

NAHB's petition

QUESTIONS PRESENTED FOR REVIEW

On December 5, 2002, the U.S. Environmental Protection Agency ("EPA") approved the State 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 EPA "determines that adequate authority does not exist" for the state to administer the program in compliance with nine specified criteria. There was no dispute that Arizona's program satisfied those criteria. Instead, environmental groups contended that EPA violated Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), because EPA did not sufficiently analyze the effects of the loss of, nor require a sufficient substitute for, consultation with the U.S. Fish and Wildlife Service. A majority of the Ninth Circuit panel agreed and vacated EPA's approval of Arizona's program. The questions presented for review are:

1. Can a court append additional criteria to Section 402(b) of the Clean Water Act that require state NPDES programs to include protections for endangered species?
2. Does Section 7(a)(2) of the Endangered Species Act constitute an independent source of authority, requiring federal agencies to take affirmative action to benefit endangered species even when an agency's enabling statutes preclude such action?
3. Did the Ninth Circuit incorrectly apply the holding of *Department of Transp. v. Public Citizen*, 541 U.S. 752 (2004), in concluding that EPA's approval of Arizona's NPDES permitting program was the legally relevant cause of impacts to endangered species resulting from future private land use activities?

United States' petition

QUESTION PRESENTED

Whether Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), which requires each federal agency to insure that its actions do not jeopardize the continued existence of a listed species or modify its critical habitat, overrides statutory mandates or constraints placed on an agency's discretion by other Acts of Congress.

Defenders' opposition

QUESTIONS PRESENTED

1. May the Environmental Protection Agency ("EPA") raise in this Court a rationale for avoiding compliance with Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) ("ESA"), that EPA not only failed to rely on during the administrative proceedings and before the Ninth Circuit issued its ruling, but which the agency expressly disavowed in the administrative proceedings and advised the court of appeals panel it was not arguing?
2. Assuming that the Court considers the merits of EPA's *post hoc* rationalization, whether EPA must comply with Section 7(a)(2) of the ESA in taking final action on Arizona's application for Clean Water Act permitting authority, where Section 7(a)(2)'s consultation and "no jeopardy" requirements apply to "any action" by a federal agency, 16 U.S.C. § 1536(a)(2), and this Court has already construed this language as "admit[ing] of no exception," *TVA v. Hill*, 437 U.S. 153, 173 (1978)?

Court's grant of cert

06-340) NAT. ASSN. OF HOME BUILDERS V. DEFENDERS OF WILDLIFE, ET AL.
 06-549) EPA V. DEFENDERS OF WILDLIFE, ET AL.

The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument. In addition to the questions presented by the petitions, the parties are requested to brief and argue the following question: "Whether the court of appeals correctly held that the Environmental Protection Agency's decision to transfer pollution permitting authority to Arizona under the Clean Water Act, see 33 U.S.C. §1342(b), was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. §1536(a)(2); and, if so, whether the court of appeals should have remanded to the Environmental Protection Agency for further proceedings without ruling on the interpretation of Section 7(a)(2)."

<http://www.eswr.com/courts/ussc/gp.pdf>

Endangered Species & Wetlands Report

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