CASE NOTES

recent environmental cases and final rules

Environmental and Natural Resources Section OREGON STATE BAR
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Editor's Note: This issue contains selected summaries of cases and administrative final rules issued in September, October, and November 2011. 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.

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CASES

Barnes v. U.S. Dep't of Transp., 655 F3d 1124 (9th Cir. 2011)

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The Hillsboro Airport (HIO) is designated by the Federal Aviation Administration (FAA) as a "reliever airport," one designated to reduce congestion at a larger commercial airport by segregating general aviation from commercial aviation. With some success: In 2008, HIO surpassed Portland International Airport (PDX) as Oregon's busiest airport in number of takeoffs and landings.

The Port of Portland, which operates HIO, wanted to add a new runway and relocate a helipad in accordance with the airport's master plan. Construction was to begin in 2010 for completion in 2011. The work would be partially funded by FAA grants, and would therefore require an environmental assessment (EA). 655 F.3d at 1127-30.

In a draft EA, the Port analyzed the environmental impacts of three alternatives, and the FAA made copies of the draft available to the public for comment. In November 2009, a public meeting was held. Petitioner Michelle Barnes, among others, attended, spoke, and submitted written comments. The Port made minor revisions to the draft EA and prepared a final EA that was approved by the FAA in January 2010. The FAA issued a Finding of No Significant Impact (FONSI), relieving itself of the need to prepare an Environmental Impact Statement (EIS). *Id.* at 1130.

Petitioner Barnes and others filed a petition for review under 49 USC § 46110, arguing that the FAA violated the National Environmental Policy Act of 1969 (NEPA) by:

(1) failing to consider indirect effects of increase aircraft operations;
(2) failing to prepare an EIS;
(3) failing to consider cumulative effects of the project;
(4) failing to consider a reasonable range of alternatives; and
(5) failing to provide a public hearing under the Airport and Airway Improvement Act of 1982, 49 USC §47101 *et seq.*

Id. at 1130-31.

The U.S. Court of Appeals for the Ninth Circuit noted that NEPA requires federal agencies to carefully weigh alternatives to proposed major federal action, and imposes procedural requirements to force a "hard look" at environmental consequences. In reviewing the FAA's decision not to prepare an EIS, the court applied the Administrative Procedures Act's arbitrary and capricious standard to determine whether the FAA had indeed taken a "hard look" at the consequences of the airport expansion plans.

The petitioners' main argument on review was that a new runway would create increased demand, and that the EA was deficient for failing to consider impacts of the indirect effects of

the increased demand. The FAA asserted that petitioners had waived that argument by failing to raise it during the notice and comment period. The court found that the petitioners had submitted comments sufficient to put the FAA on notice that the indirect effects of increased aviation due to increase capacity at HIO was at issue and should have been considered. "Furthermore, the EA's failure to address this argument is a flaw 'so obvious' that petitioners did not need to preserve it by raising it in their comments." *Id.* at 1136.

The court noted that "an EIS must be prepared if 'substantial questions are raised as to whether a project * * * may cause significant degradation of some human environmental factor," *id.* (citations omitted), and that both direct and indirect effects must be considered. Indirect effects include growth-inducing effects. *Id.* (citing 40 CFR § 1508.8).

The FAA contended that aviation activity at HIO was expected to grow regardless of whether a runway was added, and that courts typically defer to FAA expertise in forecasting air transportation demand. But the court was not swayed: "In essence, the agencies would like this court to take their word for it and not question their conclusory assertions in the EA that a new runway would not increase demand. Their word, however, is not entitled to the significant deference that courts give aviation activity forecasts actually performed by the FAA." *Id.* at 1136-37. While it was possible that a new runway might not generate increased demand, whether it was true was not known "because the agencies failed to take the required 'hard look' * * * and failed to conduct a demand forecast based on three, rather than two runways at HIO." *Id.* at 1137-38. The court distinguished other decisions involving nonrunway airport improvements, noting that a new runway is the most attractive enhancement an airport can provide, and concluded that remand to the FAA was necessary for consideration of the environmental impact of increased demand resulting from the HIO expansion pursuant to 40 CFR §1508.8(b). *Id.* at 1138-39.

The court made short shrift of the petitioners' argument that the FAA failed to conduct a public hearing as required under the Airport and Airway Improvement Act. Petitioners asserted that the public hearing held by the FAA failed to facilitate "exchange of ideas among members of the public," but the court noted that the public meeting had a hearing officer, that the public was invited to talk to project participants, ask questions, get feedback, and provide testimony, which satisfied the Act. *Id.* at 1141-43.

The court granted the petition for review and remanded to the FAA for consideration of the environmental impact of increased demand caused by the HIO expansion, if any.

Judge Ikuta dissented, arguing that the majority's decision to delay a necessary airport expansion was contrary to precedent and the facts. Given the record and prior case law, "there is no basis for concluding that the EA was deficient in not addressing the question whether the HIO project would have growth-inducing effects above and beyond the existing demand curve." *Id.* at 1145. The dissent also agreed with the agencies that petitioners had waived this issue by not asserting it during the notice and comment period:

> "To be clear, the issue here is not simply that use of the airport will continue to increase, creating more noise and traffic. The record establishes that this will

> happen in any event, and indeed, the pollution and environmental problems will be worse without the addition of a third runway. Rather, the 'growth-inducing effects' issue is whether the addition of a third runway will increase the use of the airport beyond the anticipated increase based on existing conditions that was predicted by the Master Plan and was to be addressed by the project. Nothing in the records shows any of the petitioners raising that issue."

Id.

But right or wrong, a dissenter is a loser and a runway is not leeway but a long strip of pavement, and whether the FAA did or did not err in analyzing whether a third runway at the Hillsboro Airport would have a growth-inducing effect, the majority gave the FAA another opportunity, and reason, to consider the issue.

Ctr. for Envtl. Law and Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000 (9th Cir. 2011)

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Conservation groups challenged a proposed incremental drawdown of water from Lake Roosevelt in Washington by the U.S. Bureau of Reclamation (Reclamation). The groups alleged that Reclamation's environmental assessment ("EA") for the drawdown project was untimely and inadequate with respect to cumulative effects, indirect effects, and reasonable alternatives. The Ninth Circuit Court of Appeals, reviewing the district court's grant of summary judgment to Reclamation, found that Reclamation took the requisite "hard look" under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*.

The court found that the EA was timely. Reclamation took several steps toward implementing the drawdown project before drafting the EA and adhered to NEPA's timing requirements. Moreover, although the portion of the EA devoted to cumulative effects was "conclusory and unenlightening," used "vague generalities" and failed to discuss one of the reasonably foreseeable, proposed projects in the area, the court ultimately found it was sufficient. Reclamation understood and accounted for the cumulative effects of past projects, and although the EA does not discuss the cumulative impact of one of the reasonably foreseeable projects— the Odessa Subarea Special Study— Reclamation nonetheless committed itself to scrutinizing the cumulative effects of the Special Study with the drawdown project before implementing any action resulting from the Special Study. In addition, the court found that an EA discussing only the agency's preferred alternative and a no-action alternative satisfies NEPA's requirements. Therefore, the Ninth Circuit affirmed the district court's ruling.

Nat'l Wildlife Found. v. Nat'l Marine Fisheries Serv., No. CV 01-00640-RE, 2011 WL 3322793 (D. Or. Aug. 2, 2011)

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In this latest round of the long-running legal conflict over the impacts of the Federal Columbia River Power System ("FRCPS") on federally listed fish species, the United States

District Court of Oregon has once again rejected a biological opinion for failure to comply with the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§ 1531–1544.

This decision involved the 2008 and 2010 Biological Opinions ("2008/2010 BiOp") prepared by defendant National Marine Fisheries Service. The 2008/2010 BiOp concluded that the FRCPS is not likely to jeopardize the continued existence of listed species through 2018. The court rejected the BiOp's conclusion, finding that it impermissibly relied on mitigation measures that are not reasonably certain to occur beyond 2013. The court focused on habitat improvement measures for the period from 2014 through 2018, finding that such measures were either unidentified, or were identified but without any binding commitments by the federal defendants to achieve their implementation. As a result, the 2008/2010 BiOp was arbitrary and capricious and in violation of the ESA. The court ultimately required the defendants to prepare a new BiOp no later than January 1, 2014, and to continue funding and implementing the 2008/2010 BiOp until then.

The court also rejected the federal defendants' requests for permission to curtail spill at the FRCPS's dams each May and August. Instead, the court required the federal defendants to continue operating the dams consistent with the court's annual orders on spring and summer spill.

Finally, the court rejected the plaintiffs' proposals for flow augmentation and reservoir operations, noting that the federal defendants had promised to continue studying the potential benefits and harms of those measures.

Judge James A. Redden, who issued this decision and presided over the case for more than a decade, has stepped down from the case as he prepares for retirement. In November 2011, the case was reassigned to Judge Michael H. Simon.

Or. Natural Desert Ass'n v. Bureau of Land Mgmt., No. 08-1271-KI, 2011 WL 5830435 (D. Or. Nov. 15, 2011)

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In a case regarding the Bureau of Land Management's ("BLM") plan to use a variety of methods to control juniper expansion in sage grouse habitat in an area of Harney County ("Juniper Treatment Project"), the United States District Court of Oregon granted in part and denied in part the Oregon Natural Desert Association's ("ONDA") motion for summary judgment based on claims under the National Environmental Policy Act ("NEPA"), the Federal Land Policy and Management Act ("FLPMA"), and the Steens Mountain Cooperative Management and Protection Act of 2000 ("Steens Act"). Accordingly, the court granted in part and denied in part the BLM's cross motion for summary judgment. The court determined that, for most of ONDA's NEPA arguments, NEPA does not require the BLM to conduct any more analysis than what the BLM has already done—which includes the Juniper Treatment Project's Environmental Impact Statement ("EIS") and a subsequent Determination of NEPA Adequacy ("DNA"). The court explained that (1) the BLM is not judicially estopped from determining that additional NEPA analysis is not required for the Juniper Treatment Project in light of a 2009

USGS article, nicknamed the "Sage-Grouse Monograph," simply because the BLM determined that a different project in sage grouse habitat required additional NEPA analysis in light of it; (2) the DNA, which discussed why a supplemental EIS was not necessary and was created *after* ONDA filed its opening brief, was not untimely or technically insufficient; and (3) the BLM's decision to not issue a supplemental EIS, for the most part, was not arbitrary and capricious. What was arbitrary and capricious, the court determined, was the BLM's failure to evaluate in the DNA whether a subsequently approved wind project within the Juniper Treatment Project area, possibly located within 1,500 feet of sage grouse breeding areas and determined by the BLM to be "reasonably foreseeable" during the time of the draft EIS, required a supplemental EIS. The court granted ONDA's motion for summary judgment in part on that issue.

For ONDA's FLPMA claims, ONDA argued that the Juniper Treatment Project's methods conflict with the BLM's own *Interim Management Policy for Lands Under Wilderness Review* ("IMP") to implement a Wilderness Study Area's ("WSA") "non-impairment requirement." The court agreed that cutting juniper, a method that the BLM proposes to use if prescribed burning does not work, conflicts with the IMP's prohibition on vegetative manipulation of juniper by mechanical means, and, therefore, violates FLMPA.

Finally, although the court disagreed with ONDA's argument that the BLM's proposed off-road use conflicts with the IMP under FLPMA, the court remanded the case back to the Interior Board of Land Appeals ("IBLA") to determine whether the BLM's proposed off-road use violates the Steens Act. The IBLA had determined that an "ecological restoration" exception for off-road use existed for non-WSAs, but the IBLA did not address the BLM's argument before the court—that is, whether an "administrative purpose" exception applies to the Steens Act's prohibition of off-road use in WSAs.

Jones v. Nat'l Marine Fisheries Serv., No. 10-6427 HO, 2011 WL 4501956 (D. Or. Sept. 27, 2011)

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In *Jones v. Nat'l Marine Fisheries Serv.*, No. 10-6427 HO, 2011 WL 4501956 (D. Or. Sept. 27, 2011), Judge Michael Hogan concluded that federal agencies supported their decisions by articulable facts and made rational decisions. He, therefore, denied plaintiffs' Motion for Summary Judgment and granted the defendant-intervenor and federal defendants' Motions for Summary Judgment.

Here, plaintiffs Bandon Woodlands Community Association, Oregon Coast Alliance, and three individual plaintiffs argued that a new chromite mining operation would adversely affect Oregon coast coho salmon, and that various agency decisions allowing the mining violated federal environmental statutes.

Plaintiffs first asserted that, under the Clean Water Act (CWA), the federal defendants failed to consider practical alternatives and improperly considered defendant-intervenor's financing constraints. Judge Hogan disagreed, finding that the U.S. Army Corps of Engineers (Corps) and National Marine Fisheries Service (NMFS) considered relevant factors and

articulated a rational connection between the facts found and choices made, thus complying with the CWA. Further, Judge Hogan ruled that the Corps may legitimately consider facts such as costs to the applicant.

Plaintiffs next challenged the Corps' finding of no significant impact under the National Environmental Policy Act. Judge Hogan again found that the agency had utilized relevant and substantial data, despite the existence of differing scientific opinion. The existence of differing scientific opinions did not, in this case, render the agency's decision arbitrary and capricious.

Finally, plaintiffs argued that NMFS' decision violated the Endangered Species Act by failing to consider the impacts mining would have on stream flow. Plaintiffs were also concerned about the formation of hexavalent chromium (Cr6) and its spread into groundwater. However, Judge Hogan believed that the agency's Biological Assessment specifically addressed groundwater concerns and supported NMFS's determination that risks to the environment by potential Cr6 formation were low.

Based on this analysis, Judge Hogan found the defendant agencies' actions were not in violation of those federal statutes, and thus granted summary judgment in favor of federal defendants and defendant-intervenor.

Northwest Environmental Defense Center v. U.S. Army Corps of Eng'rs, ___ F. Supp. 2d ___, No. 10-1129-AC, 2011 WL 4369129 (D. Or. Sept. 19, 2011)

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Northwest Environmental Defense Center v. U.S. Army Corps of Eng'rs, ___ F. Supp. 2d ___, No. 10-1129-AC, 2011 WL 4369129 (D. Or. Sept. 19, 2011), came before the court on Plaintiff's motion for a TRO enjoining the Corps' authorization for in-stream mining activities on the Chetco River in Southwest Oregon, and a cross motion from Defendants to strike Plaintiff's supporting declaration. The court denied the Northwest Environmental Defense Center's (NEDC) request for a temporary restraining order (TRO) and granted Defendant's motion to strike the declaration.

The Corps had issued a five-year Regional General Permit (RGP) under the Clean Water Act (CWA) allowing limited commercial in-stream gravel mining on the Chetco, designated as critical habitat for coho salmon, a listed species designated as threatened under the Endangered Species Act (ESA). A U.S. Army Corps of Engineers' (Corps) Biological Opinion (BiOp) recognized that, while coho numbers in the Chetco had increased in recent years, the current population was "extremely low." A RGP permits categories of activities under the CWA that are substantially similar in nature and cause only minimal individual and cumulative impacts on the aquatic environment.

The BiOp noted that the activities approved under the RGP would result in habitat modification, slow the improvement of the Coho runs, and likely result in the taking of some juvenile salmon. Therefore, an incidental take statement was issued. However, the BiOp also noted the impossibility of monitoring individual takes, leading to the development of an

"ecological surrogate," that, if triggered, would lead to re-evaluation of the permit. Stated simply, so long as extraction activities did not disturb over a certain percentage of the gravel bar, re-evaluation would not be triggered.

While the court dispatched the majority of NEDC's arguments relatively routinely, several points are of note. First, the decision discusses whether NEDC's supporting declaration was impermissible extra-record opinion attacking the scientific merits of the BiOp. Extra-record materials may be considered if they are necessary to determine whether the agency considered all relevant factors, whether the agency relied upon nonrecord documents, the materials are necessary to explain technical or complex subject matter, or the challenging party can show the agency acted in bad faith. Extra-record materials can also be used to show irrevocable harm in the absence of injunctive relief. Here, the court found the declaration merely challenged the "correctness or wisdom" of the BiOp's analyses and conclusions; and that it failed to show irreparable harm in the absence of relief because it *only* asserted general harms in-stream gravel mining can have on coho salmon, while failing to address the likelihood of harm from *this particular project*. Therefore, the court granted the motion to strike the declaration.

Second, the court rejected NEDC's arguments that the ecological surrogate was insufficient for failing to address *all* of the stressors that could lead to takings from the permitted activity and failing to rationally connect a measurement of only surface disturbance of the gravel bar to potential takings. The court invoked the deferential standard of review under the Administrative Procedures Act (APA) for administrative decisions, and noted that the agency need only consider the "available" scientific and commercial data in crafting a surrogate, even if that data is "admittedly weak best available science."

Finally, the court again invoked the deferential standard of review to narrowly draw the boundaries of "practicable alternatives" that must be considered to a proposed action under the CWA. Here, NEDC argued that nonriver bed gravel sources should be considered as alternatives to in-stream mining operations. Noting that up-land gravel would require more processing and sorting than river gravel, and at times may not be usable for the particular construction projects for which the gravel was being supplied, the court upheld the Corps' decision that other options to in-stream extraction were "impracticable." The court further found that the required consideration of a "no action" alternative did not mean consideration of "no mining." Instead, the court found that a "no action" alternative in the context of a RPG would mean individual permitting for mining projects; which would likely result in greater use of agency resources than under the RPG, which allowed for more comprehensive evaluation of permits in the region as a whole.

Bowler v. U.S. Bureau of Land Mgmt., No. 11-6037-HO, 2011 WL 4962150 (D. Or. Oct. 17, 2011)

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This case arises from a challenge brought by Bob and Jana Bowler to the proposed Tioga Bridge and Susan Creek Day Use Area Project ("the Project") located in the Roseburg Bureau of Land Management (BLM) district in Douglas County. The project involved approximately 103

acres of public land, and included the construction of a bridge over the North Umpqua River (a designated Wild and Scenic River) in the Susan Creek area. The management plan for the area includes several objections meant to encourage development that would make recreational facilities more readily accessible, as well as requiring development to occur in harmony with the natural environment.

Following a nearly two-year comment period, BLM issued its Environmental Assessment (EA) in July 2009. The EA considered a number of alternatives including the proposed bridge. Other considered alternatives included expansion of parking areas, new gazebos in the day-use area, construction of a pedestrian bridge, a new hiking trail, and allowing geotechnical drilling. BLM eliminated each alternative other than the proposed bridge. In May 2010, BLM issued a Finding of No Significant Impact (FONSI). BLM considered 10 possible significant impacts, but determined a full environmental impact statement was not required. The Bowlers challenged the agency's decision approving the plan based upon alleged violations of the Wild and Scenic Rivers Act, National Environmental Policy Act, Federal Land Policy and Management Act, and the Administrative Procedures Act.

The United States District Court of Oregon determined that BLM had met its obligations under the various federal laws. The court specifically noted that not a single scientific expert or relevant state agency criticized the project. Also, the record demonstrated that the project received voluminous public support from Douglas County Commissioners, local business owners, hikers, and outdoor clubs. Also, the court noted Mr. Bowler's statement approving the proposed bridge design and statements describing the currently existing parking lot as underused. Based upon this record, the court concluded that BLM's decision not to prepare an Environmental Impact Statement was reasonable.

The court's analysis under the Wild and Scenic Rivers Act was likewise brief. The court focused on the visible nature of existing concrete piers from a prior bridge that are visible from the highway. Also, the court found the proposed natural color and design of the bridge would enhance scenic qualities and provide new scenic vistas. Also, the court relied once again on Mr. Bowler's own support of the bridge design.

Finally, the court considered Mr. Bowler's FLPMA argument that the agency did not sufficiently consider the proposals impact on the Aquatic Conservation Strategy. The court concluded that the project may result in some short-term turbidity, increased flow velocities, and lost fish habitat; however, that fact alone does not result in noncompliance. The court relied upon project design features meant to prevent potential degradation in the longer term.

In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation, ___ F. Supp. 2d ___, No. 08-MC-764-EGS, 2011 WL 5022771 (D.D.C. Oct. 17, 2011)

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The polar bear litigation in the United States District Court for the District of Columbia received some headlines in June 2011 when Judge Emmet Sullivan upheld the decision of the U.S. Fish and Wildlife Service (the "Service") to list the polar bear as a threatened species under

the Endangered Species Act ("ESA"). On October 17, 2011, however, Judge Sullivan issued a decision with wider potential implications. He upheld the Service's "Special Rule" under section 4(d) of the ESA, 16 U.S.C. § 1533(d), against challenges by a coalition of conservation groups. This decision is likely to significantly constrain the use of the ESA as a general tool to regulate greenhouse gases ("GHGs"). The decision was also significant because it struck down the Special Rule for failure to do any analysis under the National Environmental Policy Act ("NEPA"). This is another data point in the ongoing debate over to what extent ESA regulations are subject to NEPA.

Background

Section 9 of the ESA prohibits any illegal or unauthorized "taking" of endangered species, as well as prohibiting other acts such as trade in listed species. Section 4(d) of the ESA allows the Secretary of the Interior to expand the take prohibition to threatened species. It also states that "the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of threatened species." *Id.* § 1533(d). The Service has issued a "blanket" section 4(d) regulation that extends the take prohibition to all threatened species under its jurisdiction, unless a species-specific rule applies. 50 C.F.R. § 17.31. At the same time that it listed the polar bear, the Service issued such a species-specific regulation—an interim Special Rule under section 4(d) of the ESA, 73 Fed. Reg. 28,306 (May 15, 2008), which was followed by a final Special Rule, 73 Fed. Reg. 76,249 (Dec. 16, 2008); 50 C.F.R. § 17.40(q).

Both rules had essentially the same provisions, extending the take prohibition to the polar bear but also establishing two exceptions. First, any activity authorized under the Marine Mammal Protection Act ("MMPA") or the Convention on International Trade in Endangered Species of Flora & Fauna ("CITES"), would be exempt from section 9 of the ESA. Thus any activity authorized under the MMPA or CITES would not be prohibited by the Special Rule. Second, and more controversially, the rule exempted from the take prohibition any activity occurring outside the range of the polar bear. The Special Rule largely meant that GHG emissions outside the polar bear's range would not be considered to be violations of the ESA, and thus would not be actionable under the statute's citizen-suit provision. The Service reasoned that it would be exceptionally difficult, if not impossible, to construct a causal chain between specific emissions (or specific quantities of emissions) and direct impacts on polar bears. 73 Fed. Reg. at 76,266.

The Court Upheld the Rule under the ESA

A coalition of conservation groups—the Center for Biological Diversity, Natural Resources Defense Council, and Defenders of Wildlife—challenged the Special Rule, focusing primarily on the range limitation and what it meant for GHG regulation. Their chief argument was that, by imposing this limitation, the Service was failing to address the very activity that it had identified as the chief threat to the polar bear. Thus, the plaintiffs argued, the rule ran afoul of section 4(d)'s grant of authority to issue rules deemed "necessary and advisable to provide for the conservation of threatened species." The plaintiffs also challenged the decision to exempt activities permitted under the MMPA and CITES.

Judge Sullivan disagreed. As a preliminary matter, he noted that "nothing in the Special Rule expressly exempts greenhouse gas emissions from regulation under the ESA or any other statute." 2011 WL 5022771 at *12. The court went on to find that the record "amply" supported the Service's conclusion that extending the ESA worldwide would not effectively address sea-ice loss. The court quoted from a USGS study that stated "it is currently beyond the scope of existing science to identify a specific source of CO2 emissions and designate it as the cause of specific climate impacts at an exact location." *Id.* at *13. It appears that the presence of the MMPA protection as a backstop also provided some comfort to the judge—if, indeed, a specific action outside the range was found to have specific impact, then the Service could bring action under the MMPA. Thus the court was left with a complaint that certain plaintiffs would not be able to bring citizen suits, which was not enough in his view to find the rule arbitrary or capricious. *Id.*

The court also rejected the argument made by the Plaintiffs that the Special Rule needed to be reviewed as a "downgrade" in protection of the bear because the blanket regulation would have otherwise applied. The court found this argument unpersuasive on both regulatory and statutory grounds. First, the blanket regulation specifically provides that it does not apply in the event a species-specifc rule is issued. *Id.* at *11 (citing 50 C.F.R. § 17.31(c)). Second, the court found that the discretionary language of section 4(d)—it provides that the Service "may" issue a rule extending "any" section 9 prohibitions—means that the Service was not required to justify issuing a species-specific rule. The Service needed only to show that the rule was necessary and advisable for the conservation of the species. *Id.* at *11 (citing, among others, *Trout Unlimited v. Lohn*, 559 F.3d 946, 962 n.12 (9th Cir. 2009)).

Judge Sullivan concluded his ESA analysis with a nod to the policy debate swirling around the litigation. "The question at the heart of this litigation—whether the ESA is an effective or appropriate tool to address the threat of climate change—is not a question this Court can decide based upon its own independent assessment, particularly in the abstract. The answer to that question will ultimately be grounded in science and policy determinations that are beyond the purview of this Court." *Id.* at *15.

The Court Held That the Service Failed to Conduct Any NEPA Analysis

The parties did not dispute that the Service did not do either an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") under NEPA when issuing the Special Rule. The Service, relying on *Center for Biological Diversity v. FWS*, No. C 04-4325, 2005 WL 2000928 (N.D. Cal. Aug. 19, 2005), argued that section 4(d) rules are exempt from NEPA as a matter of law. The court rejected this argument, finding *Center for Biological Diversity* unpersuasive because it had deferred to the Service on the Service's interpretation of NEPA. Judge Sullivan, relying on District of Columbia Circuit precedent, held that "agencies other than [the Council on Environmental Quality] are generally not entitled to deferential review in determining whether NEPA applies to a proposed action." 2011 WL 5022771 at *17. Moreover, the Service's long-standing policy that ESA *listing* rules, issued under section 4(a), do not require NEPA analysis, was inapplicable to *special* rules, in the court's view. The court went on to reject, with little analysis, the Service's fall-back argument that the Special Rule was not a "major federal action" under NEPA because it merely preserved the regulatory status quo. *Id.* at *18. To do so, the court indicated, would short-circuit the process of preparing an EA. *Id.*

The ruling on the applicability of NEPA to section 4(d) of the ESA has some broader implications, as there is an emerging split on the applicability of NEPA to certain ESA actions. To date, the Ninth Circuit has held that NEPA is inapplicable to critical habitat rules, *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), and a District Court in the Ninth Circuit has found NEPA inapplicable to section 4(d) rules, *Center for Biological Diversity*, *supra*. At least two courts have disagreed with the Ninth Circuit's decision in *Douglas County*. *Catron County Bd. of Comm'rs, New Mexico v. FWS*, 75 F.3d 1429 (10th Cir. 1996); *Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108 (D.D.C 2004). The polar bear opinion may not be the last to disagree with *Center for Biological Diversity*.

In a remand order, Judge Sullivan vacated the Final Special Rule but left the Interim—and substantially similar—Special Rule in place. The Service must finish a draft rule and draft EA by April 13, 2012, and a final rule and EA by December 6. Further litigation is sure to follow, so stay tuned.

RULES

Final National Pollutant Discharge Elimination System Pesticide General Permits Issued by State of Oregon Department of Environmental Quality and U.S. Environmental Protection Agency for Point Source Discharges From the Application of Pesticides.

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On October 31, 2011, the Oregon Department of Environmental Quality ("DEQ") and the United States Environmental Protection Agency ("EPA") each issued a final National Pollutant Discharge Elimination System ("NPDES") Pesticide General Permit ("PGP") covering certain pesticide applications under the Clean Water Act ("CWA"). The new permits regulate applications of pesticides that result in point source discharges to waters of the State (under DEQ's permit) or waters of the United States (under EPA's permit). Specifically, the permits regulate applications of biological and chemical pesticides in, over, or near water, to control mosquitoes and other flying insects, weeds and algae, nuisance animals, and forest canopy pests.

Exemptions

An NPDES permit is not required for discharges resulting from agricultural runoff and irrigation return flow, both of which may contain pesticides, because the CWA specifically exempts such discharges from permitting requirements. Also, pesticide applications to land that do not result in point source discharges to waters of the United States (*e.g.*, to control pests on agricultural crops, forest floors, or range lands) do not require NPDES permit coverage. Accordingly, many agricultural operations may not need NPDES permits for pesticide applications.

Coverage Areas

EPA's PGP provides permit coverage in areas where EPA is the NPDES permitting authority, including six states (Alaska, Idaho, Massachusetts, New Hampshire, New Mexico, and

Oklahoma), most Indian lands and U.S. Territories, and certain federal facilities. The remaining states, including Oregon, are authorized to issue their own NPDES pesticide permits. Pursuant to that authority, DEQ issued a permit that covers regulated pesticide applications within the State of Oregon, with the exception of Indian lands within the state (the EPA permit applies to such lands and includes special conditions for discharges to waters within the Warm Springs Reservation and the Confederate Tribes of the Umatilla Indian Reservation). DEQ also plans to issue a related Irrigation District General Permit sometime in 2012 to cover the application of certain aquatic pesticides into irrigation systems operated by districts formed under Oregon Revised Statutes Chapter 545 or by entities previously covered by an individual permit for the application of aquatic pesticides. This following discussion focuses on the requirements of the state permit, and the term "PGP" refers to DEQ's PGP unless otherwise noted.

Permit Terms and Conditions

The PGP covers five main categories of pesticide applications: (1) mosquito and flying insect pest control; (2) weed and algae control within three feet of water's edge; (3) nuisance animal control within three feet of water's edge; (4) forest canopy pest control when a portion of the pesticide will unavoidably be applied over and deposited in water; and (5) area-wide pest control by aerial application to avoid substantial and widespread economic and social impact, when a portion of the pesticide will unavoidably be applied over and deposited in water.

The PGP regulates "operators," defined as "any owner or entity with operational control over the decision to perform a pesticide application that is covered under this permit or has the day-to-day operational control of activities that are necessary to ensure compliance with the permit." Landowners who do not have legal authority to control the application of pesticides and are not directly financing the application are not considered "operators" (*e.g.*, when a governmental entity sprays for mosquitoes over a person's property).

All operators that conduct covered pesticide applications are subject to the permit, but only large-scale pesticide applicators, federal and state agencies, and districts responsible for pest control are required to register with DEQ and pay fees for permit coverage. The permit provides annual treatment thresholds for determining whether registration is required. The annual threshold for mosquitoes/flying insects, forest canopies, and area-wide aerial applications is 6,400 acres of surface treatment area. The threshold for weed and algae control and nuisance animals is 20 acres of surface treatment area for in-water applications or 20 linear miles of treatment area for in-water/water's-edge applications.

Federal and state agencies, and some special districts, were required to register by submitting an application to DEQ on or before January 9, 2012. Operators whose pesticide application will exceed the annual treatment area threshold are required to submit an application to DEQ no less than 45 days before exceeding the annual threshold. DEQ will review applications within 30 days and will approve or deny registration under the PGP. In addition to an initial application fee, registered operators will be required to pay an annual fee, and to apply for renewal of coverage under the permit when it expires in 2016.

The PGP contains both technology-based effluent limitations and water-quality based effluent limitations. The technology-based effluent limitations require the operator to minimize

discharges of pesticides to waters of the United States through the use of "pest management measures," including: (1) limiting use to the optimal amount of pesticide consistent with the pesticide label; (2) performing maintenance activities in a manner that reduces leaks and spills; (3) maintaining pesticide application equipment in proper operating condition; and (4) assessing weather conditions (*e.g.*, temperature, precipitation, and wind speed) in the treatment area to ensure application is consistent with all applicable requirements. Additionally, operators that are required to register must implement additional pest management measures at a more intensive level to identify the problem, evaluate pest management options, and minimize pesticide use. Registered operators also have enhanced record-keeping responsibilities.

The water-quality based effluent limitations in the PGP are narrative in nature and require an operator to meet applicable water quality standards. The expectation is that if an operator follows the permit's technology-based effluent limitations, there will be no violation of applicable water quality standards. However, if violations occur, the DEQ may impose additional requirements on the operator.

Registered operators must prepare a Pesticide Discharge Management Plan ("PDMP") by the time the application for registration is submitted to DEQ. The PDMP describes how an operator will implement the effluent limitations in the permit. An operator who is required to prepare a PDMP must review and update the plan at least once per calendar year.

Limitations on Permit Coverage

Several categories of pesticide-related discharges are not covered under the PGP. These include: (1) discharges from a pesticide application if the affected waterway is identified as impaired by a substance which either is an active ingredient in that pesticide or is a degradate of such an active ingredient (impaired waters are those identified by a state, tribe, or EPA pursuant to section 303(d) of the CWA as not meeting applicable state or tribal water quality standards); (2) certain discharges to waters designated by a state or tribe as Tier 3 (Outstanding National Resource Waters) for antidegradation purposes under Title 40 of the Code of Federal Regulations; (3) discharges that are likely to adversely affect species that are federally-listed as endangered or threatened under the Endangered Species Act (ESA) or habitat that is federally-designated as critical under the ESA; and (4) discharges covered under another NPDES permit.

DEQ permit available at:
http://www.deq.state.or.us/wq/wqpermit/docs/general/npdes2300a/2300aPermit.pdf.

EPA permit available at: http://www.epa.gov/npdes/pubs/final_pgp.pdf.

OAR 340-041-0033; Oregon's New and Revised Human Health Water Quality Criteria for Toxics

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The Oregon Department of Environmental Quality ("DEQ") has promulgated new and revised human health water quality criteria for toxics, which went into effect on October 17, 2011. Water quality criteria are required to be set by the Clean Water Act, 33 USCA §§ 1251-

1387, and describe the desired conditions of a waterbody. They consist of three principal elements: (i) the designated uses of the state's water; (ii) criteria that specify the amounts of various pollutants that may be present in those waters without impairing the desired use; and (iii) antidegradation requirements that provide for protection of the existing water uses and limitations of degradation in high quality waters. The second prong, the criteria, must be developed to protect aquatic health as well as human health. From a human health perspective, the criteria must allow Oregonians to consume fish and shellfish and to use state waters for drinking water supplies without adverse health effects.

The United States Environmental Protection Agency ("EPA") disapproved the majority of Oregon's human health criteria in 2004 because it concluded that the criteria values were based on a fish consumption rate, then set at a per capita rate of 17.5 grams/day, that was too low. EPA's decision was based on concerns raised by the Confederated Tribes of the Umatilla Indian Reservation ("Umatilla Tribes"), which argued that this standard did not adequately protect tribal subsistence consumers. After an extensive review of the fish consumption rate and a public review process coordinated by DEQ, the Umatilla Tribes, and EPA, the three entities concluded that a per capita fish consumption rate of 175 grams/day should instead be utilized to develop the criteria for Oregon's waters. DEQ then adopted new and revised human health criteria, which EPA approved on October 17, 2011, for 42 pollutants in Table 40 and revised human health toxic criteria for 63 pollutants (including arsenic, which was reviewed separately) in Table 40 of Oregon's Toxic Standards Rule, OAR 340-041-0033.

EPA's approval of the revised human health criteria does not affect the applicable aquatic life criteria. DEQ's aquatic life criteria are still undergoing Endangered Species Act consultation. They are set out in Table 20 (effective aquatic life criteria for federal Clean Water Act) and Table 33A (effective aquatic life criteria for NPDES (stormwater) permitting) of Oregon's Toxic Standards Rule.

The new human health water quality criteria will be used when wastewater-discharging facilities renew their pollutant discharge permits. However, these new criteria will only affect those permit holders that are required to monitor for toxic pollutants. Consequently, certain wastewater dischargers may need to implement new or more stringent discharge limits and/or expand monitoring for toxic pollutants to determine permit limits based on the new criteria.