

ENVIRONMENTAL COMPLIANCE & LITIGATION

S T R A T E G Y

Vol. 12, No. 11

April 1997

Economics and the Endangered Species Act

High Court Levels Playing Field For Developers, Ranchers, Others

By Diane R. Smith, Noel Davis and Mari Schroeder

THE U.S. Supreme Court has put developers, ranchers, water districts and other individuals and businesses that disagree with agency actions on an equal legal footing with environmentalists. In *Bennett v. Spear*, No. 95-813 (U.S. March 19), the high court unanimously held that it is not "environmentalists alone" who can challenge agency actions and seek judicial review of U.S. Fish and Wildlife Service decisions under the Endangered Species Act. Rather, the Court held, persons or entities with recreational, aesthetic, commercial or economic interests have the same right to go to court to challenge environmental controls as those with an interest in the preservation of endangered species. Now, those whose economic interests have been affected can use the citizen suit provisions of the Endangered Species Act, the Administrative Procedure Act and, perhaps, other

environmental laws to prevent what the Supreme Court called haphazard action based on speculation or surmise. The Court highlighted another objective as well: avoiding "needless

economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."

The roots of *Bennett* began with a consultation between the U.S. Bureau of Reclamation and the Fish and Wildlife Service. The bureau administers the Klamath Project, a series of lakes, rivers, dams and irrigation canals in northern California and southern Oregon. The Bureau of

Continued on Page 2

Eleventh Circuit Reverses *Olin*

DASHING THE hopes of some environmental lawyers and their clients, the U.S. Court of Appeals for the Eleventh Circuit has reversed a decision of the U.S. District Court for the Southern District of Alabama that found that CERCLA liability is not retroactive. Astonishing some members of the environmental community last May, the Southern District of Alabama refused to approve a consent decree regarding cleanup of a chemical plant site owned and operated by Olin Corp. The district court, in its widely reported and much-debated decision in *U.S. v. Olin Corp.*, No. 95-0526-BH-S (S.D. Ala. May 20, 1996), found that the government's attempt to hold Olin liable under the Comprehensive Environmental Response, Compensation and Liability Act violated the Commerce Clause of the U.S. Constitution because there was virtually no effect on interstate commerce. The lower court also determined that CERCLA was not intended to impose liability for activities that occurred prior to the enactment of the statute in 1980. (See *Environmental Compliance & Litigation Strategy*, June 1996, p. 8.)

The government appealed, and the Eleventh Circuit found both that CERCLA does not violate the Commerce Clause ("the statute remains valid as applied in this case because it regulates a class of activities that substantially affects interstate commerce") and that the statute may be retroactively applied ("review of CERCLA's legislative history confirms that Congress intended to impose retroactive liability for cleanup"). *U.S. v. Olin Corp.*, No. 96-6645 (11th Cir. March 25).

Assistant Attorney General for Environment and Natural Resources Lois J. Schiffer, who argued the case before the Eleventh Circuit, said, "This is good news for millions of Americans whose lives and health are threatened by hazardous waste sites." Michael Steinberg, in the Washington, D.C., office of Morgan, Lewis & Bockius, represented Olin Corp. but referred press inquiries to the Norwalk, Conn.-based corporation. Olin spokesman Bill McDaniel said that the company is and has been committed to the cleanup of the site at issue regardless of the outcome of the appeal. He also reported that Olin has no plans to seek Supreme Court review of the decision. ■

Inside

EnvirOn-Line	3
State ISO 14001 Projects	4
Clean Air Controversy	6
EnviroMoves	6
Case Notes	7

Endangered Species

Continued from Page 1

Reclamation notified the Fish and Wildlife Service that continued operation of the project in the then-current manner might affect two species of endangered fish because water levels in project lakes and reservoirs would be lowered. The Fish and Wildlife service responded by issuing a "biological opinion," which, in effect, required the bureau to maintain minimum water levels to protect the endangered fish. The bureau agreed to modify its operation of the Klamath Project.

Two irrigation districts and two ranches (collectively, "the ranchers") that rely on Klamath Project water filed suit against the government, arguing that operation of the project in accordance with the Fish and Wildlife Service's biological opinion would adversely affect the use of the project's reservoirs and related waterways and decrease the amount of water available to the ranchers for irrigation. They argued that no "scientifically or com-

mercially available" evidence indicated that the endangered fish either had declined or would decline in population if the project operated as it always had. The plaintiffs also asserted that no reliable evidence indicated that the restrictions on lake levels required by the biological opinion would have any beneficial effect on the fish.

No Legal Recourse

Lower courts held that the ranchers had no right to sue to stop the Fish and Wildlife Service's restrictions because their suit did not demand enforcement of the Endangered Species Act; rather, the litigation was commenced because of an economic interest in the use of water. The Endangered Species Act, like many other environmental laws, contains citizen suit provisions that enable "any person" to commence a civil suit to enjoin or compel enforcement of the statute. The U.S. Court of Appeals for the Ninth Circuit, which has jurisdiction over the West Coast, has historically made it difficult for parties with only economic interests to attack an agency's requirements. The Ninth Circuit has, however, interpreted environmental laws liberally when environmental groups seek to force agencies to impose more stringent controls.

Until *Bennett*, the Supreme Court had not ruled on who had the rights to use the citizen suit provisions of the Endangered Species Act. The Court decided to take the statutory term

"any person" at face value because it is common to think that all persons have an interest in the environment, and because the purpose of the provision is to encourage enforcement of the act by "private attorney generals."

Capitalists Are Citizens, Too

In *Bennett*, the Court held that the ranchers were persons who could sue under the citizen suit provisions of the Endangered Species Act. Specifically, they could sue on the basis that the government had failed to perform an act or duty under the section of the law that states that the government could specify a particular area as a critical habitat, and make revisions thereto, only on the basis of the best scientific data available and after taking into consideration economic and any other relevant impacts. The ranchers argued that the biological opinion "implicitly determines critical habitat" and that the opinion did not comply with this statutory mandate because the government had failed to utilize such data. Although the government's ultimate decision is reviewable only for abuse of discretion, the Supreme Court observed that limited judicial review does not alter the categorical requirement that the economic impact of the decision and the best scientific data available are to be considered. The Court also determined that any of the ranchers' claims not reviewable under the Endangered Species Act were reviewable under the

EDITORS

Lori Tripoli
New York, N.Y.
John M. Scagnelli
Whitman Breed Abbott &
Morgan
New York, N.Y.

CONTRIBUTING EDITORS

Mark D. Anderson
Stateside Associates
Arlington, Va.
John M. Barkett
Coll Davidson Carter Smith
Salter & Barkett, P.A.
Miami, Fla.
Kenneth J. Berke
AlliedSignal Inc.
Torrance, Calif.

Lee A. Braem
Schering-Plough Corp.
Kenilworth, N.J.
James A. Chalmers
Coopers & Lybrand
Phoenix, Ariz.
Jeffrey A. Cohen
Hannoch Weisman
Roseland, N.J.
Tony M. Davis
Baker & Boits, L.L.P.
Houston, Texas
David M. Flannery
Jackson & Kelly
Charleston, W.Va.
William L. Gardner
Morgan, Lewis & Bockius
Washington, D.C.
Marc E. Gold
Manko, Gold & Katcher
Bala Cynwyd, Pa.

Zane O. Gresham
Morrison & Foerster
San Francisco, Calif.
Thomas F. Harrison
Day, Berry & Howard
Hartford, Conn.
Stephen C. Jones
Jones, Day, Reavis & Pogue
Washington, D.C.
Lynne M. Miller
President
Environmental Strategies Corp.
Reston, Va.
Daniel Riesel
Sive, Paget & Riesel
New York, N.Y.
Michael L. Rodburg
Lowenstein, Sandler, Kohl,
Fisher & Boylan
Roseland, N.J.

Susan G. Rosmarin
Osborn, Rosmarin & Sesti
New York, N.Y.
Paul M. Samson
NCR Corp.
Dayton, Ohio
Tiffany Schauer
Brobeck, Phleger & Harrison
San Francisco, Calif.
Harvey M. Sheldon
McDermott, Will & Emery
Chicago, Ill.
Mark J. Zimmermann
Updike, Kelly & Spellacy, P.C.
Hartford, Conn.

PUBLISHER
Stuart M. Wise

Endangered Species

Administrative Procedure Act.

In *Bennett*, the Supreme Court did not decide that the Fish and Wildlife Service's biological opinion was unreasonable or unsupported. Rather, it held that the ranchers had the right to have their arguments about the opinion heard in and ruled on in federal court — a right that had been denied them by lower courts. The Court rejected the Fish and Wildlife Service's contention that the ranchers had no right to sue and that the biological opinion was merely advisory. It also disagreed with the government's argument that the biological opinion did not constitute final agency action reviewable by a court because the Bureau of Reclamation was not obligated to follow the opinion and the bureau's decision allocating available water was discretionary. The Court concluded that the biological opinion had a coercive effect on the bureau's action, as disregarding the opinion and continuing to operate the project in the manner it had been could subject the bureau and its employees to criminal penalties. The Court reversed the court of appeals and remanded the case for further proceedings consistent with its decision.

The Broader Impacts

The Endangered Species Act is an important piece of environmental legislation intended to protect endangered species and lands where these species are actually at risk, not to further other agendas. *Bennett* will benefit clients frustrated by the attempts of agencies and environmental groups to misapply the Endangered Species Act without sound factual and scientific bases for their positions. For example, in one recent case, an agency planned to protect a large area of a degraded but sensitive habitat. The California gnatcatcher, a threatened species, was claimed to be present when, in fact, the area was outside of the gnatcatcher's geographic range and the habitat in question was not suitable for the spe-

cies. The *Bennett* decision would have provided counsel with a more powerful tool for assisting clients in evaluating (and challenging) regulatory restrictions, which could have dramatic impacts on some otherwise feasible alternative development scenarios.

From the standpoint of property owners and businesses, *Bennett* increases the likelihood of successful challenges to agency actions. The decision highlights the importance of analyzing facts, research results and agency files to determine whether troublesome regulatory restrictions are based on sufficient and sufficiently sound evidence. Evaluating and documenting economic and other impacts of agency actions are also crucial, as are developing and effectively presenting alternatives to otherwise adverse agency requirements.

From the standpoint of agencies, *Bennett* underscores the necessity of obtaining and relying on comprehensive, valid scientific information in making decisions affecting the rights of others. *Bennett* also accentuates the importance of full consideration of all available information in agency decision making. The *Bennett* decision creates an opportunity for affected parties to look behind, and perhaps overturn, agency decisions via court challenges to technical information used by the agency in making a decision.

From the standpoint of the general public, *Bennett* brings a welcome fairness and equal opportunity of review of agency actions. The opinion can only add credibility and more good science to the nation's efforts to preserve environmental quality while taking into account the economic impacts of those efforts on individuals and businesses. The *Bennett* decision will probably influence future cases involving laws other than the Endangered Species Act. The requirements imposed by the Supreme Court in *Bennett* will level the playing field in day-to-day agency interaction with the regulated community. ■

EnviroOn-Line

By Tiffany Schauer

NUMEROUS federal agencies provide health, safety and scientific news essential to any environmental practice via the Internet.

The U.S. Department of Health and Human Services (HHS) has established several informative web pages. The National Institutes of Health (NIH), an operating agency of HHS, has two dozen divisions, one of which is the National Institute of Environmental Health Sciences (NIEHS). The NIEHS page, located at <http://www.niehs.nih.gov/>, provides access to an environmental health clearinghouse (<http://infoventures.com/e-hlth/>) containing pesticide background statements, environmental impact statements, human health risk assessments, ecological risk assessments and current research literature. The National Toxicology Program of NIEHS provides information about potentially toxic chemicals (http://ntpserver.niehs.nih.gov/Main_Pages/about_NTP.html).

The Centers for Disease Control and Prevention, also a part of NIH, has a page at <http://www.cdc.gov/>. Part of the the CDC, the National Institute for Occupational Safety and Health, at <http://www.cdc.gov/niosh/homepage.html>, offers a compendium of occupational and environmental questionnaires and on-the-job environmental health hazards. Information about occupational-environmental health is also provided by the Occupational Safety and Health Administration (part of the U.S. Department of Labor) at <http://www.osha.gov/>.

The U.S. Department of Energy page, at <http://www.doe.gov/>, provides information on a number of environmental topics. The U.S. Department of Transportation's site, at <http://www.dot.gov/>, links users to the National Oil and Hazardous Substances Pollution Contingency Plan as well as relevant transportation regulations. The U.S. Geological Survey offers an environmentally themed page at <http://www.usgs.gov/themes/environ.html>. ■

Tiffany Schauer is an associate in the Environmental Law Group of Brobeck, Phleger & Harrison, LLP in San Francisco. Telephone: (415) 442-0090. Deborah Adler, a research assistant, assisted in the preparation of this column.