reach. *See Platte River Whooping Crane Critical Habitat Maintenance Trust*, 962 F. 2d at 34.

Therefore, although *National Association of Home Builders* does not necessarily explore unchartered territories, its bright-line distinction between discretionary and nondiscretionary authorities, and suggestion that effects of the action with respect to non-discretionary agency acts are outside of the agency's authority to control, cements the concept that an effect of agency action outside of an agency's statutory authority will not be subject to section 7 consultation.

Equally interesting might be where to draw the line between what is discretionary and what is ministerial for purposes of triggering section 7 consultation. In the case at hand, although EPA purportedly lacked discretion once it determined the nine criteria had been satisfied, it surely had discretion in the first place with respect to whether each criterion was satisfied. Section 402(b) of the Clean Water Act states that EPA "shall" transfer permitting authority unless it determines that the State does not possess the adequate authority required under the nine criteria. It is EPA, within its discretion, which makes that determination. EPA therefore does exercise discretion in assessing whether the criteria are met – only after it determines that all criteria are satisfied will the agency be compelled to take a certain action. The implication from the Court's ruling is that it may not be enough to trigger section 7 requirements for an agency to retain some discretion, but that the agency must have discretion specifically with regard to ESA concerns.

EPA's NPDES "nondiscretionary" transfer authority can be contrasted with the Army Corps of Engineers section 404 permitting authority. As part of its permit review process, the Corps is required to determine whether its action "may affect" a listed species or designated critical habitat, and if so, it must then engage in section 7 consultation. *See, e.g.*, 33 C.F.R. § 330.4(f)(2) (nationwide permit general condition). Presumably, the *National Association of Home Builders* Court would continue to consider the Corps decision to issue a permit under those circumstances "discretionary," but where other affirmative agency actions do not expressly incorporate section 7 consultation requirements, the question will come down to the mandatory nature of those actions.

With respect to the Corps, however, even if its permitting decision is considered "discretionary" and therefore subject to section 7 on that basis, the additional question remains whether other indirect impacts resulting from the Corps' action, such as impacts to a non-jurisdictional upland arising from development fueled by the Corps' permitting decision, can be considered by the Corps in its "may affect" determination. If it has no statutory authority to regulate such impacts, application of section 7 may be called into question.

What is clear is that section 7 obligations do not provide authority beyond the bounds of an agency's inherent statutory authority, which includes the bounds of the agency's discretionary authority. It is likely that determinations assessing the applicability of section 7 following the *National Association of Home Builders v. Defenders of Wildlife* decision will in many cases come down to the extent to which the bounds of agency authority, and the line between discretionary and nondiscretionary decisions, are drawn.