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Recent Environmental Cases and Rules

Environmental & Natural Resources Section — Oregon State Bar
Chris Thomas, Editor — November 2020

Editor's Note: This issue contains selected summaries of judicial opinions and administrative developments between June and September 2020.

A special thank you to our talented contributors for their summaries: Dallas DeLuca of Markowitz Herbold PC; Ryan Shannon of the Center for Biological Diversity; Matthew D. Query of Yockim Carollo LLP; Drew Hancherick of Lewis & Clark Law School; Lizzy Pennock of Lewis & Clark Law School; and Geoff Tichenor of Stoel Rives LLP.

If you are interested in summarizing cases or rules, please contact the editor.

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Ninth Circuit

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1. ***Northwest Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs***, -- F. Supp. 3d --, No. 3:18-cv-00437-HZ, 2020 U.S. Dist. LEXIS 147446 (D. Or. Aug. 15, 2020)

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Ninth Circuit

1. ***Pac. Choice Seafood Co. v. Ross***, 976 F.3d 932 (9th Cir. Sept. 25, 2020).
   Author: Dallas DeLuca of Markowitz Herbold PC.

Plaintiffs challenged the decision of the National Marine Fisheries Service ("NMFS") to cap a group of related companies' aggregate shares of the quota of the Pacific non-whiting groundfish fishery at 2.7 percent of the total quota. NMFS and the Pacific Fishery Management Council set that cap in 2010 to prevent, as required by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, any quota "holder" from "acquir[ing] an excessive share of the total limited access privileges" to a single fishery subject to a quota system, 16 U.S.C.A. § 1853a(c)(5)(D), such as the non-whiting groundfish fishery. To arrive at the 2.7 percent cap, the Council and NMFS considered, during a multi-year investigation, a variety of factors, including per vessel profitability and "other issues such as bargaining, market power, and types of relationships that may influence the operation of the fishery." *Pac. Choice Seafood Co. v. Ross*, 976 F.3d 932, 937 (9th Cir. 2020) (internal quotation marks omitted).

At the same time, NMFS implemented a rule to enforce the "excessive share" statute by including entities under common control as a single entity for purposes of determining compliance with a quota cap. *Id.* at 937-38. NMFS promulgated a rule that no entity can "control" quota share (also called "limited access privileges") above a cap, and that "control" means the "'ability through any means whatsoever to control or have a controlling influence' over an entity holding quota share. 50 C.F.R. § 660.140(d)(4)(iii)(H)." *Id.* at 938.

Plaintiff Pacific Choice Seafood through itself and related entities (collectively, plaintiffs) controlled 3.8 percent of the quota. That control of quota above the cap triggered the divesture requirement in 50 C.F.R. 660.140(d)(4)(v). 976 F.3d at 938. Pacific Choice divested and then sued claiming that NMFS misinterpreted the term "excessive share" in the statute by considering per vessel profit instead of market power as the controlling factor, and claiming that the NMFS acted arbitrarily and capriciously by not considering all factors when setting the maximum quota per entity. 976 F.3d at 939. Plaintiffs also challenged the rule defining "control."

First, plaintiffs contended that "excessive share" means market-power "conditions of monopoly or oligopoly", *id.*, and that although NMFS could consider other factors, the cap could be no lower than a cap justified by market-power. *Id.* at 940. In other words, if market-power indicated that no single participant should have no more than 10% of the allocation of quota, NMFS could not use other factors to set a lower cap. The court engaged in an extensive analysis under *Chevron* deference and concluded that because Congress had not defined "excessive share" NMFS was entitled to deference in interpreting and applying that term. The court analyzed the context of the 2006 Reauthorization Act and concluded that NMFS was reasonable in interpreting "excessive share" to allow it to set a lower cap than market-power alone would require. *Id.* at 941. And, here, considering profit-per-vessel for smaller market participants was within the scope of deference to allow NMFS to reduce the cap-size. *Id.* The court also reviewed the record and concluded that setting the cap at 2.7 percent was not arbitrary and capricious because, among other reasons, it was within the range of options provided by the economic analysis that NMFS relied on. *Id.* at 942-44.

Plaintiffs also lodged statutory interpretation and APA challenges to NMFS's rule defining "control." That rule, 50 C.F.R. § 660.140(d)(4)(iii)(H), allowed NMFS to aggregate together various entities to determine that plaintiffs, combined, exceeded the 2.7 percent cap. Plaintiffs contended that because the word "control" was not in the statute, NMFS erred in creating a definition for the word "control" and applying it to the statute. The court noted that the statute provides that NMFS can set a cap to "'establish[ ] a maximum share ... that a [share] holder is permitted to hold, acquire, or use.' 16 U.S.C. § 1853a(c)(5)(D)(i)." 976 F.3d at 944. The court rejected the statutory challenge because the word "acquire" in the statute means "control" and that the word "use" also can mean "control." *Id.* The court also rejected the APA challenge because the NMFS definition of "control" was, although broad, not without limit. Also, the court concluded that it did not need to decide if the rule was too broad because the plaintiffs met even a narrow definition of "control" because all six entities were owned by Frank Dulcich or by a company he controls. *Id.* at 945.

2. ***Nat'l Family Farm Coal. v. EPA***, 966 F.3d 893 (9th Cir. July 22, 2020).
   Author: Ryan Shannon of the Center for Biological Diversity.

Before Circuit Judges Smith, Watford & Nelson. Opinion by Judge Nelson; Concurrence by Judge Nelson, and Dissent by Judge Watford

Several environmental petitioners (collectively "Petitioners") challenged the U.S. Environmental Protection Agency's ("EPA") decision to register Enlist Duo—a weed-killing pesticide used on corn, soybean, and cotton fields—in 2014, 2015, and 2017, alleging that EPA's decision violated the Endangered Species Act ("ESA") and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). *Id.* at 904.

Timeliness

Respondent-Intervenor Dow Agrosciences LLC, the producer of Enlist Due, first argued the petitions for review were untimely and the Petitioners lacked standing. *Id.* at 907. A petition for review challenging a pesticide registration order in a court of appeal must be filed within 60 days after entry of such order. *Id.* (citing 7 U.S.C. § 136n(b)). In this case, the 2017 Notice of Registration was signed on January 12, 2017, but did not explicitly include a "date of entry." *Id.* Thus, pursuant to regulation, because the "date of entry" was not "explicitly" provided in the Notice of Registration, the "date of entry" was two weeks later on January 26, 2017. *Id.* at 907–08 (citing 40 C.F.R. § 23.6). Thus, the petitions filed 54 days later on March 21, 2017 were timely. *Id.* (citing 7 U.S.C. § 136n(b)).

Article III Standing

Next, the panel found that Petitioners had demonstrated Article III standing. First, regarding Petitioners' FIFRA claims alleging that EPA misapplied FIFRA's procedural requirements and lacked substantial evidence in support of its decision that Enlist Duo's registration complied with those requirements, the panel found Petitioners had standing because there was "a credible threat of harm" that Enlist Duo could affect their members' aesthetic interests in monarch butterflies. *Id.* at 909. Relaxing the causation and redressability requirements for standing for Petitioners' procedural FIFRA claims, the panel found Petitioners had satisfied both elements because there was "a 'reasonable probability' that EPA may have further minimized any alleged harm to monarch butterflies had it adopted NRDC's arguments[,]" and adopting those arguments "*may*

influence the agency's ultimate decision[.]"*Id.* at 910. The panel disregarded the fact that the butterflies may still be harmed by other related pesticides even if Petitioners won their case because "the mere existence of multiple causes of an injury does not defeat redressability, particularly for a procedural injury." *Id.* (quoting *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015)).

Second, addressing Petitioners' claims alleging that EPA violated the ESA's section 7 consultation procedures in registering Enlist Duo, the panel found that the Petitioners' members aesthetic and recreational interest in species within geographic regions affected by the registrations sufficient to demonstrate injury-in-fact. *Id.* at 911. Again proceeding under the relaxed causation and redressability analysis for procedural violations, the panel similarly found that Petitioners had demonstrated causation and redressability because a ruling in their favor could protect Petitions' members' interests in endangered and threatened species. *Id.* at 912. Because one petitioner from each petition had associational standing, the panel did not need to decide whether the other petitioners had associational standing. *Id.* at 911–912.

Petitioners' FIFRA Claims

Turning to the merits, the panel considered petitioners' FIFRA claims. FIFRA regulates the use, sale, and labeling of pesticides through a process called "registration," which can be unconditional or conditional, and which establishes the terms and conditions by which a pesticide may be sold and used. *Id.* at 912.

Petitioners first argued that EPA erred when it applied the more lenient "conditional" registration standard over the more stringent "unconditional" standard when it registered Enlist Duo in 2014. *Id.* at 914. The panel rejected this argument, holding first that Petitioners had waived the argument as it had not raised the issue in its prior challenges to Enlist Duo's registration. *Id.* Regardless, the panel found Petitioners' argument unpersuasive because the registration documents supported the conclusion that EPA was applying the unconditional standard, despite what appeared to be a "typographical error" calling the registration conditional. *Id.*

Petitioners also argued that EPA incorrectly applied FIFRA's "cause any unreasonable adverse effects" unconditional registration standard in its 2017 registration decision. *Id.* at 915. EPA conceded as much but argued that any error was harmless. The panel agreed because the standard for unconditional registration was higher, not lower, than the conditional registration standard.

Petitioners next argued that EPA lacked substantial evidence for its 2014, 2015, and 2017 registration decisions for four reasons. *Id.* at 916. Ruling in part for Petitioners, the panel agreed that EPA failed to properly assess harm to monarch butterflies from the increased use of one of Enlisted Duo's active ingredients on milkweed, the butterfly's host plant, in fields on which Enlist Duo was being applied—as opposed to areas beyond treated fields. *Id*. at 916–17. The panel held that given the record evidence suggesting monarch butterflies may be adversely affected by one of Enlist Duo's active ingredient on target fields, EPA was required, under FIFRA, to determine whether there were any "adverse" effects prior to determining whether any effect on the environment was "unreasonable." *Id.* at 917. EPA's failure to do so meant that its decision lacked substantial evidence. *Id.*

Petitioners next argued that EPA's conclusion that Enlist Duo would not have unreasonable adverse effects because one of its active ingredients, glyphosate, was already being used was

impermissible under FIFRA. *Id.* The panel, however, disagreed and found that FIFRA allows EPA to take an "ingredient-by-ingredient" approach and that EPA did not need to undertake a complete review of the data for a previously registered active ingredient when there was substantial evidence supporting EPA's conclusion that the registration of Enlist Due would not increase the use of glyphosate overall. *Id.* at 917–18.

Petitioners then argued that EPA had failed to properly consider Enlist Duo's volatility—i.e., its tendency to evaporate and drift away from areas of application. *Id.* at 918. The panel similarly rejected this argument, finding that while EPA's study of Enlist Duo's volatility was not perfect, the panel owed deference to EPA's technical conclusions, and that a "reasonable mind might accept" the studies upon which EPA relied to find that Enlist Duo's volatility would not cause unreasonable adverse effects on the environment. *Id.* at 920–21.

The panel then rejected Petitioners' argument that EPA should have accounted for the potential synergistic effect of mixing Enlist Duo with a different chemical called glufosinate. The panel held that this concern was speculative as nothing in the record suggested synergistic effects of mixing of glufosinate with Enlist Duo, despite Petitioners' evidence to the contrary. *Id.*

Petitioners' ESA Claims

The panel next addressed, and rejected, Petitioners' ESA claims. The ESA requires each Federal agency to ensure that any action authorized by it is "not likely to jeopardize the continued existence of any endangered species … or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). This process starts with a determination of whether the proposed action will have "no effect" or "may effect" listed species or their critical habitat. *Id.* at 922. If there is no effect, then the Federal agency does not need to engage in formal consultation with the expert agencies. *Id.*

The panel first rejected Petitioners' claim that EPA's "no effect" determination was arbitrary and capricious. *Id.* at 923. In doing so, the panel deferred to EPA's scientific expertise and held that the EPA could rely on the "risk quotients" and "levels of concern" analyses it did in compliance with FIFRA to make a determination on the ESA that the authorization of Enlist Duo would have "no effect" on listed species or their critical habitat. *Id.* That is because the panel found that the ESA's "may affect" standard was only triggered if there was "any possible effect" on listed species or their critical habitat, and EPA's studies, in combination with EPA's mitigation measures governing the use of Enlist Duo, allegedly found that there was none. *Id.* at 924. In doing so, the panel's conclusion was not altered by the fact that EPA's preliminary risk assessments found that Enlist Duo "may affect" hundreds of protected species or by the fact that EPA was not able to guarantee the effectiveness of required mitigation measures. *Id.* at 924–925.

The panel next rejected Petitioners' argument that EPA improperly limited the "action area" to the treated fields (as opposed to including the surrounding area where Enlist Duo could drift) when considering the effects of Enlist Duo. Again, the panel deferred to EPA's scientific analysis that Enlist Duo would not spread beyond the treated fields based on EPA's mitigation measures—despite Petitioners' allegations that such mitigation measures were unlikely to occur.

Finally, the panel rejected Petitioners' argument that EPA violated its duty to insure against the adverse modification or destruction of critical habitat. In doing so, the panel upheld EPA's conclusion that only species who used treated fields may be affected, and that none of the species

would be affected because the elements of the habitat on which the species' relied were not "related to agriculture" and therefore wouldn't be affected by the pesticide. *Id.* at 928–29.

Remedy
Having considered Petitioners' arguments, the panel addressed the appropriate remedy for EPA's failure to consider the harm to monarch butterflies when it registered Enlist Duo. *Id.* at 929–930. The panel decided to remand, rather than vacate, EPA's registration of Enlist Duo because it found EPA's error "not serious," and that EPA may "likely be able to offer better reasoning" supporting its decision on remand. *Id.* at 929.

Judge Nelson's Concurrence
Concurring, Judge R. Nelson addressed how the interplay between FIFRA's venue provision and standing could make a difference in a future case when a petitioner may have proper standing but have joined a petitioner in an improper venue. *Id.* at 930–32.

Judge Watford's Dissent
In dissent, Judge Watford set forth his view that, in addition to violating FIFRA for failing to consider Enlist Duo's impact on monarch butterflies, EPA also violated the ESA by failing to use the best scientific data available to assess whether Enlist Duo will adversely affect threatened or endangered species. *Id.* at 932. Specifically, he pointed to a report from the National Academy of Sciences that explained that EPA's "risk quotient" method failed to actually estimate risk at all and failed to reflect worst-case scenarios. *Id.* at 932. He also noted that EPA had failed to dispute the scientific failings of its "risk quotient" method and had not attempted to justify its continued reliance on such methods. *Id.* at 933.

Judge Watford went on to assert that the majority's decision set a dangerous precedent by allowing an agency to "rely on data produced by a scientifically indefensible methodology so long as better data, produced by a method that *is* scientifically defensible, has no yet been generated." *Id.* In doing so, he noted that courts could not require agencies to conduct new studies, but that they should require them to rely on scientifically defensible ones to justify their conclusion that an agency action would not harm listed species or their critical habitat. *Id.* at 934. Ultimately, he found that the majority's decision left courts forced to accept flawed data and agencies with no reason to require scientifically defensible data—essentially that an agency could rely on the absence of data demonstrating harm to conclude that there was no harm.

3. ***Crow Indian Tribe v. United States***, 965 F.3d 662 (9th Cir. July 8, 2020).
   Author: Matthew D. Query of Yockim Carollo LLP.

This Ninth Circuit opinion represents the most recent judicial ruling on the U.S. Fish and Wildlife Service's ("FWS") somewhat protracted effort to delist the grizzly bear from the Endangered Species Act ("ESA").

Prior to European settlement, it is estimated that as many as 50,000 grizzly bears inhabited the western contiguous United States. By the 1930s, it is estimated that only around 2 percent of that population remained. 82 F.R. 30,508. As one of the primary motivators for the legislation, the condition of the grizzly bear in the contiguous 48-states has been closely followed since the enactment of the ESA. In 1982, the FWS set forth its Grizzly Bear Recovery Plan which, among

other objectives, identified specific geographic habitat regions and recovery goals therefor. By 2006, the FWS determined these goals to have been largely achieved within the specific Greater Yellowstone Ecosystem region, and in 2007, the FWS issued a rule that delineated the Yellowstone grizzly population as a distinct population segment ("Yellowstone grizzly") and delisted it from the ESA. The Montana District Court vacated the rule in 2009, and the Ninth Circuit affirmed the vacation in part and remanded for further agency consideration in Greater Yellowstone Coal., Inc. v. Servheen, 665 F. 3d 1015 (9th Cir. 2011). As a result of the remand, in 2017 the FWS issued a second rule in delisting the Yellowstone grizzly, which was again vacated and remanded by the Montana District Court in 2018.

This case was brought about by the FWS' appeal of the 2018 District Court ruling, and there are four primary issues on appeal. The FWS sought review of the remand's required further study of the effect of the delisting on both (1) other grizzlies in the contiguous 48-states outside of the Yellowstone grizzly population that are still listed under the ESA, and (2) the long-term genetic diversity of the Yellowstone grizzly. Additionally, the states that encompass the Yellowstone grizzly population habitat (Idaho, Montana, and Wyoming) and private hunting and agricultural organizations intervened on the side of the FWS appealing the same rulings, in addition to raising the unique issue regarding the District Court's order requiring adjustments to any new grizzly population estimation methods. Appellees who brought the District Court action—environmental and tribal groups—asserted that the Ninth Circuit lacks jurisdiction to review the order, on grounds that the District Court's 2018 remand order is not appealable under Ninth Circuit jurisprudence.

As a preliminary matter, the Court addressed, and rejected, Appellees' jurisdictional challenge. Appellees' argument was largely based on NRDC v. Guitierrez, 457 F. 3d 904 (9th Cir. 2006) and Alsea Valley Alliance v. Dep't of Commerce, 358 F. 3d 1181 (9th Cir. 2004). Ninth Circuit found it did have jurisdiction, and rejected Appellees' arguments on grounds that (A) Gutierrez was not applicable because it pertained to an agency's challenge to District Court reasoning, as opposed to the final relief granted (as is the case here); and (B) under Alsea, a remand of an agency's rulemaking is a constructive final order, and therefore appealable.

With respect to the Intervenors' unique appeal of the District Court's ruling specific to recalibration of population estimators (an issue the FWS did not appeal or brief), the Court rejected Intervenors' arguments and found that the District Court properly ordered the FWS to include a commitment to recalibration. A "commitment to recalibration" is, essentially, a commitment to account for methodological changes between population estimators, and is considered by many to be necessary for the accurate estimation of species' populations, including the Yellowstone grizzly population. Intervenors—the states of Idaho, Montana, and Wyoming—had objected to the inclusion of a commitment to recalibration in the grizzly Conservation Strategy (relied upon by the 2017 delisting rule), and their objection resulted in the FWS' omission of such a commitment from the final Conservation Strategy. The District Court found that the omission was a result of political pressure from the Intervenor states, rather than a determination made "solely on the basis of the best scientific and commercial data," as mandated by the ESA. 16 U.S.C. § 1533(b)(1)(A). Thus, the District Court ruled, and the Ninth Circuit agreed, that the FWS's omission of the commitment to recalibration constituted a violation of 16 U.S.C. § 1533(b)(1)(A).

With respect to the first of the FWS's two primary challenges to the District Court ruling, this is the only issue on appeal where the Ninth Circuit partially agreed with the FWS and vacated a portion of the District Court ruling against the agency. This issue regards the extent to which the FWS was required to conduct a more in-depth analysis of the effect of this delisting upon the "remnant grizzly population" (i.e. other grizzly bear populations outside the Greater Yellowstone Ecosystem that remain listed under the ESA). Below, Appellees argued, and the District Court agreed, that the FWS' lack of an extensive analysis on this delisting's impact to remnant populations constituted a failure to adhere to the standards set forth in the D.C. Circuit's holding in Humane Society v. Zinke, 865 F. 3d 585 (D.C. Cir. 2017). The Ninth Circuit interprets the Humane Society holding to require a "comprehensive review" of the effect of delisting one distinct population segment upon others of the same species, but found that "a more practical inquiry" was envisioned by the D.C. Circuit than what the Montana District Court ordered the FWS to undertake in 2018. The FWS argued that the District Court effectively mandated a full threat analysis under Section 4(a) of the ESA of the delisting's effect on the remnant population, and that compelling a Section 4(a) analysis was unreasonable. The Ninth Circuit agreed. Thus, the Court vacated that portion of the District Court's holding on grounds that a Section 4(a) threats analysis is not required, on remand the FWS should still ensure that a "comprehensive review" of the threats to the remnant population has been undertaken in adherence with the Humane Society holding.

Finally, with respect to the second of the FWS's primary challenges to the District Court ruling, the Ninth Circuit agreed with the District Court's conclusion that the FWS acted contrary to the best available science in determining that the Yellowstone grizzly did not face long-term threats caused by lacking genetic diversity. The FWS argued that its conclusion in the 2017 rule—that it "do[es] not consider genetic concerns to be a threat[]"—was supported by the principal biological studies in the record. The Ninth Circuit points out, however, that while these studies may have found no short-term threats related to lacking genetic diversity, "both studies express concerns about the long-term genetic health of the Yellowstone grizzly[,]" and cites to the relevant expressions of concern related to genetic isolation and long-term viability of the delisted population. Additionally, FWS included regulatory mechanisms in the 2017 delisting rule that allude to palliating the threat of lacking genetic diversity, but the District Court found, and the Ninth Circuit agreed, that the mechanisms were inadequate to address the long-term threat of lacking genetic diversity. Accordingly, in light of the specific findings within these record studies pertaining to the genetic threat and the inadequacy of the FWS's regulatory mechanisms included in the rule to mitigate the same, the Ninth Circuit ruled that the 2017 delisting rule's conclusion regarding lacking genetic diversity is without scientific basis, and is thereby arbitrary and capricious under the APA.

4. ***Am. Wild Horse Campaign v. Bernhardt,*** 963 F.3d 1001 (9th Cir. July 2, 2020). *Author*: Drew Hancherick of Lewis & Clark Law School.

American Wild Horse Campaign, a wild horse advocacy group, brought claims against the Bureau of Land Management ("BLM") and related parties based on alleged violations of the National Environmental Policy Act ("NEPA"), the Administrative Procedure Act ("APA"), and the Wild Free-Roaming Horses and Burros Act ("WHBA"). Plaintiffs sought injunctive and declaratory relief against BLM's decision to geld wild male horses as part of its Gather Plan. The United States District Court for the District of Nevada granted summary judgment in BLM's favor, the wild horse advocacy group appealed.

On appeal, the Ninth Circuit affirmed the lower court's ruling, holding that BLM had taken a "hard look" at whether the project would "significantly affect" the human environment. The court found that BLM did not need to prepare an Environmental Impact Statement ("EIS") because 1) the risks of gelding on wild horses were not highly uncertain; 2) negative public comments on the plan did not render it "highly controversial"; 3) wild horses are not a "cultural resource" as defined by NEPA; 4) it did not create a precedent for future actions; and 5) BLM's decision to geld and release was not a violation of WHBA. Further, the court found that BLM did not act arbitrarily and capriciously under the APA by failing to address specific public comments, expert opinions, and reports.

Congress enacted WHBA in 1971 in response to a rapidly diminishing wild horse population. The law gave federal protection to wild horses and tasked BLM with managing the populations on public lands. WHBA was extremely successful, and soon horse populations were growing out of control. In 1978, Congress amended WHBA to require BLM to monitor wild horse populations and, if it determined that "action is necessary to remove excess animals," the agency "shall immediately remove excess animals from the range so as to achieve appropriate management levels." 16 U.S.C. § 1333(b)(2).

In response to an excess of about 8,600 wild horses on public lands in northeastern Nevada, BLM developed its Antelope and Triple B Complexes Gather Plan. The Plan calls for removing excess horses and also adjusting sex ratios through gelding males to create a smaller breeding population. Plaintiffs argued that BLM should have prepared an EIS because five of NEPA's intensity factors show that gelding would have a significant effect on the environment, and the agency acted arbitrarily and capriciously by determining that the EIS was unnecessary.

Agencies consider both the "context" and "intensity" of the possible effects to determine if an action "significantly" affects the environment; NEPA includes ten intensity factors in its regulations. 40 C.F.R. § 1508.27. Plaintiff raised five of these elements.

1) Highly Uncertain Effects

Agencies must prepare an EIS if the possible effects of its action are so uncertain that they raise "substantial questions" as to whether there will be a significant environmental impact. 40 C.F.R. § 1508.27(b)(5). This is not necessary if there is any uncertainty at all, "only if the effects of the project are 'highly' uncertain." *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009). The court noted that BLM's plan did not meet that threshold. BLM "used the existing research to predict that those effects likely would be insignificant." It acknowledged that some questions existed about the potential effects of releasing gelded males into the general wild

horse population, but concluded that no questions existed about whether there would be a *significant* effect on the environment." (Emphasis in original). Because the court defers to BLM's "scientific prediction[s] within the scope of its technical expertise," it found nothing that contradicted the reasonableness of the agency's determination.

2) Highly Controversial

To be considered "highly controversial," plaintiffs must bring evidence that "cast[s] serious doubt upon the reasonableness of [the] agency's conclusions." *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1057 (9th Cir. 2010). The plaintiffs were unable to introduce any evidence that rose to this standard. They relied on a BLM-commissioned report from the National Academy of Sciences ("NAS"); however, that report was inconclusive and did not contradict BLM's position. Plaintiffs also brought expert opinions that opposed the plan, but those experts did not base their opinions on any studies or existing research. The court determined that simply opposing the action did not create a controversy as contemplated in NEPA regulations.

3) Unique Characteristics

BLM determined that the area occupied by wild horses was not in close "proximity to historic or cultural resources". This decision was not arbitrary and capricious because wild horses are not a cultural resource under NEPA. Congress specified that they should be managed "as components of the public lands," which the court decided BLM has done here. 16 U.S.C. § 1333(a).

4) Precedent

To be considered precedent-setting, the plan must set "a precedent for future actions with significant effects," or represent "a decision in principle about a future consideration." 40 C.F.R. § 1508.27(b)(6). The court noted that the Gather Plan did neither, as BLM's conclusions in its environmental assessment were "specific to the scientific evidence that is currently available."

5) Threatens a Violation of Law

The court concluded that BLM followed the requirements of WHBA. In accordance with the WHBA, the agency appropriately addressed concerns raised by both studies performed in its assessment and by expert opinions.

Additionally, plaintiffs challenged the Gather Plan on grounds that BLM acted arbitrarily and capriciously in not addressing the Gelding Study, ignoring expert opinions mentioned in plaintiffs' public comments, and failing to adequately consider the NAS Report. The court noted that while BLM did not directly address the Gelding Study, it did address the issue the study raised and so addressing the study itself was unnecessary. WHBA did not require BLM to address each expert opinion specifically, and the agency adequately explained why it did not rely on those experts' opinions in its response to public comments. In the case of the NAS report, BLM complied with its duty to consult with NAS and acknowledged the uncertainty it raised, but determined that the concerns did not rise to the level of "highly uncertain."

Because BLM considered the intensity factors laid out in NEPA regulations and concluded that its Gather Plan would not have a significant effect on the environment, the Ninth Circuit held that the agency "permissibly concluded that preparation of an EIS was not required" and the agency had not acted arbitrarily and capriciously in failing to consider certain contrary evidence.

District of Oregon

1. ***Northwest Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs***, -- F. Supp. 3d --, No. 3:18-cv-00437-HZ, 2020 U.S. Dist. LEXIS 147446 (D. Or. Aug. 15, 2020).
   Author: Lizzy Pennock of Lewis & Clark Law School.

Plaintiffs Northwest Environmental Defense Center et al. ("NEDC") alleged that Defendants, United States Army Corps of Engineers ("Corps") and the National Marine Fisheries Service ("NMFS"), violated the Endangered Species Act ("ESA") and the Administrative Procedure Act ("APA") in managing and regulating the Willamette River Basin Flood Control Project ("WVP"). The WVP consists of 13 dams and related facilities that the agencies acknowledge adversely affect Upper Willamette River Chinook salmon and steelhead, both listed as "threatened" species under the ESA. In an Opinion and Order on cross-motions for summary judgment addressing only the liability phase of this litigation, Judge Hernández of the District of Oregon granted summary judgment to the Plaintiffs on all claims.

The court first concluded that the Corps violated the ESA § 7(a)(2) because the Corps failed to "fully and timely implement" the Reasonable and Prudent Alternative ("RPA") NMFS set forth in its 2008 Biological Opinion ("BiOp") covering the WVP. In that assessment, NMFS concluded that the "continued operation of the WVP as proposed by the Corps was likely to jeopardize the continued existence" of the listed chinook and steelhead and would destroy or adversely modify the species' critical habitat, thus violating the ESA's dual prohibitions in § 7(a)(2) unless the Corps fully and timely implemented the RPA. Disposing of Defendants' argument that the Corps "need not implement every aspect of the RPA to comply with the ESA" because NMFS' suggestions for how to avoid section 7 violations are "technically non-binding," the court explained that an action agency disregards a BiOp "at its own peril." Though the court acknowledged that the Corps' management decisions could deviate from those in NMFS' RPA, the agency must still take "alternative, reasonably adequate steps to ensure against jeopardizing the listed salmonids." The court found that the Corps' failed to take such steps, concluding that the continued operation of the WVP without the "critical RPA measures" was a "substantial factor in the salmonids' decline." The court also dismissed Defendants' effort to attribute the listed salmonids' decline to factors other than the WVP, holding that "even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm."

Second, the court determined that the Corps violated ESA § 9, 16 U.S.C. § 1538(a)(1), which prohibits "take" of endangered species, a prohibition extended to the threatened salmonids in this case under C.F.R. §§ 223.102 and 223.203(a). Though NMFS authorized a limited amount of incidental take caused by the WVP operations in an Incidental Take Statement ("ITS") (see 16 U.S.C. § 1536(b)(4)), "the record demonstrate[d] [that] the Corps [was] violating the ITS's take limits for each of the relevant subbasins within the WVP." The court rejected the Corps' "familiar argument" that the agency "cannot be held liable for "takes" caused by the mere existence of dams," concluding that the Corps' discretionary decisions concerning how to operate the WVP caused the unlawful take.

Third, the court concluded that NEDC's "failure-to-reinitiate" claim was not moot, even though the Corps had reinitiated section 7 consultation with NMFS shortly after NEDC filed suit,

because the court could still grant effective relief. The court concluded that the Corps' "significant delay" before reinitiating consultation was a substantial procedural violation of the ESA; The Corps was required to reinitiate consultation as early as 2013, when there were "clear indications" that critical RPAs would not be met by the deadlines in the 2008 BiOp. The duty to reinitiate was triggered because the Corps' failure to implement the RPAs "modified the operation and maintenance of the WVP" in a way the 2008 BiOp did not consider, and because the Corps exceeded the level of incidental take authorized in the ITS. Although ordering reinitiation would not be effective relief, the court reasoned that it could grant "injunctive relief in the form of operational changes to the WVP during the pendency of the reinitiated consultation process" to remedy the additional harm to the species caused by the delay in reinitiation. It also held a declaratory judgment could be effective relief because it would put NMFS "on notice that it must reinitiate consultation sooner when an action agency substantially deviates from the RPA or exceeds the ITS's take limits."

Lastly, because the triggers for reinitiation apply to both the consulting agency and the action agency, the court concluded that NMFS violated the APA, 5 U.S.C. § 706(2)(A). NMFS' decision not to reinitiate consultation until 2018—despite having known since at least 2013 that the Corps was "missing critical RPA deadlines," and "knowing the Corps was greatly exceeding the ITS's take limits"—was arbitrary and capricious. The court asked for additional briefing on the scope of injunctive relief, and the parties are now in the remedy phase of the litigation to decide what relief will be granted.

Oregon State Court

1. ***Kinzua Res., LLC v. Oregon Dep't of Envtl. Quality***, 366 Or. 674, 468 P.3d 410 (June 9, 2020). *Author:* Geoff Tichenor of Stoel Rives LLP.

This July, the Oregon Supreme Court held that liability for complying with Oregon solid waste disposal site (landfill) statutes extends well beyond the site's permit holder to include any person with authority to control the site, whether or not that person ever actually exercised that authority. The Court's holding evinces the true breadth of potential liability under Oregon's solid waste disposal site statutes. And it undercuts reliance on the foundational corporate law principle of limited liability.

Legal Background
Oregon's statutes require a permit for solid waste disposal sites, including landfills. Oregon's statutes likewise specify closure requirements, including financial assurance obligations, for permitted disposal sites. Significantly, the closure requirements apply first to the person holding the site's permit but, if that person fails to comply, then to the "person owning or controlling" the disposal site. See ORS 469.205 and ORS 459.268.

Factual Background
This case involves a dispute over closure requirements for a wood waste landfill located in Pilot Rock, Oregon. A single limited liability company, Kinzua Resources LLC, was both the permit holder and the owner of the property on which that landfill, the Pilot Rock Landfill, is located.

Although the landfill stopped accepting waste in 2010, Kinzua failed – according to the Oregon Department of Environmental Quality (DEQ) – to fulfill the landfill closure requirements or to maintain adequate financial assurance. Thereafter, in 2011, Kinzua was administratively dissolved. Following Kinzua's dissolution, in 2013, DEQ assessed a sizeable civil penalty (nearly $800,000) against Kinzua, as well as its two members (Frontier Resources, LLC and ATR Services, Inc.) and a related individual (who himself was a member of Frontier and president of ATR), alleging violations of applicable closure and financial assurance requirements.

Following a contested case hearing, the Oregon Environmental Quality Commission (EQC) found that Frontier, ATR and the related individual were each liable for the violations (and therefore were responsible for closing the landfill and obtaining financial assurance) as each of them qualified as "controlling" the landfill. Frontier, ATR and the related individual sought review of the EQC's order in the Oregon Court of Appeals, which agreed that none of those parties met the test for "controlling" the landfill.

On appeal, the Oregon Supreme Court reversed the Court of Appeals, issuing this decision.

What is "Controlling"?
The Oregon Supreme Court's decision turned on its interpretation of the term "controlling" under ORS 459.205 and ORS 459.268. Finding that term to be "inexact," the Court construed the term without deference to the EQC's construction. Nonetheless, upon its own examination of the text, context and purpose of ORS 459.205 and ORS 459.268, the Court agreed with the EQC that "controlling" means both "having power over" as well as "actually exercising 'restraining or directing influence' over" a disposal site. In other words, the Court found liability for a category of persons based on their mere status, i.e., as possessing authority to control a disposal site. According to the Court, such liability for "controlling" persons attaches irrespective of whether they are ever actively involved in the disposal site's operations.

What about Limited Liability for LLC Members?
In defining disposal site closure requirements to apply to various persons with theoretical control over a disposal site, the Court rejected concerns that its holding interfered with ORS 63.165(1), the Oregon statute limiting the liability of an LLC's members for the debts, obligations or liabilities of the LLC. The Court "harmonized" that statute with its interpretation of ORS 459.205 and ORS 459.268, explaining that while ORS 63.164(1) applies to prevent LLC members from being vicariously liable for the LLC's liabilities, ORS 459.205 and ORS 459.268 impose direct liability on those persons "controlling" a solid waste disposal site.

What's Next?
The Oregon Supreme Court remanded the case to the Court of Appeals for further factual evaluation of whether Kinzua's owners (Frontier and ATR) and the related individual actually possessed authority to direct Kinzua's management of the landfill or the property on which it is located. Regardless of how the further proceedings turn out, this decision will undoubtedly have ramifications for parties involved in owning or operating solid waste disposal sites in Oregon.

But the lesson from this decision appears broader than that: this decision signals the Oregon Supreme Court's willingness to interpret state laws -- including laws establishing corporate rights and expectations -- to avoid leaving the public with responsibility for costly environmental problems when private parties can be held to account.