CASE NOTES

recent environmental cases and rules

Environmental and Natural Resources Section OREGON STATE BAR
Editor: Jared Ogdon April 2013

Editor's Note: This issue contains selected summaries of cases issued in August and November 2012, and January, February, and March 2013. 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 Willamette Law Online and 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

Decker v. Northwest Environmental Defense Center, No. 11-338, __ U.S. __, 2013 WL 1131708 (Mar. 20, 2013), *available at* http://www.supremecourt.gov/opinions/12pdf/11-338_kifl.pdf

Joanna Fluckey, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2013/03/decker-v-northwest-environmental-defense-center-georgia-pacific-west-inc-v-northwest-environmental-defense-center/

Respondent brought a suit under the Clean Water Act (33 U. S. C. §1251 et seq.) in district court against forest products companies and the Oregon Board of Forestry. Respondent alleged that the companies were in violation of the Clean Water Act because they released pollutants into Oregon waters without a National Pollutant Discharge Elimination System (NPDES) permit. At issue was whether drainage ditches and other conveyances of natural runoff should be considered "point sources" of pollution, which require NPDES permits.

The district court granted Petitioners' motions to dismiss on the grounds that a drainage ditch discharging stormwater was not a point source and thus did not require such a permit. The Court of Appeals for the Ninth Circuit reversed, holding that the EPA's Industrial Stormwater Rule (40 CFR §122.26(b)(14)) applied to the companies' activities, and that the ditches discharging natural runoff were point sources subject to the NPDES permitting process.

The Supreme Court reversed the Ninth Circuit's ruling and determined that the EPA should be afforded deference in its interpretation of the rule, which excluded the ditches from NDPES permitting as non-point source. Although the EPA had issued a final version of the Industrial Stormwater Rule just before oral arguments in this case, the Court determined that the case was not moot, as an issue remained as to whether the petitioner's would be liable under the earlier version of the rule.

United States v. El Dorado County, 704 F.3d 1261 (9th Cir. 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/11/11-17134.pdf

Robin Wade, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at http://www.willamette.edu/wucl/resources/journals/wlo/9thcir/2013/01/United_States_v_El_Dorado_County.html

El Dorado County entered into a consent degree with the U.S. Forest Service regarding cleanup of a landfill. Citing errors in the decree, the County moved to modify it in district court. The district court suspended the degree and the Forest Service appealed. The County argued that the "order was not appealable because it is non-final." The Forest Service claimed that an interlocutory appeal was proper because it would suffer "serious, perhaps irreparable consequences" if the Court did not address the suspended decree immediately. The Court rejected the Forest Service's argument, holding that, while the district court's order has the effect of an injunction, it only suspends, but does not cancel the decree. Therefore, the Forest Service

failed to meet its burden of showing that only an immediate interlocutory appeal would save it from suffering "serious, perhaps irreparable consequences." APPEAL DISMISSED.

United States v. Yi, 704 F.3d 800 (9th Cir. 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/02/11-50234.pdf

Eva Vaccari, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at http://www.willamette.edu/wucl/resources/journals/wlo/9thcir/2013/01/united-states-v-yi.html

Charles Yi was convicted and sentenced for conspiracy to violate the Clean Air Act. Yi was the CEO of Millennium Pacific Icon Group. Millennium purchased Forest Glen complex, and certain ceilings of the building contained asbestos. Instead of removing the asbestos, Yi ordered that the ceiling be scraped and refinished. On appeal, the Court considered whether the district court erred in giving a "deliberate ignorance" jury instruction, in applying a sentence enhancement for an offense resulting in substantial likelihood of death or serious injury, and in applying a sentence enhancement based on Yi's role as an organizer or leader. First, the Court determined that the district court did not err in giving a deliberate ignorance jury instruction, because (1) there was testimony that Yi was aware of a high probability that the Forest Glen ceiling contained asbestos, and (2) Yi deliberately decided not to read the reports and, therefore, avoided learning the truth. Second, the Court held that the sentence enhancement applied was not clear error, because the crew's on-site conduct and the potential harm from inhaling asbestos created a substantial likelihood of death or serious bodily injury. Finally, the district court did not err in applying the enhancement for Yi's role as an organizer or leader, because Yi had the ultimate approval power for any part of the project, thus making him the organizer or leader of it. AFFIRMED.

Jayne v. Sherman, 706 F.3d 994 (9th Cir. 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/07/11-35269.pdf

Taylor Anderson, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at http://www.willamette.edu/wucl/resources/journals/wlo/9thcir/2013/01/jayne_v_sherman.html

Plaintiffs, various environmental protection organizations and their members, brought suit to prevent the implementation of a new regulation affecting Idaho's National Forest area known as the Idaho Roadless Rule. This rule provided for the opening of new areas in Idaho's forest for the building of new roads, logging, and mining. In its adoption of this new regulation, the Forest Service relied on a Biological Opinion issued by the Fish and Wildlife Service ("FWS") for its Final Environmental Impact Statement ("FEIS"). The FWS relied on promises to protect a listed species by the supervisor of the Idaho Panhandle National Forest ("IPNF"). Plaintiffs argued that the FWS violated the Endangered Species Act ("ESA") in preparing the opinion, since it relied on a promise to protect, and therefore the new regulation violates the ESA and cannot be implemented. Defendants claimed the Plaintiffs lacked standing and that the issue was not ripe, because the regulation had not been implemented yet. The Ninth Circuit adopted the opinion of the district court as its own in a per curiam opinion. The district court held that the

Plaintiffs had proper standing, and that the issue was ripe since their affidavits established sufficient use and enjoyment from the National Forest and that a final regulation was imminent; therefore, this was the only opportunity for Plaintiffs to challenge the rule. However, the Court held that the FWS did not violate the ESA in preparing the Biological Opinion since they did not act in an arbitrary or capricious manner. The consideration of a promise by the IPNF supervisor to protect those endangered species was not a violation of the ESA. This holding was adopted by the Ninth Circuit and the district court's grant of summary judgment was upheld. AFFIRMED.

Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073 (9th Cir. 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/23/12-70218.pdf

Mae Lee Browning, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at http://www.willamette.edu/wucl/resources/journals/wlo/9thcir/2013/01/Alaska_Survival_v_Surface_Transp_Bd.html

The Alaska Railroad Corporation ("ARRC") sought approval from the Surface Transportation Board ("STB") to construct a rail line. STB's Office of Environmental Analysis ("OEA") prepared an Environmental Impact Statement ("EIS"), which acknowledged the rail line's harmful environmental effects and suggested mitigation measures that the ARRC must employ. The STB adopted all of the OEA's conclusions and permitted the ARRC to construct the rail line. Petitioner filed for review challenging STB's decision. Under the Administrative Procedure Act ("APA"), the Ninth Circuit will uphold STB's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Petitioner challenged STB's grant of an exemption to ARRC under § 10502(a) of the Interstate Commerce Commission Termination Act ("ICCTA"). STB can grant the exemption "if the project is either of limited scope or the full statutory proceedings are not necessary to protect shippers from abuse of market power." STB only has to consider one of those factors. Therefore, STB "acted within its authority" and did not have to engage in analysis about the scope of the project, because it concluded that the project would not harm shippers. Petitioner also brought a claim under the National Environmental Protection Act of 1969 ("NEPA"), which requires agencies to take a "hard look" at environmental consequences, and consider "reasonable alternatives" that would "minimize adverse impacts." The Ninth Circuit concluded that STB "thought hard about the appropriate factors" when it adopted a "purpose and need statement" that focused on ARRC's goals. Furthermore, STB did not have to consider "an infinite range of alternatives." It was sufficient that STB considered only the "reasonable or feasible" ones. Lastly, STB used proper methodology and engaged in "thoughtful discussion" when it assessed the mitigation measures ARRC must use when it builds the rail line. PETITION FOR REVIEW DENIED.

Center for Biological Diversity v. Salazar, 706 F.3d 1085 (9th Cir. 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/02/04/11-17843.pdf

Kirsten Larson, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2013/02/center-for-biological-diversity-v-salazar-2/

Appellants Center for Biological Diversity, et al., appealed the decision of the U.S. Bureau of Land Management ("BLM") allowing Denison Mines Corporation to restart mining

operations after a hiatus in mining. Appellants argued that this was in violation of the National Environmental Policy Act ("NEPA"). Specifically, they claimed that the 1988 plan of operations was no longer effective after the mine was closed in the early 1990s and, thus, could not be used by Denison. The Court determined that, following a temporary closure, no regulation requires approval of a new plan before mining resumes. As such, the BLM did not abuse its discretion in allowing Denison to resume mining. Appellants also argued that the 1988 NEPA analysis is outdated and that the mining should be reviewed for its environmental impact. In concluding that additional NEPA review was not necessary, the Court noted that NEPA is only triggered when there is a new "major Federal action," which was not present in this case. Further, Appellants argued that the BLM should not have allowed the gravel removal from the Robinson Wash under the categorical exclusion. The Court, however, concluded that the BLM was correct in applying this exclusion, because the permit did not affect the environment in a "cumulatively significant" way. AFFIRMED.

Great Old Broads for Wilderness v. Kimbell, 709 F.3d 836 (9th Cir. 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/03/04/11-16183.pdf

Robin Wade, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2013/03/great-old-broads-for-wilderness-v-kimbell/

The Great Old Broads for Wilderness challenged the United States Forest Service's decision to approve the restoration of a flood-damaged road in northeast Nevada. Great Old Broads argued the decision was "arbitrary and capricious" on the grounds that it violated both the National Forest Management Act and the National Environmental Policy Act, as well as an executive order. The district court granted the Forest Service's motion for summary judgment, holding that the Great Old Broads had not adequately exhausted administrative remedies and that the Forest Service's decision was not "arbitrary and capricious." The Ninth Circuit held that in order for a plaintiff to adequately exhaust all administrative remedies, the "claims raised at the administrative appeal level and in the federal complaint must be so similar that the district court can ascertain that the agency was on notice of, and had an opportunity to consider and decide, the same claims now raised in federal court." The Court reversed the district court's decision, holding that all three of the Great Old Broads's claims were administratively exhausted because the plaintiffs' letters arguing the violation to the Forest Service were so similar to the claims on appeal that the Forest Service was put on notice. Additionally, the Court affirmed the district court's conclusion that the Forest Service's decision was not "arbitrary and capricious," holding that the Forest Service's interpretation of the statutes and executive order was reasonable and not "plainly erroneous" and was entitled to deference. REVERSED in part, and AFFIRMED in part.

Chubb Custom Ins. v. Space Systems/Loral, No. 11-16272, __ F.3d __, 2013 WL 1093071 (9th Cir. 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/03/15/11-16272.pdf

Trevor Findley, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2013/03/chubb-custom-ins-v-space-systemsloral/

Chubb Custom Insurance sold an environmental insurance policy to the insured landowner for remediation costs stemming from pollution incidents by previous owners of

several lots in Palo Alto, California. Chubb reimbursed the insured for remediation costs and brought an action against the previous landowners, alleging they caused the pollution and were responsible for remediation costs under §107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), subrogation under §112(c) of CERCLA, and various state law claims. After the third amended complaint, the district court dismissed the complaint with prejudice. The Ninth Circuit determined that Chubb may not bring a subrogation claim under §107(a) because the subrogee (Chubb) did not itself incur "costs of response" as required by the statute, and reimbursement costs are insufficient. The panel also examined the context of the statute, and determined that allowing a subrogation claim under §107(a) would render §112(c) meaningless. Additionally, to make a subrogation claim under §112(c), the insured must make a claim against the potentially responsible parties or the Superfund, and the subrogee insurance company must allege the insured is a "claimant." The panel also determined that under the discovery rule, Chubb failed to bring the state law claims before the statute of limitations expired. AFFIRMED.

Cascadia Wildlands v. Kitzhaber, No. 3:12–cv–00961–AA, slip op., 2012 WL 5914255 (D. Or. Nov. 19, 2012) (preliminary injunction order); ___ F. Supp. 2d. ___ 2012 WL 5914259 (D. Or. Nov. 19, 2012) (order on motions for dismissal).

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In this Endangered Species Act case, the plaintiff environmental organizations alleged that multiple state officials were causing unlawful takings of marbled murrelets in the Tillamook, Clatsop, and Elliott State Forests by approving and implementing timber sales, forest management plans, implementation plans, annual operation plans, and a take avoidance policy. In two orders signed the same day, the District Court granted the plaintiffs' motion for a preliminary injunction, and granted in part and denied in part motions for dismissal filed by the defendants and defendants-intervenors.

The first order involved the plaintiffs' motion for a preliminary injunction against multiple timber sales and logging activities. The defendants argued that because they had already voluntarily ceased all logging-related activities, the plaintiffs' request was moot and an injunction would have no practical effect. The court noted, however, that the defendants had retained the ability to resume logging activities at any time, with sixty days advance notice to the plaintiffs. The court held that because a possibility remained that the allegedly illegal conduct could recur, the request for injunctive relief was not moot.

Similarly, the defendants contended that because they had voluntarily suspended the logging activities, the plaintiffs could not establish a likelihood of irreparable harm. The court reiterated that the logging could resume with notice and that the defendants were not legally bound by their voluntary cessation of the challenged activities. Given these facts, as well as the imperiled status of the marbled murrelet species, the court found an imminent threat of irreparable injury and granted the plaintiffs' motion for a preliminary injunction.

In its other order, the court addressed various motions filed by the defendants and defendants-intervenors to dismiss portions of the plaintiffs' claims. First, the court found that the

individually named members of the Oregon Board of Forestry were entitled to absolute legislative immunity in adopting the forest management plans. The court noted that the management plans at issue were not targeted to specific parcels of land, but rather generally allowed increased logging in state forests over a number of years. The court held that the plans were legislative because they were part of a broad and long-term forest management policy, they were of general application, and they bore the hallmark of traditional legislation. Thus, the court dismissed this claim against those defendants.

Second, the court addressed the claims against the named members of the State Land Board and the State Lands Director (collectively, "State Lands defendants"). The court held that because the State Lands defendants had delegated their management responsibilities over state forest lands to the Oregon Department of Forestry, their involvement was too removed to constitute a proximate cause of a taking. Nor had the plaintiffs alleged any direct acts by the State Lands defendants sufficient to state a plausible claim for relief. Accordingly, the court dismissed the claims against the State Lands defendants.

Finally, the court held that the plaintiffs had presented facts sufficient to allege that the individually named State Foresters had proximately caused takings by preparing, adopting, and implementing implementation plans, annual operation plans, and marbled murrelet management areas. The court thus declined to dismiss these claims. The court, however, dismissed a claim involving the defendants' adoption of a take avoidance policy, concluding that the plaintiffs had failed to allege facts sufficient to demonstrate that the policy itself caused takings.

Humane Society v. Bryson, No. 3:12–cv–642–SI, __ F.Supp.2d __, 2013 WL 595092 (D. Or. Feb. 15, 2013)

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In recent years, a number of sea lions have travelled up the Columbia River to prey on salmonids that congregate in the area directly below the Bonneville Dam. In 2006, the states of Oregon, Washington, and Idaho applied for authorization under Section 120 of the Marine Mammal Protection Act (MMPA) to lethally remove California Sea Lions (CSL) that were preying on threatened and endangered species of fish as the fish congregated directly below the dam while on their migration route. The National Marine Fisheries Service (NMFS) initially granted authorization to remove CSL in 2008, but that authorization was vacated by the Ninth Circuit. In vacating the authorization, the Ninth Circuit directed NMFS to (1) explain the apparent inconsistency between its Section 120 findings that sea lion predation was having a significant negative impact on protected fish, on the one hand, and other prior positive environmental assessments of fisher plans that seemed to have greater mortality impacts on the same fish, on the other hand, and to (2) articulate a reasoned explanation for NMFS's implicit finding that only CSL predation greater than one percent would have the requisite "significant negative impact on the decline or recovery" of native fish. Following the Ninth Circuit's ruling, the States resubmitted their Section 120 applications. NMFS issued new letters of authorization in 2012, and plaintiffs filed this action. Plaintiffs made three arguments: (1) that NMFS's Section 120 determination did not comply with the Ninth Circuit's instructions on remand and was

arbitrary and capricious in violation of the Administrative Procedures Act (APA); (2) that the letters of authorizations allow "take's" of Steller sea lions, a threatened species, in violation of the Endangered Species Act (ESA) and the MMPA; and that NMFS violated the National Environmental Policy Act (NEPA) by not preparing a supplemental environmental assessment before issuing the new authorizations.

On all parties' motions for summary judgment, the United States District Court of Oregon ruled against plaintiffs on all three arguments. Regarding NMFS's Section 120 determination, the court held that NMFS reasonably explained any apparent inconsistencies between its 2012 letters of authorization and four environmental assessments for fisheries plans that had previously been authored by NMFS and that NMFA also identified relevant qualitative difference between the impacts caused by fisheries and the mortality caused by CSL predation. The court also noted that NMFS provided a reasoned explanation to support its decision to replace the one percent threshold for significant negative impacts in the 2008 authorizations with a new standard in the 2012 letters of authorization. Applying the APA's narrow scope of review, the court held that NMFS had considered the relevant data and articulated a satisfactory explanation for its decision. The court further held that NMFS examined the relevant date and articulated a satisfactory explanation as to why the 2012 letters of authorization would not result in the incidental harassment, capturing, or killing of Steller sea lions. Finally, the court held that NMFS provided reasonable explanations for its decision not to prepare a supplemental environmental assessment before moving forward with the 2012 letters of authorization. The court therefore granted summary judgment to NMFS and the States of Washington, Oregon, and Idaho (intervenors). Because the court's review of NMFS's final agency determination under the APA was limited to the administrative record and no further fact finding was required, the case was dismissed.

Ed Niemi Oil Co., Inc. v. Exxon Mobil Corp., No. 3:11–cv–00214–MO, slip op. (D. Or. Mar. 11, 2013)

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Ed Niemi Oil Co. sought contribution from Exxon Mobil Corp. for costs Niemi incurred cleaning up two contaminated facilities formerly owned by Exxon, and a declaration that Exxon was liable for future remedial action costs. Exxon counterclaimed for indemnification and contribution. Both sides moved for summary judgment.

The Facilities

The first facility was a bulk petroleum storage facility Exxon (or its predecessors) leased from the Port of Astoria beginning around 1925. J. Ed Niemi worked at the site as a night watchman and driver from around 1920, but by 1945 he was distributing petroleum products for Mobil Oil, and in 1966, Niemi Oil Co. subleased the site from Exxon. Niemi eventually leased the site directly from the Port of Astoria and operated there until the late 1990s. The Oregon Department of Environmental Quality (DEQ) found soil and groundwater contamination there and ordered Niemi and others (not including Exxon) to perform a remedial investigation and clean up.

The second facility was a gas station on Marine Drive in Astoria owned by an Exxon predecessor from around 1945. In 1965, Niemi lease the gas station from Exxon and began operating it, and in 1978, purchased it from Exxon Mobil. In 1999, during removal of an underground waste oil tank, contamination was found in the soil and groundwater. Niemi conducted an investigation, and DEQ determined no further remedial action was necessary.

Applicable Law

The court analyzed the cross-motions for summary judgment under the Oregon Hazardous Waste Act, which (with some exceptions) imposes strict liability for remedial action costs on current and certain former owners and operators of a facility, as well as on those who caused or contributed to a release.

Analysis

As to the bulk petroleum storage facility, the court found that both Exxon and Niemi are potentially liable for remediation costs. Declarations submitted by each party playing up factual bases for the liability of the other created genuine issues of material fact not appropriate for summary judgment.

The court further found that an indemnity provision in lease agreements unambiguously required Niemi to indemnify Exxon for the period of the lease. But the court also found that nothing in the various agreements between the parties required Niemi to indemnify Exxon for all past contamination.

As to the gas station facility, the court noted that the analysis was largely the same. Exxon was potentially liable as an owner until 1978. Niemi was potentially liable from 1965, when it began operating the gas station, until removal of the waste oil tank in 1999. Because DEQ had determined that no further action was necessary, Exxon was entitled to summary judgment to the extent Niemi sought a declaration that Exxon was liable for future remedial action costs. Otherwise, the claims were inappropriate for summary judgment.

Siltronic Corp. v. Employers Ins. Co. of Wausau, No. 3:11–cv–1493–ST, __ F.Supp.2d __, 2013 WL 428453 (D. Or. Feb. 4, 2013)

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The United States District Court for the District of Oregon recently concluded that an insurance company that has exhausted its indemnity coverage under a commercial general liability ("CGL") policy has no continuing obligation to defend covered environmental claims, even if the insured's entire liability has not been fully and finally determined through judgments and settlements.

Siltronic Corporation ("Siltronic") owns real property on the southwest shore of the Willamette River, adjacent to the approximate center of the 10-river-mile-long Portland Harbor

Superfund Site. Siltronic purchased six consecutive CGL policies from Employers Insurance Company of Wausau ("Wausau") for the years 1980-1986, with combined policy limits of $6 million. Each of the policies contained the same coverage provision for property damage, which limited Wausau's liability by providing that "the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements."

Siltronic performed remedial investigations and implemented source control measures under a series of Oregon Department of Environmental Quality ("DEQ") and Environmental Protection Agency ("EPA") administrative orders, a settlement agreement with EPA and a consent judgment with DEQ that resolved some, but not all, of Siltronic's liability. From September 2003 to September 2009, Wausau paid Siltronic's defense costs and its indemnity costs, totaling $7,699,837 and $6 million, respectively. In September 2009, Wausau declared the exhaustion of its coverage limits and refused subsequent tenders of Siltronic's defense costs. Siltronic filed a declaratory judgment and breach of contract action against Wausau, seeking a declaration of Wausau's continuing duty to defend under the insurance policies.

The dispute turned on the interpretation of the phrase "exhausted by payment of judgments or settlements" in the policies. Siltronic argued that Wausau's duty to defend it in the ongoing proceedings with EPA and DEQ is not discharged until those proceedings are finally resolved through judgments and settlements, a resolution that, given the large number of responsible parties involved in Portland Harbor, will likely take years. Wausau argued that its payment on Siltronic's behalf of cleanup costs mandated by DEQ and EPA between 2003 and 2009 was the equivalent of the "payment of judgments or settlements" and, therefore, once those cleanup costs met the policy limits, Wausau's duty to defend was discharged.

The District Court, relying on analogous cases from Washington, Texas, Hawaii, and California, agreed with Wausau. The court found that the DEQ and EPA orders and agreements included "language of finality and an intent to create legally enforceable rights and responsibilities to a third party," and thus Wausau's indemnity payments on Siltronic's behalf pursuant to those orders and agreements were the equivalent of payments in response to judgments or settlements. The court distinguished Siltronic's case—where Wausau had been paying Siltronic's defense costs for six years before declaring the indemnity limits exhausted—from so-called "premature tender" or "dumping" cases, where an insurer tries to extinguish its defense obligations early on by tendering its indemnity limits to the insured and walking away. The court noted that premature tender is a significant concern in the context of environmental insurance coverage cases, where defense costs frequently exceed indemnity limits. Here, the court concluded that there was no evidence that Wausau tendered the full amount of the indemnity liability in an attempt to avoid having to pay defense costs. Rather, Wausau had exhausted its liability under the policies at Siltronic's request, those payments were the equivalent of the payment of judgments and settlements, and Wausau had no continuing duty to defend.

Hayden Island Livability Project v. Oregon Dept. of Environmental Quality, Multnomah County Circuit Court, Case No. 1011-16565 (Aug. 30, 2012)

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Hayden Island Livability Project (HILP), Hayden Island Manufactured Home Community Homeowners Association, Audubon Society of Portland, and several individuals ("Petitioners") challenged three Beneficial Use Determinations (BUDs) by the Oregon Department of Environmental Quality (DEQ). The BUDs allowed the Port of Portland ("Port") to place dredged material from the Willamette River on Port property on West Hayden Island (WHI). DEQ is responsible for making BUDs, which permit the productive use of solid waste material, rather than disposal, where DEQ determines that such use is (1) productive, and (2) will not adversely impact public health or the environment. A use is considered productive if there is "an identified or reasonably likely use for the material that is not speculative." DEQ approved the Port's proposed use for the dredge sediment, which involved filling portions of its property on WHI in anticipation of the development of a marine industrial terminal.

Petitioners argued that this proposed use was too speculative given that WHI would need to be successfully annexed to the City of Portland, and the Port would need to receive several federal permits in order to go forward with the project. DEQ and the Port challenged the petitioners' standing to sue, arguing that they had failed to point to any concrete harm that would befall petitioners individually, or as representative groups, and that their claims were moot with regard sediment deposit that had already been performed. DEQ and the Port further alleged that the petitioners had failed to carry their burden in moving for summary judgment by failing to plead facts supporting their contention that the dredge deposits would have adverse effects on public health or the environment.

Petitioners also challenged the BUDs under Oregon's environmental justice statute, which requires natural resource agencies (including DEQ) to consider the effects of agency actions on environmental justice issues. Petitioners argued that they had standing to bring a claim under the statute because Hayden Island Manufactured Home Community is an environmental justice community, and thus members have a personal stake in an agency's decision which affects the community. Asserting that the majority of Hayden Island Manufactured Home Community residents are elderly, petitioners argued that their heightened vulnerability to health risks warranted additional studies of the cumulative impacts of DEQ actions, and greater opportunity for public participation in the process. DEQ and the Port denied the petitioners' argument that the Oregon environmental justice statute imposes a "substantive analytical requirement" analogous to that of NEPA, and reiterated that the petitioners had failed to point to a risk exposure pathway that would implicate environmental justice issues.

Ruling from the bench without opinion, the court found that petitioners had standing to challenge the determinations. However, the court granted DEQ and Port of Portland's motions for summary judgment on all points, and affirmed the agency's BUDs for the Post Office Bar and Terminal 6.