

“Local Wildlife Law” in Context

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Federal Wildlife Law

Migratory
Bird Treaty
Act 1918

Missouri v.
Holland,
252 U.S.
416 (1920)

Endangered
Species Act
1973

Local Wildlife Law

State Wildlife Law

Geer v.
Connecticut,
161 U.S. 519
(1896)

Hughes v.
Oklahoma,
441 U.S. 322
(1979)

The Reach of Federal Wildlife Law

Wetlands

United States v.
Riverside Bayview
Homes, 474 U.S.
121 (1985)

Solid Waste
Agency v. U.S.
Army Corps of
Engineers, 531
U.S. 159 (2001)

Rapanos v.
United States,
547 U.S. 715

Protected Species

National Assoc.
Homebuilders
v. Babbitt, 130
F.3d 1041 (1997)

Gibbs v. Babbitt,
214 F.3d 483
(2000)

Ranch Viejo v.
Norton, 323 F.3d
1062 (2003)

GDF Realty v.
Norton, 326
F.3d 622 (2003)

Supervision of States

National
Association of
Homebuilders v.
Defenders of
Wildlife
(Decided June 25,
2007)

Clean Water Act § 402. National pollutant discharge elimination system

(b) State permit programs

At any time after the promulgation of the guidelines . . .the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist

FWPCA 1972

Endangered Species Act §7(a)

(2) 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 . . . 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 . . . to be critical

The EPA concluded that Arizona had met each of the nine statutory criteria listed in § 402(b) and approved the transfer of permitting authority. [T]he EPA noted that the issuance of the FWS's biological opinion had “conclude[d] the consultation process required by ESA section 7(a)(2) and reflects the [FWS'] agreement with EPA that the approval of the State program meets the substantive requirements of the ESA.”

[R]espondents filed a petition in the . . . Ninth Circuit seeking review of the transfer Respondent Defenders of Wildlife also filed a separate action in the United States District Court for the District of Arizona, alleging . . . that the biological opinion issued by the FWS in support of the proposed transfer did not comply with the ESA's standards. 127 S.Ct. at 2528

“[W]e defer to the agency's reasonable interpretation of ESA § 7(a)(2) as applying only to “actions in which there is discretionary Federal involvement or control.” 50 CFR § 402.03. Since the transfer of NPDES permitting authority is not discretionary, but rather is mandated once a State has met the criteria set forth in § 402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger § 7(a)(2)'s consultation and no-jeopardy requirements.”

127 S. Ct. at 2538