

Developers win victory in top court on permits
State's ADEQ, not EPA, still in charge of water discharge

By Tony Davis and Howard Fischer
ARIZONA DAILY STAR CAPITOL MEDIA SERVICES

Brushing aside concerns about endangering species, the U.S. Supreme Court ruled Monday that the state of Arizona can keep issuing water-discharge permits for new developments.

In a big victory for home builders, the high court found nothing irregular or illegal in the 2002 decision of the U.S. Environmental Protection Agency to delegate that authority to the state Department of Environmental Quality.

The majority rejected arguments by Defenders of Wildlife and the Center for Biological Diversity that delegation failed to consider the impact it would have on endangered and threatened species.

The ruling was a 5-4 decision, with Chief Justice John Roberts joining the court's other conservative members to form a majority that also included Justices Samuel Alito, Clarence Thomas, Anthony Kennedy and Antonin Scalia.

The court's more liberal justices — Stephen Breyer, Ruth Bader Ginsburg, David Souter and John Paul Stevens — dissented.

Arizona DEQ Director Steve Owens acknowledged that state laws and regulations he follows when deciding whether to issue permits are not as comprehensive as those governing the EPA. Specifically, his agency is not covered by the federal Endangered Species Act or required to consult with the U.S. Fish and Wildlife Service to consider the impacts that permits will have on plants and animals.

DEQ consults wildlife service

In fact, Arizona law — unlike in states such as California — actually limits what his agency can consider. But Owens said he still believes DEQ is protecting the environment. Whenever it gets a notice from a developer of a proposed discharge permit, the agency promptly sends it to the wildlife service for its review and comment.

"We are required to ensure that we give due consideration to impacts on endangered species," Owens said.

Nor does Owens believe he needs more authority from the Legislature to properly protect plants and animals. "I think the current statutes are adequate," he said.

But Dr. Robin Silver of the Center for Biological Diversity said the state should be taking a more aggressive stance, by sending notices to the wildlife service and to the Environmental Protection Agency that it has a serious concern about species issues involving permits for areas such as the San Pedro River.

Silver's group has been tangling with state and federal agencies for many years over the effects of development on the San Pedro and on the endangered Southwestern willow flycatcher and Huachuca water umbel that live in or along the river.

"The state sends hundreds of these permits — they go in a box," Silver said. "Unless someone raises concerns, they (federal agencies) just get pummeled with notices."

Builders initiated case

The Southern Arizona Home Builders Association and other building industry trade associations had asked the Supreme Court to reverse a Ninth Circuit Court of Appeals decision of two years ago that struck down the Environmental Protection Agency's approval of Arizona's permitting program.

"This is an important win for the business community in Arizona," said Norman James, an attorney with Fennemore Craig in Phoenix who represented the home builders.

"First, the Clean Water Act program will continue to be administered locally by ADEQ, not by the EPA in San Francisco," he said. "Second, the Supreme Court has made it clear that the Endangered Species Act is not a super statute that overrides other federal programs."

Ed Taczanowsky, SAHBA's executive vice president, added, "We're very pleased we don't have another layer of bureaucracy put upon us when developing land up here on an already regulated resource."

Michael Senatore, an attorney for Defenders of Wildlife, said Monday's ruling is a setback for environmental protection because the state procedures are not as comprehensive as those required under the EPA.

"We think as a result of this decision, at least certainly in Arizona, endangered species are going to suffer," he said.

At the center of the fight is the decision of the EPA to let DEQ issue permits for water discharge. That mainly affects the more than 20,000 general permits issued each year every time a developer wants to bulldoze property in any way that would affect storm-water runoff.

Under EPA until 2002

Until 2002, EPA ran the program, often frustrating homebuilders by delaying the issuance of permits until the builder worked out agreements with the Fish and Wildlife Service to conserve land to protect the then-endangered cactus ferruginous pygmy owls that lived on Tucson's Northwest Side.

After the 2002 transfer of permitting authority to the state, the Defenders of Wildlife sued to overturn the EPA's decision.

It noted that federal laws and rules require the EPA to get input from other federal agencies, such as the Fish and Wildlife Service, about potential harm to species before issuing permits. But when the EPA transferred its authority to the DEQ, the federal agency imposed no such requirement on the state.

In its 2005 ruling, the appellate court said the requirement that the EPA consult with other agencies — something not required of DEQ — is critical. Appellate Judge Marsha Berzon said this has led to measures protecting various endangered species, including the Pima pineapple cactus, the razorback sucker and the cactus ferruginous pygmy owl.

Despite that 2005 ruling, DEQ continued to issue the permits while the case went to the Supreme Court.

? Contact reporter Tony Davis at 806-7746 or tdavis@azstarnet.com.