CASE NOTES

recent environmental cases and rules

Environmental and Natural Resources Section OREGON STATE BAR
Editor: Jared Ogdon August 2012

Editor's Note: This issue contains selected summaries of cases issued in February, April, May, and June 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.

Jared Ogdon
Case Notes Editor
jaogdon@gmail.com or *Oregon Department of Justice*
jared.ogdon@doj.state.or.us
(503) 947-4698

CONTENTS

Cases

CASES

United States v. Backlund, 677 F.3d 930 (2012), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2012/04/26/10-30264.pdf

Rebecca Voss, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2012/05/united-states-v-backlund/

Michael Backlund and David Everist (collectively, "defendants") were convicted of violating 36 C.F.R. § 261.10(b) for their occupancy of National Forest System lands without prior approval. Defendants contended they were engaged in bona fide mining operations,

justifying full-time residency on their mining claim sites. The Forest Service determined that neither residencies were reasonably incident to the mining operations, and that neither defendant possessed an approved plan of operations or special-use authorization. Defendants appealed on three grounds: the Forest Service lacks authority to regulate residency on mining claims; § 261.10(b) is unconstitutionally vague; and the district court denied them due process when it precluded a challenge to the administrative decision that their residences were not reasonably incident to mining. The Court determined that residential occupancy on a valid mining claim is not automatically reasonably incident to mining; thus, the Forest Service acted within its authority. Next, the Court found that § 261.10(b) is not unconstitutionally vague, because Congress intended that the Department of Agriculture regulate the use and occupancy of national forest lands. Lastly, because Everist did not appeal the Forest Service's decision, he did not exhaust his administrative remedies and thus waived his right to judicial review. Backlund, however, did exhaust his administrative remedies, and, since he is within the Administrative Procedure Act's ("APA") six-year statute of limitations, he is entitled to seek direct judicial review. The Court determined that a person can obtain judicial review of a final agency action by either filing suit in a federal district court under the APA, or challenging the decision in a subsequent criminal proceeding. Judgment in No. 10-30264 VACATED and case REMANDED. Judgment in No. 10-30289 AFFIRMED.

Native Village of Point Hope v. Salazar, 680 F.3d 1123 (9th Cir. 2012), *available at*
http://www.ca9.uscourts.gov/datastore/opinions/2012/05/29/1172891.pdf
Kirsten Larson, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at
http://willamettelawonline.com/2012/06/native-village-of-point-hope-v-salazar/

Native Village of Point Hope et al. and Inupiat Community of the Arctic Slope (collectively, "Petitioners") argued that the Bureau of Ocean Energy Management ("BOEM") neglected its obligations under the Outer Continental Shelf Lands Act ("OCSLA") by approving Shell Offshore Inc.'s ("Shell") plan for exploratory oil drilling. BOEM approved Shell's revised exploration plan in August 2011, with the condition that it make certain technical demonstrations regarding its oil spill response program. The Bureau of Safety and Environmental Enforcement ("BSEE") approved the revised plan in March 2012. First, Petitioners argued that Shell's plan did not sufficiently plan for the worst case scenarios that could occur. However, the Court found that this challenge was moot based on the BSEE's approval of the plan. Second, Petitioners challenged BOEM's decision on the basis that Shell did not provide all the information required by OCSLA and other implementing regulations. The Court disagreed, finding that the BOEM could reasonably conclude that the description of the technology was adequate. Petitioners also voiced concern that Shell did not explain the way the technology would work or how the plan would be executed within the proscribed time. The Court found that the feasibility of this type of well-capping technology was a determination within BOEM's expertise. The Court deferred to BOEM's decision and, as a result, denied the petitions for review. DENIED.

Karuk Tribe of California v. USFS, 681 F.3d 1006 (9th Cir. 2012), *available at*
http://www.ca9.uscourts.gov/datastore/opinions/2012/06/01/05-16801.pdf
Lee Adams, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at

http://willamettelawonline.com/2012/06/karuk-tribe-of-california-v-usfs/

The Karuk Tribe sought injunctive and declaratory relief under Section 7 of the Endangered Species Act against the United States Forestry Service (USFS) for approving four Notices of Intent (NOI) for gold mining by suction dredging in the Klamath River that runs through southern Oregon and northern California with a "threatened" species of Coho salmon. The district court denied the Tribe's motion for summary judgment and ruled in favor of the USFS. The Ninth Circuit affirmed the district court's ruling. The Ninth Circuit agreed to rehear the case *en banc*. The Court first ruled that while the Tribe's current claims were potentially moot, because of the repeatable nature of the mining dispute, the claims were not moot. The Tribe argued that under Section 7, the USFS was obligated to consult with the Fish and Wildlife Service or the NOAA Fisheries Service before approving any NOI because a NOI is agency action that "may affect" a listed species. The Court found that a NOI by definition requires agency action because granting or rejecting any type of permit is inherently affirmative action and creating criteria for different areas of the river is discretionary. The court held that Congress intended the term "may affect" to apply broadly to any effect on a listed species, rejecting the argument that likelihood of effect is a relevant factor in determining "may affect." Finally, the Court ruled that because the Tribe showed that Coho salmon could be affected by dredging, the USFS had a duty to consult with a designated agency before approving or denying any NOI. REVERSED and REMANDED.

Samson v. City of Bainbridge Island, No. 10-35352, __ F.3d __, 2012 WL 2161371 (9th Cir. June 15, 2012), *available at*
http://www.ca9.uscourts.gov/datastore/opinions/2012/06/15/10-35352.pdf
Nate Parker, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at
http://willamettelawonline.com/2012/06/samson-v-city-of-bainbridge-island/

The Samson's, who are shoreline property owners in Bainbridge, WA, appeal an adverse summary judgment ruling on their claims of substantive and procedural due process. Washington revised its Shoreline Management Act requiring local governments to comply with new regulations within one year of their passage. The City of Bainbridge began the process by adopting an ordinance imposing a moratorium on shoreline development of new docks and piers. The ordinance was passed without a public hearing and was extended several times before the City Council permanently banned new dock construction in Blakely Harbor. The state courts struck down the rolling moratorium but upheld the permanent ban. The Ninth Circuit held that Bainbridge did not violate the Samson's substantive due process rights because the moratorium did not impinge on any fundamental right. The Court reasoned that the ordinance was not "clearly arbitrary [or] unreasonable, [with] no substantial relation to public health, safety, morals or general welfare." Additionally, the Court noted that Bainbridge had legitimate interests in protecting wildlife and preserving the shoreline and that none of the actions taken by the City Council were "egregious official conduct." The Ninth Circuit also held that Bainbridge did not violate the Samson's procedural due rights because the moratoria were lawful legislative acts, and "when the legislative body performs its responsibilities in the normal manner prescribed by law," due process is satisfied. AFFIRMED.

Snoqualmie Valley Preservation v. USACE, No. 11-35459, __ F.3d __, 2012 WL 2384159 (9th Cir. June 26, 2012), *available at*
http://www.ca9.uscourts.gov/datastore/opinions/2012/06/26/11-35459.pdf
Chelsea Rock, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at
http://willamettelawonline.com/2012/07/snoqualmie-valley-preservation-v-usace/

Puget Sound Energy, Inc. ("PSE") planned modifications to a hydroelectric power plant at Snoqualmie Falls to relieve flooding. PSE pursued verification from the U.S. Army Corps of Engineers ("Corps") through general nationwide permits ("NWPs") that would allow PSE to discharge certain fill materials into the Snoqualmie River. In 2009, the Corps sent a Verification Letter and a Decision Document, confirming that the project fell within NWPs 3a, 33, and 39, and would have "minimal individual and cumulative impacts." The Snoqualmie Valley Preservation Alliance ("Alliance"), formed by property owners downstream, filed suit against the Corps, arguing, *inter alia*, that "the Corps violated the [Clean Water Act ('CWA')] in authorizing discharges under the [NWPs] rather than requiring an individual permit." PSE intervened, and the district court granted summary judgment in favor of the Corps and PSE. On appeal, the Court noted that it could only set aside an agency's decision if the agency "entirely failed to consider an important aspect of the problem," or did not "articulate a rational connection between the facts found and the conclusions made." The Court found that "[t]he Alliance's argument that hydropower projects can only be authorized under NWP [17], or otherwise must undergo the individual permitting process, is not supported by the regulation." In deferring to the Corps's interpretation and application of its own regulations, the Court concluded that the Corps's decision was consistent with its regulation and practices. Thus, it did not err in verifying that the proposed activity was within NWPs 3 and 39. The Corps was sufficiently articulate in providing reasons for authorization in the Verification Letter, and the Court declined to require greater analysis. AFFIRMED.

Pacific Rivers Council v. USFS, __ P.3d __, 2012 WL 2333558 (9th Cir. June 20, 2012), *available at*
http://www.ca9.uscourts.gov/datastore/opinions/2012/06/20/08-17565.pdf
Samuel Rayburn, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at
http://willamettelawonline.com/2012/07/pacific-rivers-council-v-usfs-2/

This opinion replaces a prior opinion filed on February 3, 2012. The Pacific Rivers Council ("Pacific Rivers") brought suit against the United States Forest Service ("USFS"), and other individuals acting in their official capacity with the USFS, challenging the 2004 Environmental Impact Statement ("EIS") prepared for the forests in the Sierra Nevada Mountains as inconsistent with the National Environmental Procedure Act and the Administrative Procedure Act. Pacific River alleged that the 2004 EIS did not "sufficiently analyze the environmental consequences of the 2004 Framework for fish and amphibians." The challenged 2004 plan significantly increased allowances for logging and related activities, and reduced grazing restrictions included in the 2001 plan. Further, the 2004 plan's impact statement relating to the effects on certain wildlife was not as detailed as the 2001 plan. The district court granted summary judgment for the USFS. On appeal, the Ninth Circuit considered two issues:

(1) whether Pacific Rivers had standing to bring its action under Article III of the Constitution; and (2) whether the 2004 EIS sufficiently addressed the effects on fish and amphibians. First, the Court found a "significant concrete interest" between Pacific Rivers' enjoyment of the Sierras and the effects of the 2004 plan to recognize standing under Article III. Second, the Court concluded that it was "reasonably possible" for the USFS to "provide some analysis of the environmental consequences on individual fish species" in the 2004 EIS, and that the USFS "failed to take the requisite 'hard look'" at the 2004 plan's effects on fish. However, the USFS did take a "hard look" at the effects on amphibians. REVERSED in part, AFFIRMED in part, and REMANDED.

Coalition for Responsible Regulation, Inc. v. EPA, No. 09-1322, __ F.3d __, 2012 WL 2381955 (D.C. Cir. June 26, 2012), *available at* http://www.cadc.uscourts.gov/internet/opinions.nsf/52AC9DC9471D374685257A290052ACF6/$file/09-1322-1380690.pdf
Samantha L. Gamboa, Schwabe, Williamson & Wyatt

Petitioners, various states, and industry groups challenged the United States Environmental Protection Agency's ("EPA") greenhouse gas regulations under the Clean Air Act ("CAA"), which EPA developed following the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2000). The D.C. Circuit Court rejected all of petitioners' challenges, upholding and reaffirming EPA's greenhouse gas regulations.

Specifically, the court held that: (1) EPA's Endangerment Finding and Tailpipe Rule were neither arbitrary nor capricious but consistent with *Massachusetts v. EPA* and the CAA; (2) EPA's interpretation of the governing CAA provisions was "unambiguously" correct, under which EPA is statutorily compelled to require Prevention of Significant Deterioration ("PSD") permits for major emitters of greenhouse gases; and (3) petitioners lacked standing to challenge the Timing and Tailoring Rules because the rules do not cause "injury in fact," but rather mitigate petitioners' permitting burden.

Nw. Envtl. Advocates v. EPA, No. 3:05-CV-01876-AC, __ F.Supp.2d __, 2012 WL 653757 (D. Or. Feb. 28, 2012)
Emily C. Rake, Kell, Alterman & Runstein, L.L.P.
erake@kelrun.com

In *Northwest Environmental Advocates v. U.S. Environmental Protection Agency* (*NWEA II*), the court considered decisions about Oregon's water quality standards made by the Environmental Protection Agency (EPA), National Marine Fisheries Service (NMFS), and Fish and Wildlife Service (FWS). Northwest Environmental Advocates (NWEA) challenged EPA's review and approval of Oregon's water quality standards under the Clean Water Act (CWA) and the NMFS's and FWS's (collectively, Services) conclusions that the effects of EPA's approval of water quality standards were not likely to jeopardize salmonids listed as threatened or endangered under the Endangered Species Act (ESA) or destroy or adversely modify their critical habitat. On cross-motions for summary judgment, the court made the following key findings: (1) EPA failed to fulfill its duty to review nonpoint source provisions to the extent that such provisions affect attainment of water quality standards; (2) EPA properly approved numeric criteria, use designations, and standards regarding threatened or endangered species; (3) EPA's

approval of natural conditions criteria and Oregon's antidegradation policy and implementation plan was arbitrary and capricious; and (4) the Services' "no jeopardy" and "no adverse modification" conclusions were arbitrary and capricious.

Background

In 1996, Oregon submitted water quality standard revisions to the EPA for approval. After consulting the Services, EPA approved Oregon's revisions in part but rejected temperature criterion for salmonid migration and rearing in the Lower Willamette River. Oregon did not further revise that criterion. Subsequently, EPA did not promptly promulgate its own criterion in violation of the CWA. *Northwest Envtl. Advocates v. U.S. Envtl. Prot. Agency* (*NWEA I*), 268 F. Supp. 2d 1255, 1259–61 (D. Or. 2003). In *NWEA I,* the court found that EPA's approval of certain water quality standards and NMFS's conclusion that the standards would not jeopardize listed salmonids was arbitrary and capricious and ordered EPA to publish revised standards and an antidegradation plan for Oregon. *Id.* at 1265–73. In response, EPA published a proposed rule that was not finalized before Oregon submitted new revisions for approval in December 2003. After consulting the Services, which issued Biological Opinions (BiOps) concluding that revised water quality standards were not likely to jeopardize listed fish or adversely modify their critical habitat, EPA approved Oregon's revisions. In 2005, NWEA brought suit to challenge the EPA's approval of Oregon's water quality standards and the Services' BiOps.

Clean Water Act Claims

The court first considered whether EPA neglected a nondiscretionary duty to review Oregon's nonpoint source provisions. Taking care to explain that EPA has no obligation to directly *regulate* nonpoint sources, the court found that EPA had a nondiscretionary duty to *review* the effects of nonpoint source provisions "to ensure that they do not supplant, delay the implementation of, or in some other way undermine the application of Oregon's standards to the state's waterbodies." *NWEA II*, 2012 WL 653757 at *10. The court reasoned that at least some nonpoint source provisions are "intrinsically intertwined" with water quality standards, and "have the potential to interfere with the attainment of water quality standards." *Id.* at *7–8.

The court deferred to EPA's decisions to approve Oregon's numeric criteria and use designations. While the court acknowledged the availability of more protective numeric criteria for water temperature, it identified rational connections between scientific support in the record and EPA's conclusion that temperature criteria were protective of salmonids. *Id.* at *10–14. Because the court deferred to EPA's approval of numeric standards, it also concluded that EPA's approval of water quality standards as a whole for protecting salmonids was not arbitrary and capricious. *Id.* at *20. Additionally, the court found that EPA reasonably approved new use designations because new uses continue to protect salmonids and because no regulations required Oregon to conduct a Use Attainability Analysis, which is a scientific assessment of factors affecting use attainment. *Id.* at *16–17; 40 C.F.R. § 131.3(g) (2012).

The court reversed some EPA actions, including approvals of Oregon's narrative Natural Conditions Criteria (NCC), antidegradation policy, and implementation plan. The NCC provides that if Oregon determines the "natural thermal potential" of a water body is warmer than the biologically-based numeric criteria, the natural thermal potential automatically supersedes

otherwise applicable numeric criteria for that water body. Or. Admin. R. 340-041-0028(8) (2012). The court reasoned the NCC allows Oregon to replace numeric criteria (determined to protect salmonids) with a new numeric standard for use during the total maximum daily load (TMDL) process. *NWEA II*, 2012 WL 653757 at *15. The court also characterized the NCC as an attempt to "restore one aspect of Oregon's historical water conditions (higher temperatures in some waterbodies) without restoring the other conditions that allowed salmonids to thrive." *Id.* The court upheld EPA's approval of Oregon's antidegradation policy's "Tier 1" provisions for existing in-stream water uses because the court found it met minimum CWA requirements. Even so, the court concluded that EPA must review Oregon's entire Internal Management Directive to ensure that it describes essential elements of antidegradation review implementation and complies with federal regulations. *Id.* at *18–19.

Endangered Species Act Claims

The court found that NMFS's no jeopardy and no adverse modification conclusions were arbitrary and capricious because its BiOp failed to adequately consider individual Evolutionary Significant Units, species' recovery, baseline conditions, or cumulative effects. *Id.* at 20–24. Because NMFS failed to adequately consider these issues, the court could not determine whether NMFS reasonably considered specific standards about spawning, smoltification, migration corridor use, and intergravel dissolved oxygen water quality criteria. *Id.* at *24–26. The court also found that FWS's no jeopardy conclusion with regard to bull trout was arbitrary and capricious because FWS failed to consider individually two distinct population segments (DPSs) and to account for the precarious condition of one DPS. *Id.* at *28. In addition, e-mails showed FWS may have considered political feasibility, a factor beyond the best scientific information available. *Id.* at *29. Ultimately, the court remanded both BiOps to the Services with instructions to reconsider water quality standards. *Id.* at *20–30.

Conclusion

In sum, the court validated EPA's approval of Oregon's numeric criteria for temperature water quality standards. Yet NWEA's successful challenge of narrative criteria places TMDLs based on the NCC in limbo, which creates uncertainty for industries subject to point source regulation. Moreover, EPA may struggle to evaluate nonpoint source provisions' effects without impermissibly regulating nonpoint sources such as forestry, grazing, and farming activities. It also remains to be seen if on remand the Services will conclude Oregon's water quality standards are protective of listed species and their critical habitat.

Noble v. Dept. of Fish and Wildlife, 250 Or. App. 252 (2012), *available at*
http://www.publications.ojd.state.or.us/Publications/A140936.pdf
Inna Levin, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at
http://willamettelawonline.com/2012/05/noble-v-dept-of-fish-and-wildlife/

Noble appealed a decision of the Oregon Department of Fish and Wildlife (ODFW) that approved fishways on two downstream dams. Noble argued that ODFW erred in determining the amount of water that was entering the system, and that fish only require passage when the water spills over the dams to the fishways. Noble also argued that ODFW improperly interpreted its

own rules regarding adequate fish passageways. The Court of Appeals stated that it will affirm a plausible agency interpretation of its own rule that is consistent with the rule itself. The Court held that OFDW's interpretation of channel-spanning fishways takes into account the possible difference in water levels affecting fish migration at certain points of the year. Thus, this interpretation is plausible and consistent with ODFW's rules and the owners of the dams are required to provide fish passage. Affirmed.