

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DEFENDERS OF WILDLIFE, <i>et al.</i>,)	
Plaintiffs,)	
v.)	
DIRK KEMPTHORNE, <i>et al.</i>,)	No. 1:04-cv-01230-GK
Defendants,)	
and)	
AMERICAN FOREST & PAPER)	
ASSOCIATION,)	
Defendant-Intervenor.)	
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AF&PA’s Notification Of Supplemental Authority

The American Forest & Paper Ass’n wishes to bring to the Court’s attention two recent Supreme Court decisions. *National Ass’n of Home Builders v. Defenders of Wildlife*, ___ S. Ct. ___, 2007 WL 1801745 (Nos. 06-340 and 06-549, decided June 25, 2007); and *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (U.S., decided June 11, 2007). *NAHB v. Defenders* addresses Endangered Species Act (“ESA”) § 7 and Administrative Procedure Act (“APA”) issues comparable to those in the instant case. *Long Island Care* also concludes that the agency provided a rational explanation for its rulemaking which satisfies the APA.

The case at bar concerns the legality of a set of ESA§ 7 counterpart rules for time-sensitive projects implementing the National Fire Plan (“Counterpart Rules” or “Rules”). The Court’s summary judgment opinion explains why the Counterpart Rules comply with the ESA. *Defenders of Wildlife v. Kempthorne*, 2006 WL 2844232 at *16-19 (D.D.C. Sept. 29, 2006) (doc. 59). The opinion also summarizes why the Rules are not arbitrary under the APA, and why the National Environmental Policy Act compliance is adequate. *Id.* at *19-21.

The case is currently pending on Plaintiffs’ motion to reconsider whether the Services (the Fish and Wildlife Service and the National Marine Fisheries Service) rationally explained the Counterpart Rules. *See* Plaintiffs’ Motion for Partial Reconsideration (Oct. 16, 2006) (doc.

61). The Reconsideration Motion urges the Court to prepare a lengthier opinion on the APA arguments. AF&PA and Federal Defendants have opposed the Reconsideration Motion. *See* docs. 62 and 63.

The recent Supreme Court decisions provide further support for denying the Reconsideration Motion and for reaffirming the Counterpart Rules' compliance with ESA § 7.

1. This Court reasoned that ESA § 7 “leaves room for the [Services] to determine” precisely which agency actions should be subject to project-by-project “consultation,” that the Services could permissibly fill the statutory ambiguity through the Counterpart Rules, and that the Services' ESA construction in the Counterpart Rules is controlling under a *Chevron* Step Two analysis. *Defenders of Wildlife v. Kempthorne*, 2006 WL 2844232 at *16-19.

The Supreme Court subsequently employed a similar analysis in *NAHB v. Defenders*.¹ The majority opinion found that ESA § 7(a)(2) is unclear as to whether its consultation and jeopardy-avoidance provisions apply where another statute provides an exclusive set of criteria for federal decisionmaking. The Court concluded that the regulatory interpretation in 50 C.F.R. 402.03 – that ESA § 7 applies only where the agency has “discretion” to consider impacts on listed species under non-ESA law – was reasonable under a *Chevron* Step Two analysis and did not offend *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). *NAHB v. Defenders of Wildlife*, 2007 WL 1801745 at *12-15.

Thus, *NAHB v. Defenders* confirms the correctness of this Court's summary judgment reasoning that the Services have considerable interpretive discretion in construing ESA § 7(a)(2), that “consultation” is not required on every federal action, and that courts should defer to the Services regulatory interpretation of ESA § 7.

¹ That suit was brought by the environmental group plaintiff in the case at bar. Defenders of Wildlife is represented by the same counsel in both cases.

2. Plaintiffs' view in the Reconsideration Motion is that the APA requires an extensive agency response to each sub-issue to provide an APA-adequate rational explanation. Two recent Supreme Court opinions support denial of that Motion. *NAHB v. Defenders* reiterates the Supreme Court's teachings that: (1) to be arbitrary, an agency must have "entirely failed to consider an important aspect of the problem"; and (2) courts should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." 2007 WL 1801745 at *9.

The other opinion concludes that a "reasonable, albeit brief, explanation" satisfies the APA, and suggests that rulemakings often are rational under APA if they are within the substantive discretion granted by the statute. *Long Island Care*, 127 S. Ct. at 2351-52. That unanimous opinion earlier explains why *Chevron* deference must be granted to the agency's interpretation of an unclear statute. *Id.* at 2345-47.

Respectfully submitted,

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