CASE NOTES

recent environmental cases and rules

Environmental and Natural Resources Section OREGON STATE BAR
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Editor's Note: This issue contains selected summaries of cases and administrative rules issued in December 2011, and in January, February, and March 2012. Please contact me if you have any comments or suggestions about the newsletter, or would like to recommend a case or rule for inclusion in future issues. Thank you to all of the volunteer authors in this issue and to those who have signed up to write summaries for future newsletters. If you are interested in summarizing cases and rules for this newsletter, please contact me.

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CASES

Sackett v. EPA, 566 U.S. __, 132 S. Ct. 1367 (2012), *available at* http://www.supremecourt.gov/opinions/11pdf/10-1062.pdf

Megan Perry, Willamette Law Online
Summary reprinted with permission and first published by Willamette Law Online at http://willamettelawonline.com/2012/03/sackett-v-epa-2/.

After Petitioners filled in half-an-acre of their property with dirt and rock in order to build a house, the EPA issued a compliance order against them for discharging pollutants into wetlands in violation of the Clean Water Act. The order required Petitioners to remove the fill material and restore the property to its original condition. Petitioners sought and were denied a hearing with the EPA, and subsequently filed for injunctive and declaratory relief in district court claiming that the compliance order was arbitrary and capricious and violated Petitioners' due

process rights. The district court dismissed for lack of subject-matter jurisdiction. The Court of Appeals for the Ninth Circuit affirmed the dismissal, concluding that pre-enforcement judicial review of EPA-issued compliance orders is not permitted under the Clean Water Act and that this preclusion did not violate Petitioners' due process rights.

The Supreme Court reversed and remanded, holding that the Clean Water Act does not expressly preclude judicial review of the compliance order, and the overall statutory intent does not overcome the APA's presumption favoring judicial review of final agency actions. The Court also held that the compliance order was a final agency action because it determines rights or obligations, creates legal obligation and consequences, and marks the consummation of the EPA's decision making process.

Alliance for the Wild Rockies v. Salazar, 672 F.3d 1170 (9th Cir. 2012), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2012/03/14/11-35661.pdf

Frank Lupo, U.S. Department of the Interior, Office of the Solicitor, Southwest Region.[1]

Congress, via Section 1713 of the Department of Defense and Full-Year Continuing Appropriations Act of 2011 ("Section 1713"), ordered the Secretary of the Interior to remove a portion of a distinct population segment of gray wolves from the protections of the Endangered Species Act ("ESA") without regard to any otherwise applicable statute or regulation. The U.S. Fish & Wildlife Service ("FWS") complied with the Section 1713 by issuing a rule designating a distinct population segment of gray wolves in the northern Rocky Mountains and removing ESA protection from the entire population, except those wolves in Wyoming. Plaintiffs, various environmental groups, filed suit, seeking an injunction against the implementation of Section 1713. Plaintiffs argued that Section 1713 violates the separation of powers mandated by the United States Constitution. The District Court of Montana, Judge Molloy, rejected Plaintiffs' claims. *Alliance for the Wild Rockies, et al. v. Salazar*, 800 F. Supp. 2d 1123 (D. Mont. 2011). The Ninth Circuit reviewed de novo and affirmed the District Court ruling.

Appellants argued that *United States v. Klein*, 80 U.S. 128 (1871) foreclosed Congress's authority to issue Section 1713. In *Klein*, the Supreme Court struck down an act of Congress because it dictated the result of pending litigation. Klein filed suit against the United States, seeking the proceeds of property sold during the Civil War. Klein premised his suit on an earlier Supreme Court case ruling that a presidential pardon was sufficient proof of "loyalty" to support the claim. While Klein's suit was pending, Congress passed a statute that directed the opposite result; namely, that acceptance of a pardon was, in most cases, proof of disloyalty. The Supreme Court in *Klein* struck down that statute because Congress had "prescribe[d] a rule for the decision of a cause in a particular way" and therefore exceeded the bounds of legislative power. *Id*. at 146-47. In coming to this decision, the Court distinguished the earlier *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. 421 (1855) (*Wheeling Bridge*). In *Wheeling Bridge*, Congress decreed that a certain bridge was a post-road for passage of mail. This contradicted an earlier Court decision holding that the bridge was an obstruction to navigation. *Klein* distinguished these two matters, by noting that Congress's action in *Wheeling Bridge* changed

[1] The views in the article are the author's alone and do not necessarily represent those of the Office of the Solicitor, the Department of the Interior, or the United States.

the law itself, rather than requiring that the Court reach a different conclusion under the pre-existing law.

In *Alliance for the Wild Rockies*, the Ninth Circuit noted that *Klein* is an isolated separation of powers case. The Ninth Circuit had previously relied on *Klein* in *Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), but it was later reversed by the Supreme Court in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). In *Seattle Audubon Society*, Congress, through an Appropriations Act, specifically allowed logging in parts of disputed spotted owl habitat, regardless of otherwise applicable laws. The Ninth Circuit held that Congress had violated separation of powers by requiring a specific result in ongoing litigation and making factual findings under existing law. However, the Supreme Court disagreed, noting that Congress had, in fact, amended existing law and replaced the applicable legal standards.

The Ninth Circuit in *Alliance for the Wild Rockies* concluded that the Appropriations Act under review in *Seattle Audubon Society* was analogous to Section 1713. Congress mandated a particular result (ensuring that certain portions of the gray wolf population are not listed under the ESA), but did so by changing the law applicable to that case. The court noted that Congress's meaning and the effect of Section 1713 was clear. The court closed with the caveat that the rule Congress required the FWS to adopt includes standards for the agency to assess the continuing viability of wolf populations and that judicial review of any subsequent regulations was not foreclosed by Congress.

Turtle Island Restoration v. Hawaii Longline, 672 F.3d 1160 (9th Cir. 2012), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2012/03/14/11-15783.pdf

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The Hawaii Longline Association ("Longline"), an organization representing fishing interests, appealed the district court's approval of a consent decree entered into by a group of environmental organizations (collectively, "Turtle Island") and the National Marine Fisheries Service ("NMFS"). The consent decree vacated a portion of a new rule promulgated by NMFS that had increased the number of incidental takes of loggerhead turtles—a threatened species under the Endangered Species Act ("ESA")—permitted by the operations of the Hawaii-based shallow-set longline fishery. Turtle Island brought suit against NMFS, challenging the new rule as well as the 2008 Biological Opinion by NMFS upon which the new rule was based, and Longline intervened as a defendant. While the litigation was pending, Turtle Island and NMFS entered into the consent decree, which the district court approved, whereby the increased loggerhead turtle incidental take limit was vacated and the previous lower limit reinstated, and NMFS was prohibited from increasing the turtle take limit without first issuing a new Biological Opinion.

Having jurisdiction over what it concluded to be an interlocutory grant of an injunction, *see* 28 U.S.C. § 1292(a)(1), the Ninth Circuit Court of Appeals affirmed the district court's approval of the consent decree. The court rejected Longline's arguments that the approval of the consent decree violated both the Magnuson-Stevens Fishery Conservation and Management Act

(the "Magnuson Act") and the Administrative Procedures Act ("APA"). Longline argued that by entering into a consent decree that vacated portions of a new rule, NMFS had engaged in rulemaking without going through the rulemaking procedures required by the Magnuson Act and the APA, such as a public notice and comment period. The court disagreed, emphasizing that the consent decree did not make substantive changes to the regulations, it merely vacated a portion of the regulation, reinstating the prior rule. Because the court found that the consent decree did not result in the imposition of a new substantive regulatory standard, the court did not reach the issue of whether a statute's rulemaking procedures generally apply to a judicial act such as a consent decree (both Turtle Island and NMFS argued that the consent decree, as a judicial act, was not subject to the statutes' rulemaking procedures). The court also cited to the policy of encouraging settlement of litigation in an arms-length negotiation between a plaintiff and a defendant. Thus, the court held that the district court did not abuse its discretion in approving the consent decree.

Greater Yellowstone Coalition, Inc. v. Servheen, 665 F.3d 1015 (9th Cir. 2011), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2011/11/22/09-36100.pdf

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Greater Yellowstone Coalition challenged the U.S. Fish and Wildlife Service's decision to remove the Yellowstone distinct population segment of grizzly bears from the threatened species list under the Endangered Species Act. The district court granted the Coalition's motion for summary judgment based on two claims and vacated and remanded the rule. The Service appealed. The Ninth Circuit affirmed the district court's ruling that the Service failed to articulate a rational connection between the information in the record and its determination that declines of whitebark pine, the seeds of which are a key food source for grizzly bears, were not a threat to the Yellowstone grizzly. However, the Ninth Circuit reversed the district court on the second issue and remanded, holding that the Service's determination regarding the adequacy of existing regulatory mechanisms was reasonable.

In the Service's final delisting rule, it analyzed the five listing factors in Section 4(a)(1) of the Endangered Species Act, 16 U.S.C. § 1533(a)(1), which the Service also uses to determine whether to delist a species. *See* 50 CFR 424.11(d). Under 16 U.S.C. § 1533(a)(1)(E), "other natural or manmade factors affecting its continued existence," the Service concluded that any changes to production of whitebark pine are not likely to threaten the Yellowstone grizzly. The Ninth Circuit noted the substantial information in the record indicating that whitebark pine loss presents a potential threat to the Yellowstone grizzly; the Service acknowledged concern that there will be future changes in whitebark pine abundance because of stresses from mountain pine beetles and white pine blister rust, both of which may be exacerbated by climate change; and there is evidence of a direct correlation between reduced whitebark pine seed availability and increased mortality and decreased reproduction of grizzly bears. Given these factors, the Ninth Circuit agreed with the district court that the Service failed to articulate a rational connection between the information it relied upon and its conclusion that whitebark pine declines were not likely to threaten the Yellowstone grizzly.

In reaching this ruling, the Ninth Circuit provided insight into the issues of scientific uncertainty and adaptive management in delisting decisions. The Service concluded it does not yet know what impact whitebark pine declines may have on the Yellowstone grizzly. The court concluded it is not enough for the Service to invoke scientific uncertainty in the delisting decision; the Service must rationally explain why it decided to delist now rather than later given the uncertainty. In addition, the court noted that the Service relied heavily on adaptive management to justify its delisting decision in the face of scientific uncertainty. The court concluded that more specific management responses tied to more specific triggering criteria are required for adaptive management of a potential threat to suffice as a basis for a delisting decision.

Under 16 U.S.C. § 1533(a)(1)(D), "the inadequacy of existing regulatory mechanisms," the Service concluded that adequate regulatory mechanisms were in place to maintain the recovered Yellowstone grizzly population after delisting. The district court held that the Service's conclusion relied on too many measures that were not legally binding and failed to explain how legally binding measures would protect the population. The Service had developed a strategy to guide management and monitoring of the Yellowstone grizzly and its habitat upon recovery and delisting, and the strategy designated a Primary Conservation Area with population and habitat conditions that have allowed the population to achieve recovery and expand outside the area. The Ninth Circuit concluded that the Service could reasonably conclude that adequate regulatory mechanisms exist to protect the Yellowstone grizzly, because Forest Service National Forest Plans and Park Service National Park Compendia make legally binding standards on 98% of the critical Primary Conservation Area, and the Wilderness Act provides legally binding protections on a significant portion of grizzly habitat outside of the Primary Conservation Area.

State v. Trident Seafoods, 248 Or. App. 664, 274 P3d 218 (2012), *available at* http://www.publications.ojd.state.or.us/Publications/A143431.pdf

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Trident Seafoods is a wholesale fish processor located in Newport, Oregon. In 2005, Trident entered into an agreement with the Oregon Department of Fish & Wildlife (ODFW) to participate in a hake fishing program developed by the National Marine Fisheries Service. The federal program allowed trawlers to keep all fish caught in the nets set for hake—including protected species—if they delivered them to designated processors, such as Trident. Under the agreement with ODFW, Trident was allowed to sell by-catch overages consisting of non-protected groundfish species, and was required to report the amount and fair market value of the by-catch. The agreement also provided that it could be terminated by ODFW if Trident failed to abide by its terms.

Although Trident agreed to the terms of the agreement, it was not equipped to handle fish other than hake, and objected to paying for fish it could not process and sell. Over the summer of 2005, thousands of pounds of various rockfishes were delivered to Trident. Trident ground those fish into fish meal and reported its fair market value as zero. State police investigated and estimated that the value of the by-catch was about $20,000. Trident refused to pay, because it was unable to process or sell the fish.

Trident was cited for failure to comply with applicable wildlife laws, ORS 496.992(1). Trident argued that it was entitled to acquittal on three theories: that its agreement with ODFW relived it of the duty to pay for by-catch; that the fishing vessel, and not Trident, were required to pay; and that the by-catch had no value. The trial court found Trident guilty, and it appealed.

The Court of Appeals affirmed. The court termed "fallacious" the argument that the agreement absolved Trident from complying with otherwise applicable laws, and construed the agreement to require that Trident, not the vessel, make the payments. Although Trident's argument that ODFW's rules imposed the obligation on the fisherman was plausible, it could not be squared with the language of the agreement, which logically could apply only to a processor. Finally, the court rejected Trident's argument that the by-catch had no fair market value because Trident was unable to process it.

No petition for review has been filed.

Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission, 248 Or. App. 301, 273 P.3d 267 (2012), *available at*
http://www.publications.ojd.state.or.us/Publications/A146584.pdf

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Summary reprinted with permission and first published by Willamette Law Online at http://willamettelawonline.com/2012/02/friends-of-the-columbia-gorge-inc-v-columbia-river-gorge-commission/

The Friends of the Columbia Gorge, Inc. request judicial review of the Columbia River Gorge Commission's revisal of its management plan. The Columbia River Gorge National Scenic Area Act directed the Columbia River Gorge Commission to adopt a management plan that incorporated their developed land use designations for certain land along the Columbia River. In 2004, the Commission adopted revisions to the original plan, which the Petitioner, Friends of the Columbia Gorge, Inc. argued violated aspects of the Act including the definition of "natural resources" and failed to protect natural and cultural resources. The Court of Appeals held that the revised management plan violated the Scenic Area Act by failing to include provisions that require commercial, residential, and mineral resource development to take place without adversely affecting natural resources, and that the commission should also reconsider provisions addressing adverse cumulative effects to cultural resources. The definition of natural resources was reasonable. Affirmed in part, reversed in part, and remanded for reconsideration.

RULES

EPA's Proposed "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units"

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On April 13, 2012, EPA published a proposed rule in the *Federal Register* that specifies a carbon standard for new fossil fuel-fired power plants pursuant to section 111 of the Clean Air

Act (CAA). The proposal would establish a new source performance standard (NSPS), subpart TTTT, applicable to and limiting carbon dioxide (CO_2) emissions from each "fossil fuel" burning "electric utility generating unit" (EGU) with a base load rating of more than 73 megawatts (MW) that commences construction after the proposal's publication date.

Beyond limiting CO_2 emissions from new EGUs, the rule will essentially compel new units fired with coal or petroleum coke to make use of carbon capture and storage (CCS) systems, as discussed below.

Applicability

The proposed subpart TTTT rule would apply to new fossil fuel-firing EGU's (*e.g.*, natural gas, coal or petroleum coke-fired units) with a base load rating in excess of 73 MW that (a) are constructed to supply and sell more than a third of their potential electric output capacity to a utility and (b) which have a net-electrical output of more than 25 MW.

The proposed rule would not, however, apply to:

- new EGUs that do not burn fossil fuels (*e.g.*, biomass-fired plants);
- new fossil-fuel-fired EGUs constructed in Hawaii or in other non-continental areas;
- existing fossil-fuel-fired EGUs, including existing units that are modified or reconstructed;
- "transitional sources," which include EGUs that (a) have already obtained the necessary preconstruction permit and (b) commence construction within 12 months after the proposal was published; or
- municipal, commercial or industrial solid waste incineration units.

Proposed CO_2 Emissions Standard

The proposal would impose an output-based CO_2 emissions standard on affected units of 1,000 pounds (lb) of CO_2 per megawatt-hour (MWh), calculated on a 12-month annual average basis. EPA chose that standard because, according to the agency, it reflects what a new natural gas combined cycle power plant can achieve without add-on controls. Interestingly, the proposal specifically exempts simple cycle combustion turbines from compliance with the 1,000 lb CO_2 standard.

New coal and petroleum coke-fired EGUs would not fare as well. Such units would need to achieve the 1,000 lb CO_2 standard unless they are designed to support the installation and operation of a CCS system. A CCS-capable unit would be allowed to satisfy the 1,000 lb CO_2 standard using a 30-year emissions averaging option. Under the option, the unit would be subject to a more relaxed CO_2 emissions standard (1,800 lb CO_2/MWh) through the 10th year of its operation. (EPA predicts that CCS technologies will become economically viable in the next decade). Beginning in the 11th year of the unit's operation, the unit's CCS system must be operational and the unit would become subject to a tougher CO_2 emissions standard (of 600 lb CO_2/MWh). Moreover, each unit using a CCS system must demonstrate that, on a 30-year average basis, its CO_2 emissions do not exceed the 1,000 lb standard.

Conclusions / Comment Period

The proposed subpart TTTT rule is the first-ever NSPS for CO_2. If finalized as proposed, subpart TTTT will have profound implications for the utility industry. As just one example, the rule could provoke significant new investment in CCS technologies to accommodate the development of new coal and petroleum coke-fired power plants. EPA will accept comments on the proposed subpart TTTT rule on or before June 12, 2012. The proposal will undoubtedly attract scores of commends from industry, environmental groups and others interested in EPA's regulation of greenhouse gas emissions.

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