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Recent Environmental Cases and Rules

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Editor's Note: This issue contains selected summaries of cases issued in January, February, and March of 2018.

A special thank you to our talented contributors for their summaries: Ryan Shannon of the Center for Biological Diversity, Chris Thomas of the Freshwater Trust, Matthew Querey of Yockim Carollo LLP.

If you are interested in summarizing cases or rules, please do not hesitate to contact me.

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Supreme Court Case

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9th Circuit Cases

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Supreme Court

1. ***Nat'l Ass'n of Manufacturers v. Dept. of Defense***, 138 S.Ct. 617 (Jan. 22, 2018). Author: Ryan Shannon, Center for Biological Diversity.

Following consolidation of several petitions for review challenging the final rule clarifying the definition of "waters of the United States," as used in the Clean Water Act (CWA), the Sixth Circuit denied motions to dismiss for lack of jurisdiction. Certiorari was granted.

The statutory term "waters of the United States" delineates the jurisdictional boundaries of the CWA's permitting programs operated by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). In 2015, these agencies promulgated a regulatory definition of "waters of the United States," known as the Waters of the United States Rule

(WOTUS Rule). Although establishing jurisdictional boundaries, the WOTUS Rule stated that it did not establish any regulatory requirements. *See* 80 Fed. Reg. 37,054, 37,102 (June 29, 2015).

Under the CWA, most agency actions are reviewable in federal district court pursuant to the APA. However, seven categories of EPA actions are reviewed exclusively by the federal courts of appeals, including EPA actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345" of the CWA, and EPA actions "issuing or denying any permit under section 1342" of the CWA. *See* 33 U.S.C. 1369(b)(1). The question presented was whether the federal courts of appeal had exclusive jurisdiction over the review of the WOTUS rule.

The Supreme Court held that challenges to the WOTUS Rule must be filed in federal district court because the WOTUS Rule was not covered by 33 U.S.C. § 1369(b)(1), as it was neither an "effluent limitation or other limitation," nor an EPA action "issuing or denying any permit under section 1342" of the CWA. *Nat'l Ass'n of Mfrs.*, 138 S.Ct. at 628–634.

The WOTUS Rule was not an effluent limitation, a defined term under the CWA, 33 U.S.C. § 1362(11), because the WOTUS Rule did not impose a restriction on specific pollutants. *Id.* at 628. Rather, it "announces a regulatory definition for a statutory term and 'imposes no enforceable duty' on the 'private sector.'" *Id.* (citation omitted). Similarly, the WOTUS Rule was not an "other limitation" because the text and structure of the CWA make it clear that an "'other limitation' must be similar in kind to an 'effluent limitation': that is, a limitation related to the discharge of pollutants." *Id.* at 628–629. Neither did the use of the word "any" prior to "effluent limitation or other limitation," 33 U.S.C. § 1369(b)(1)(E) broaden the scope of subparagraph (E) as the statutory context made it clear that "any" could not "expand the phrase 'other limitation' beyond those limitations that, like effluent limitations, restrict the discharge of pollutants." *Nat'l Ass'n of Mfrs.*, 138 S.Ct. at 629. Regardless, the WOTUS Rule was not covered by subparagraph (E) because it was promulgated pursuant to 33 U.S.C. § 1361(a), EPA's general rulemaking authority, rather than 33 U.S.C. §1311. *Id.* at 629–630; *see also* 33 U.S.C. § 1369(b)(1)(E).

The WOTUS Rule also "neither issue[d] nor denie[d] a permit under [§ 1342]" of the CWA. *Id.* at 631; *see also* 33 U.S.C. § 1369(b)(1)(F). The Court found subparagraph (F) unambiguous, despite the Government's argument that a "functional interpretive approach" should apply under which courts ask whether the WOTUS rule was "functionally similar" to the issuance or denial of a permit under § 1342 of the CWA. *Nat'l Ass'n of Mfrs.*, 138 S.Ct. at 631. The Court found this approach "completely unmoored from the statutory text" of the CWA, *id.* at 632, and that while "the WOTUS Rule may define a jurisdictional prerequisite of the EPA's authority to issue or deny a permit, the Rule itself makes no decision whatsoever on individual permit applications." *Id.* The Court similarly rejected multiple policy arguments regarding judicial efficiency and national uniformity. *Id.* at 632–634.

The Court thus reversed the Court of Appeals and remanded the case back to the Sixth Circuit with instructions to dismiss the consolidated petitions for lack of jurisdiction. *Id.* at 634.

9th Circuit

2. ***Hawai'i Wildlife Fund v. County of Maui***, No. 15-17447 (9th Cit. Feb. 1, 2018). Author: Chris Thomas, Fresh Water Trust.

In recent years, there has been a great deal of uncertainty about the scope of Clean Water Act ("CWA") jurisdiction. One major source of this uncertainty relates to the boundaries of federally jurisdictional waters. Similarly, it is not clear precisely when an indirect discharge—a discharge to non-jurisdictional waters that nevertheless have a hydrologic connection to waters of the United States—falls within the scope of the CWA. In a very recent opinion, the Ninth Circuit addressed this question in the context of discharges to groundwater wells that were shown to have a direct connection to the Pacific Ocean.

This case arose as a citizen suit by a group of environmental nonprofits. Plaintiffs in this case alleged that the County of Maui was discharging pollutants without a permit in violation of the CWA. The County owns and operates the Lahaina Wastewater Reclamation Facility. The Facility treats roughly four million gallons of wastewater per day and discharges the vast majority of the treated effluent into four groundwater wells that have a clear hydrologic connection to the Pacific Ocean. The parties did not dispute that this effluent reaches the Pacific. One expert even estimated that wastewater comprises one out of every seven gallons of groundwater entering the Pacific near the Lahaina Facility. The County of Maui defended its actions on the grounds that the injection wells did not fall within the CWA's jurisdiction as there was not a direct discharge to a jurisdictional water; only discharges to groundwater that indirectly reached the Pacific Ocean.

The U.S. District Court for the District of Hawaii granted summary judgment to the Plaintiffs, concluding that the County had violated the CWA for discharging pollutants without a permit. The lower court relied on three independent grounds for this decision: the County indirectly discharged to the Pacific through a groundwater conduit, the groundwater constitutes a point source, and the groundwater is a navigable water for CWA purposes.

Upholding the lower court's decision but dismissing the contention that groundwater constitutes either a point source or navigable water, the Ninth Circuit held that the CWA does not require a direct discharge to jurisdictional waters so long as the connection is "fairly traceable." Specifically, the Court held that the County was liable for unpermitted discharges because, "(1) the County discharges pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than *de minimis*." (emphasis in original). The opinion rejected the EPA's suggestion, submitted in an amicus brief, to require a "direct hydrological connection" for indirect discharges. The Court reasoned that this suggestion relies on language ("direct" and "hydrological") not found in the CWA. While the rule announced in this case may better aligns with the statutory text of the CWA, the Court declined to determine when "the connection between a point source and a navigable water is too tenuous to support liability under the CWA." Although the Court declined to adopt a bright line, the County's discharges were determined to fall within the jurisdiction of the CWA.

The Ninth Circuit also rejected the County's argument that it did not have fair notice that the wells may fall under the jurisdiction of the CWA. As recently as 2014, the Hawaii Department of Health, the agency tasked with administering the CWA NPDES program, stated that it was still in the process of determining whether a NPDES permit applied to the County's wells. The County asserted that the combination of statutory ambiguity and lack of response from the agency deprived it of fair notice under the due process clause of the Constitution. The Ninth Circuit disagreed, finding instead that a reasonable person would have understood that the CWA prohibited the discharges in question.

Although this case may not provide additional clarity to the ongoing questions about CWA jurisdiction, the opinion makes clear that "this case is about preventing the County from doing indirectly that which it cannot do directly." As the County could not discharge effluent directly to the Pacific Ocean without a CWA permit, it could not utilize the natural hydrogeology to accomplish the same result.

3. ***Native Ecosystems Council v. Marten***, 883 F.3d 783 (9th Cir. Feb. 22, 2018). Author: Matthew Query, Yockim Carollo LLP.

Plaintiffs Native Ecosystems Council and the Alliance for the Wild Rockies (collectively, "Plaintiffs") filed a lawsuit pursuant to the Endangered Species Act ("ESA"), the National Forest management Act ("NFMA"), the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA") against Leanne Marten, Regional Forester of Region One of the U.S. Forest Service ("USFS"), the USFS, and the United States Fish and Wildlife Service ("FWS") (collectively, "Defendants"). In 2005, the USFS developed a fuel treatment project to thin, slash, and/or selectively burn several thousand acres – broken into specific project areas – of old-growth and juvenile forest within the Gallatin National Forest to mitigate fire risk. The USFS issued an Environmental Impact Statement ("EIS") and a Record of Decision ("ROD") in 2012 approving the project. Plaintiffs' lawsuit alleged several aspects of the planned fuel treatment project violated the ESA, NFMA, NEPA, and APA, including FWS' insufficient Biological Opinions ("BiOps") with respect to two listed species in the area; grizzly bears and Canada lynx.

The parties filed cross-motions for summary judgment, and in 2014 the district court granted partial summary judgment to Plaintiffs on the ESA claim, enjoined the project and remanded for preparation of site-specific BiOps. After the rejection of another set of FWS BiOps in 2015, the district Court found a final set of BiOps to be sufficiently site-specific and that FWS had satisfied its consultation obligation under the ESA, and dissolved the injunction allowing the project to proceed in the summer of 2016. On appeal, the Ninth Circuit affirmed the district court's ruling, and ruled in favor of Defendants on all claims.

With respect to the ESA claim, Plaintiffs' argued that the FWS and USFS' amendments to the Lynx Conservation Agreement ("LCA") – creating an exemption to the prohibition on human activity in lynx habitat for certain fire mitigation projects – were not based on the "best scientific… data available." The ESA requires federal agencies to ensure that their actions are not "likely to jeopardize the continued existence of any endangered species or threatened species," using the "best scientific and commercial data available." 16 U.S.C. 1536(a)(2).

Plaintiffs alleged the amendments were not based on the best scientific data available, asserting that the conclusion of a 2014 master's thesis – authored by a graduate student at the University of Montana – was fatal to the agencies' data-based determinations. The "determination of what constitutes the 'best scientific data available' belongs to the agency's 'special expertise…'" *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983)). The Court noted Defendants' prior consideration of and partial disagreement with this graduate thesis' conclusion, and disagreed with Plaintiffs' argument, citing the deference courts owe to the agency's expertise.

With respect to the NFMA claims, Plaintiffs' argued that Defendants were not acting in compliance with its own Forest Plan, thus rendering approval of the fuel treatment project unlawful. The NFMA requires that all national forests operate under "land and resource management plans," and that all individual management actions within a forest unit "be consistent with each forest's overall management plan." 16 U.S.C. 1604(a); *Native Ecosystems Council v. U.S. Forest Serv.,* 428 F.3d 1233, 1249 (9th Cir. 2005). One of the "Goals" of the Gallatin Forest Plan is to "[p]rovide habitat for viable populations of all indigenous wildlife species and for increasing populations of big game animals." Plaintiffs alleged parts of the fuel treatment project was incompatible with this goal. The Court disagreed, noting that the USFS can fulfill its obligations so long as its actions are not incompatible with the goal of "providing habitat for viable populations of all indigenous wildlife species" in the forest as a whole. For this reason, as well as other factors considered in its analysis of Plaintiffs' NFMA argument, the Court ruled in favor of Defendants.

With respect to the NEPA claims, Plaintiffs argued that the EIS prepared by Defendants is inaccurate or misleading in several ways. NEPA requires agencies to prepare an EIS for any agency action that "significantly affect[s] the quality of the human environment[,]" and also that the agency takes a "hard look" at environmental consequences of its proposed action. 42 U.S.C. 4332(C); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004). The Ninth Circuit's analysis of the adequacy of an EIS requires "a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). Plaintiffs argued that the EIS was inadequate for both misrepresenting and failing to properly consider certain science. Although it did criticize a misstatement of the agency within the EIS, the Court disagreed with most of Plaintiffs arguments and ruled in favor of Defendants, noting the USFS' development of the EIS and treatment of the science therein was not arbitrary and capricious (thus finding the agency acted in compliance with NEPA under the standards of the APA).