ENR Case Notes, Vol. 24

Recent Environmental Cases and Rules

Environmental and Natural Resources Section — Oregon State Bar
Meredith Price, Editor — January 2016

Editor's Note: This issue contains selected summaries of cases issued in October, November, and December of 2015. Thank you to Willamette Law Online, which provides case summaries and first publishes those summaries at http://www.willamette.edu/wucl/resources/journals/wlo/. Thank you also to Maura Fahey of Crag Law Center, Ryan Shannon of Earthrise Law Center, and Ivan Gold of Perkins Coie LLP for their summaries. If you are interested in summarizing cases or rules, please contact me.

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9th Circuit Court of Appeals

- ***Cascadia Wildlands v. Thrailkill***, 806 F.3d 1234 (9th Cir. 2015)

District of Oregon

- ***Advocates v. Mountain View Paving, Inc.***, No. 1:15-CV-01854-CL, 2015 WL 8207504 (D. Or. Dec. 7, 2015)
- ***Nw. Envtl. Def. Ctr. v. H & H Welding***, No. 3:13-CV-00653-AC, 2015 WL 7820958 (D. Or. Oct. 13, 2015) *report and recommendation adopted sub nom.*, No. 3:13-CV-00653-AC, 2015 WL 7862749 (D. Or. Dec. 2, 2015)

Oregon Administrative Rules

- Rule Caption: ***Amend existing special use rules to include geothermal resources installations***; Adm. Order No.: DSL 3-2015; Rules Amended: 141-125-0100, 141-125-0110, 141-125-0120, 141-125-0140, 141-125-0160; Date: Dec. 15, 2015

A. 9th Circuit Court of Appeals

1. *Cascadia Wildlands v. Thrailkill*, 806 F.3d 1234 (9th Cir. 2015)

The Douglas Complex fire destroyed around 48,000 acres of Oregon's forest. Subsequently, the Medford District of the Bureau of Land Management organized the Recovery Project (the Project) to clean up burnt foliage and restore the habitat of the endangered spotted owl. Pursuant to Section 7 of the Endangered Species Act, the Bureau conferred with the Fish and Wildlife Service (the Service) before beginning its Project. Although the Project was likely to kill twenty-four owls, the Service concluded in their biological opinion that the Project was unlikely to critically jeopardize or destroy the owl's habitat. Environmental groups, led by Cascadia Wildlands, moved for a preliminary injunction to enjoin the initiation of the Project. The Court denied Cascadia Wildland's motion. Cascadia Wildland appealed.

On appeal, the Ninth Circuit reviewed the district court's denial of the preliminary injunction for abuse of discretion, which was "limited and deferential." The Court held that the district court did not abuse its discretion in denying Cascadia Wildland's motion for preliminary injunction as the Service's conclusions were "supported by the best available science, and were not arbitrary and capricious." The Court reasoned that where matters of science are concerned, a district court should defer to the agency. The Court further reasoned that the district court appropriately complied with this administrative maxim because the Service fully considered the consequences of the Project on the spotted owl's habitat and based its decision on scientific evidence. Moreover, the Court agreed that denial of the preliminary injunction was appropriate because Cascadia Wildland was unable to prove that it was likely to succeed on the merits.

B. District of Oregon

1. *Advocates v. Mountain View Paving, Inc.*, No. 1:15-CV-01854-CL, 2015 WL 8207504 (D. Or. Dec. 7, 2015) (Summarized by Maura Fahey, Crag Law Center)

Plaintiff Rogue Advocates filed a citizen suit under the Clean Air Act (CAA) against Defendant Mountain View Paving, an asphalt batching company, to enforce a narrative condition of Defendant's general CAA permit requiring all operations, processes and associated activities to be in compliance with state and local land use laws. Prior to the suit, Defendant had operated its industrial asphalt use for over 14 years on a residentially zoned property in southern Oregon and within the floodplain of a tributary to the Rogue River. Pursuant to local Jackson County land use and zoning law, special permits and authorizations are required for Defendant's use. Defendant had never obtained any land use permits allowing its operation on the subject property. Plaintiff is a local non-profit land use advocacy group with members who live, work and recreate near Defendant's operation and who are subjected to noise, dust, and noxious asphalt fumes.

Defendant filed a motion to dismiss Plaintiff's action arguing that the federal district court lacked subject matter jurisdiction because Plaintiff's CAA claim was dependent on state land use law, a subject Defendant argued is within the exclusive jurisdiction of the Oregon Land

Use Board of Appeals (LUBA). Defendant also argued that Plaintiff's claims were not ripe for review because Defendant was in the process of seeking its required land use approvals and that process was pending review by LUBA. Defendant made an alternative motion for the court to abstain under the Burford and Colorado River doctrines.

On the jurisdictional arguments, Judge Clarke held that Plaintiff sought enforcement of an "emission standard or limitation" as defined by the CAA and thus Plaintiff's claim fit squarely within the citizen suit provision, over which the Act confers exclusive jurisdiction in the federal district courts. The court held that federal jurisdiction was not invalidated simply because Plaintiff's CAA claim implicated state and local land use law; rather, the overlap in state and federal law is encouraged by the Act's system of cooperative federalism. With respect to ripeness, the court held that Plaintiff's claim was ripe for review because it alleged that Defendant was currently operating in violation of its CAA permit and it was not contingent on the outcome of Defendant's attempts to secure the required land use permits.

The court also rejected Defendant's abstention arguments. First, the court found the Burford doctrine inapplicable because Plaintiff sought enforcement of federal law against a private actor and did not challenge any state or local agency action. Second, the court found abstention under the Colorado River doctrine to be inappropriate because Defendant's request failed the doctrine's threshold requirement – the state and federal proceedings were not "substantially similar" and thus, the court was not assured that the pending LUBA appeal would resolve Plaintiff's claim that Defendant is currently violating the CAA. Defendant's motion was denied in full.

On January 22, 2016, Judge Clarke signed an order granting Plaintiff's pending motion for preliminary injunction and enjoining Defendant from operating its asphalt batch plant until a final judgment on the merits.

2. ***Nw. Envtl. Def. Ctr. v. H & H Welding***, No. 3:13-CV-00653-AC, 2015 WL 7820958 (D. Or. Oct. 13, 2015) *report and recommendation adopted sub nom.,* No. 3:13-CV-00653-AC, 2015 WL 7862749 (D. Or. Dec. 2, 2015)

This lawsuit originated when the Northwest Environmental Defense Center (NEDC) filed a complaint against Parkrose Auto Recycling, LLC and its owner (Parkrose), and other related defendants, alleging that the unpermitted discharge of stormwater from an auto dismantling facility into the Columbia Slough violated the Clean Water Act. NEDC and Parkrose sought to resolve these claims through a Consent Decree approved by Magistrate Judge Acosta in May 2014. The Consent Decree required Parkrose to take specific actions relating to (1) managing stormwater runoff; (2) monitoring runoff and reporting to NEDC on the status of Parkrose's compliance with the Permit and the Consent Decree; and (3) making payments to address Parkrose's prior unpermitted discharges and to reimburse NEDC for attorney's fees and costs.

However, Parkrose failed to comply with the terms of the Consent Decree. As a result, NEDC moved the court to find Parkrose in contempt. The court found that Parkrose in fact had failed to comply with Consent Decree and found the company and its owner in contempt. In doing so, Magistrate Judge Acosta rejected two arguments Parkrose made concerning why its noncompliance should be excused.

First, the court held that Parkrose's failure to obtain coverage under an appropriate Clean Water Act National Pollutant Discharge Elimination System permit did not excuse performance under the Consent Decree. While the agreement contemplated that Parkrose would obtain permit coverage—and would need to do so to continue to operate lawfully—permit coverage was not a prerequisite to compliance with the terms of the Consent Decree. Moreover, the court determined that Parkrose failed to take the available steps as outlined by the permitting agency, the Oregon Department of Environmental Quality (DEQ), to qualify for coverage.

Second, the court held that NEDC's participation in the administrative process regarding DEQ's consideration of whether Parkrose qualified for a state-issued general stormwater permit did not excuse Parkrose's noncompliance with the Consent Decree. There, the court determined that NEDC's participation as an interested party in the administrative hearing considering DEQ's denial of permit coverage to Parkrose did not violate NEDC's commitment in the Consent Decree to refrain from initiating any addition litigation against Parkrose for alleged past Clean Water Act violations. In addition, the court found that any role NEDC had in DEQ's decision to not grant Parkrose permit coverage did not frustrate Parkrose's compliance with the Consent Decree, because, as noted above, permit coverage was not a prerequisite to compliance. As a result, Magistrate Judge Acosta issued a Findings and Recommendation that Parkrose and its owner were in contempt of the court's order. To purge this contempt, Judge Acosta recommended the Defendants: 1) provide NEDC with the information called for under the Consent Decrees, 2) pay the initially agreed upon Supplemental Environmental Project payment, plus interest, and additional $1,000.00, for a total of $11,600.00; and 3) pay NEDC the agreed upon fees and costs reimbursement of $6,000.00 plus interest. On December 12th, 2015, Judge Mosman adopted the Findings and Recommendation.

C. Oregon Administrative Rules

1. Oregon Department of State Lands Revises Rules for Geothermal Resource Exploration And Development On State Lands, Dec. 15, 2015.

Rule Caption: Amend existing special use rules to include geothermal resources installations; Adm. Order No.: DSL 3-2015; Rules Amended: 141-125-0100, 141-125-0110, 141-125-0120, 141-125-0140, 141-125-0160

Astride the Pacific Ring of Fire, Oregon has significant geothermal resources, estimated at 4,600mWt. Oregon has more than 30 geothermal energy projects in operation producing less than 75 mWt, including two projects that produce 25 mW of electric capacity. However, Oregon's Department of State Lands (DSL) manages exploration and development of geothermal resources on state lands. Developers are increasingly interested in Oregon's geothermal resources. Oregon now ranks 5th among states in the number of geothermal projects being developed. DSL had been using rules dating from 1974, OAR 141.075-575, for these projects.

In December 2015, because the 1974 rules were "difficult to understand and unduly complicated," DSL repealed the old rules, and integrated exploration and development of geothermal resources into DSL's existing "Special Use Rules" (Division 125).

The Special Use Rules already contain DSL's up-to-date administrative rules and procedures and already managed exploration and development of other forms of renewable energy on state lands. The new rules result in similar standards for all use applications to DSL.

The amended rules for geothermal resources are:

- 141.125-011 1 (j), which now includes "geothermal resources" and their "associated transmission facilities" as "renewable energy projects," under the Special Use Rules;

- 141.125.0110 (11), which gives first rights to develop projects to holders of licenses for land based geothermal "demonstration projects;"

- 141.125.0120 (20), which defines "geothermal projects" and their products, e.g., heat and energy within the rule;

- 141.125.0140 (8), which provides for notice posting and distribution of all use applications to ensure notice to minority and low-income communities; and

- 141.125.0160 (11) which sets out fees and royalties for licenses and leases of geothermal resources on state lands: basic rates are $5.00 per acre, 1% on the gross sale price of demineralized water sold; and 5% for heavy metals, non-hydrocarbon gases and miscellaneous precipitates sold. However, in each case, the state is expected to charge fees and royalties generally consistent with fees and royalties charged by other landowners for similar projects.

Oregon's Department of Geology and Mineral Resources regulates exploration and development of geothermal resources within the State of Oregon. ORS Ch. 522. In addition, geothermal energy projects larger than 35 mW require site certificates from Oregon's Energy Facility Siting Council. ORS Ch. 469.320.