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Recent Environmental Cases and Rules

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A special thank you to our talented contributors for their summaries: Ka'Sha Bernard of Crag Law Center; Sara Liljefelt of Schroeder Law Offices; Connie Sue Martin of Schwabe, Williamson, and Wyatt; Jennifer J. Hammitt of Marten Law; and Alexa Shasteen of Marten Law. If you are interested in summarizing cases or rules, please do not hesitate to contact me.

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District of Oregon

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2. ***Protect our Cmtys. Found. v. Lacounte***, No. 17-55647, 2019 U.S. App. LEXIS 28632 (9th Cir. Sep. 23, 2019).

Oregon Supreme Court

1. ***E. Or. Mining Ass'n v. Dep't of Envtl. Quality***, 365 Or. 313, 445 P.3d 251 (Or. 2019).

District of Oregon

1. ***Concerned Friends of the Winema v. McKay***, No. 1:19-cv-00516-MC, 2019 U.S. Dist. LEXIS 113277 (D. Or. July 9, 2019). *Author:* Ka'Sha Bernard, Crag Law Center.

In this case, the Plaintiffs filed a Motion for Preliminary Injunction seeking to enjoin the U.S. Forest Service from authorizing grazing on the Antelope Allotment in south-central Oregon during the pendency of litigation. The U.S. District Court for the District of Oregon denied the motion based on the Plaintiffs' failure to show the likelihood of irreparable harm in the absence of an injunctive relief. *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 20 (2008).

There has been ongoing litigation over the impacts of cattle grazing to the Jack Creek population of Oregon spotted frog ("OSF"), listed as threatened under the Endangered Species Act. In 2018, the Forest Service approved a new system of livestock grazing, which involved opening new or previously closed areas to grazing, and allowing cattle to be dispersed over a wider area. The Plaintiffs filed a Motion for Preliminary Injunction seeking to enjoin the new grazing plan over the 2019 grazing season.

In response to the complaint filed by the Plaintiffs, the Forest Service entered into agreements with permittees to substantially reduce the scope of grazing for the 2019 season. Because the Forest Service substantially limited the scope of the grazing by entering into agreements with permittees, the Government argued that the Plaintiffs could not make the necessary showing of irreparable harm.

The Plaintiffs argued irreparable harm would flow from the proposed grazing by harming the OSF population as well as fens—a unique wetland complex—on the Allotment. Although under the plan, cattle are limited to specific exclosures that did not contain OSF habitat, the Plaintiffs' experts believed that if the cattle are driven along the roads, they would disperse at the first opportunity and potentially make their way to Jack Creek and the OSF habitat in search of water and forage. The Government pointed to safeguards that the Forest Service had put into place to alleviate the risk of cattle trespass. The Court concluded that the Forest Service imposed sufficient limitations and safeguards to render the risk to the Jack Creek OSF population speculative, rather than imminent. A plaintiff may not obtain a preliminary injunction unless they can show that irreparable harm is likely, rather than merely possible. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). "[S]peculative injury does not constitute irreparable injury." *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 849 (9th Cir. 1985). Therefore, the Plaintiffs did not meet the irreparable harm standard necessarily for the preliminary injunction.

Next, the Plaintiffs argued that the proposed grazing was likely to cause irreparable harm to the fens on the Allotment. Cattle grazing can damage fens by compacting the soil, removing vegetation, and by "nutrient enrichment owing to direct deposit of bovine fecal waste and urine," which alters competitive balances among fen plant species. The Government argued that because of the small scale of authorized grazing in 2019, and the protective measures in place to avoid such effects or correct them before the next grazing season, the fens would not be impacted. The Court was satisfied with those steps taken by the Forest Service to mitigate the risk of irreparable harm and once again concluded that the Plaintiffs could not meet the standard necessary for a Preliminary Injunction.

2. ***W. Watersheds Project v. Bernhardt***, No. 2:19-cv-0750-SI, 2019 U.S. Dist. LEXIS 118112 (D. Or. July 16, 2019). *Author:* Sarah Liljefelt of Schroeder Law Offices.

Plaintiffs, environmental advocacy organizations, filed a lawsuit challenging the U.S. government's grant of a renewed grazing permit to Hammond Ranches, Inc. on four grazing allotments within Harney County, Oregon. *Western Watersheds Project v. Bernhardt*, 392 F.Supp.3d 1225 (Or. Dist. Ct. 2019). The plaintiffs alleged that Secretary of the Interior Ryan Zinke and the Bureau of Land Management ("BLM") acted arbitrarily and capriciously in

violation of the Administrative Procedures Act when they failed to follow the requirements of the National Environmental Policy Act ("NEPA"), the Federal Land Policy and Management Act ("FLPMA"), and the applicable BLM regulations. *Id*. at 1232. The Oregon District Court previously granted a Temporary Restraining Order to enjoin grazing on two of the allotments, and the issue before the court was whether a preliminary injunction should issue to enjoin grazing until the court issues a judgment on the substance of plaintiffs' claims. *Id*.

A plaintiff seeking preliminary injunction must show: 1) likelihood of success on the merits, 2) irreparable harm, 3) the balance of equities weighs in favor of injunction, and 4) injunction is in the public interest. *Id*. at 1233. Furthermore, the Ninth Circuit also employs the "serious questions" test under which serious questions going to the merits and a hardship balance that tips sharply towards the plaintiff can support issuance of an injunction, as long as the other injunction tests are met. *Id*. at 1233-34. Thus, the court addressed each element in turn.

Regarding plaintiffs' likelihood of success on the merits, grazing on federal lands is governed by the Taylor Grazing Act, FLPMA, and BLM's regulations issued thereunder. BLM's regulations specify the mandatory qualifications for an applicant to obtain a grazing permit, including a "satisfactory record of performance." *Id*. at 1235 (citing 43 C.F.R. § 4110.1(b)). In order to have a satisfactory record of compliance, the person or entity seeking the grazing permit must be in "substantial compliance with" regulations applicable to the permit. *Id*. (citing 43 C.F.R. § 4130.1-1(b)(1)(i)). BLM regulations applicable to grazing permits prohibit burning or destroying vegetation, and damaging or removing US property without authorization. *Id*. (citing 43 C.F.R. § 4140.1(b)). The regulations also prohibit users of public land from causing fires, or burning trees and grass without authorization. *Id*. at 1236 (citing 43 C.F.R. § 9212.1).

Here, the owners of Hammond Ranches, Inc. were previously convicted of causing fires on the grazing allotments. As a result of the convictions, as well as an alleged unsatisfactory record of performance not related to their convictions, BLM denied Hammond Ranches' application for renewal of their grazing permit in 2014. *Id*. at 1237-38. However, in 2018, President Trump executed Executive Grants of Clemency, pardoning the owners and commuting their sentences. *Id*. at 1239. Thereafter, Secretary Zinke instructed BLM to renew Hammond Ranches' grazing permit, and BLM issued a renewed permit. *Id*. at 1239-40. The court ruled that when a necessary qualification is impacted by underlying conduct regardless of conviction, a "pardon has little effect." *Id*. at 1246. Therefore, the court ruled that plaintiffs are likely to succeed in arguing that the decision to renew Hammond Ranches' permit was in violation of FLPMA and BLM's regulations, and arbitrary, capricious, and an abuse of discretion. *Id*. at 1246, 1248.

Further, FLPMA directs BLM to develop and maintain Resource Management Plans ("RMPs") that govern all aspects of public land management and grazing administration. *Id*. at 1236 (citing 43 U.S.C. § 1712). The land use plans relevant to the allotments in this case are the Steens Mountain Cooperative Management and Protection Area ("CMPA") Resource RMP and the Andrews Management Unit RMP. *Id*. Both RMPs were amended in 2015 by the Oregon Greater Sage Grouse Approved RMP Amendment ("GSG-ARMPA") that defines categories of sage grouse habitat and requires that certain renewals of livestock grazing permits and leases undergo NEPA analysis. *Id*.

Here, the court found that while a NEPA analysis is not required to be completed before a permit is renewed, there is not an exemption from NEPA's requirements; rather, FLPMA allows a limited grace permit for completion. *Id*. at 1249. Further, categorical exclusions may be issued under FLPMA to determine a NEPA analysis is not required when a permit or lease continues the current grazing management of the allotment. *Id*. The court found, however, that there was not "current grazing" occurring on the allotments because the permit was not renewed in 2014, resulting in no grazing in the interim. *Id*. Therefore, the court also held that plaintiffs were likely to prevail on the merits of their NEPA claim. *Id*. at 1249, 1251.

To complete the preliminary injunction analysis, the court determined that the balance of equities weighs in favor of issuing a preliminary injunction, and that a preliminary injunction was in the public interest. *Id*. at 1260, 1263. However, because defendants proposed an alternative grazing plan for the court's consideration that reduced grazing in the allotments during the case, and because plaintiffs did not meet their burden for a preliminary injunction based on the alternative grazing plan, the court only granted the preliminary injunction for grazing activities beyond that proposed in the alternative grazing plan. *Id*. at 1263-64. Therefore, the court allowed defendants to continue allowing a reduced level of grazing while the merits of the case are decided.

Ninth Circuit

1. ***Dine Citizens Against Ruining our Env't v. Bureau of Indian Affairs***, No. 17-17320, 2019 U.S. App. LEXIS 28676 (9th Cir. July 29, 2019). *Author: Connie Sue Martin of Schwabe, Williamson, and Wyatt.*[1]

This case addressed whether an Indian tribal business entity is a necessary party in an action challenging federal permits issued to the tribal entity for operations on the tribe's reservation, where the tribal entity's joinder in the suit is barred by sovereign immunity, and dismissal would leave the challengers of the permits without a forum or remedy. The case pit anti-coal environmental interests against a tribe with treaty rights to coal, and highlights the sometimes divergent interests of Indian tribes and their federal trustees.

The Navajo Mine is a 33,000-acre strip mine on the Navajo Nation reservation in New Mexico. Coal from the mine is sold to the Four Corners Power Plant, also on the Navajo reservation, to generate electricity that is distributed from the power plant west into Arizona over transmission lines that pass through lands reserved to the Navajo Nation and Hopi Tribe. The mine, power plant, and transmission lines have operated since the early 1960s. *Dine Citizens Against Ruining Our Environment* ("*Dine CARE"*), 2019 U.S. App. LEXIS 28676 at *6.

The power plant is owned by several utility companies, including the Arizona Public Service Company (APS). APS operates the power plant on behalf of all co-owners under a lease agreement with the Navajo Nation that was executed in 1960. Under the agreement, the mine sells coal exclusively to the power plant, and the power plant buys its coal exclusively from the mine. The Navajo Nation also authorizes easements for rights-of-way over Navajo lands for the

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Power Plant, and both the Navajo Nation and Hopi Tribe authorize easements for rights-of-way for power transmission lines that cross tribal lands. *Id*. at *7.

The coal resources on the Navajo Nation's tribal trust lands are its most valuable resource, specifically reserved under treaties with the United States. *See* Answering Brief of Appellee Navajo Transitional Energy Company, LLC, Case No. 17-17320, Dkt. Entry 34 ("Answering Brief"), at 5. Like the timber and commercial fishery resources managed by Northwest Indian tribes, the Navajo Nation enjoys fundamental treaty and inherent sovereign rights to develop its coal resources to advance its rights of self-determination. The mine and the power plant are key sources of revenue for the Navajo Nation, employing hundreds of Navajo tribal members and generating between 40 and 60 million dollars per year for Navajo public services. *Dine CARE*, at **7 - 8.

In 2011, APS and the Navajo Nation amended the lease governing power plant operations, and extended the term of the lease through 2041. BHP Billiton, the owner of the mine at the time, sought a renewal of the mine's existing surface mining permit, and a new surface mining permit that would allow operations to move to an additional area within the mine lease area. *Id*. at *8.

Because the mine and power plant are on tribal trust land, the amendment, permit renewal, and new permit required the approval of several bureaus of the Department of the Interior – the Office of Surface Mining Reclamation and Enforcement, the Bureau of Indian Affairs, and the Bureau of Land Management. The review also required coordination and cooperation with the National Park Service, the Fish and Wildlife Service, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the Navajo Nation, and the Hopi Tribe. *Id*. at **8 – 9.

In 2013, after decades of leasing its coal resources the Navajo Nation created the Navajo Transitional Energy Company (NTEC) to purchase and operate the mine as part of a broader tribal energy policy to transition (hence, the "Transitional" in the company name) the Navajo Nation's energy economy to renewable energy development and clean-coal technology. NTEC was formed as a wholly-owned Navajo entity and limited liability company under Navajo law, serving as an "arm and subordinate instrumentality of the Navajo Nation" with "all protections, privileges, benefits, and authorities" arising from its status as a Navajo tribal entity, including sovereign immunity. Answering Brief, at 11.

When NTEC purchased the mine, it became the applicant for the mining permits. The federal agencies issued a Record of Decision (ROD) in 2015 granting the approvals necessary for the continued operation and expansion of the mine. Since then, APS and NTEC have made financial investments of hundreds of millions of dollars in the mine and power plant. *Dine CARE*, at **8 – 10.

In 2016 a number of environmental organizations sued the federal agencies, challenging the 2015 ROD, seeking declarations that the agencies violated NEPA and the Endangered Species Act (ESA), to set aside the ROD, and to enjoin the agencies from authorizing any element of the mining operations pending compliance with NEPA, among other relief sought. APS intervened. NTEC also intervened, as a matter of right as the owner of the mine, for the limited purpose of filing a motion to dismiss under FRCP 19 and 12(b)(7) for failure to join a required party whose joinder is barred by sovereign immunity. *Id*., at **10 – 12.

Even though dismissal would have preserved the ROD, the defendant federal agencies opposed NTEC's motion, asserting that the federal government was the only party required to defend an action seeking to enforce compliance with NEPA and the ESA. The district court granted NTEC's motion to dismiss, concluding that NTEC had a legally protectable interest that could not be adequately represented by the federal agencies, sovereign immunity barred NTEC's joinder, and the litigation could not "in equity and good conscience," continue in NTEC's absence. *Id.*, at **12 – 13.

The environmental organizations appealed, contending that NTEC did not have a legally protected interest in the federal agencies' compliance with environmental laws, that the federal agencies could adequately represent that interest, and that even if NTEC were a required party, the litigation could continue in its absence under the "public rights exception" to traditional joinder rules. *Id.*, at *13.

The 9th Circuit Court of Appeals affirmed the district court's dismissal. The Court concluded that although the environmental organizations' challenge was to the NEPA and ESA processes, the purpose of the challenge was to prevent the operation of the mine and power plant. If the environmental organizations prevailed on appeal and the agency actions were vacated, NTEC's interest in the existing lease, rights-of-way, and surface mining permits would be impaired because without the proper approvals the mine could not operate, and the Navajo Nation would lose a key source of revenue in which NTEC had already substantially invested. *Id.*, at **19 – 20. And, while the federal agencies had an interest in defending their decisions, their overriding interest must be in complying with NEPA and the ESA, which differed in a meaningful way from NTEC's and the Navajo Nation's sovereign interest in ensuring that the mine and power plant continue to operate and generate revenue for the Navajo Nation. *Id.*, at *25.

The Court applied each of the FRCP 19(b) factors and determined that none of them warranted reversal of the district court's dismissal, even though it left the environmental groups without a remedy. The Court held:

> We have recognized that the lack of an alternative remedy "is a common consequence of sovereign immunity." . . . Accordingly, "we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." . . . Mindful of the "wall of circuit authority" in favor of dismissing an action where a tribe is a necessary party, . . . we agree with the district court that this litigation cannot, in good conscience, continue in NTEC's absence.

Id., at *32 (internal citations omitted).

Finally, the Court addressed the "public rights" exception, a limited exception to traditional joinder rules that applies in cases of that transcend the private interests of the litigants and seeks to vindicate a public right, under which a necessary party will be deemed not to be indispensable, allowing the litigation to continue in the party's absence. The Court held that the exception does not apply where the litigation would "destroy the legal entitlements of the absent parties." *Id.*, at *33. "Here, although Plaintiffs nominally seek only a renewed NEPA and ESA process, the implication of their claims is that Federal Defendants should not have approved the mining activities in their exact form. The result Plaintiffs seek, therefore, certainly threatens NTEC's legal entitlements." *Id.*, at **38-39.

2. ***Protect our Cmtys. Found. v. Lacounte***, No. 17-55647, 2019 U.S. App. LEXIS 28632 (9th Cir. Sep. 23, 2019). *Author: Jennifer J. Hammitt of Marten Law.*

While we may hear a lot about the death of deference from pundits and court watchers these days, deference to Agency decision-making in NEPA challenges is still very much alive and well, as shown by the Ninth Circuit's decision in *Protect our Communities Foundation v. Lacounte*.

In this case, Plaintiffs Protect our Communities Foundation, a citizens' group, challenged a decision from the Bureau of Indian Affairs ("BIA") to approve an industrial scale wind facility approximately 60 miles east of San Diego. The project, known as the Tule project, included a total of 85 turbines on a combination of federal and tribal lands, and thus required approval from BIA and the Bureau of Land Management ("BLM"). Like any major construction project that requires federal approval, the Agencies involved were required to prepare an Environmental Impact Statement ("EIS") and evaluate alternatives under the National Environmental Policy Act ("NEPA"). Also, like any major construction project, this so-called "hard look" NEPA analysis resulted in a challenge from a group opposed to the project due to impacts on the protected golden eagle and other avian species that would unavoidably collide with the turbines and lose breeding territory.

The Ninth Circuit upheld the District Court's grant of summary judgment to the defendant Agencies (and the defendant-intervenor Ewiiaapaayp Band of Kumeyaay Indians, which supported the project). The Court found that the Agencies' EIS and Record of Decision ("ROD") for the 85-turbine project met the requirements of "hard-look" analysis, and that alternatives were sufficiently raised and considered. On the specific question of the golden eagle, the Court found that the Agencies' EIS recognized the impacts on eagle populations and territories and appropriately considered mitigation measures. Finally, the Court rejected a specific challenge that alleged that the Agencies' should have required the developer to obtain a "take" permit (allowing harm to a protected species) under the Bald and Golden Eagle Protection Act ("BGEPA") – while the project will require a permit before any "take" can occur, the permit is not required at the pre-construction stage (when the Fish and Wildlife Service ("FWS") had not yet finalized its permit guidelines). And, as the Court is careful to point out, the BGEPA and Endangered Species Act don't prohibit every killing of every eagle – just "take" without a permit.

In sum, the decision shows that Courts, including the Ninth Circuit, are still willing to defer to Agencies on admittedly close cases where they are balancing competing interests as part of NEPA review. The deciding factor here appears to have been the support of the Tribe; whereas FWS has a mission to protect wildlife, BIA has a "special concern to advance the interests of the Indian Nations," who sought the revenue the project would provide. The decision also shows that while NEPA remains a powerful tool for groups opposed to projects to slow or stop construction, it remains a procedural and not a substantive law – an agency's decision must be "arbitrary and capricious," or "irrational," to be overturned even if more protective alternatives exist. Therefore, Agency decisions that show this "hard look" review and sufficient support from affected communities will likely be upheld even in the face of detrimental impacts to protected species like the golden eagle.

Oregon Supreme Court

1. ***E. Or. Mining Ass'n v. Dep't of Envtl. Quality***, 365 Or. 313, 445 P.3d 251 (Or. 2019). *Author: Alexa Shasteen of Marten Law.*[2]

In Eastern Oregon Mining Assoc. v. Department of Environmental Quality, 365 Or. 313 (2019), the Oregon Supreme Court upheld the Oregon Department of Environmental Quality's (DEQ) regulation of in-stream turbidity caused by suction dredge mining. The Court held that DEQ had authority to regulate the activity under the Clean Water Act (CWA) authority delegated to it by the U.S. Environmental Protection Agency (EPA).

Suction dredge mining involves, in lay terms, vacuuming water and sediment from a streambed, separating out heavy metals like gold, and discharging the rest of the material back into the waterway. As the Court explained it, "[i]n addition to discharging the leftover sediment and water, suction dredge mining creates a turbid wastewater plume and can remobilize pollutants, such as mercury, that otherwise would have remained undisturbed and relatively inactive in the sediment."

The Clean Water Act's Division of Regulatory Authority

Suction dredge mining requires a Clean Water Act (CWA) permit because the federal CWA prohibits point source discharges of pollutants into waters of the United States without a permit issued by the EPA or the U.S. Army Corps of Engineers (Corps). Discharges of most pollutants are permitted by EPA under Section 402 of the CWA, the National Pollutant Discharge Elimination System (NPDES). Most states, including Oregon, have authority to administer the federal NPDES program at the state level. In Oregon, DEQ is the permitting authority. Unlike other pollutants, however, discharges of "dredged material" are permitted by the Corps under Section 404 of the CWA. This case is about the contours of the division between the two agencies' authorities.

NPDES General Permits

This case concerns DEQ's issuance of a "general permit" for suction dredge mining. Under the NPDES program, a discharger may be covered by an "individual" permit or a "general" permit. A general permit "cover[s] one or more categories or subcategories of discharges…except those covered by individual permits, within a geographic area." 40 C.F.R. § 122.28(a)(1). Individual operators then apply for coverage under the general permit, which contains permit conditions generally applicable to the type of activity permitted under the general permit. Applying for coverage under a general permit is typically a much simpler process than applying for an individual NPDES permit.

Procedural History

The Court's recent decision follows a complicated 14-year-long procedural history. The case first arose when the Oregon Environmental Quality Commission (DEQ's predecessor) issued a

general permit for suction dredge mining in Oregon in 2005. On appeal by both miners and environmentalists, the Oregon Court of Appeals concluded that suction dredge mining created both turbid wastewater plumes and dredged spoil, which required permitting by the EPA (or DEQ, through its delegated authority) and the Corps, respectively.

Both sides appealed to the Oregon Supreme Court, but after the Court granted review, the permit expired and the case was dismissed as moot. In 2010, DEQ issued a new permit (the 700-PM permit). The permit expired while on appeal to the Court of Appeals, which that court dismissed as moot. The Supreme Court reversed because the issue "was capable of repetition yet evading review." It remanded the case back to the Court of Appeals, which exercised its discretion to consider one of Petitioner Eastern Oregon Mining Association's assertions of error: that DEQ lacked authority to issue a permit for suction dredge mining. The Court of Appeals affirmed DEQ's authority to issue the permit.

The Court's Decision

On appeal to the Supreme Court, Petitioners argued that DEQ lacked authority to issue a permit for suction dredge mining because: (1) the procedure does not add a pollutant to a waterway and is therefore outside EPA's permitting authority, and (2) even if suction dredge mining did add a pollutant to a waterway, that pollutant is unprocessed dredged material subject to the Corps' permitting authority, not EPA's or DEQ's.

Addition of a Pollutant

Petitioners first argued that EPA has permitting authority only over the "discharge of a pollutant," which is defined in statute to mean "any addition of any pollutant to navigable waters from any point source." Because suction dredge mining does not add anything to the water, petitioners argued, EPA has no authority to permit the practice.

The Court quickly rejected petitioners' argument as contrary to established Ninth Circuit law and EPA interpretations (although their authority is not binding on the Oregon Supreme Court).

Dredged Material

The heart of the case centers on the meaning of "dredged material." Petitioners argued that, "even if suction dredge mining adds pollutants to the water, the material discharged as a result of suction dredge mining constitutes 'dredged material' over which the Corps has exclusive permitting authority." DEQ maintained "that, in interpreting and administering their regulations, the Corps and the EPA reasonably have concluded that the material is processed waste subject to the EPA's permitting authority rather than unprocessed dredged material subject to the Corps' permitting authority and that [the Court] should defer to those agencies' reasonable interpretation."

A full discussion of the Court's analysis on this point is beyond the scope of this article, but in short, the Court's analysis proceeded as follows. First, the Court concluded that neither the CWA itself nor its implementing regulations squarely answered the question of whether discharges from suction dredge mining constitute "dredged material" subject to the Corps' permitting authority. However, "from 1986 to 2018, the EPA and the Corps have been on the same page…. [B]oth agencies consistently have recognized that processed waste discharged as a result of suction

dredge mining is a pollutant that requires a permit from the EPA under section 402. Similarly, they consistently have concluded that the discharge resulting from suction dredge mining is not 'dredged material' that requires a permit from the Corps under section 404." Finally, the Court concluded the Agencies' interpretation was "reasonable" and deserving of deference.

Dissent

Justice Balmer dissented, reasoning that the Corps' 2008 definition of "dredged material" as "material that is excavated or dredged from waters of the United States" was dispositive and should have resulted in the Court reaching the opposite conclusion. Administrative law connoisseurs interested in early interpretations of Auer deference post-Kisor will want to read Justice Balmer's dissent in full. *See Auer v. Robbins*, 519 U.S. 452 (1997) (establishing that courts must defer to reasonable agency interpretations of their own ambiguous regulations); *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) (exploring the limits of *Auer* deference and establishing a five-step analysis to determine whether to apply it).

Conclusions and Implications

Suction dredge mining in Oregon may proceed under the most recent 700-PM permit, which was issued in 2015. That permit was modified in 2018 to reflect new Oregon law banning motorized mining in essential salmon habitat. That law and the resulting litigation was previously covered in-depth by this publication. See *Bohmker v. Oregon*, 903 F.3d 1029 (9th Cir. 2018); *Campbell v. Oregon Dep't of State Lands*, 2017 WL 3367094 (D. Or. 2017). The current 700-PM permit expires January 1, 2020. This means DEQ should initiate a new permitting process soon (although DEQ sometimes fails to comply with NPDES permitting deadlines).