

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE, et al.,)
)
 Plaintiffs,)
)
 v.)
) Civ. No. 04-1230 (GK)
 DIRK KEMPTHORNE, et al.,) (No dates presently scheduled)
)
 Defendants.)

**PLAINTIFFS’ RESPONSE TO AF & PA’s NOTIFICATION
OF SUPPLEMENTAL AUTHORITY AND PLAINTIFFS’
NOTICE OF SUPPLEMENTAL AUTHORITY**

The American Forest & Paper Ass’n (“AF & PA”) has brought to the Court’s attention two Supreme Court decisions that, AF & PA asserts, “support denial” of plaintiffs’ pending motion for partial reconsideration. Notif. at 3. In fact, only one of the rulings even arguably bears on the underlying legal issues in this case, and neither decision in any way undercuts the specific Administrative Procedure Act (“APA”) grounds on which plaintiffs have sought reconsideration. On the other hand, as discussed below, another ruling recently issued by the Supreme Court supports plaintiffs’ motion.

In the first ruling cited by AF & PA – *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, __ S. Ct. __, 2007 WL 180745 (U.S. June 25, 2007) (“*NAHB*”) – the Supreme Court was required to “mediate a clash of seemingly categorical – and, at first glance, irreconcilable – legislative commands.” *Id.* at * 10. In particular, the Court was called on to address the question of whether section 7(a)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2), applied to an agency action required by a preexisting statutory scheme that, as construed by the

court, “*forbid*[] [the agency] from considering” adverse impacts on endangered and threatened species. *Id.* at * 12 (emphasis added).

In its 5-4 ruling, the Court held that compliance with section 7(a)(2) was not required under those narrow circumstances. In doing so, the Court recognized that the “language of § 7(a)(2)” is “imperative” and “categorical” and that its “mandate *is to be carried out through consultation* and may require the agency to adopt an alternative course of action.” *Id.* at * 10 (emphasis added). Accordingly, the only reason why the Court held that this mandatory process need not be followed in that case was because *another*, earlier-enacted statute – a provision of the Clean Water Act providing that transfers of permitting authority to states “shall” occur when nine enumerated criteria are satisfied – *compelled* the agency action at issue, and hence applying section 7(a)(2) would “effectively repeal” the earlier statutory command. *Id.* at * 11.

There is no comparable issue in this case. Defendants have never argued that *another* statute excuses them from fully complying with section 7(a)(2) with respect to the agency actions at issue here. Accordingly, even with regard to the underlying statutory construction issue raised by plaintiffs – which is not, in any event, the focus of plaintiffs’ motion for reconsideration – *NAHB* has little to do with this case. And to the extent it has any bearing here at all, the ruling’s discussion of the consultation process that must be followed whenever section 7(a)(2) *does* apply to a particular kind of agency action is more consistent with plaintiffs’ reading of the ESA than that proffered by defendants. See also *id.* at * 15 (“[T]he ESA’s no-jeopardy mandate applies to every discretionary agency action – regardless of the expense or burden its application might impose.”) (first emphasis added; second emphasis in original).

In any case, plaintiffs have moved for reconsideration on APA grounds that are not

affected at all by *NAHB*. Indeed, the Court simply reiterated the APA principles on which plaintiffs have relied in their pending motion. See id. at * 9 (an agency action may be challenged on APA grounds where the agency “has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise”) (quoting *Motor Vehicle Mfrs. Ass. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 43 (1973)). Here, plaintiffs have moved for reconsideration on precisely these grounds, including because the drastic regulatory change under review is not supported by record evidence, and because the rule relies on meaningless definitions of crucial terms. Nothing in *NAHB* undercuts these arguments.

So too with the other ruling cited by AF & PA, *Long Island Care at Home Ltd. v. Coke*, 127 S. Ct. 2339 (2007). In that case, the principal issues were whether an agency’s longstanding regulation interpreting a statutory term was contrary to the particular statute at issue, and whether it conflicted with another rule promulgated by the same agency. The decision does not discuss the *State Farm* standards that plaintiffs have invoked in their reconsideration motion here, let alone suggest that they have been relaxed or modified in some manner.

On the other hand, the Supreme Court’s recent ruling in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), *does* bear on the issues raised in plaintiffs’ motion for reconsideration. In that case, the Court specifically considered whether EPA’s denial of a rulemaking petition requesting that the agency regulate greenhouse gas emissions from new motor vehicles was arbitrary and capricious. Although agencies’ “[r]efusals to promulgate rules” are reviewed on an “extremely limited” and “highly deferential” standard, *id.* at 1459, and despite the fact that EPA had

“explained in detail why it would refuse” to regulate greenhouse gas emissions, *id.* at 1451, the Court nonetheless held that “EPA has offered no *reasoned explanation* for its refusal to decide whether greenhouse gases cause or contribute to climate change,” and that “[i]ts action was therefore ‘arbitrary, capricious . . . or otherwise not in accordance with law.’” *Id.* at 1463 (internal citation omitted; emphasis added); *id.* at 1462 (EPA’s “laundry list of reasons not to regulate” was inadequate to “provide[] some *reasonable* explanation of why it cannot or will not exercise its discretion” to regulate greenhouse gas emissions) (emphasis added).

Massachusetts v. EPA, therefore, reaffirms that to survive review under the arbitrary and capricious standard it is not sufficient for an agency simply to proffer some “reasons” for taking (or not taking) a particular regulatory course. Rather, to pass muster, the agency’s rationale for acting as it has must at least be “reasoned” and “reasonable” – *i.e.*, it must be predicated on concrete evidence in the Administrative Record, and it must at least be consistent with the purposes underlying the statutory scheme pursuant to which the agency is acting. *Id.* (“once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute”).

Here, as explained in detail in plaintiffs’ motion for partial reconsideration – with no effective rebuttal by defendants – the regulatory change under review falls far short of these standards, especially as recently elucidated and applied by the D.C. Circuit. Thus, at least on the Administrative Record here, it was not reasonable for defendants to significantly modify their longstanding section 7 procedures when the Record reflects *no* evidence that those procedures were responsible for delays in necessary projects; that the Services had already put in place admittedly *effective* streamlining procedures to prevent such delays; that the agencies’ own

consultation experts believed that the new procedures would place listed species at a greater risk of extinction without accomplishing countervailing benefits; and that defendants failed to devise a coherent, concrete definition of the kind of projects that are governed by the new rule. The Court need not, at this stage, speculate whether the Services *can* proffer a better explanation for the rule change; rather, as in *Massachusetts v. EPA*, the Court should only hold that the decision under review is inadequately supported by the reasons and record proffered to date, and hence should be remanded and vacated on that basis for further deliberation.¹

Respectfully submitted,

s/_____
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¹ While plaintiffs' reconsideration motion focuses on State Farm concerns, a recent D.C. Circuit ruling is pertinent to this Court's Chevron analysis. In holding that this is "not a step-one case" under Chevron, the Court relied, in part, on the fact that a "definition of 'consultation' is not provided in [section 7], nor elsewhere in the ESA." Defenders of Wildlife v. Kempthorne, 2006 WL 2844232 * 18 (D.C. Cir. Sept. 29, 2006). However, in Natural Resources Defense Council v. EPA, ___ F.3d ___, 2007 WL 1651831 (D.C. Cir. June 8, 2007), in the course of sustaining an environmental group's challenge to a regulation implementing the Clean Air Act ("CAA"), the Court of Appeals rejected EPA's argument that the pertinent CAA provision was "ambiguous because it does not contain definitions of certain terms." Id. at * 5 (internal quotation omitted). The Court held that "[t]he lack of a statutory definition of a word does not necessarily render the meaning of a word ambiguous," and that the statutory language was sufficiently clear to "halt[] our review at *Chevron*'s step 1." Id. at * 7.

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have caused this motion to be filed on all counsel of record by filing the motion in accordance with the Court's electronic filing procedures.

/s/ _____
Eric R. Glitzenstein