CASE NOTES

recent environmental cases and final rules

Environmental and Natural Resources Section OREGON STATE BAR
Editor: Jared Ogdon October 2011

Editor's Note: This issue contains selected summaries of cases and administrative final rules issued in May, June, July, and August 2011. Thank you to all of the volunteer authors who wrote summaries for this issue.

I am very excited to take over as the new editor of Case Notes and am grateful to the OSB Environmental and Natural Resources Section Executive Committee and Micah Steinhilb for the opportunity to provide this valuable resource to the members of our section.

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. In addition, if you are interested in summarizing cases and rules for this newsletter, please contact me.

Jared Ogdon
Case Notes Editor
jaogdon@gmail.com
(619) 417-6466

or

Oregon Department of Justice
jared.a.ogdon@doj.state.or.us
(503) 947-4698

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CASES

Montana v. Wyoming, 563 U.S. __, 131 S. Ct. 1765 (2011).

Sarah Liljefelt, Schroeder Law Offices, P.C.
s.liljefelt@water-law.com

In February 2008, Montana brought suit against Wyoming and North Dakota, alleging that Wyoming breached the Yellowstone River Compact, to which all three states are parties. 65 Stat. 663. The Yellowstone River Compact provides: "Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of prior appropriation." Article V(A). In addition, the Compact allocates to each state the quantity of water necessary to provide supplemental water supplies for the pre-1950 uses (Article V(B)), and any remaining water is allocated by percentage based on the water source. Montana alleged that pre-1950 appropriators had increased the efficiency of their irrigation practices by switching from flood irrigation to sprinkler systems, thereby consuming more water (because less water was "wasted" by flowing back into the water system), and depriving downstream appropriators in Montana. Wyoming filed a motion to dismiss the complaint, and the Special Master determined that Montana's allegation did not state a valid claim for relief and should thus be dismissed. Montana took exception to the finding.

In a 7-1 decision, the United States Supreme Court affirmed the decision of the Special Master. The Court's opinion, written by Justice Thomas, generally discussed the Prior Appropriation Doctrine, which creates a hierarchal system of water rights, and the "no injury" principle, by which junior appropriators can prevent senior appropriators from making changes to their water rights which would harm existing (including junior) uses. The Court recognized that the law of return flows is an unsettled area of law in every western state, but held that junior users have no right to prevent senior users from increasing the efficiency of their irrigation techniques, thus decreasing return flows, for the following reasons. First, the no-injury rule is not absolute and only applies to certain types of changes that cause harm, including changes to points of diversion, places of use, and purposes for use. Thus, the scope of a water right includes the right to make efficiency improvements, so long as the water is not used to irrigate additional acreage. Second, the rule of recapture, accepted in Wyoming (and Oregon), allows an appropriator to collect and reuse water while it remains on the appropriator's land.

Montana additionally argued its claim based on the Compact's definition of "beneficial use," which defines the term as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Article II(H). The majority found that the definition did not support Montana's position that the drafters intended to fix the level of depletion by the pre-1950 appropriators. Justice Scalia agreed with Montana's argument on this point, and thus dissented from the majority opinion.

American Elec. Power Co., Inc. v. Connecticut, 564 U. S. __, 131 S. Ct. 2527 (2011).

Dallas DeLuca, Markowitz, Herbold, Glade & Mehlhaf, P.C.
DallasDeLuca@MHGM.com

Summary

The United States Supreme Court, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), concluded that the Clean Air Act (CAA) authorized the Environmental Protection Agency (EPA) to regulate greenhouse gas emissions. As a result of that conclusion, the Court unanimously held

in *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. __, 131 S. Ct. 2527 (2011), that the CAA displaced federal common law public nuisance claims on the same topic. By an equally divided court, the Court also affirmed that at least some of the plaintiffs have standing to bring those common law claims. The Court did not address whether the CAA preempted state law claims and remanded for further proceedings on plaintiffs' public nuisance claims under state common law, but on September 2, 2011, plaintiff requested leave to withdraw their complaints.

Background

In two district court actions filed in 2004, plaintiffs filed claims for injunctive relief against defendant electric power companies to restrict emissions of carbon dioxide. Plaintiffs asked for a cap on emissions that would be reduced annually. Plaintiffs based their request for relief on two different claims: federal common law public nuisance and, in the alternative, state common law public nuisance. Plaintiffs, eight states and the City of New York in one action and three land trusts in the other, alleged that defendants, four power companies and the Tennessee Valley Authority, are the five largest emitters of carbon dioxide in the United States. *Amer. Elec. Power Co.*, 131 S. Ct. at 2533-34.

The district court consolidated and then dismissed the claims on the theory that the claims were non-justiciable political questions. *Connecticut v. Amer. Elec. Power Co., Inc.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005). The Second Circuit reversed. *Connecticut v. Amer. Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009).

The Court affirmed 4-4 that at least one plaintiff had standing.

By an equally divided court, the Court affirmed the Second Circuit judgment on standing. The Court, relying on its holding in *Massachusetts v. EPA*, 549 U.S at 520-26, stated that at least some of the plaintiffs had standing under the allegations. *Amer. Elec. Power Co.*, 131 S. Ct. at 2535. In *Massachusetts v. EPA*, the Court concluded that because a state had standing, that was adequate for review regardless of whether the non-state plaintiffs would have had standing on their own. 549 U.S. at 518. The Court noted that states, because of their "quasi-sovereign interests" and because Congress bestowed on states special rights under the CAA, are "entitled to special solicitude in our standing analysis." *Id.* at 520 (footnote omitted).

The Court concluded the CAA displaced federal common law claims to limit carbon dioxide emissions to control climate change.

The Court briefly discussed the nature of claims under federal common law, but stated it was "an academic question" whether federal common law would recognize plaintiffs' claim for harm resulting from carbon dioxide emissions crossing state borders because "[a]ny such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions." *Amer. Elec. Power Co.*, 131 S. Ct. at 2537. The Court explained that the CAA "speaks directly" to the issues in the complaint in this case. *Id.* "The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *Id.* (citation omitted). The Court noted that

specialized federal common law is an "unusual exercise of law-making by federal courts[,]" *id.* (quotation marks and citation omitted), and the burden to displace it is lower than the burden needed to preempt state law. *Id.*

Here, the burden for displacement had been met because the Court had held in *Massachusetts v. EPA* that the CAA authorized regulation of carbon dioxide emissions. 131 S. Ct. at 2537. Thus, the CAA spoke to the issue of emissions from defendants' power plants, and, hence, the specialized federal common law was displaced on this issue. *Id.* The Court reviewed air pollution regulation and enforcement under the CAA and concluded that "We see no room for a parallel track." *Id.* at 2538.

The Court then addressed the Second Circuit's contrary reasoning. The Second Circuit had concluded that because the EPA had not yet issued any regulations concerning carbon dioxide pursuant to the CAA, it had not displaced the federal common law. *Id.* at 2538. The Court rejected that argument, stating that the question was whether Congress had displaced the field, not how such displacement had been implemented. *Id.* at 2538-39.

The Court explains that Congress created a decision making structure to regulate air pollutants nationally.

The Supreme Court ended up where the district court did: both stated that the issues involved in the complaints required answering complex scientific questions and then weighing environmental interests against economic interests. The district court had concluded that it was a political question as to how those interests should be weighed, and how to determine both scientific issues and regulatory issues, such as at what level to cap emissions, what sources to cap, and how quickly to reduce such caps. 406 F. Supp.2d at 272-73. The Supreme Court concluded that Congress has already addressed the question and delegated authority to EPA to answer those questions in the first instance, and that Congress had delegated review of that decision to the courts only after EPA has made a decision. 131 S. Ct. at 2539-40. The Court stated that claims that ask district courts to make those decisions one-at-a-time for different plaintiffs "cannot be reconciled with the decision making scheme Congress enacted." *Id.* at 2540.

Natural Resources Defense Council v. County of Los Angeles, __ F.3d __, 2011 WL 2712963 (9th Cir. 2011)

Leanne Vinson Holm, Attorney, U.S. Army Corps of Engineers, Portland District
leanne.v.holm2@usace.army.mil

This case was an appeal of a district court's grant of summary judgment in favor of the County of Los Angeles and the Los Angeles County Flood Control District ("municipal entities"). The plaintiffs alleged that the municipal entities were discharging polluted stormwater in violation of the Clean Water Act (CWA). The plaintiffs alleged that the defendants had violated the CWA by allowing untreated and heavily-polluted stormwater to flow unabated from the municipal separate storm sewer system (MS4) into four rivers, and eventually into the Pacific Ocean. The municipal entities had been operating under a National Pollutant Discharge Elimination System (NPDES) permit since 1990 that required that mass-emissions readings be

taken five times per year for the Watershed Rivers (Malibu Creek, and Los Angeles, San Gabriel, and Santa Clara rivers). Between 2002 and 2008, the four monitoring stations identified hundreds of exceedances of the permit's water quality standards. The municipal entities admitted that they conveyed pollutants via the MS4 but contended that its infrastructure alone did not generate or discharge pollutants. Plaintiffs' claims each rested on the same premise: (1) the permit set water-quality limits for each of the four rivers; (2) the mass-emission stations recorded exceedances of those standards; (3) an exceedance is in non-compliance with the permit and, thereby, the CWA; and (4) defendants, as holders of the permit and operators of the MS4, were liable under the CWA. The court held that the permit's provisions plainly specified that the mass-emissions monitoring was intended to measure compliance and that any violation of the permit is a CWA violation. The plaintiffs argued that the measured exceedances in the rivers *ipso facto* established a permit violation, but the court held that while it may be undisputed that the exceedances had been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant.

The Ninth Circuit reversed the district court's grant on two claims, and stated that the plaintiffs were entitled to summary judgment on the municipal entities' liability for discharges into the Los Angeles and San Gabriel Rivers. The court held that there was evidence showing that polluted stormwater from the MS4 was added to those rivers by the municipal entities because the mass-emissions stations for those two rivers were located in a section of the MS4 owned and operated by the municipal entities. When pollutants were detected in these locations, they had not yet exited the point source into the river.

However, the Ninth Circuit also held that the plaintiffs had failed to meet their evidentiary burden with respect to the discharges by the municipal entities into the Santa Clara River and Malibu Creek, and therefore affirmed the district court's grant of summary judgment on those two claims. The Ninth Circuit held that the plaintiffs had not provided sufficient evidence for the district court to determine if stormwater discharged from an MS4 controlled by the District caused or contributed to pollution exceedances located in those two rivers. On the record in the case, the Ninth Circuit determined that they were unable to identify the relationship between the MS4 and the mass-emissions stations in those two rivers. To establish a violation, the plaintiffs were obligated to spotlight how the flow of water from an MS4 contributed to a water-quality exceedance detected at the monitoring stations, but had failed to meet their burden.

Hinds Investments v. Team Enterprises, __ F.3d __, 2011 WL 3250461 (9th Cir. 2011)

Carey Caldwell, Judicial Clerk
carey.caldwell@gmail.com

In *Hinds Investments v. Team Enterprises*, __ F.3d __, 2011 WL 3250461 (9th Cir. 2011), the Ninth Circuit affirmed a lower court's dismissal of claims brought by Hinds Investments (HI) under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901 *et seq.*, against multiple defendants. The court held "that[,] to state a claim predicated on RCRA liability for 'contributing to' the disposal of hazardous waste, a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process." *Hinds Investments*, __ F.3d at __ (slip op at 9859).

HI owns shopping centers that housed dry cleaners and had groundwater contaminated by perchloroethylene (PCE), a hazardous substance often used in dry cleaning. HI brought suit against, amongst others, multiple manufactures of dry cleaning equipment, seeking declaratory relief and monetary damages to offset the cost of environmental remediation and clean-up. HI alleged that the manufacturers were liable under RCRA for "contributing to" the disposal of hazardous waste by virtue of their provision, installation, operation, maintenance, and repair of dry cleaning equipment that was designed to discharge wastewater contaminated with PCE directly into sewer systems. Specifically, HI claimed that entire pieces of some equipment and parts of others were specifically designed to discharge hazardous waste and that user manuals that accompanied the equipment directed the user to discharge the waste directly into open sewers.

The Ninth Circuit looked to the dictionary definition of "contribute," "to aid to a common purpose," to guide its analysis and concluded that, to be liable under RCRA, the defendant must "be actively involved in or have some degree of control over the waste disposal process." *Id.* at __ (slip op at 9856). The court went on to explain that active involvement requires a direct or "hands on" participation in "[h]andling the waste, storing it, treating it, transporting it, and disposing of it." *Id.* at __ (slip op at 9858). The court concluded that Congress did not intend for manufacturers of machinery that happen to generate hazardous waste when operated to be liable under RCRA; rather, only defendants that actually come into direct contact with hazardous waste are liable under RCRA. *Id.* at __ (slip op at 9857).

Pakootas v. Teck Cominco, 646 F.3d 1214 (9th Cir. 2011)

Nathan Karman, Ater Wynne LLP
nak@aterwynne.com

This was the latest in a series of opinions involving a smelter in Trail, British Columbia, currently owned by Teck Resources Limited, formerly known as Teck Cominco Metals Limited ("Teck Cominco"). From 1905 to 1995, slag from the smelter entered into the Columbia River ten miles north of the Washington border. In 2003, EPA issued a unilateral administrative order (the "UAO") commanding Teck Cominco and its American subsidiary to conduct a remedial investigation and feasibility study and to implement a cleanup. For a variety of reasons, including arguments concerning CERCLA's extra-territorial application, Teck Cominco did not fully comply with the UAO. In 2006, Teck Cominco and EPA settled pursuant to a "contractual agreement" (the "Agreement") under which Teck Cominco agreed to perform remediation. The Agreement also provided, among other things, that EPA would not sue for penalties or injunctive relief for noncompliance with the UAO should Teck Cominco perform its obligations under the Agreement.

Plaintiffs, individual members of the Confederated Tribes of the Colville Reservation, sought civil penalties for Teck Cominco's 892 days of noncompliance with the UAO as well as costs and fees. The district court dismissed the claims under FRCP 12(b)(1) for lack of jurisdiction based on CERCLA's pre-enforcement bar, 42 U.S.C. § 9613(h).

On appeal, plaintiffs argued that (1) 42 U.S.C. § 9613(h) is a timing regulation and not jurisdictional, (2) the suit for penalties is not a challenge that would invoke the 42 U.S.C. §

9613(h) jurisdictional bar, and (3) the penalty exception to 42 U.S.C. § 9613(h) would apply. The Ninth Circuit rejected these arguments and affirmed the district court's decision.

With respect to the first argument, the Ninth Circuit relied on the "readily administrable bright[-]line" test established by the Supreme Court in *Arbaugh v. Y & H Corp.*: "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." 546 U.S. 500, 511 (2006). The Ninth Circuit found that the language in 42 U.S.C. § 9613(h)—namely, "[n]o Federal court shall have jurisdiction"—satisfied that bright line test.

With respect to the second argument, the court found that a citizen suit for past penalties still constitutes a "challenge" barred by 42 U.S.C. § 9613(h). In enacting the jurisdictional bar, Congress "made a choice to protect[] the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup efforts." *Pakootas*, 646 F.3d at 8907 (citation and internal quotation omitted). The Ninth Circuit found that allowing a citizen suit for past penalties would cause the interference Congress attempted to avoid. First, EPA did not waive the penalties in the Agreement; instead, the penalties were retained as "EPA's hammer" to ensure compliance with the Agreement. According to the court, if plaintiffs were allowed to enforce those penalties, Teck Cominco might choose to walk away from cleanup efforts. Second, according to the court, penalties exacted prior to the cleanup could interfere with a party's ability to perform a cleanup. Finally, the court noted that if Congress intended suits for penalties to fall outside of the jurisdictional bar, it would not have needed to create an exception for suits to recover penalties.

With respect to plaintiffs' penalty exception argument, the court looked to the statutory text to hold that the exception to the jurisdictional bar applied when there is an action to "recover a penalty." The penalty the plaintiffs sought "is Superfund money, payable to the government, not payable to citizens who bring lawsuits." According to the court, "[s]uch a lawsuit is not one to 'recover' money." *Id.* at 8913.

Team Enterprises, LLC, v. Western Investment Real Estate Trust, 647 F.3d 901 (9th Cir. 2011)

Sean Malone, Attorney at Law
seanmalone8@hotmail.com

At issue in this case arising under CERCLA is whether a manufacturer of a machine used in the dry cleaning process may be held liable for contribution to environmental cleanup costs. Team Enterprises ("Team") used a volatile organic compound, perchlorethylene ("PCE"), defined as a "hazardous substance" in its dry cleaning process, and created contaminated wastewater as a result. Team filtered the wastewater using equipment designed and manufactured by R.R. Street & Co. ("Street") called the Puritan Rescue 800 filter-and-still combination equipment ("Rescue 800"). The Rescue 800 filtered the wastewater reuse. The remaining residual wastewater was eventually poured down the sewer drain by Team, and Team was required to clean up the contaminated soil.

Team sued Street and others under CERCLA, which provides that a person who has incurred cleanup costs may seek contribution from any other covered person under CERCLA.

Team argued that the Rescue 800 generated wastewater containing dissolved PCE, and Team had no choice other than pour it down the drain. Street defended the case under the theory that it created a useful product that eventually required future disposal of a hazardous substance, thus precluding liability under CERCLA. The District Court entered summary judgment in favor of Street, and Team appealed.

The court concluded that the purpose of the Rescue 800 was to recover and to recycle usable PCE that would otherwise be discarded. That Team felt compelled to dispose of wastewater containing PCE after using the Rescue 800 does not indicate that Street planned a disposal of PCE. The court held that to satisfy the intent requirement, a company selling a product that uses and/or generates a hazardous substance as part of its operation may not be held liable as an arranger under CERCLA unless the plaintiff proves that the company entered into the relevant transaction with the specific purpose of disposing of a hazardous substance. Therefore, Street was not liable under CERCLA on the basis of the Rescue 800's design because it did not have the requisite intent, and Street never owned, possessed, or exercised control over the disposal process.

Ash Grove Cement Co. v. Liberty Mutual Ins. Co., __ F. Supp. 2d __, 2011 WL 2470109 (D. Or. 2011)

Ansley Nelson, Port of Portland
ansley.nelson@portofportland.com

Plaintiff Ash Grove Cement Co. sought a declaratory judgment from federal district court that its insurers had a duty to defend and indemnify plaintiff for expenses incurred while investigating contamination within the Portland Harbor Superfund Site. Following the court's previous decision, which held that the insurers had a duty to defend plaintiff, the parties moved for summary judgment on the scope of the insurers' duty under the circumstances. The court held that the scope in this case could not be decided as a matter of law. Instead, a trial would be necessary to decide (a) the date of tender of the claim, (b) when the insurers refused to defend, and (c) to what extent the duty includes costs incurred during an Alternate Dispute Resolution (ADR) process with other potentially responsible parties.

To provide some background, EPA sent Ash Grove a CERCLA section 104(e) request in 2008, seeking information on plaintiff's role in possible hazardous substance releases in the harbor. Shortly thereafter, Ash Grove sent copies of the section 104(e) request to its insurers. However, it was not until several months later that Ash Grove informed its insurers that it was indeed incurring costs to respond to EPA and was requesting reimbursement. A dispute followed.

The district court first considered the insurers' liability for defense costs prior to tender of the claim. The court sought to identify the date that tender actually occurred, citing that insurers have a statutory duty to investigate after notice of a claim and that tender was not expressly defined in plaintiff's policies. It hypothesized that the duty may have been triggered when the insurers were sent copies of the section 104(e) request. However, a factual issue remained as to whether Ash Grove told its insurer it did not yet want a defense. As a consequence, the court

could not then decide when the insurer refused to defend Ash Grove and when voluntary payments prior to tender occurred.

Second, the district court considered whether the voluntary ADR process was a "reasonable and necessary defense cost." Likening the section 104(e) request to a complaint in civil litigation and Ash Grove's response to something of an answer, the court suggested that the duty to defend could include other investigation costs, citing ORS 465.480(1)(a), ORS 465.480(6)(a), and the continuing obligation to supplement its response to EPA. It also identified the value of participating in the ADR process to reach a settlement with EPA on liability for cleanup costs. However, the court left it to the parties to prove at trial that the ADR process was as a matter of fact "reasonable and necessary," cautioning that it might require an itemized analysis of ADR activities.

To conclude, the court declined the motions for summary judgment on the scope of the duty to defend, necessitating a trial.

RULES

EPA Defers for Three Years Application of PSD and Title V Requirements to CO_2 Emissions from Bioenergy and Other Biogenic Sources

Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs, 76 Fed. Reg. 43,490 (July 20, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71).

Bridget Donegan, Oregon Supreme Court
bridget.donegan@ojd.state.or.us

On July 20, 2011, the EPA finalized a three-year deferral of biogenic CO_2 emissions from PSD and Title V applicability. EPA defined "biogenic CO_2 emissions" to mean "emissions of CO_2 from a stationary source directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels and mineral sources of carbon." EPA identified categories of entities likely to be covered by the deferral to include biomass combustion, municipal solid waste combustion, sources and users of biogas (including solid waste landfills and sewage treatment facilities), fermentation processes, and certain food or beverage processors. The deferral was effective on the date of publication for all PSD and Title V permitting programs implemented by EPA; state, local, and tribal permitting authorities may adopt the deferral at their option.

Absent this deferral, stationary biogenic sources of CO_2 emissions would be subject to PSD and Title V requirements under EPA's PSD and Title V Greenhouse Gas Tailoring Rule (75 Fed. Reg. 31,514 (June 3, 2010)) (Tailoring Rule). The Tailoring Rule had the effect of phasing in permitting requirements for stationary sources of greenhouse gas emissions. In July 2010, EPA published a Call for Information (CFI) to solicit information about approaches to accounting for greenhouse gas emissions from bioenergy and other biogenic sources (75 Fed. Reg. 41, 173 (July 15, 2010)). Through the CFI, EPA received information supporting both the positions that biogenic CO_2 should and should not be excluded from stationary source permitting programs. Also, the National Alliance of Forest Owners petitioned EPA to reconsider and stay

the implementation of the Tailoring Rule, or, in the alternative, to stay the application of the PSD and Title V permitting programs to biomass CO_2 emissions. The petitioner argued, consistently with the positions supporting exclusion of biogenic sources from the Tailoring Rule, that production and combustion of fuels derived from biomass do not increase atmospheric CO_2 levels because biogenic CO_2 emissions are canceled out by the CO_2 absorption associated with growing the fuel. Based on the petitioner's arguments and the information received through the CFI, EPA concluded that "the issue of accounting for the net atmospheric impact of biogenic CO_2 emissions is complex enough that further consideration of this important issue is warranted."

During the three-year deferral, EPA will conduct a detailed examination of the science associated with biogenic CO_2 emissions from stationary sources. EPA will then undertake a rulemaking to determine how biogenic CO_2 emissions should be treated and accounted for in PSD and Title V permitting. EPA cites as its authority for the rule the same authority that it cited for the Tailoring Rule: the absurd results doctrine, the administrative necessity doctrine, and what EPA refers to as the "one-step-at-a-time" doctrine. In sum, EPA is authorized to defer application of the permitting rules because EPA does not need to unnecessarily regulate greenhouse gas sources with negligible net impacts, because the science in determining those impacts is highly complex, because analyzing and accounting for biogenic CO_2 emissions would create an extensive workload, and because EPA remains on track to full statutory compliance.

Fish and Wildlife Service Issues Revised Recovery Plan for the Northern Spotted Owl

Endangered and Threatened Wildlife and Plants; Revised Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina), 76 Fed. Reg. 38,575 (July 1, 2011)

Maureen McGee, Oregon Court of Appeals
maureen.a.mcgee@ojd.state.or.us

The Department of Interior Fish and Wildlife Service has issued its final revision of the 2008 Recovery Plan for the Northern Spotted Owl, effective July 1, 2011. An opinion ordering a remand for revisions to the 2008 plan was issued during a challenge to that plan in *Carpenters' Industrial Council v. Salazar*, Case No. 1:08-cv-01409-EGS (D.DC), after the Federal government moved for remand in response to an Inspector General report. The report concluded that the integrity of the agency decision-making process for the spotted owl recovery plan was potentially jeopardized by improper political influence.

Most significantly, the revision withdraws a prior recommendation to implement "Managed Owl Conservation Areas" throughout the species' range. Instead, the agency recommends continuing to rely on the Northwest Forest Plan and designated critical habitat. According to Fish and Wildlife, the revised recovery plan is designed to address the most pressing threats to spotted owl persistence, identified as past habitat loss, current habitat loss, and competition from barred owls. The plan also recommends conserving spotted owl sites and high value spotted owl habitat; acknowledges a need of additional conservation contributions from non-Federal lands; and affirms "support for forest restoration management actions that address concerns about climate change and heath of forest ecosystems." Electronic copies of the revised recovery plan are available online at: http://www.fws.gov/endangered/species/recovery-plans.html and http://www.fws.gov/species/nso.