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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 April, May, and June of 2018.

A special thank you to our talented contributors for their summaries: Aaron Bruner of Western Resources Legal Center, Oliver Stiefel of Crag Law Center, Kingsly Alec McConnell of University of Washington Law School, Nathan Klinger of Willamette Law School and Schroeder Law Officers, Rebeka Dawit of Lewis and Clark Law School, and Devin Franklin of the Multnomah County District Attorney's Office.

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

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Cases

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1. ***Cal. Dep't of Toxic Substances Control v. Westside Delivery, LLC***, 888 F.3d 1085 (9th Cir 2018). Author: Aaron Bruner of Western Resources Legal Center.

This case arose as a state enforcement action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against Westside Delivery, LLC and 10 John Doe companies and involves interpretation of CERCLA's "third-party defense" provision that exempts certain new owners from CERCLA's broad liability. Westside had argued it was not liable because it purchased the property from the State of California at a tax sale, and thus did not have a "contractual relationship" with the original owner-operator that would subject it to liability. A novel issue before the Ninth Circuit, the Court sought to examine—in its words—

whether CERCLA liability may thus be "laundered" through a state's tax delinquency process by severing the contractual relationship between a liable owner and subsequent purchaser via the intervening tax sale.

An Illinois District Court decision and a 2006 "recommended decision" by an EPA Regional Judicial Officer had previously considered this same issue. Each found that a tax-sale purchaser does not have a "contractual relationship" with the previous owner because the tax sale results in a new title. *Cont'l Title Co. v. Peoples Gas Light & Coke Co.*, 1999 WL 753933, at *2 (N.D. Ill. Sept. 15, 1999); *Fla. Petroleum Reprocessors, Inc.* (EPA recommended decision June 29, 2006). The District Court here had ruled the same way, granting summary judgment to Defendant Westside Delivery. The Ninth Circuit reversed that decision, looking to CERCLA and other provisions to divine the intent of Congress.

Davis Chemical Company, the original owner, had recycled spent solvents at its Los Angeles, California facility from 1949 to 1990. In 1990, the California Department of Toxic Substances Control ordered Davis to desist from all hazardous-waste related activities, and a preliminary assessment by the U.S. Environmental Protection Agency found "significant spillage" on the site. After an initial agreement to clean up the site—devised by the Department with several of Davis' former customers—fell through, and Davis defaulted on its tax assessments, the property was sold at a tax auction in 2009 to Westside Delivery.

The Department undertook cleanup efforts at the site from 2010 to 2015, while the site sat unused by its new owner, after which the Department sued Westside under CERCLA to recover its cleanup expenses. Westside argued the release of hazardous substances at the site was caused solely by third parties (including Davis Chemical), with whom it lacked a "contractual relationship" within the meaning of 42 U.S.C. § 9607(b)(3) (third-party defense provision). Section 9607(b)(3) exempts from liability a person, otherwise liable, who can establish that the release of a hazardous substance was caused "solely by an act or omission of a third party *other than* . . . one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant." (emphasis added). Undefined by CERCLA, the term "contractual relationship" was defined by the Superfund Amendments and Reauthorization Act in 1986 to provide a defense to purchasers of contaminated land who did not know and had no reason to know that a hazardous substance had been released at the facility. 42 U.S.C. § 9601(35)(A). This is referred to as the "innocent-landowner" defense.

2. ***Clatsop Residents Against WalMart v. United States Army Corps of Eng'rs***, No. 16-35767, 2018 U.S. App. LEXIS 13908 (9th Cir. May 25, 2018). Authors: Kingsly Alec McConnell, University of Washington School of Law and Oliver Stiefel, Crag Law Center.

Plaintiff-Appellant Clatsop Residents Against WalMart ("CRAW") appealed a grant of summary judgment in favor of Defendant-Appellee, the United States Army Corps of Engineers ("Corps"). CRAW contended that the Corps acted arbitrarily and capriciously in approving a permit for Peaksview, LLC to fill 0.37 acres of wetlands in Warrenton, Oregon. In a Memorandum

Opinion, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court.

CRAW first challenged the sufficiency of the Corps' alternatives analysis under the National Environmental Policy Act ("NEPA") and the Clean Water Act ("CWA"). NEPA requires the Corps to discuss alternatives in an Environmental Assessment ("EA"). 40 C.F.R. § 1508.9. Under the CWA, the Corps may not issue a fill permit if there is a practicable alternative which would have less adverse impact on the environment. 40 C.F.R. § 230.10(a). In questioning the EA's sufficiency, CRAW argued that the Corps had an obligation to independently evaluate the information Peaksview submitted in its permit application.

In response, the Ninth Circuit found that the alternatives analysis was sufficient and commensurate with the level of impact. The Corps' conclusion that there was no practicable alternative to the 0.37-acre wetland fill was not arbitrary and capricious as it was based on analysis that was "comprehensive, searching, and rational . . . in proportion to the wetland question." In addition, the Corps was not required to conduct an independent evaluation of Peaksview's permit application under either NEPA or the CWA. Independent review is only required for Environmental Impact Statements, not EAs. 33 C.F.R. pt. 325 App. B § 8(f)(2). In short, "no regulation imposes a standalone requirement that the Corps independently evaluate an applicant's submissions when preparing an Environmental Assessment."

Second, CRAW contended that the Corps' analysis of cumulative impacts under NEPA was arbitrary and capricious. The Ninth Circuit disagreed, determining that the EA "aggregate[ed] the cumulative effects of past projects" into a five-year environmental baseline. This range was not arbitrary and capricious because "NEPA does not impose a requirement that the Corps analyze impacts for any particular length of time," and because it included the "most significant past impact." Furthermore, the Corps properly decided that other wetland fill projects identified in a county master plan were not reasonably foreseeable because the master plan did not include a timeline or identify any specific proposed projects.

Lastly, CRAW challenged the Corps' finding that the Peaksview permit was not contrary to "public interest." The Ninth Circuit held that under the CWA regulations, the Corps properly balanced the "benefits which reasonably may be expected to accrue from the proposal . . . against its reasonably foreseeable detriments." 33 C.F.R. § 320.4(a)(1). Additionally, the Ninth Circuit determined that the Corps was not required to conduct its own independent analysis on public interest. Instead, it was proper for the Corps to rely on local officials' zoning decisions in determining the project's detrimental impact on small businesses in the region. As a result, the public interest review was not arbitrary and capricious.

3. ***Defenders of Wildlife & NRDC v. US Army Corps of Eng'rs***, Nos. 17-35712, 17-35713, 2018 U.S. App. LEXIS 8558 (9th Cir. Apr. 4, 2018). Author: Nathan Klinger, University of Willamette Law School and Schroeder Law Offices.

This case, involving Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and Clean Water Act (CWA) claims, arises from the operations of dams on the

Missouri and Yellowstone Rivers and the dams' effects on the wild pallid sturgeon, listed as an endangered species in 1990. The Fort Peck Dam and Yellowstone Intake Diversion Dam prevent sturgeon from spawning successfully. As a result, sturgeon are on the brink of being locally extinct. The U.S. Army Corp of Engineers and other federal defendant agencies decided to modify the Intake Dam, in part, to help sturgeon navigate around the dam and ensure the survival of the species. The Defendants completed an Environmental Assessment (EA) in 2015 and found the project would have no significant impact on the sturgeon. The Plaintiffs, consisting of environmental nonprofits, filed a Complaint and Motion for Preliminary Injunction to stop construction and force Defendants to complete a full Environmental Impact Statement (EIS) and an accompanying analysis.

The U.S. District Court for the District of Montana granted Plaintiff's Motion and Defendants then completed an EIS and issued findings for NEPA, EPA and CWA requirements. Plaintiffs filed an amended complaint challenging Defendants' 2016 NEPA, ESA, and CWA findings. Plaintiffs brought another Motion for Preliminary Injunction that was granted by the lower court, and Defendants appealed. The Ninth Circuit vacated the preliminary injunction on appeal.

The Ninth Circuit reviewed the court's decision to impose a preliminary injunction for abuse of discretion. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). On the first issue of "irreparable harm," the Ninth Circuit held that the lower court erred in considering harm "caused by the continued operation of the dam" as part of its analysis when the Plaintiff did not seek to enjoin the status quo operation and maintenance of the dam. *Defenders of Wildlife & NRDC v. United States Army Corp of Eng'rs*, No. 17-35712 (9th Cir. 2018). Only the harm that will occur in absence of preliminary relief may be considered when determining "irreparable harm." *Id* at 1.

Further, the Ninth Circuit held that the lower Court applied the incorrect preliminary injunction standard by requiring that Defendants prove the project would allow successful passage of sturgeon. Rather, the burden of proof is on the Plaintiff to show that irreparable harm would result from the activity sought to be enjoined. The Ninth circuit determined that the lower court lacked evidence that irreparable harm would result from the project. *Id* at 1.

Second, as related to "likelihood of success on the merits," the Ninth Circuit held that the lower court failed to apply the deferential standard of review found under the Administrative Procedures Act (APA). The correct standard only required Defendant to "articulate a rational connection between the facts found and the conclusions made," and, under that standard, the Ninth Circuit found no basis to conclude Plaintiffs were likely to succeed on the merits. *Id* at 1.

Finally, using the APA's deferential standard, the Ninth Circuit evaluated the lower court's ESA, NEPA and CWA findings. Under the ESA, a federal agency must ensure that its project "is not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. § 1536(a)(2).

Defendants articulated a reasoned basis for its no-jeopardy finding in the Biological Opinion and Incidental Take Statement, which showed the project would reduce harm caused to the sturgeon and have a positive impact on recovery. As a result, the Ninth Circuit held that lower court erred "when it treated the absence of a specific Incidental Take Statement analysis and the failure to identify a quantifiable recovery goal as technical deficiencies that precluded a no-jeopardy finding in the Biological Opinion." *Defenders of Wildlife*, No. 17-35712 at 2.

Under NEPA, agencies must evaluate any reasonable alternatives to proposed projects. The Ninth Circuit found that Defendants considered multiple alternatives and analyzed the different environmental consequences of each alternative, including the alternative proposed by Plaintiffs. As a result, the Ninth Circuit held that the lower court's arbitrary and capricious determination was in error. *Id* at 2.

Under the CWA, a discharge of dredged or fill material is prohibited "if there is a practicable alternative to the proposed discharge" that would have less of an impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). The Defendants found that there was no practicable alternative that would have less of an adverse impact on the sturgeon, and ample evidence in the record supported that conclusion. Applying the correct standard under the APA, the Ninth circuit held that the lower court erred in finding Plaintiffs' CWA claim was likely to succeed on the merits. *Defenders of Wildlife*, No. 17-35712 at 2.

4. ***Friends of the Santa Clara River v. United States Army Corps of Eng'rs,*** 887 F3d 906 (9th Cir 2018). Authors: Rebeka Dawit, Lewis and Clark Law School and Oliver Stiefel, Crag Law Center.

Santa Clara Organization for Planning the Environment, *et al.* (SCOPE) brought suit against the United States Army Corps of Engineers (Corps), challenging a Clean Water Act (CWA) Section 404 permit issued to Newhall Land and Farming which would facilitate large scale residential, commercial, and industrial development in LA County. The United States Court of Appeals for the Ninth Circuit held that SCOPE had standing to seek judicial review of claims arising under the CWA, the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA), and affirmed the district court's decision on the merits that the Corps' permitting decision complied with the three statutes.

In determining whether SCOPE had standing to bring NEPA and ESA claims, the court looked to see whether it demonstrated the irreducible constitutional minimum of Article III standing for each claim for relief. The Ninth Circuit clarified that the standard is "softened" if a plaintiff asserts that the injury is a violation of a procedural right. The Defendants charged that SCOPE failed to establish standing even under the "relaxed" standard for procedural violations, because SCOPE's NEPA and ESA claims both centered on inadequate analysis of the project's impacts on steelhead, but steelhead are not present in the project area. In contrast, SCOPE's interests were limited to recreation and natural resources *within* the project area.

The court rejected this argument, deciding that "plaintiffs need show only that the challenged agency *action* will threaten their concrete interests, not that the alleged procedural deficiency will threaten such interests." Here, SCOPE needed to show only that the issuance of the Section 404 permit would affect their interest in recreation and aesthetics in the project area. The Ninth Circuit thus joined two sister circuits (the Tenth and D.C. Circuits) in holding that the plaintiffs' injury need not be tied to the particular procedural deficiency alleged; instead, plaintiffs must show that their concrete interests will be threatened by the challenged action. The court also clarified that under the causation and redressability prongs of the standing inquiry, plaintiffs are not required to show that correction of alleged procedural errors would lead to a decision not to issue a Section 404 permit. Rather, plaintiffs need only show that a "reasonable probability" exists that the Corps' decision could be influenced by correction of the procedural deficiencies.

On the merits, SCOPE first argued that the Corps did not comply with the CWA because it failed to select the "least environmentally damaging practicable alternative" in issuing the Section 404 permit. SCOPE claimed that the Corps incorporated overly specific objectives from the applicant that unreasonably narrowed possible alternatives. The court rejected this argument, noting that the Corps' regulations provide that it *must* consider the applicant's project objectives, so long as the options for other alternatives are not completely precluded. The court further explained that the Corps must take into consideration the cost of an alternative in making the determination that there is no practicable alternative. While SCOPE claimed that the Corps' cost methodology was flawed, the court found that the Corps adopted a "reasonable methodology for calculating and evaluating costs," which was entitled to deference.

SCOPE next argued that the Corps failed to comply with the ESA, specifically that the Corps erroneously determined that the project would have "no effect" on listed steelhead and on that basis did not engage in Section 7 consultation with the National Marine Fisheries Service. SCOPE contented that the project "may affect" steelhead because although steelhead are not present in the project area—separated by a dry gap in the river—storm events may cause discharges from the project area to flow to downstream reaches where the species and its critical habitat are present. The court rejected the argument, deferring to the Corps' determination as to what constitutes the "best scientific data available." Central to the court's conclusion was the fact that even during storm events, the concentrations of dissolved copper in the stormwater runoff—which SCOPE asserted could pose sublethal effects to the juvenile steelhead—would be within the "background range," and well below the State's dissolved copper criterion for the river.

Finally, under NEPA, SCOPE claimed that the Corps' final EIS failed to adequately analyze the cumulative impacts that the copper discharge would have on steelhead downstream. The court decided that, given the Corps' ESA "no effect" determination, it was not arbitrary or capricious to conclude that there would be no significant cumulative water quality impacts to steelhead. Furthermore, the court decided that a supplemental analysis prepared by the Corps on the dissolved copper issue did not require recirculation of the EIS because it merely confirmed the Corps' confirmed the Corps' conclusions and did not contain "significant new information" so as to require further comment.