

E – OUTLOOK

ENVIRONMENTAL HOT TOPICS AND LEGAL UPDATES

Year 2020
Issue 3

Environmental & Natural Resources Law Section
OREGON STATE BAR

Editor's Note: Any opinions expressed in the articles below are those of the author alone.

Climate Change Litigation: Oregon Rejects Expansion of Public Trust Doctrine

[Eric Christensen](#),¹ [William Enoch](#),² [David Weber](#)³ & [Gus Winkes](#)⁴

Beveridge & Diamond

On October 22, 2020, the Oregon Supreme Court [rejected](#) claims by youth climate activists seeking to expand the state's public trust doctrine to address climate change. The court ruled that the state did not have an affirmative "fiduciary" obligation to undertake measures to reduce greenhouse gas (GHG) emissions to protect environmental resources, such as navigable waters, that are subject to the public trust doctrine.

Key Takeaways:

- In a 6–1 decision authored by Justice Lynn Nakamoto, the court declined to accept the plaintiffs' invitation to either expand the boundaries of the public trust doctrine to accommodate additional resources or impose upon the state a heightened duty of protection for covered resources.

¹ Eric Christensen is Of Counsel at Beveridge & Diamond's Seattle office. Eric is a leading energy practitioner in the Pacific Northwest, focusing on assisting renewable and traditional energy companies, as well as major energy consumers, to navigate the complex legal and regulatory systems governing the nation's energy industry. Before entering private practice, Eric served as Assistant General Counsel at Snohomish County (WA) Public Utility District, one of the largest public utilities in the U.S., and as a trial attorney at the U.S. Federal Energy Regulatory Commission (FERC). He received his J.D. from Stanford Law School.

² William Enoch is an Associate at Beveridge & Diamond's Seattle office whose practice focuses on complex environmental litigation, including CERCLA and other issues arising from contaminated sites. Prior to his work at Beveridge & Diamond, Will clerked on the Washington State Court of Appeals, Division II. He received his J.D. from Lewis & Clark Law School.

³ David Weber is the Managing Principal and co-founder of Beveridge & Diamond's Seattle office. He leads the firm's air and climate change work for the western states. His practice is focused on environmental litigation and compliance counseling. He received his J.D. from University of Oregon School of Law.

⁴ Gus Winkes is an Associate in Beveridge & Diamond's Seattle office. His practice centers on contaminated site cleanup and litigation. He also advises clients on regulatory compliance and defends enforcement actions under federal and state water quality, hazardous waste, air quality, and climate change laws. He received his J.D. from the University of Michigan Law School.

- While the court left open the possibility that the doctrine could be expanded in the future, its decision, along with the [Ninth Circuit's recent rejection](#) of similar claims by a similar group of plaintiffs, is a setback for efforts to employ the public trust doctrine to force action on climate change.
- It remains to be seen whether the court would be receptive to public trust arguments involving damage claims for specific navigable waters protected by the trust, rather than plaintiffs' abstract claims regarding damage to those resources generally arising from climate change.

Background – The Public Trust Doctrine

The public trust doctrine has roots in ancient Roman, Spanish, and English property law, which held that the Crown owned all submerged and tidal lands in trust for its subjects and that this trust relationship obliged the Crown to ensure that the public's right to navigate these waters was not unreasonably impaired. After the American Revolutionary War, the Crown's trust ownership of lands transferred to the former colonies, as well as new states as they entered the Union. In Oregon, as with many other states, the doctrine was expanded to include all navigable waters, not just tidal waters.

This once-obscure doctrine gained prominence in 1970 when legal scholar Joseph Sax published a [highly influential law review article](#) arguing that the doctrine should serve as a legal framework for courts to evaluate environmental issues. In recent years, this doctrine has been identified as a potential tool to fight climate change through the courts, as exemplified by the [amicus brief](#) filed by 107 law professors with the Oregon Supreme Court.

Chernaik v. Brown

Youth climate activists filed the lawsuit in 2011 against former governor John Kitzhaber. They sought declaratory relief that the public trust doctrine covers resources such as the atmosphere, wildlife, and fish. The plaintiffs also sought a ruling that Oregon, by failing to adequately regulate and reduce carbon dioxide emissions, had failed to uphold the fiduciary obligations imposed by the public trust doctrine. Their case was initially dismissed by Oregon's lower courts on procedural grounds in 2012, but the Oregon Court of Appeals [reversed](#) and remanded in 2014, holding that the plaintiffs had a right to seek declaratory relief.

Once the State was required to address the substance of the plaintiffs' claims on remand, it argued two main points: First, the public trust doctrine does not extend to the atmosphere, to non-navigable waters of the state, or to fish and wildlife. Second, unlike the duties

associated with administering private trusts, the public trust doctrine does not impose fiduciary duties upon the state. The circuit court again granted the State's motion to dismiss, and the case ultimately wound its way to the Oregon Supreme Court.

Justice Nakamoto distilled the case to two primary issues: (1) whether the public trust applies to natural resources beyond submerged and submersible lands and navigable waters; and (2) "whether the public trust doctrine imposes a fiduciary duty upon the state to protect trust resources from the negative impacts of climate change."

The Scope of Protected Resources

The Oregon Supreme Court has previously held that the public trust doctrine covers all submerged and submersible lands as well as all navigable water. The court has not extended the doctrine to cover all waters of the state or to wildlife (although wildlife are protected by the "wildlife trust," which is similar to, but distinct from, the public trust doctrine).

As the public trust doctrine is based in the common law, the court recognized that it is not fixed but "can be modified to reflect changes in society's needs." The court noted that previous expansions "all resulted from disputes involving a specific body of water and furthered the primary purpose of the doctrine—protecting the public's right to use navigable waters for fishing and navigation."

The plaintiffs proposed a two-pronged test to justify the expansion of the doctrine to additional resources—e.g., the atmosphere. Under the test, the doctrine would cover all resources that were (1) "not easily held or improved" and (2) "of great value to the public for uses such as commerce, navigation, hunting, and fisheries." Rejecting the proposed test, the court noted that it had no "practical limitations" and that it was "difficult to conceive of a natural resource that would not satisfy [the test]." The court ruled that the plaintiffs had not established the legal basis for an expansion beyond its current limits to include protection of the atmosphere. The court also avoided articulating any test that could be used to expand the doctrine to cover additional natural resources.

A Narrow View of the Scope of State's Duties as Trustee

Because submerged and submersible lands and navigable waters are trust resources, the court evaluated the scope of the state's responsibilities for protecting those resources.

The plaintiffs argued that, as "trustee," the state must act similarly to that of a trustee of a private trust, which includes a fiduciary duty to protect trust resources. The court recognized that the state and private trustees share certain responsibilities, including that

it must satisfy the general standard of reasonableness. However, the court concluded that the state's obligations do not encompass *all* the responsibilities of a private trustee and declined to find, "under the legal theory . . . articulate[d] in this case," that "the state has fiduciary obligations under the public trust doctrine that require . . . [it to] protect public trust resources from the effects of climate change."

Chief Justice Walters issued a long and impassioned dissent, concluding: "This court can and should issue a declaration that the state has an affirmative fiduciary duty to act reasonably to prevent substantial impairment of public trust resources."

Broader Implications of Decision

The Oregon Supreme Court's opinion is a setback to efforts to invoke the public trust doctrine as a basis for litigation seeking to limit GHG emissions. The court rejected key elements of this theory—that the public trust doctrine should be expanded to treat the atmosphere as a public trust resource and that the fiduciary obligations inherent in the public trust doctrine require the government to take affirmative measures to protect trust resources.

That said, the opinion expressly holds the door open for future litigation that might reach a different result, as the court did not "foreclose the possibility that the doctrine could expand to include other resources in the future" or "foreclose the possibility that the doctrine might be expanded in the future to include additional duties imposed on the state." The court may be signaling that it would be receptive to a more refined and restrictive test than that proposed by the plaintiffs.

Furthermore, the court reasoned that, because the case did not involve claims of damage to specific navigable waters protected by the trust, but rather abstract claims regarding damage to those resources arising from climate change, it was inappropriate to issue any declaration requiring action by the state. Thus, if a plaintiff brought a subsequent suit alleging, for example, that the public trust doctrine covers a specific body of water damaged by the effects of climate change, the outcome could potentially be different.

In addition, while this case limits the public trust doctrine as legal basis for seeking to force action on climate change in Oregon, it does not foreclose other theories. For example, a number of public entities have asserted that energy companies are responsible for climate change under common law nuisance and similar theories. The U.S. Supreme Court is [set to decide](#) whether these cases should be heard in state or federal courts. Because those lawsuits are proceeding on different legal theories, the Oregon Supreme Court's decision will not affect them.

Finally, earlier this year, Oregon’s Governor Kate Brown issued Executive Order No. 20-04 directing state agencies to take actions to reduce and regulate GHG emissions. The order directs actions to reduce GHG emissions in Oregon by at least 45 percent below 1990 emissions levels by 2035. The order directs further actions between 2035 and 2050 to reduce emissions by at least 80 percent below 1990 emissions levels by 2050. Details on the order are available [here](#).

*EPA’s Online Guidance Database:
A Makeover for the Agency’s Guidance Documents*

[Priscilla \(Polly\) Hampton](#), [Christina Bonanni](#) & [Marc R. Bruner](#)

Perkins Coie

The U.S. Environmental Protection Agency (EPA) recently adopted a final regulation governing the issuance of guidance documents, which the agency historically has used to provide direction to agency staff, other governmental agencies, the regulated community, and interested stakeholders on a wide variety of technical and regulatory matters under its purview. In this update, we discuss the impetus for the new rule, what the rule aims to accomplish, and potential implications for the regulated community, environmental groups, and others who may be affected by the new rule.

Background

EPA’s new final rule, which was published in the Federal Register on October 19, 2020, “establishes the procedures and requirements for how [EPA] will manage the issuance of guidance documents consistent with the Executive Order 13891.” [85 Fed Reg. 66230 \(Oct. 19, 2020\)](#). This October 2019 executive order directed all federal agencies to “set forth processes and procedures for issuing guidance documents.” See [84 Fed. Reg. 55235](#), Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents” (Oct. 15, 2019). EPA’s final rule does four key things:

- Defines “guidance document” as “an Agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation” subject to a few specific exclusions
- Establishes general requirements and procedures for issuing certain guidance documents

- Carves out a category of “significant guidance” documents, as defined in E.O. 13891, which require at least a 30-day public notice and comment period, and a follow-up public response by the agency to major concerns (with some exceptions for exigency, safety, health and similar)
- Establishes procedures for the public to petition for the modification or withdrawal of active guidance documents or alternatively, for reinstatement of a rescinded guidance document; and requires that EPA respond to such petitions within 90 days of receipt

Whether a document is classified as “significant” is based on the following criteria as set forth in E.O. 13891: (1) an annual effect on the economy of \$100 million or more; (2) creation of a serious inconsistency or interference with planned or executed actions of another agency; (3) a material alteration of the impacts on the budget of entitlements, grants, user fees, or loan programs or the rights and obligations of recipient of such; and (4) novel legal or policy issues of legal mandates or the president’s priorities, or established processes of regulatory planning and review. The determination of whether a guidance document is “significant” will be made in consultation with the EPA Office of Information and Regulatory Affairs. Additionally, all guidance issued by EPA’s regional offices must go through the presidentially appointed EPA official tasked with administering the national program under which the guidance arises.

According to Administrator Andrew Wheeler, the goal of this rule is to improve agency transparency. Speaking at an online event, Administrator Wheeler touted the agency action as “probably the biggest change in at least a generation,” stating that “[t]he American public has a right to this information. They have a right to a seat at the table and they have a right to understand what the government is doing, why they’re doing it, how it will affect them.”

There are thousands of EPA guidance documents, which the agency historically has used to clarify EPA regulations and technical matters. In many cases, however, where guidance documents were either abandoned or replaced by newer guidance, the status of the older guidance remained unresolved. In establishing the new online database, EPA explicitly defined an “active guidance document” as “a guidance document in effect that the EPA expects to cite, use or rely upon,” and will affirmatively rescind guidance that is no longer applicable. Only active guidance documents will be posted to the online database.

Effect on Challenges to Agency Guidance

Challenges to agency guidance have routinely been dismissed by the courts because such guidance is not legally binding and therefore is not considered final agency action subject to judicial review. For agency action to be reviewable by a court, the U.S. Supreme Court has established that the action must constitute “final agency action” under the federal Administrative Procedure Act, which means that the action (1) must represent the “consummation” of the agency’s decision-making process; and also (2) must determine legal rights and obligations or give rise to direct and appreciable legal consequences. *Bennett v. Spear*, 520 U.S. 154 (1997).

One of the more notable recent court cases involved a [2018 guidance memorandum](#) from the then-assistant administrator for EPA’s Office of Air and Radiation that backtracked on EPA’s longstanding “once in, always in” policy for classifying “major” sources under Section 112 of the Clean Air Act. The U.S. Court of Appeals for the District of Columbia Circuit held that while the guidance articulates what EPA believes to be the only permissible interpretation of Section 112, it “does not revoke or amend or single permit,” nor does it “bind state permitting authorities or assure regulated entities of the ability to reclassify” their sources of air emissions. The court thus found that the guidance memorandum “does not have a single direct and appreciable legal consequence.” *California Communities Against Toxics v. Environmental Protection Agency*, 934 F.3d 627, 637-38 (D.C. Cir. 2019). As a result, it was not judicially reviewable.

In a similar case, the Sierra Club challenged [another 2018 guidance memorandum](#) issued by EPA under the Clean Air Act, which advised on how to determine whether an air emissions source exceeds a “significant impact level” for purposes of the the Prevention of Significant Deterioration permitting program. Relying on its decision in the *California Communities* case, the D.C. Circuit found that the guidance did not constitute judicially reviewable final agency action, on the ground that state permitting authorities retained discretion on whether to use the guidance on a case-by-case basis and were not bound to follow it. *Sierra Club v. Environmental Protection Agency*, 955 F.3d 56, 63-65 (D.C. Cir. 2020).

Because these cases predated the EPA’s final rule, the courts did not have an opportunity to address whether the challenged guidance documents would be classified as “significant.” But going forward, it is possible that EPA guidance that historically has been deemed judicially unreviewable will be subject to court review based on whether the guidance meets the significance threshold, and if so, whether the process for adopting the guidance meets the requirements for public notice and comment and for responding to any major concerns raised in the comments.

Pros, Cons, and Implications

EPA's new rule has received mixed reviews. Proponents argue that guidance documents—while not legally binding—affect compliance practices by providing greater clarity to the regulatory community on how EPA is likely to interpret and enforce its rules. Under this line of reasoning, the effect of the new rule should be to produce guidance that provides greater clarity and direction to the regulated community.

Opponents of the new rule fear that it may impose heavier burdens on EPA, which may in turn reduce the amount of new guidance and the rate at which it is issued. Specifically, where EPA guidance materially impacts compliance practices, it may very well meet the definition of “significant,” thus triggering public notice and comment and a duty on EPA's part to respond to substantial issues raised in the comments. This would minimize the distinctions between the process for adopting guidance documents and the process for a formal rulemaking, which may incentivize the agency to proceed by way of regulations instead of issuing informal guidance. In turn, this may blunt the utility of EPA's long-standing practice of issuing guidance to provide greater clarity and direction on complex regulatory and technical issues. Additional criticisms of the rule suggest that the online database reflects an attempt to “clean house” on guidance documents issued by previous administrations.

Takeaways

A number of significant questions persist. A new administration could seek to rescind the new rule, potentially as part of a broader realignment of environmental priorities. If the new rule stands, it remains to be seen how the identification of “current guidance” will be used to limit the effectiveness of older guidance documents. It also remains to be seen how the new petition process for modifying, withdrawing, or reinstating guidance might affect agency resources and practices, and whether this process could result in fewer active guidance documents or generate increased litigation to challenge EPA guidance decisions in response to such petitions. Despite the preexisting restraints on judicial review of EPA guidance, courts may also be called on to determine whether new guidance qualifies as “significant” under the new rule, and if so whether the notice and comment requirements have been satisfied prior to adoption.

Regardless of what the future holds, in these early stages of EPA's implementation of its new rule, interested parties should engage with EPA to help determine which guidance is applicable for their specific projects and programs.

Oregon Releases Updated Ecological Risk Assessment Guidance

[Gus Winkes](#)⁵ & [Olivia Parish](#)⁶

Beveridge & Diamond

On September 29, 2020, the Oregon Department of Environmental Quality (DEQ) released updated guidance on [Conducting Ecological Risk Assessments](#) to aid in evaluating ecological risks at contaminated sites and in determining whether, based on those risks, remedial action is required. The guidance identifies circumstances under which ecological risk assessments (ERAs) are necessary during remedial investigations and options for conducting those assessments.

The guidance includes clarifications concerning preliminary scoping and exclusions from the ERA process, which may result in investigation efficiencies at some sites. Additional information on cumulative risk assessment methods may also help to standardize ERAs at sites with multiple contaminants. Finally, in conjunction with the primary ERA guidance document, updated ecological risk-based concentrations (RBCs) for a range of contaminants and exposure pathways can be found in DEQ's [Tables and Appendices for: Conducting Ecological Risk Assessments](#). The ecological RBCs set default values for acceptable risk levels, and practitioners should review these closely to determine if the changes may affect the need for remedial action at specific sites.

When conducting ERAs, reference also should be made to companion guidance on [Decision Unit Characterization](#). DEQ is treating the ERA guidance as a living document and has requested ongoing feedback from stakeholders.

Key issues addressed in the ERA guidance include:

- **Scoping the ERA.** As a preliminary step, scoping involves the assembly of basic information to describe ecological features and species at the site, and evaluates the potential for complete exposure pathways for ecological receptors. Scoping is essential to determine if an ERA is needed. For simple sites where ecological exposures are unlikely, a screening checklist may be employed for scoping. For all other sites, a more rigorous exposure pathway assessment should be conducted in accordance with the conservative methods set forth in the guidance. If the scoping identifies complete exposure pathways and there are no applicable exclusions, an ERA is required.

⁵ Gus Winkes is an Associate in Beveridge & Diamond's Seattle office. His practice centers on contaminated site cleanup and litigation. He also advises clients on regulatory compliance and defends enforcement actions under federal and state water quality, hazardous waste, air quality, and climate change laws. He received his J.D. from the University of Michigan Law School.

⁶ Olivia Parish is a Paralegal Assistant with Beveridge & Diamond's Seattle office. She regularly provides litigation support on a range of matters and develops internal and client-facing research and analysis on policy and regulatory issues. Her substantive background includes state and federal water quality, contaminated site, and air quality laws.

- **ERA exclusions.** ERAs will not be required when the “de minimis size of the site results in a low potential for meaningful exposure.” The size exclusion is available if sites have less than 0.5 acres of exposure area, the area adjacent to the site must not contain a terrestrial exposure area greater than 0.5 acres, and if threatened and endangered species and their critical habitat are not present within 1/4 mile of the site boundary. However, exclusions do not apply for “aquatic and sensitive environments,” “areas where threatened or endangered ... species are likely” to occur, and “areas where high concentrations of contaminants are known or suspected to be present that could represent acute toxicity or an ongoing source to other environments.”
- **Risk assessment methods.** DEQ follows EPA’s standard ERA process to determine whether the site poses an unacceptable ecological risk. For simple sites, a Tier I screening-level risk assessment, which compares contamination concentrations to default ecological RBCs developed by DEQ, may be appropriate. Tier II screening allows for site-specific adjustments to the RBCs, such as bioaccumulation factors, organic carbon, or prey consumption rates. If adjustments are made, the basis for the adjustments must be documented. Tier III ERAs are more complex than the standard screening frameworks and “use additional endpoints to complete the risk assessment for site-specific receptors.” Importantly, Tier III methods must be approved by DEQ for each site.
- **Updated ecological RBCs.** The guidance includes updated ecological RBCs tables to use, or adjust for use, in the risk assessments. RBCs “are receptor- and media-specific concentrations that represent acceptable risk to plants, invertebrates, fish, birds, and mammals within terrestrial and aquatic environments.” However, updates to sediment RBCs were not completed for the new guidance.
- **Cumulative risk assessments.** Because contaminated sites often include multiple contaminants, the guidance clarifies approaches for estimating the cumulative risks from exposure to all relevant contamination.

The updated ERA guidance should be consulted by contaminated site practitioners in Oregon. The clarifications to the ERA scoping process and exclusions for terrestrial ecological evaluations may provide opportunities to streamline site investigations. The updated ecological RBCs will be relevant to determining whether remedial action at contaminated sites is required to protect potential ecological receptors from adverse effects. Finally, the detailed content on completing basic cumulative risk assessments may standardize the analysis of ecological risks from multiple contaminant exposures.