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Recent Environmental Cases and Rules

Environmental and Natural Resources Section — Oregon State Bar
Matthew Preusch, Editor — July 2015

Editor's Note: This issue contains selected summaries of cases issued in April, May, and June of 2015. Thank you to Willamette Law Online, which provides case summaries and first publishes those summaries at http://www.willamette.edu/wucl/resources/journals/wlo/. Thank you also to Maura Fahey, staff attorney at Crag, and Bob O'Hallaron, Associate Attorney at Smith Freed & Eberhard P.C., for their summaries. If you are interested in summarizing cases or rules, please contact me.

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CASES

9th Circuit Court of Appeals

- ***Comm. for a Better Arvin v. EPA***, No. 11-73924, ___ F.3d ___, (9th Cir., May 20, 2015)
- ***El Comité para el Bienestar de Earlimart v. EPA***, No. 12-74184, ___ F.3d ___, (9th Cir., May 8, 2015)

District of Oregon

- ***Oregon Wild v. United States Forest Service***, No. 1:14–cv–00981–PA, ___ F.3d ___ , (D. Or. May 29, 2014)
- ***Audubon Society of Portland, et. al., v. Jewell, et. al.***, Case No. 1:14-cv-00675-CL, (D. Or. Apr. 15, 2015)
- ***League of Wilderness Defenders, et al. v. Peña, et al.***, No. 3:12-cv-02271-HZ (D. Or. Dec. 9, 2014/Apr. 6, 2015)

9th Circuit Court of Appeals

Comm. for a Better Arvin v. EPA, No. 11-73924, ___ F.3d ___ , (9th Cir., May 20, 2015), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2015/05/20/11-73924.pdf
Eric Robertson, Willamette Law Online

Several environmental and community groups (collectively, Petitioners) challenged whether the Environmental Protection Agency (EPA) erred in approving California's State Implementation Plan (SIP) to comply with National Ambient Air Quality Standards (NAAQS) enacted under the federal Clean Air Act (CAA) concerning ozone and fine particulate matter in the San Joaquin Valley. The court granted the petition in part, denied it in part, and remanded.

First, the EPA argued that the CAA does not require waiver measures, which had already been subject to an EPA approval process, to undergo an additional process to be included in an SIP. The Ninth Circuit held that to be in compliance with NAAQS, a SIP must include waiver measures to the extent that they are needed to comply with federal standards. Petitioners next contended that the EPA erred when state enforcement measures were not included in the SIP regarding a chip reflash measure, Particulate Matter Control Measure, and the Solid Waste Collection Vehicle Rule. The panel reasoned that since the EPA did not give emission reduction credit based on the chip reflash rule itself, but based it on actions taken before the California Supreme Court invalidated it, the Petitioners' argument failed. The panel ruled that the Diesel Particulate and Solid Waste rules had minimal effect, therefore the EPA did not need approval under the CAA. Petitioners also argued that California's reductions were merely aspirational. The panel found that the goals were not aspirational because California's plans were specific on reduction quantity and deadlines. Lastly, Petitioners argued that the California measures were practically unenforceable because the EPA and citizens would be left to obtain information only available from the California Air Resources Board and the pollution control district. The panel held that information was available throughout the regulatory process, and that the EPA has its own notice and comment rulemaking procedures.

El Comité para el Bienestar de Earlimart v. EPA, No. 12-74184, ___ F.3d ___ , (9th Cir., May 8, 2015), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2015/05/08/12-74184.pdf
Adam Mentzer, Willamette Law Online

Under the Clean Air Act, 42 U.S.C. § 7409, states must submit a State Implementation Plan (SIP) in order to meet national ambient air quality standards established by the Environmental Protection Agency (EPA). In creating its SIP, California submitted the Wells Memo, which was later corrected by the Howekamp Letter, and was accepted as part of California's SIP Pesticide Element by the EPA. California further revised its SIP and added fumigant regulations in 2009, which was approved by the EPA in 2012.

In response, El Comité para el Bienestar de Earlimart (El Comité) and other organizations filed a petition for review regarding the EPA's 2012 approval. El Comité sued under under § 307(b)(1) of the Clean Air Act, alleging that (1) the plain language of the Pesticide Element requires a 20 percent, not 12 percent reduction; (2) the revisions and fumigation regulations did

not fulfill the Pesticide Element's commitment; and (3) that California's assurances of compliance with Title VI of the Civil Rights Act were inadequate. The Ninth Circuit rejected El Comité's arguments. The panel held that the EPA made reasonable conclusions concerning the sufficiency of the revisions and fumigation regulations, and that it would be inappropriate to discard the EPA's conclusions absent arbitrary and capricious action. The panel further upheld the EPA's determination that California met the Pesticide Element requirements, finding the determination rational, and not capricious or arbitrary. Lastly, the panel held that the EPA was acting within its discretion by finding that California made the necessary assurances of compliance with federal and state laws, as required under the Clean Air Act, because the EPA's decision was supported by California's response to the EPA's inquiries and reports concerning the new effects of the new regulations.

District of Oregon

Oregon Wild v. United States Forest Service, No. 1:14–cv–00981–PA, ___ F.3d ___ , (D. Or. May 29, 2014)
Matthew Preusch, Keller Rohrback L.L.P.

Plaintiffs Oregon Wild challenged the Forest Service's authorization of the Bybee Vegetation Management Project ("the Bybee Project"), a 16,215-acre thinning and logging proposal near Crater Lake National Park in the Rogue River–Siskiyou National Forest. Plaintiffs brought claims based on the Administrative Procedure Act (APA), Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and the National Forest Management Act (NFMA). Both parties moved for summary judgment, and the court granted the Forest Service's motion while denying Oregon Wild's.

On the NEPA claims, the court concluded that the Forest Service correctly determined that the project did not require a full Environmental Impact Statement given (1) "the relatively small percentage of [Potential Wilderness Area] acreage that will be affected by the Bybee Project"; (2) the agency rationally determined the project would not significantly impact Crater Lake National Park or a nearby scenic highway; (3) the "limited scope of the Bybee Project, as well as the highly specific, non-binding nature of the" Environmental Assessment; (4) the agency's review of impacts to the Northern Spotted Owl and Gray Wolf, where the latter was not present in the area at the time of the decision; and (5) there was no threatened violation of the law. The court also held that the agency's decision to not conduct a supplemental EA after the arrival of OR-7, the famous Gray Wolf, in the area was not arbitrary or capricious. Finally, the court, deferring to "Forest Service's determination that the mitigation measures to be implemented in the Bybee Project will prevent a net increase in soil disturbance," concluded that the agency did not violate NFMA.

Audubon Society of Portland, et. al., v. Jewell, et. al., Case No. 1:14-cv-00675-CL, (D. Or. Apr. 15, 2015).
Bob O'Hallaron, Assoc. Attorney, Smith Freed & Eberhard P.C., bohalloran@smithfreed.com

On April 15, 2015, Judge Panner approved Judge Clarke's grant of summary judgment to plaintiffs, who requested that defendants complete a Comprehensive Conservation Plan (CCP) for the Klamath Basis Complex by August 1, 2016, as opposed to October 18, 2017 as request by Defendants.

The FWS conceded that it failed to act, within the meaning the Administrative Procedure Act, by not preparing a CCP to cover five KBC National Wildlife Refuges by the October 9, 2012 deadline in the Refuge Act, 16 U.S.C. § 668dd, *et. seq*. The agency argued, however, that it was entitled to deference from the court for setting a timeline for completing that CCP. The court was not swayed, noting that, as articulated in *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185 (9th Cir. 2011), the deference afforded an agency decision is different than the deference afforded an agency in the court's consideration of the equities involved in imposing an injunction. Weighing those equities, the court reasoned that August 1, 2016 was a reasonable deadline for finalizing the CCP.

League of Wilderness Defenders, et al. v. Peña, et al., No. 3:12-cv-02271-HZ (D. Or. Dec. 9, 2014/Apr. 6, 2015)
Maura Fahey, Crag Law Center

Plaintiffs League of Wilderness Defenders/Blue Mountains Biodiversity Project and the Hells Canyon Preservation Council challenged the U.S. Forest Service's Record of Decision (ROD) and final environmental impact statement (EIS) approving a project allowing commercial logging of large trees and old growth stands in the Wallowa Whitman National Forest (Wallowa Whitman). Plaintiffs' claims alleged that the Forest Service violated the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). The court granted intervention by several parties, including two counties and several timber industry representatives. All parties filed cross-motions for summary judgment. The court granted plaintiffs' motion in part.

On the NEPA claims, the court agreed that the Forest Service failed to properly analyze the cumulative impacts of past site-specific amendments to the Eastside Screens forest plan standards within the Wallowa Whitman, as a whole, and failed to justify the limited geographic scope of its cumulative impacts analysis with respect to two species. The court also concluded that the Forest Service's reliance on a withdrawn Travel Management Plan to analyze impacts on elk within the forest was invalid and required a supplemental EIS. Additionally, the Court held that the Forest Service violated NEPA when it incorporated by reference wildlife reports that were relied on in the draft EIS but were not made accessible to the public and were not included as appendices to the draft EIS. The court deferred to the Forest Service's consideration of alternatives.

Plaintiffs' NFMA claim alleged that the Forest Service improperly used site-specific amendments of the Eastside Screens and the national forest's forest plan to address conditions

that are common throughout the Wallowa Whitman. The court held that the decision to adopt site-specific amendments was "arbitrary and capricious" because the ROD and final EIS did not adequately articulate a rational connection between any unique characteristics of the project area and the choice to adopt site-specific, rather than forest-wide amendments.

On an April 6, 2015, the Court issued a remedy order vacating the ROD and EIS despite the Forest Service's argument that such relief would disrupt agency processes. The court declined to cancel three suspended timber sales contracts, stating that those contracts could not be reinstated until the Forest Service addressed the issues identified by the court.