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Recent Environmental Cases and Rules

Environmental & Natural Resources Section — Oregon State Bar
Jessica Bernardini &
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Editors' Note: This issue contains summaries of recent judicial opinions that may be of interest to members of the Environmental & Natural Resources Section.

A special thank you to our talented contributors for their summaries: Drew Hancherick, Vial Fotheringham LLP; Dallas DeLuca, Markowitz Herbold PC; Ryan Shannon, Center for Biological Diversity; and Max Yoklic, NewSun Energy.

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OREGON SUPREME COURT

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Wildlands v. Bureau of Land Management, No. 6:21-CV-01487-MC,
2023 U.S. Dist. LEXIS 51388, 2023 WL 2647104 (D. Or. Mar. 27, 2023)

***Matter of Site Certificate for Boardman to Hemingway Transmission Line*, 370 Or. 792 (Or. 2023);** *summarized by* Dallas DeLuca, Markowitz Herbold PC.

Introduction

Petitioners Stop B2H Coalition ("Stop B2H"), Michael McAllister, and Irene Gilbert sought judicial review of an order of the Energy Facility Siting Council ("EFSC") "approving an Idaho Power Company (Idaho Power) application for a site certificate to construct a 300-mile high-voltage electrical transmission line from Boardman, Oregon, to Hemingway, Idaho." 370 Or. at 795.[1] In an opinion consolidating all three challenges (on ten different grounds), the court affirmed the EFSC Order. *Id.*

Procedural History

Idaho Power submitted its notice of intent to apply for a site certificate in 2008 and spent 10 years receiving input from the public, including from 17 state and federal agencies, in the process of submitting and amending its application. *Id.* at 797–99. After Idaho Power submitted its application in 2018, the Notice and Comment period commenced followed by the contested case proceeding in 2021 and 2022. *Id.* at 799–800.

Oregon Supreme Court's Analysis

First, the court addressed Stop B2H's and Gilbert's challenges to their designation as "limited parties" instead of full parties in the contested case proceeding. The court reviewed the history and text of the Administrative Procedures Act's ("APA's") contested case model rules, the APA statute and rule concerning "limited parties" compared to full parties, and the EFSC substantive statute concerning site certificate contested cases, ORS 469.370(5). *Id.* at 801–02. That statute provides that the applicant "shall be a party to the contested case" while also providing, in contrast, that the EFSC "may permit" any person who had participated in the public comment process to be a party in the contested case. The court concluded that the "may permit" text, as applied to the APA model rules, allowed the EFSC to limit participation of intervenors in the public comment process to "limited parties" in the contested case. *Id.* at 802–03.

Next, the court addressed Stop B2H's challenges to the exception and variance that the EFSC granted concerning corona noise from the transmission lines. It was undisputed that the corona noise (the "'low hum, hissing, frying, or crackling sound'" *Id.* at 805 n.7 (quoting order)) would occur during less than two percent of hours per year and that it would exceed noise limits specified by OAR 340-035-0035(1)(b)(B)(i). The court concluded that EFSC had authority to grant both the exception and the variance (using those terms as defined in zoning cases, *id.* at 805 n.8). The Department of Environmental Quality ("DEQ") and the Environmental Quality Council ("EQC") have authority to grant exceptions and variances, respectively, to noise standards, but, under OAR 340-035-0110, they had "'suspended administration of the noise program[.]'" *Id.* at 806 (quoting rule). DEQ had also sent a management directive to the EFSC in this contested case authorizing it to review the applications for exceptions and variances. *Id.*

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[1] According to the Idaho Power website, it will be a 500-kilovolt 1,000-megawatt line, and it is owned 45% by Idaho Power and 55% by PacifiCorp. Idaho Power expects construction to begin this year and to take three years. https://www.idahopower.com/energy-environment/energy/planning-and-electrical-projects/current-projects/boardman-to-hemingway/purpose-and-need/.

Because the legislature had granted broad authority to the EFSC in ORS chapter 469 and because of those circumstances, the court rejected Stop B2H's argument that only DEQ and EQC could grant the exceptions and variances that Idaho Power requested. *Id.* at 806–07. Further, the court concluded that substantial evidence supported the EFSC decisions to grant the exception because of the infrequency of the noise events, and to grant the variance because "strict compliance" with the noise rule would be harsh (*i.e.*, denial of authority to build or substantial curtailment in use of the lines). *Id.* at 807–09.

Then, the court addressed Stop B2H's third assignment of error: that the EFSC erred because it had wrongfully engaged in rule making when it decided to list noise-sensitive landowners who are located only within half a mile of the proposed transmission line instead of within one mile, as required by *former* OAR 340-021-0010(1)(x)(E) (renumbered OAR 340-021-0010(1)(y)(E)). The Oregon Department of Energy ("ODOE") had decided to limit the scope to just half a mile because of the "'linear nature of the proposed facility.'" *Id.* at 809 (quoting ODOE). The Court concluded that ODOE had not engaged in rule making because another rule, OAR 345-021-0000(4), allows ODOE to "'waive or modify those requirements'" that ODOE "'determines are not applicable to the proposed facility.'" *Id.* at 810 (quoting rule). Because the ODOE modification applied only to this site certificate application, it "[wa]s not a rule of general applicability" and, therefore, "rule making was not required." *Id.*

Next, the court addressed Stop B2H's fourth and final challenge, "that Idaho Power's methodology for assessing the visual impacts of the transmission line was flawed because it failed to account for viewers' subjective perceptions and reactions when determining whether a potential impact was going to be 'significant.'" First, the court found that "nothing in the rule required Idaho Power to utilize a particular methodology or specifically account for subjective perceptions and reactions in assessing whether the transmission line would be likely to result in "significant adverse visual impacts" to scenic resources." *Id.* at 811. Additionally, "the methodology used to assess the visual impacts of the transmission line did take viewers' subjective perceptions into account." *Id.* The court then described the methodology and the mitigation where significant impacts were found, and it rejected Stop B2H's challenge to "how" subjective perceptions were measured because Stop B2H "has not identified a legal error" in the methodology. *Id.*

The court then addressed McAllister's one assignment of error, that the ORS 469.370(13) required Idaho Power to include the Glass Hill Route as an alternative in its final application because the U.S. Department of Interior Bureau of Land Management ("BLM") had identified that route as an environmentally preferred alternative. Idaho Power had included the Glass Hill Route in its preliminary application but not in its final application due to local opposition. *Id.* at 798-99. First, the court rejected Idaho Power and the state's argument that consideration of the Glass Hill Route was outside of the EFSC's jurisdiction because Idaho Power had deleted that option from the final application. *Id.* at 812. The court found that under OAR 345-021-0010(1)(b)(D)—the "corridor selection assessment" rule—the EFSC was allowed to consider alternate routes that had been addressed during the corridor selection process prior to submission of the final application. *Id.* at 813. Ultimately, though, the court agreed with Idaho Power and the state on the merits. Examining ORS 469.370(13), the court concluded that while it provided for EFSC's coordination with federal agencies such as BLM, it did not require any particular result

such as choosing the route deemed environmentally preferred under the NEPA process that the federal agency engaged in. *Id.* at 814.

Then, the court addressed Gilbert's second, third, and fourth assignments of error, concerning impacts on historic sites and mitigation efforts. Gilbert challenged the EFSC order under ORS 469.501(1) and under OAR 345-022-0090, a rule which provides that before issuing the site certificate the EFSC "must find that the construction and operation of the facility, taking into account mitigation, are not likely to result in significant adverse impacts to" historic resources, among other things. *Id.* at 815. Gilbert challenged the part of the order that delegates to ODOE authority to review and approve of an Historic Properties Management Plan that Idaho Power will prepare in the future, prior to construction. *Id.* at 817. She contended that was an error because the order approved the site certificate application before making required findings on information that did not yet exist and because it was an improper delegation of authority. *Id.* at 817-18. The court rejected that argument because ORS 469.402 specifically allowed such delegation to ODOE. *Id.* at 817.

Gilbert also argued that the order allowed Idaho Power to use less stringent federal mitigation standards. The court rejected this argument based on language in the order requiring "Idaho Power to demonstrate that the mitigation efforts it adopted . . . also satisfy state law." *Id.* at 819. Gilbert next contended that the EFSC order was "insufficiently specific" as to impacts to historic sites and mitigation. *Id.* The court also rejected this argument, determining that the order was specific and Gilbert failed to explain why any particular information in the order was not sufficiently specific. *Id.* at 819–20.

Lastly, Gilbert challenged one of the conditions in the EFSC order that allowed Idaho Power to begin construction even if it did not yet hold construction rights to the entire route. Gilbert challenged the condition in the order because it did not exactly mirror the conditions in OAR 345-025-0006(5). The court disagreed, because the change between the rule and the order merely deleted parts of the rule not applicable to transmission lines (*i.e.*, order omitted the parts of the rule applicable to pipelines). *Id.* at 821.

In sum, the court affirmed the final order of the EFSC on all grounds.

***Douglas County v. Oregon Fish & Wildlife Commission*,**
323 Or. App. 720 (Or. Ct. App. 2023); *summarized by* Max Yolick, NewSun Energy.

Introduction

In *Douglas County v. Oregon Fish & Wildlife Commission*, the Oregon Court of Appeals clarified the scope of agency orders and rulemaking under the Oregon Administrative Procedures Act ("APA").

Factual Background

In 2014, the Oregon Fish and Wildlife Commission ("Commission") adopted the Coastal Multi-Species Conservation and Management Plan ("CMP"), a fish management plan for conservation and utilization of anadromous salmonids along much of the Oregon coast.[2] The CMP established management areas and designated two hatchery programs for the North Umpqua Management Area, including one for summer steelhead—the Rock Creek Hatchery. The Oregon Department of Fish and Wildlife ("ODFW") adopted regulations to implement the CMP. *See* OAR 635-500-6775. In 2022, the Commission eliminated the summer steelhead hatchery program upon oral motion and vote at a Commission meeting (the "Decision").

Procedural History

The Douglas County Board of Commissioners, the Umpqua Fishery Enhancement Derby, and a local fishing guide ("Petitioners") appealed the decision to the Marion County Circuit Court, seeking review under the APA. Petitioners challenged the Decision as an order other than contested case under ORS 183.484, which grants the Marion County Circuit Court jurisdiction for such orders. In the alternative, Petitioners asserted that the Decision was an agency rule that should be invalidated under ORS 183.400. The Commission and ODFW moved to dismiss, arguing that the Decision was not an order subject to judicial review and that the circuit court did not have jurisdiction over rulemaking. Marion County Circuit Court referred to the case to the Oregon Court of Appeals to resolve the jurisdictional issue.

Oregon Court of Appeal's Analysis

The Court of Appeals concluded that the APA conferred jurisdiction to neither it nor the circuit court because the Decision was not an order or a rule. ORS 183.310(6)(a) defines an "order" as "any agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers or members of an agency." The Decision was not an order because it was directed at agency employees, officers or members "who managed, and who will end" the summer hatchery program rather than named persons like fishers or conservationists, even though such persons may rely on the program.

The Court of Appeals also determined that the Decision was not a rule. Under the APA, a rule must be generally applicable. ORS 183.310(9). Repeals or amendments of existing rules that change the meaning of the rule are also rules, but "internal management directives, regulations or statements which do not substantially affect the interests of the public" are not. The Court of

[2] ODFW, *Costal Multi-Species Conservation and Management Plan* (last visited May 4, 2023), https://www.dfw.state.or.us/fish/crp/coastal_multispecies.asp.

Appeals explained that the Decision was specific to the Rock Creek Hatchery meaning that it could not be generally applicable, as opposed to a decision directed at all hatcheries in the state, for example. The court held a decision that is not generally applicable is "determinative, both with regard to whether the decision itself [is] a rule or to whether it amends or repeals a rule."

Petitioners had also sought to compel funding and implementation of a fish trapping program at Rock Creek Hatchery under ORS 183.490. The parties did not dispute the circuit court's jurisdiction over that claim, so the Court of Appeals remanded the case to the circuit court to consider that claim in the first instance.

***WaterWatch of Oregon, Inc. v. Water Resources Department*,**
324 Or. App. 362 (Or. Ct. App. 2023); *summarized by* Drew Hancherick, Vial Fotheringham LLP.

Introduction

This case is the result of three 2011 orders by the Oregon Water Resources Department (the "Department") which granted extensions of time to the City of Lake Oswego, the North Clackamas County Water Commission, and the South Fork Water Board (collectively, the "Municipalities") to perfect water rights under their respective permits for the diversion of water from the lower Clackamas River for municipal use.

Procedural History

WaterWatch of Oregon, Inc. ("WaterWatch") challenged the 2011 orders, questioning whether the Department lawfully determined that the "undeveloped portion" of the Municipalities' permits complied with the ORS 537.230(3)(d) requirement to maintain the "persistence" of sensitive, threatened, or endangered fish species within the portions of the river affected by water use under the permits. The Oregon Court of Appeals reversed and remanded the 2011 orders, finding that the Department's determination regarding fish persistence was deficient in both substantial evidence and substantial reason. *WaterWatch of Oregon, Inc. v. Water Res. Dep't,* 268 Or App 187 (2014) ("*Waterwatch I*").

In *Waterwatch I,* the Court of Appeals rejected nearly all of WaterWatch's arguments. WaterWatch's sole successful attack on the Department's evidence related to a specific finding that short-term drops below minimum streamflows predicted by WaterWatch's expert are not incompatible with persistence of listed fish species. The court found that nothing in the evidence defined a short-term drop versus a long-term drop or why the flows identified by WaterWatch's expert fell within the former category.

On remand, the Department heard additional evidence and eventually issued a final order (the "2018 order") which supplemented the 2011 orders. The Department again found that the permits as conditioned would maintain the persistence of listed fish species and so granted the requested extensions to the Municipalities with substantially similar conditions to those required in the 2011 orders.

In preparing the 2018 order, the Department consulted the Oregon Department of Fish and Wildlife ("ODFW") for advisement on permit conditions that would "maintain persistence of listed fish species consistent with the recommended flows." Additionally, the Department referred the case for further hearing before an ALJ, the scope of which included addressing the distinction between short-term and long-term drops in flow, supported in part by ODFW's "Annual Scaled Scenario." The Department issued its 2018 order, which WaterWatch appealed, arguing once again that the decision violated ORS 537.230(3)(d), as well as the ORS 183.470(2) requirement that the Department accompany its order with concise findings of fact applied to the law.

Oregon Court of Appeal's Analysis

WaterWatch contended that the Department's reliance on the Annual Scaled Scenario in making its permit determination violated ORS 537.230(3)(d). WaterWatch argued that the Annual Scaled

Scenario was a projected use that the Municipalities were not required to follow and was not made a permit condition, which violates the statute's requirement to determine fish persistence based on the full amount of water that the Municipalities are legally allowed to use under their permits. Instead, WaterWatch contended, the Department relied on the Annual Scaled Scenario to determine that the Municipalities would not use the entire allotment of their permits, which would allow for fish persistence.

The court found that while WaterWatch was correct that the statute required the Department to condition the undeveloped portion of the permit to maintain fish persistence, the statute does not address *how* the Department must determine what sort of conditions are required to maintain that persistence. Because the court determined that the Department made a policy directive to use current data to project future requirements for fish persistence, its reliance on the Annual Scaled Scenario was not a violation of the statute. Accordingly, the court rejected WaterWatch's assignment of error alleging insufficient evidence.

WaterWatch also argued that the Department's decision was not supported by substantial reason because the 2018 order did not explain why identified short-term drops below persistence flows are consistent with fish persistence, and so violated the ORS 183.470(2) requirement that the Department accompany its order with concise findings of fact applied to the law. The court noted that WaterWatch, in making its argument, focused only on a small number of findings that it found to be inadequate while it entirely ignored findings and discussion in the record that supported the Department's determination. The court found that the Department adequately explained its rationale for applying the Annual Scaled Scenario and so did not violate the statute. Accordingly, the court affirmed the Department's determination.

***Wildlands v. Bureau of Land Management*,**
No. 6:21-CV-01487-MC, 2023 U.S. Dist. LEXIS 51388, 2023 WL 2647104 (D. Or. Mar. 27, 2023); *summarized by* Ryan Shannon, Center for Biological Diversity.

Introduction

In a case before Judge McShane of the District of Oregon, Plaintiffs Cascadia Wildlands, Klamath-Siskiyou Wildlands Center, and Oregon Wild facially challenged the Bureau of Land Management's ("BLM")'s Forest Management Decision Protest Process and Timber Sale Administration Final Rule ("Final Rule"), 85 Fed. Reg. 82,359 (Dec. 18, 2020), which eliminated the 15-day protest process for forest management decisions, including advertised timber sales, and brought an as-applied challenge to BLM's authorization of the Mine your Manners Timber Sale based on its reliance on the Final Rule. Plaintiffs alleged that "BLM violated the APA by failing to provide a reasoned explanation for its change in policy and failing to respond to public comment." *Id.* at *5.[3] They also alleged "that the Final Rule violates the FLPMA because it does not provide for adequate public participation or objective administrative review of agency decisions." *Id.* Judge McShane denied Plaintiffs' motion for summary judgment as to both claims.

The District Court's Analysis

Regarding Plaintiffs' first claim, Judge McShane noted that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Id.* at *7 (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016)). To meet this requirement, "an agency must show (1) an awareness of its change in position, (2) 'that the new policy is permissible under the statute,' (3) a belief that the new policy is better than the old, and (4) that there exists good reason for the new policy." *Id.* (citing and quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Judge McShane found that Plaintiffs attempted to place a higher burden on BLM than the law required, and that BLM had met the applicable legal requirements because: it had "expressly acknowledged it [was] changing its previous regulations," *id.* at *8; the policy was permissible pursuant to FLPMA, *id.* at *9; BLM had provided adequate reasoning that it believed that the Final Rule was better policy than the previous rule, *id.* at **9–10; and because "BLM's desire to streamline its forest management process so that it can effectuate decisions pertaining to wildfire risk and meet its timber sale obligations under the O&C Act [was] a legitimate reason for changing its policy[.]" *Id.* at **10–14. Judge McShane also found that BLM had adequately responded to public comments. *Id.* at **15–20.

Regarding Plaintiffs' substantive claim that the Final Rule violated FLPMA because it did "not provide adequate third-party participation or objective administrative review of initial decisions as required by § 1701(a)(5)" of FLPMA, Judge McShane held that § 1701(a)(5) establishes "broad policy directives, which can prove useful in interpreting agency regulations and implementing provisions of the FLPMA, but [does] not alone impose specific, mandatory obligations on BLM." *Id.* at *22. However, given FLPMA's policy in favor of public review, Judge McShane still considered Plaintiffs' argument that the Final Rule's elimination of the protest process and automatic stay of a timber sale during that processes failed to provide adequate public participation and review. *Id.* However, he subsequently ruled that "Plaintiffs' contention that the protest processes is required to assure adequate public participation is simply not supported by the statutory framework[,]" that "[n]othing in the statute binds BLM to any

[3] Pin-cites are according to Lexis pagination.

specific procedure[,]" and upheld BLM's determination that the National Environmental Policy Act's "processes provides multiple public participation opportunities for forest management decisions that were duplicative of public participation through the protest process." *Id.* at *26. He also found that the elimination of the automatic stay did not render the administrative review process meaningless because it did not "alter the public's ability to appeal BLM forest management decision to the IBLA and request a stay of the decision pending appeal." *Id.* at **27–31.

After denying all of Plaintiff's facial challenges to the Final Rule, he denied their derivative as-applied challenge to the Mind your Manner Timber Sale as well. *Id.* at **31–33.