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Defenders of Wildlife v. U.S. Env'tl. Prot. Agency, 420 F.3d 946 (9th Cir. 2005)

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held that to allow states such as North Dakota to enforce their water-quality standards against the Corps when it is acting to balance these interests would be contrary to the intended purposes of the FCA. Therefore, the court upheld the decision of the district court dismissing North Dakota's complaint, based on the Corps' sovereign immunity and North Dakota's preemption from enforcing its state water-quality standards against the Corps.

Kate Brewer

NINTH CIRCUIT

Defenders of Wildlife v. U.S. Env'tl. Prot. Agency, 420 F.3d 946 (9th Cir. 2005) (holding the Environmental Protection Agency acted arbitrarily and capriciously when it failed to consider impact on endangered species, as required by the Endangered Species Act, in transferring Clean Water Act National Pollution Discharge Elimination System authority to Arizona).

Defenders of Wildlife ("Defenders") challenged the Environmental Protection Agency's ("EPA") decision to transfer administration of the Clean Water Act ("CWA") National Pollution Discharge Elimination ("pollution permitting") System to Arizona. When deciding whether to transfer pollution permitting authority, the EPA relied on a biological opinion issued by the Fish and Wildlife Service ("FWS"), which was premised on the proposition that the EPA lacked authority to take into account the impact of transfer on endangered species and their habitat.

The court began by explaining the background of the applicable statutes. Under the CWA, the EPA has authority to issue permits for the discharge of pollutants into navigable waters through the pollution permitting system. The CWA further provides that states may apply to the EPA to administer the pollution permitting program within their borders, whereupon the EPA must determine whether the state has met nine specified criteria and "shall approve" applications that meet those criteria. Section 7 of the Endangered Species Act ("ESA") applies to all federal agencies carrying out actions in which they have discretionary involvement or control. It does not apply to state governmental bodies. Under section 7, federal agencies must determine if proposed actions may affect endangered species or their habitat and must then seek formal consultation with the FWS. As part of this process, the FWS issues a biological opinion analyzing direct and indirect effects of the proposed action to determine whether that action is likely to jeopardize endangered species or their habitats. Agencies rely heavily on biological opinions when making a final determination on a proposed action.

When Arizona applied for transfer of pollution permitting authority, the EPA determined the transfer could affect endangered species and initiated formal section 7 consultations with the FWS. FWS staff concluded the transfer would result in a loss of section 7 protections, which might affect conservation benefits. The FWS staff expressed further concerns that federal and state laws such as Section 9 of the ESA do not sufficiently protect endangered plant species and wide-ranging rare species. However, the FWS ultimately issued a biological opinion concluding other federal and state laws would sufficiently protect endangered species. The EPA approved the permitting authority transfer two days after the FWS issued its biological opinion, basing the approval upon the EPA's belief the biological opinion "appropriately considered all relevant information regarding the effects of the approval."

Defenders challenged the pollution permitting transfer in two lawsuits, one before the United States Court of Appeals for the Ninth Circuit to review the EPA's transfer decision, and a second in the District Court of Arizona alleging multiple claims, including non-compliance with ESA standards. The district court severed, transferred, and consolidated the non-compliance claim into this suit.

The Administrative Procedure Act provides an arbitrary and capricious standard of review for the EPA's requirements under the ESA to "insure" that any action it takes is "not likely to jeopardize" listed species or their critical habitats." In order to meet the standard, the EPA must show it considered all the relevant ESA factors and had a plausible and internally coherent rationale for its decision to transfer the pollution permitting authority. The court held the transfer decision did not survive arbitrary and capricious review.

The court determined the EPA's propositions underlying its transfer decision included: (1) it must consult concerning transfers, and (2) it is not permitted as a matter of law, to take impact on endangered species into account when making transfer decisions. The court held the propositions could not both be true and were therefore not reasoned decision making. Further, the court determined the Biological Opinion's exclusion of private development from its impact analysis was irrational. The court remanded to the EPA for a plausible, coherent interpretation of its actions pursuant to the Endangered Species Act.

Next, the court reviewed the EPA's conclusion that it had no statutory authority to refuse transfer under the CWA, even if the transfer would violate the ESA. The EPA did have control over the indirect effects which could endanger species resulting from its transfer decision, because the transfer decision was discretionary. The court held even if the agency met its CWA obligations, it still must meet the ESA obligations. The court held that section 7 gave the EPA statutory authority to make pollution permitting transfer decisions on behalf of

endangered species and their habitat. The biological opinion the EPA relied on was fatally deficient in ignoring indirect effects of the loss of section 7 consultation.

The court then looked for other independent bases on which the EPA could have rationally relied for its transfer decision. The court held the EPA did not give a sufficiently detailed discussion of effects on all listed species, resulting in a failure to consider an important aspect of the transfer decision. The court held the protections the EPA claimed could substitute for section 7 protections were insufficient. These protections included a Memorandum of Agreement between the EPA and an Arizona agency, EPA oversight, the ESA's anti-take provisions, and Arizona state law. The EPA's own Biological Evaluation report did not give sufficient devotion to endangered species protection. The EPA's reliance on assurances from one Arizona state agency was not comprehensive enough to be sufficient.

The court concluded the EPA erred in relying on the biological opinion when it made its transfer decision. Further, the EPA did not provide sufficient independent bases to support its transfer decision. Thus, the EPA entirely failed to consider an important aspect of the problem, making its transfer decision arbitrary and capricious.

The court concluded by vacating the EPA's decision to approve Arizona's pollution permitting application, transferring Defenders' suit challenging the validity of the biological opinion back to the district court, and granting and remanding to the EPA the petition for review for proceedings consistent with its opinion.

Julie M. Schmidt

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 418 F.3d 971 (9th Cir. 2005) (granting preliminary injunction to environmental and conservation organizations based on violation of the Endangered Species Act; ordering the federal agency in charge of the Columbia River Power System to provide summer water spill rather than pass water through turbines in order to avoid harm to threatened species; holding that the district court did not apply an incorrect legal standard by failing to weigh economic harm to the public in reaching its conclusion).

National Marine Fisheries Service ("NMFS") operates the dams and power plants comprising the Federal Columbia River Power System ("FCRPS"), which consists of fourteen sets of dams. The United States District Court for the District of Oregon granted the National Wildlife Foundation ("NWF") a preliminary injunction order, requiring NMFS to pass a specified amount of water through the spill gates of dams rather than through turbines for power generation, in order to avoid irreparable harm to threatened species.