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Recent Environmental Cases and Rules

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A special thank you to our talented contributors for their summaries: Jennifer Schwartz of Law Office of Jennifer R. Schwartz, Oliver Stiefel of Crag Law Center, Alexa Shasteen, Cody Gregg of Willamette University Law School, and Lia Comerford of Earthrise Law Center. If you are interested in summarizing cases or rules, please contact Meredith or Devin.

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- ***EPA Decision Not to Regulate Forest Road Discharge Under the Clear Water Act***, Agency Dkt. Nos. EPA–HQ– OW–2015–0668, FRL–9948–62–OW, 81 Fed. Reg. 43492, 43492-43510 (July 5, 2016).

A. 9th Circuit Court of Appeals

1. ***Natural Res. Def. Council v. Pritzker***, 828 F.3d 1125 (9th Cir. July 15, 2016) (9th Cir. July 15, 2016). *Author:* Jennifer Schwartz, Law Offices of Jennifer R. Schwartz.

The Ninth Circuit reversed the district court's grant of summary judgment to federal defendants in a case relating to the proper scope under the Marine Mammal Protection Act ("MMPA") of mitigation measures required to protect marine mammals when the responsible federal agency, the National Marine Fisheries Service ("NMFS"), sought to approve incidental "take" relating to military readiness activities, namely, the Navy's use of Low Frequency Active ("LFA") sonar.

The MMPA generally prohibits "take" of marine mammals (meaning to harass, hunt, capture or kill). One exception is the take of "small numbers" of marine mammals, incidental to a specified activity, for up to 5 years provided NMFS: 1) finds the incidental take "will have a negligible impact on such species or stock" involved and 2) prescribes regulations setting forth "means of effecting the least practicable adverse impact on such species or stock and its habitat..."

Most recently, in 2012, NMFS issued a Final Rule authorizing incidental take of marine mammals from the Navy's use of LFA sonar between 2012-2017. LFA sonar can harm many marine mammal species in a myriad of ways such as through the disruption or abandonment of natural behavior patterns.

Plaintiffs appealed the district court's conclusion that NMFS's mitigation measures from the 2012 Final Rule satisfied the MMPA's requirement to ensure the "least practicable adverse impact" on marine mammals.

The Court first rejected federal defendants' argument that the "least practicable adverse impact" requirement was superfluous once NMFS made a "negligible impact" finding: "[i]t is clear from the statute's text" that it "sets forth a two-part requirement for authorization of incidental take." The Court thereby held a "negligible impact" finding *and* mitigation measures sufficient to achieve the "least practicable adverse impact" are each independent requirements.

Looking to the MMPA's implementing regulations, the panel concluded the definition of "negligible impact" is concerned with population-level effects ("annual rates of recruitment or survival" for species or stocks), whereas the "least practicable adverse impact" standard is undefined. Rather the MMPA itself simply requires NMFS to prescribe regulations setting forth "means of effecting the least practicable adverse impact on such species or stock and its habitat[,]" which can relate to activities that do not necessarily produce population-level effects.

The Court held that NMFS's Final Rule not only lacked an analysis that the selected mitigation measures would yield the "least practicable adverse impact" but the evidence in the record ran counter to such a finding. Specifically, NMFS acted arbitrarily in selecting a mitigation measure that was far less protective than what was recommended by the agency's own experts with respect to designating "offshore biologically important areas" (OBIAs) where the Navy's use of LFA sonar would be restricted. The panel remanded for further proceedings.

2. ***Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of Interior***, No. 14-15514, 2016 WL 3974183, --- F. App'x --- (9th Cir. July 25, 2016). *Author:* Oliver Stiefel, Crag Law Center.

Plaintiffs ("Pacific Coast") challenged an Environment Assessment ("EA") and Finding of No Significant Impact underlying the Bureau of Reclamation's ("Reclamation") approval of eight interim two-year contracts for the delivery of water from the Central Valley Project to California water districts. The district court held in favor of Reclamation on claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* On appeal, the Ninth Circuit decided that the case was not moot, despite the expiration of the two-year contracts. Given the short duration and serial nature of the interim contracts, Pacific Coast's claims fell within the mootness exception for disputes capable of repetition yet evading review. The court went on to affirm in part, reverse in part, and remand, on three principal grounds.

First, the Ninth Circuit held that the EA's "no action" alternative, which assumed continued interim contract renewal, did not comply with NEPA. The court explained that while a "no action" alternative may in some instances properly be defined as no change from current management direction or historical practice, it is meaningless if it assumes the existence of the very plan being proposed. The court defined the "action" under consideration as the renewal of the water delivery contracts. Distinguishing actions that are mandatory, whereby the "no action" alternative may properly be defined as carrying out the action, the court decided that the action here was permissive because the relevant statutory provision used the term "may." The court also rejected Reclamation's argument that the contracts themselves required renewal, because an agency may not evade obligations under NEPA by contracting around them.

Second, the court decided that Reclamation's decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of discretion, and the agency did not adequately explain why it eliminated this alternative from detailed study. Under established Circuit precedent, the existence of a viable but unexamined alternative renders an EA inadequate, and none of the reasons offered by Reclamation in the EA established the non-viability of the alternative of water quantity reduction. In particular: (1) Reclamation failed to prove that a provision of the governing statute mandating renewal of existing contract quantities had been met because Reclamation relied on stale data; (2) a Central Valley Project-wide EIS prepared for long-term contract renewal did not address site-specific impacts of individual contracts; (3) the existence of a mechanism for adjusting water quantities after contract approval did not relieve Reclamation of the obligation to consider a reduction in water quantities prior to contract approval; and (4) Reclamation improperly relied on a policy decision to promote the economic security of agricultural users, rather than explaining why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts.

Finally, the court held that the EA's geographic scope was not improperly limited, and the EA did not improperly fail to address impacts on listed species and cumulative impacts. The court noted that the EA tiered to the Central Valley Project-wide EIS, and decided it would be impractical to require Reclamation to trace the incremental effects of each two-year service contract in light of the comprehensive analysis.

3. ***Physicians for Soc. Resp. v. EPA***, No. 14-73362, 2016 WL 3974194, --- F.Supp.3d --- (9th Cir. July 25, 2016). *Author:* Alexa Shasteen.

In 2013, the EPA directed the state of California to revise its State Implementation Plan (SIP) for the Los Angeles-South Coast Air Basin in order to comply with the Clean Air Act's one-hour ozone standard. California made the revisions, and the EPA approved them. Petitioners Physicians for Social Responsibility-Los Angeles, et al. challenged EPA's approval of the revised plan, including an attainment demonstration for the one-hour ozone standard. In a memorandum opinion issued by Judges Farris, O'Scannlain, and Christen, the Ninth Circuit denied as untimely petitioners' argument that the approved attainment deadline should have been adjusted.

The Court also rejected petitioners' "challenge to the approved attainment demonstration's inclusion of new technology measures," concluding that the EPA had "reasonably resolved" the ambiguous statutory construction at issue. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

Finally, the Court rejected petitioners' argument "that the tonnage commitments included in the approved attainment demonstration are unenforceable and therefore contrary to law." The Court explained it had recently approved "materially identical commitments" in California's plan for the San Joaquin Valley's compliance with the eight-hour ozone standard, and saw no reason to distinguish that case. *See Comm. for a Better Arvin*, 786 F.3d 1169, 1179-80 (9th Cir. 2015).

Judge Christen issued a separate concurrence "to emphasize the importance of contingency measures where" the EPA approves a plan including "new technology measures" under 42 U.S.C. § 7511a(e)(5)(B). SIPs must include contingency measures to be implemented if new technologies do not result in the anticipated reductions. Judge Christen emphasized the Court's prior ruling in *Association of Irradiated Residents v. EPA,* 686 F.3d 668, 673 (9th Cir. 2011), which "clarified that EPA may not permit a state to delete from its SIP control measures that give the SIP teeth," such as contingency measures intended to be implemented if new technologies do not perform as anticipated. Under *Association of Irradiated Residents*, if the new technologies identified in California's revised SIP prove insufficient, contingency measures will be triggered.

B. District of Oregon

1. ***Audubon Soc'y of Portland et. al. v. U.S. Army Corps of Engineers***, No. 3:15-cv-665-SI, 2016 WL 4577009, --- F.Supp.3d --- (D. Or. Aug. 31, 2016). *Author:* Jennifer Schwartz, Law Office of Jennifer R. Schwartz.

This case involves a challenge to the U.S. Army Corps of Engineers' ("Corps") Double-crested Cormorant ("DCCO") culling program. Over the last 25 years, the National Marine Fisheries Service ("NMFS"), pursuant to its obligations under the Endangered Species Act ("ESA"), has issued several Biological Opinions ("BiOps") assessing the impacts of the Federal Columbia River Power System ("FCRPS") on threatened and endangered Columbia and Snake

River salmonids. Because NMFS determined that FCRPS operations would jeopardize the continued existence of these salmonids the agency recommended numerous "reasonable and prudent alternatives (RPAs)" as measures to avoid that outcome.

One such RPA was a DCCO management plan that would include lethal "take" or culling DCCO populations (killing adult birds, oiling eggs and destroying nests) to reduce their predation on juvenile salmonids. Pursuant to this RPA, the Corps prepared an Environmental Impact Statement ("EIS") to assess various levels of DCCO take. In April 2015, U.S. Fish and Wildlife Service ("FWS") adopted the DCCO final EIS and issued the Corps a take permit.

Plaintiffs Audubon Society of Portland, Wildlife Center of the North Coast, Animal Legal Defense Fund, Center for Biological Diversity, and Friends of Animals ("Plaintiffs") alleged the Corps violated the National Environmental Policy Act ("NEPA") in preparing the DCCO EIS by: (1) failing to consider an adequate range of alternatives; (2) crafting an unreasonably narrow "purpose and need" statement; and (3) failing to take the requisite "hard look" at information indicating killing DCCOs will only provide a marginal benefit to listed salmonid species.

Plaintiffs further alleged the Corps exceeded its statutory authority under the Water Resources Development Act ("WRDA") because the lethal take of DCCOs was not authorized pursuant to a management plan developed by FWS, as the statute requires.

Last, Plaintiffs alleged FWS violated the Migratory Bird Treaty Act ("MBTA") because 1) the total take of DCCOs would reduce the population to a potentially unsustainable level; and 2) the Corps failed to provide a valid justification for the take of DCCOs in the first instance.

The court held in Plaintiffs' favor on the first NEPA claim, reasoning that because the government failed to consider reasonable alternatives other than culling DCCOs at the programmatic FCRPS BiOp level it should have done so in the DCCO final EIS (analogous to a site-specific level).

The court held in favor of Federal Defendants on the other NEPA claims. Following the reasoning in *'Ilio' ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006), the "purpose and need" statement in the DCCO EIS was not unreasonably narrow; the Corps' analysis adequately addressed the concept of "compensatory mortality" (regarding the marginal benefit to salmonids from killing DCCOs); and Plaintiffs should have raised the argument−that the Corps unreasonably relied on NMFS' 2014 BiOp when it knew information showing the benefit to listed salmonids from killing DCCOs will be negligible−in the context of an ESA Section 7 challenge, not as a NEPA violation or standalone Administrative Procedure Act ("APA") claim.

The court deferred to FWS's modeling and scientific expertise with respect to Plaintiffs' MBTA claims. The court also concluded FWS was sufficiently involved, as a cooperating agency with the Corps, in developing the DCCO management plan and final EIS to satisfy the WRDA's requirement that lethal take be pursuant to a plan developed by FWS.

While recognizing vacatur as the standard APA remedy, the court invoked its equitable powers to leave the current DCCO management plan and final EIS in place; reasoning that reducing DCCOs will provide at least some benefit to ESA listed salmonids pending the agencies' consideration of non-culling alternatives in its revised NEPA analysis.

2. ***Holdner v. Coba*****,** No. 3:15-cv-2039-AC, 2016 WL 4210776, --- F.Supp.3d --- (D. Or. Aug. 8, 2016). *Author*: Cody Gregg, Willamette University Law School.

Plaintiff William Holdner was subject to civil administrative enforcement actions and criminal prosecution for violating state water pollution statutes by discharging animal waste from his cattle farm into state waters. After two previously dismissed civil suits, plaintiff brought this § 1983 action against Katy Coba, Director of the Oregon Department of Agriculture (ODA), and Dick Peterson, Director of the Department of Environmental Quality (DEQ) alleging violations of his constitutional due process rights. He also asserted claims against ODA and DEQ for acting outside their enforcement authority and a claim that his land patent precludes state regulation of water quality on his land. Defendants moved to dismiss plaintiff's complaint under FRCP 12(b)(1) and 12(b)(6), arguing that: (1) plaintiff lacked standing, (2) that claim preclusion and issue prelusion barred his lawsuit, (3) that Eleventh Amendment immunity barred his § 1983 claim, (4) that defendants are entitled to qualified immunity, (5) that plaintiff may not bring a private action under the Clean Water Act, and (6) that he failed to state a claim on which relief can be granted. The court granted the defendant's motion and dismissed plaintiff's claims with prejudice.

In dismissing the defendant's claims, the court held that the defendant lacked standing to challenge the State's authority to regulate cattle ranches and water quality because his criminal convictions for animal neglect had disqualified him from owning cattle. Therefore, he could not assert an injury-in-fact or the imminent likelihood of injury. The court found that the claims brought and issues raised were not only the same as those in the plaintiff's previously dismissed lawsuits, but also ones that should have been raised in prior administrative and criminal proceedings. These claims were therefore barred by claim and issue preclusion. The plaintiff had also not adequately alleged facts to support a § 1983 claim nor had sovereign immunity been waived. Finally, in addressing the plaintiff's CWA allegations, the court found that the State was authorized to enforce the CWA and that a private citizen may only bring a "citizen suit" under the CWA to enforce the CWA's provisions, not to nullify a State's ability to enforce it. Therefore the plaintiff's CWA claims necessarily failed. The court subsequently denied Plaintiff's motion for reconsideration which it construed as a motion under FRCP 59(e) and 60(b).

C. Federal Register

1. ***EPA Decision Not to Regulate Forest Road Discharge Under the Clear Water Act***, Agency Dkt. Nos. EPA–HQ– OW–2015–0668, FRL–9948–62–OW, 81 Fed. Reg. 43492, 43492-43510 (July 5, 2016). *Author:* Lia Comerford, Earthrise Law Center.

On July 5, 2016, the United States Environmental Protection Agency ("EPA") announced its final Decision Not to Regulate Forest Road Discharges Under the Clean Water Act. *See* 81

Fed. Reg. 43,492 (July 5, 2016). Water pollution from forest roads is a problem: forests cover about one-third of the continental United States and are connected by a vast network of roads that vary in age, condition, use, and ownership. *Id.* at 43,494–95. Improperly designed, constructed, maintained, or decommissioned forest roads can cause physical, biological, and ecological impacts to water quality and aquatic organisms. *Id.* at 43,494. In its rulemaking EPA provided several reasons for not exercising its discretion to regulate forest road discharges at the federal level. First, EPA noted that many rigorous public and private sector programs already exist to address stormwater discharges from forest roads. *Id.* at 43,505. EPA believes that it can more effectively address forest road discharges by supporting these existing programs rather than establishing a new federal regulatory program. *Id.* Second, EPA found that numerous practical considerations weigh against a federal regulatory program, including "the site-specific nature of the environmental problem, the complex ownership arrangements of forest roads, and the limited financial resources and legal tools for addressing forest roads. *Id.* EPA determined that the potential benefits of setting a federal floor for regulation stormwater discharges from forest roads do not outweigh the implementation problems, high costs, and potential duplication or displacement of existing initiatives that address such discharges. *Id.*

This decision has been almost thirty years in the making. Congress amended the Clean Water Act ("CWA") in 1987 to require National Pollutant Discharge Elimination System ("NPDES") permits for certain specified stormwater discharges and to give EPA discretion to regulate stormwater discharges from other sources, including discretion to regulate stormwater discharges from logging roads. *Id.* at 43,493. As a result of a lawsuit against EPA for failing to regulate discharges from forest roads as part of EPA's 1999 stormwater regulations, *see Environmental Defense Center v. US EPA*, 344 F.3d 832 (9th Cir. 2003), EPA undertook research to better understand the impact of stormwater discharges from forest roads on water quality and the existing programs and laws in place to control those discharges. *Id.* at 43,494. EPA published a summary of this research in the Federal Register in May 2012. *See* 77 Fed. Reg. 30,473 (May 23, 2012). In December 2012, EPA promulgated a rule clarifying that discharges of stormwater from silviculture activities other than rock crushing, gravel washing, log sorting, and log storage do not require NPDES Permits. *See* 77 Fed. Reg. 72,970 (Dec. 7, 2012). In January 2014, Congress amended the CWA to further prohibit the requirement of NPDES permits for additional types of silviculture activities. *See* 33 U.S.C. § 1342(l). Finally, in December 2014, environmental groups petitioned the Ninth Circuit Court of Appeals to compel EPA to make a determination regarding whether the CWA requires federal regulation of stormwater discharges from forest roads. 81 Fed. Reg. at 43,494. As a result of that Petition, the court ordered EPA to issue a final determination by June 2016. *Id.*