Planning an Environmental Case as a Plaintiff

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Judicial Review of Federal Agency Decisions

Specific Review Provision-Endangered Species Act, 16 U.S.C. Sec. 1540(g)(citizen suits) District Court

No specific provision-Administrative Procedure Act, 5 U.S.C. Sec. 701-706, District Court

Petitions for Review, Federal Court of Appeals, Fed. R. App. Pro. 15, e.g., 15 U.S.C. 717r (Fed. Energy Regulatory Comm. Orders)

Non-Substantive Preliminary Issues in Environmental Litigation

- Venue
- Article III Standing
- Prudential Standing
- Final Agency Action
- Pre-Suit Notice
- Exhaustion of Administrative Remedies

How do you know where to sue?

Why does it matter?

Where to sue?

- Venue requirements, defined by 28 USC § 1391, establish where you can file a lawsuit—typically where a defendant "resides" or where a "substantial part" of the events or omissions occurred-also remember Local Rules—Here LR 3.2
- Sometimes you have a choice re where to file your lawsuit
- What should you consider when you have a choice?

Standing

Standing is always a potential issue—

Know how you intend to prove it before you file a lawsuit

Article III Standing

- *Sierra Club v. Morton, 405 US 727*
- *Lujan v. Defenders of Wildlife, 504 US 555*
- *Lujan v. National Wildlife Federation, 497 US 871*
- *Steel Co. v. CBE, 523 US 83*
- *Friends of the Earth v. Laidlaw, 528 US 167*
- *Summers v. Earth Island. 129 S.Ct. 1142 (2009)*
- *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 971–72 (9th Cir. 2003).

Sierra Club v. Morton

- Aesthetic injuries can be injuries in fact under Article III
- Organizations can gain standing through their members
- But must show that at least one member uses an impacted area and that this members interests could be injured-general assertions of injuries that are of a kind that concerns the organization generally are not enough
- But trees don’t have standing

National Wildlife Federation

- How close is close enough for an injury in fact to exist?
- Can a plaintiff generally assert that she uses a 500,000 acre forest and gain standing to challenge a decision that will impact only a small part of that forest?

Defenders of Wildlife

- Usually the case cited for three separate requirements of Article III standing
- Injury in fact
- Causation
- Redressability
- In *Defenders* issue was how specific must plaintiffs be about future intent to use particular areas—general assertions are not enough—often past use will support likelihood of future use—very close scrutiny of plaintiffs' standing affidavits

Steel Company

- Focus on redressability requirement
- Held that civil penalties do not redress a plaintiffs' injuries when the defendant halted the conduct before the case was filed
- Assumes injury in fact, but finds no redressability

Laidlaw

- Addresses several important issues
- Mootness—not the same as standing inquiry-voluntary cessation is usually not enough
- Injury in fact—very good discussion of what sort of affidavit evidence is enough, reasonable fears not actual harm
- Redressability—civil penalties do redress harm when conduct only ceases after case filed and could continue
- Diligent prosecution—unusual example of no diligence

Summers

Not really new law, but:

- Submit standing declarations with your motion for summary judgment, even if Defendant says it is not challenging standing

- Do not assert a procedural injury as your basis for establishing an injury in fact

Prudential Standing

- Standing requirements established by statute that is the basis for lawsuit
- Eg., APA, NEPA, ESA
- Plaintiff and claim must be within zone of interests covered by statute
- In 9th Circuit only plaintiffs concerned about environmental impacts can sue under NEPA—commercial interests cannot use NEPA to block competing projects See. E.g., *Ashley Creek Phosphate v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005)
- In *Bennett v. Spear*, 520 US 154, Court held that economic interests were within ESA "zone of interests"
- Individual citizen suit provisions often restrict their use, e.g., CWA—present violations, *Gwaltney*, 484 US 49

How do you establish standing?

- First allege it in your complaint. Why?
- Second, plaintiff has the burden of establishing standing. you will need to prove facts to support your allegations. How and when do you do that?
- Before district court you usually do it when you seek summary judgment by submitting declarations or affidavits from witnesses.
- What do you do when you seek review first in the court of appeals?

Final Agency Action

APA, Sec. 704

Bennett v Spear, 520 U.S. 154, 178 (1997):
A "final agency action" under the APA is:

(1)The action is the "Consummation of the agency's decisionmaking process"" and
(2) The action is one which determined "rights of obligations" or "from which legal consequences flow."

See also *ONDA v. USFS,* 465 F.3d 977 (9th Cir. 2006)

"Agency Action" which triggers duty to consult under the ESA is different, see *Karuk Tribe of Calif. V. USFS,* 681 F.3d 1006 (9th Cir. 2012) (enbanc)

Pre-Litigation Notice

- Not a due process issue, not controlled by *Mullane v. Central Hanover Bank*, 339 US 306 (1950)—you satisfy Mullane when you serve the complaint
- Many environmental statutes contain an extra, statutory notice requirement—typically 60 days with some exceptions
- Are these requirements “Jurisdictional”?

Specific Notice Requirements

- Clean Air Act-42 USC Sec. 7604, CAA Sec. 304
  - CAA Notice regs-40 CFR Secs. 54.1-54.3
- Clean Water Act-33 USC Sec. 1365, CWA/FWPCA Sec. 505
  - CWA Notice regs-40 CFR Secs. 135.1-135.3

Specific Notice Requirements-2

- Resource Conservation and Recovery Act- 42 USC Sec. 6972, SWDA Sec. 7002
  - RCRA notice regulations-40 CFR Part 254
- Endangered Species Act-16 USC Sec. 1540(g), ESA Sec.11
  - No regulations
- Emergency Planning and Community Right To Know Act-42 USC Sec. 11046, EPCRA, Sec. 326
  - No regulations

Typical Notice Requirements

- How do you serve-certified mail?
- Who do you serve-Federal agency, state agency, private violator?
- What do you have to tell them?
- Potential plaintiff/attorney info
- Potential claims—how specific?

Bosma Dairy, 305 F.3d 943 (9th Cir. 2002)

- Prior decisions hold that failure to provide plaintiff info requires dismissal.
- But, plaintiff "is not required to list every specific aspect or detail of every alleged violation" (quoting Hercules decision)
- "Neither CWA nor [regulations] require plaintiffs to provide an exhaustive list of all violations"—is that really a "strict construction of 40 CFR Sec. 135.3(a), quoted in Bosma, at 951?
- Plaintiffs provided a range of dates and were alleging "in essence" a single violation that repeated itself—but doesn't each individual violation represent a potential separate penalty?

Klamath-Siskiyou Wildlands Center v. MacWhorter
797 F3d 645 (9th Cir. 2015)

- First appellate court decision addressing ESA notice requirements.
- Similar to *Bosma Dairy*
- Plaintiff does not have to give defendant agency info that agency itself already has.

But watch out for *National Parks*, 502 F.3d 1316 (11th Cir. 2007)

OK, statute does not require a notice letter, but does that mean you can just sit back, wait for the agency to screw up and then sue ?

Issue exhaustion vs exhaustion of administrative remedies

What's the difference?

- *US DOT v. Public Citizen*, 541 US 752—someone must raise issue during agency's public decision-making process—issue exhaustion

- Party suing must comply with an agency's available administrative remedies—APA, 5 USC Sec. 704, *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002) —exhaustion of admin. remedies

Admin. Appeal Requirements

- U.S. Forest Service/Dept. of Agriculture
- 7 USC Sec. 6912
- 36 CFR Part 218
- Bureau of Land Management/Dept. of Interior
- APA, 5 USC Sec. 704
- 43 CFR Part 4
- NEPA, does not contain an admin. Appeal process/requirement, but submitting comments is a prerequisite to suit-*Dept of Transportation vs. Public Citizen*, 541 U.S. 752, 764 (2002)

How to Appeal--FS Regs

- FS Regs re site-specific projects-36 CFR Part 218—now called “objection”
- Must comment first
- Timing based on newspaper notice but latest regs require notice to also be posted on agency website
- Objections must be based on prior comments
- Cannot incorporate by reference, even though USFS can

Always attach any document cited except cases and statutes/regs

- *In re Delta Smelt Consolidated Cases*, 2010 WL 2520946, *3 (E.D. Ca 2010)—documents only cited in comment letter are NOT part of the administrative record

- 36 CFR § 218.8(b)—objections cannot incorporate by reference

Failure to Exhaust-*Kleissler* 183 F.3d 196 (3rd Cir. 1999)

- Side-by-side comparison of admin appeal issues and complaint / sj brief issues
- Only issues in written appeal
- No leniency for pro se appellants (chose not to be represented by counsel?)
- Lessons:
  - Have litigation issues identified at admin appeal stage
  - Don’t put stupid things on your website (see note 6)

Native Ecosystems Council, 304 F.3d 886 (9th Cir.2005)

- Examines appeal " taken as a whole"
- Specifically notes that many who file appeals do not have lawyers
- Is this consistent with FS regs which require you to set forth law or reg being violated?
- Is exhaustion "jurisdictional"? Can a court create equitable exceptions?
- New case-*Great Old Broads for Wilderness*, 709 F.3d 836 (9th cir. 2013)

Oregon Natural Desert Association v. McDaniel, 751 F.Supp. 2d 1151 (D.Or. 2011)

Excellent Summary and explanation of 9th Circuit Law on Exhaustion

Exceptions

- Exhaustion not required unless decision stayed--*Darby*, 509 US 137 (1993); *Ore. Nat. Desert Assoc.*, 953 F. Supp. 1133 (D.Ore. 1997)
- Only one appellant has to raise issue--*Engine Manuf. vs. EPA*, 88 F.3d 1075 (DC Cir. 1996)

Likelihood of Intervention

After *Wilderness Society v. USFS,* 630 F.3d 1173 (9th Cir. 2011)(en banc), intervention is much easier in APA/NEPA cases, but maybe still hard in Seventh Circuit

Focus on limiting rights of intervenor:

- Advisory Comm. Note cited and quoted by *Stringfellow v. Concerned Neighbors in Action*, 480 US 370, 383, n. 21 (Brennan, J. Concurring), see also at 378, limitations do not constitute denial of right to participate
- *Fund for Animals v. Norton*, 322 F.3d 728, 737, n.11 (D.C.Cir 2003) also citing Advis. Comm. Note
- *Beauregard, Inc. v. Swordservs*, *LLC*, 107 F.3d 351, 352-53 (5th Cir. 1997), "firmly established principle" that court can impose conditions on intervention as of right
- *Southern v. Plumb Tools*, 696 F.2d 1321, 1323 (11th Cir. 1983), imposing conditions on intervenor as of right and permissive intervenor is "no problem"
- *Friends of Tims Ford v. TVA*, 585 F.3d 963 F.3d 963 (6th Cir. 2009) (allows conditions on intervention as or right)

Will you need to Seek Preliminary Relief?

Law has changed a lot re standard for obtaining preliminary injunctions

Under FRCP 65, the Court may issue a preliminary injunction pending final resolution of plaintiffs' claims.

Typically, a plaintiff must demonstrate:

- "[1] that he is likely to succeed on the merits,
- [2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
- [3] that the balance of equities tips in his favor, and
- [4] that an injunction is in the public interest."

Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1289 (9th Cir. 2013) (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)).

Ninth Circuit Gloss on PI Standard

- However, a plaintiff need "only show that there are 'serious questions going to the merits'… if the 'balance of hardships tips *sharply* in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *Shell Offshore*, 709 F.3d at 1291 (quoting *Alliance for the Wild Rockies ("AWR") v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

- See also *LOWD v. Connaughton*, 752 F.3d 755 (9th Cir. 2014)

- *Winter* applies in ESA cases—*Cottonwood Envir. Law Center v. USFS,* 789 F.3d 1075 (9th Cir. 2015), cert denied, 2016 WL 2840129 (Oct. 11, 2016)