# ENR Case Notes, Vol. 46

*Recent Environmental Cases and Rules*

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*Editors' Note: This issue contains summaries of and a comment on recent judicial opinions that may be of interest to members of the Environmental & Natural Resources Section.*

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## OREGON COURT OF APPEALS

*Douglas County v. Fish & Wildlife Commission*, 326 Or. App. 188 (Or. Ct. App. 2023), *reconsideration of* 323 Or. App. 720 (Or. Ct. App. 2023)

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

*Cascadia Wildlands v. Adcock*, No. 6:22-CV-1344-MK, 2023 WL 3628590 (D. Or. Apr. 21, 2023), *report and recommendation adopted sub nom. Cascadia Wildlands v. Adock*, No. 6:22-CV-1344-MK, 2023 WL 3626467 (D. Or. May 24, 2023)

*Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 3750334 (D. Or. June 1, 2023)

*Willamette Riverkeeper v. National Marine Fisheries Service*, No. 6:21-CV-00034-AA, 2023 WL 4173893 (D. Or. June 26, 2023)

## COMMENT

Oregon Wetlands Protections in a Post-*Sackett* World

***Douglas County v. Fish & Wildlife Commission*, 326 Or. App. 188 (Or. Ct. App. 2023);** *summarized by* Max Yoklic, NewSun Energy.

## Introduction

In 2022, the Oregon Fish and Wildlife Commission ("Commission") eliminated a summer steelhead hatchery program on the North Umpqua River (the "Decision"), which for the preceding eight years had allowed ODFW to raise and release summer steelhead smolts into the river and its tributaries, historically from the Rock Creek Hatchery (the "Program"). The Douglas County Board of Commissioners, the Umpqua Fishery Enhancement Derby, and a local fishing guide ("Petitioners") appealed the Decision, which arrived at the Oregon Court of Appeals on a jurisdictional issue. *See Douglas County. v. Oregon Fish & Wildlife Commission*, 323 Or. App. 720 (Or. Ct. App. 2023) (summarized in ENR Case Notes, Vol. 45).

## Original Decision

The Oregon Court of Appeals determined that it did not have jurisdiction to review the Decision under the Oregon Administrative Procedures Act ("APA") because the Decision was neither an order nor a rule. *Id.* at 727–29. The Court of Appeals held that the Decision was not a rule because: (1) it was not "generally applicable" under ORS 183.310(9) because it was specific to the Rock Creek Hatchery and not "applicable to all hatchery programs—or all of some other classification of programs"; and (2) it did not amend the existing rule at OAR 635-500-6775(6)(b) authorizing the Commission to eliminate hatchery programs. *Id.*

## Petition for Reconsideration

Petitioners sought reconsideration arguing, *inter alia,* that the Decision was, in fact, generally applicable in the sense that it terminated ODFW's ability to release summer steelhead smolts into the North Umpqua River altogether, not just from the Rock Creek Hatchery. Petition for Reconsideration, *Douglas County v. Oregon Fish & Wildlife Commission*, 326 Or. App. 188 (Or. Ct. App. 2023). The Court of Appeals disagreed, adhering to its original decision and clarifying that its "ultimate legal conclusion" was that the Decision was not an amendment to a rule because the underlying rule authorized both the starting and ending of hatchery programs. *Douglas County v. Oregon Fish & Wildlife Commission*, 326 Or. App. 188, 191 (Or. Ct. App. 2023); *see also* OAR 635-500-6775(6)(b) (stating that ODFW may "obtain Commission approval for starting new or eliminating existing hatchery programs in a management area"). The Court of Appeals also modified its original decision in two places to correct a factual error—the original decision stated that the North Umpqua management area was a "two-hatchery" area rather than a "two-hatchery-program" area—but reiterated that the conflation of the number of hatcheries with the number of hatchery programs had no impact on its legal conclusions. *Id.* at 190.

## Petition for Review

Petitioners have since filed a Petition for Review in the Oregon Supreme Court asserting, among other things, that the Court of Appeals decisions created a new APA standard requiring a rule to affect "all of some other classification of programs" within an agency. Petition for Review, *Douglas County v. Oregon Fish & Wildlife Commission*, Petition for Review, __ Or. App. __, (Or. Sup. Ct. 2023). The case awaits the Oregon Supreme Court's disposition.

***Cascadia Wildlands v. Adcock*, No. 6:22-CV-1344-MK, 2023 WL 3628590 (D. Or. Apr. 21, 2023);** *summarized by* Nathan Liu, Crag Law Center.

## Factual Background

The Bureau of Land Management's (BLM) Siuslaw Field Office undertook the Siuslaw Harvest Land Base Landscape Plan (the "Landscape Plan") in accordance with the Northwest Resource Management Plan's requirements for timber harvest. The Landscape Plan defined 13,225 acres of BLM land as the project area, which would have included around 1,300 acres of clearcuts. BLM completed an Environmental Assessment and issued a Finding of No Significant Impact.

## Case Disposition

Plaintiffs Cascadia Wildlands and Oregon Wild filed an action in the Oregon District Court against BLM, alleging that it violated NEPA in preparing and approving the Landscape Plan. They claimed that BLM violated NEPA by failing to establish baseline environmental conditions, consider significant aspects of the project impacts, take a 'hard look' at project and cumulative impacts, and prepare an Environmental Impact Statement.
BLM filed a motion to dismiss this action on two bases: (1) that there was no jurisdiction due to lack of Article III standing; and (2) the case was not ripe. The motion appeared before Magistrate Judge Kasubhai of the Oregon District Court.

## The Court's Analysis

1. *Standing*

Article III standing requires: 1) an injury in fact that is actual or imminent, 2) a causal connection between the injury and defendant conduct, and 3) likelihood that the injury will be redressed by a court decision in favor of plaintiff. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). As to the first factor, the Court noted that a plaintiff who brings a procedural action (such as any based on NEPA) must show that their concrete interests were violated.

BLM's arguments centered on the first factor: denying that there was a relevant injury. BLM argued that Plaintiffs' injuries were not imminent because the Landscape Plan and its Decision Record were "programmatic documents" that did not involve the actual implementation of any further actions like a timber sale. The Court agreed with Plaintiffs that because those documents "committed" the project area to be logged, there was no real possibility that BLM would not pursue future site-specific logging projects. This was demonstrated by the fact that BLM had mapped out future tracts for logging and stated in the Environmental Assessment that the Resource Management Plan made it impossible for it to decide against logging in the area.

The Court also found that Plaintiffs had demonstrated "concrete interests," distinguishing *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009). In *Summers*, the Supreme Court held the plaintiff had not demonstrated a concrete interest when they only expressed vague "someday" intentions to visit the 190 million acres affected by the regulation they had challenged. *Id.* at 496. Here, on the other hand, the Court deemed that the declarations from Plaintiffs' members were enough to show a concrete interest in the area because they demonstrated that they regularly recreated (some having done so for decades) in the 13,225-acre project area and that several members lived close to the area.

Additionally, the Court rejected BLM's argument that Plaintiffs failed to demonstrate a "geographic nexus" between themselves and the "location suffering an environmental impact" because BLM had not determined where logging would specifically occur within the Project Area. *See Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1081 (2015). It stated that the Ninth Circuit did not require injury on a "unit to unit" basis and that Plaintiffs' demonstration of a concrete interest in the entire project area was enough to establish the required geographic nexus.

*2. Ripeness*

BLM also claimed Plaintiffs' claim was not yet ripe based on the factors set forth by the Supreme Court in *Ohio Forestry Ass'n, Inc, v. Sierra Club*, 523 U.S. 726, 732–33 (1998): 1) whether delayed review would cause hardship to the plaintiff, 2) whether judicial intervention would inappropriately interfere with further administrative action, and 3) whether the courts would benefit from further factual development of the issues. The Court disagreed. Instead, it found that a different test applied to procedural claims given *Ohio Forestry*'s statement that "a person with standing who is injured by a failure to comply with NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Id.* The Court thus held that because Plaintiffs had alleged injury from BLM's failure to comply with NEPA, their claims were ripe.

## Conclusion

Magistrate Judge Kasubhai found that Plaintiffs had established standing and that their claims were ripe. He recommended that BLM's motion to dismiss be denied. The Findings and Recommendations were adopted in full by Judge McShane of the Oregon District Court. *See Cascadia Wildlands v. Adock*, No. 6:22-CV-1344-MK, 2023 WL 3626467 (D. Or. May 24, 2023).

***Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 3750334 (D. Or. June 1, 2023);** *summarized by* Dallas DeLuca, Markowitz Herbold PC.

## Introduction

Eight years ago,[1] Plaintiffs filed suit seeking declaratory and injunctive relief against the United States government to phase out fossil fuel emissions and reduce atmospheric greenhouse gases. Plaintiffs brought claims under the Due Process Clause, the Equal Protection Clause, the Ninth Amendment to the Constitution, and the public trust doctrine. On remand from a 2020 Ninth Circuit opinion, the June 1, 2023, district court decision holds that, based on an intervening 2021 Supreme Court case, Plaintiffs have standing.

## Procedural History

Plaintiffs are youth residing in several western states, including Oregon, along with a nonprofit association of youth climate activities, and Dr. James Hansen (formerly of NASA) in the role of guardian of future generations. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016) ("*Juliana I*") (denying motion to dismiss), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020) ("*Juliana VII*"). Plaintiffs allege that catastrophic climate change caused by emissions of carbon dioxide was a violation of their constitutional rights. *Juliana v. United States*, No. 6:15-cv-01517-AA, 2023 WL 3750334 (D. Or. June 1, 2023) ("*Juliana VIII*").[2] Among other allegations, Plaintiffs claim that Defendants' actions exposed Plaintiffs to the dangers of climate change, which is a violation of their substantive due process rights to life, liberty, and property, and a violation of the obligation to hold natural resources in trust for future generations. *Juliana I* at 1233. The district court denied the motion to dismiss and found that Plaintiffs had standing. *Id.* at 1247.

After Defendants answered the complaint,[3] the district court denied a motion to certify an interlocutory appeal of the denial of their motion to dismiss. *Juliana v. United States*, No. 6:15-cv-01517-AA, 2017 WL 9249531 (D. Or. May 1, 2017) (Coffin, M.J.) ("*Juliana II*"), *report and recommendation adopted*, 2017 WL 2483705 (D. Or. June 8, 2017) ("*Juliana III*"), *rev'd on reconsideration*, 2018 WL 6303774 (D. Or. Nov. 21, 2018) ("*Juliana V*") (certifying interlocutory appeal of *Juliana I* and interlocutory appeal of *Juliana v. United States*, 339 F. Supp. 3d. 1062 (D. Or. 2018) ("*Juliana IV*") (granting and denying in part motions for judgment

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[1] For the purposes of comparison, a similar lawsuit in Montana state court went from complaint in March 2020, to trial in June 2023, and judgment in August 2023. *Held v. Montana*, Montana First Judicial District Court, Lewis and Clark County, No. CDV-2020-307 (Mt. Aug. 14, 2023) (findings of fact, conclusions of law, and order), available at https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf.

[2] There are, so far, eight written opinions by the district court and the Ninth Circuit Court of Appeals, plus a minute order at the Ninth Circuit denying reconsideration and a minute order at the United States Supreme Court dismissing mandamus.

[3] The Court in *Juliana II* quoted numerous admissions that Defendants made, including that officials in the federal government have known for 50 years of the research about the risk of fossil fuel emissions leading to severe negative effects on humans due to climate change. *Juliana II*, 2017 WL 9249531 at *1–2.

on the pleadings and summary judgment and denying request to certify for interlocutory appeal)). The Ninth Circuit, over a lengthy dissent, granted the petition for the interlocutory appeal. *Juliana v. United States*, 949 F.3d 1125 (9th Cir. 2018) ("*Juliana VI*").[4] The Ninth Circuit Court of Appeals began its substantive opinion reversing the district court by summarizing the evidentiary record to-date in the case. *Juliana VII*, 947 F.3d at 1164 ("A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse."). It rejected defendants' argument that the case must first proceed through administrative channels under the Administrative Procedures Act. *Id.* at 1167. The Ninth Circuit then affirmed the district court's finding that at least some of the plaintiffs had alleged and presented evidence of "concrete and particularized injuries." *Id.* at 1168. Next, it affirmed the district court's finding that, under a summary judgment standard, the causation prong of Article III standing was met, "'even if there are multiple links in the chain [of causation].'" *Id.* at 1169 (citation omitted). But the Ninth Circuit, over a dissent, concluded that plaintiffs' claims were not redressable by a federal court and thus plaintiffs lacked Article III standing; the court reversed the district court's denial of summary judgment and the motion to dismiss and remanded with instructions to dismiss. *Id*. at 1169–75.

The District Court's Analysis on Remand

Despite the instructions from the Ninth Circuit to dismiss the case because the claims were not redressable, the district court instead allowed Plaintiffs to file an amended complaint. *Juliana VIII*, 2023 WL 3750334 at *9.[5] After the Ninth Circuit's opinion in *Juliana VII*, the United States Supreme Court issued *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021) (Thomas, J.). Judge Aiken relied on *Uzuegbunam* to conclude that Plaintiffs had standing under the expanded definition of standing from that case. *See Uzuegbunam*, 141 S. Ct. at 806 (Roberts, C.J.) (dissent) (stating decision is "a radical expansion of the judicial power").

First, though, the district court rejected Defendants' argument that the appellate opinion barred the Court from allowing Plaintiffs to file an amended complaint. The Court stated that because the Ninth Circuit opinion "did not expressly address the possibility of amendment and did not indicate a clear intent to deny amendment[,]" controlling precedent allowed a district court to allow an amended pleading. *Juliana VIII*, 2023 WL 3750334 at *5 (citations omitted).

[4] Defendants had also twice sought a stay of the district court proceedings at the United States Supreme Court and also sought mandamus at the Ninth Circuit, all unsuccessfully. *Juliana VIII*, 2017 WL 2483705 at *3.

[5] In the gap of three years and five months between the Ninth Circuit's opinion in *Juliana VII* and the district court's opinion in *Juliana VIII*, the plaintiffs unsuccessfully sought *en banc* rehearing at the Ninth Circuit, *Juliana v. United States,* 986 F.3d 1295 (9th Cir. 2021), apparently considered but did not appeal *Juliana VII* to the United States Supreme Court, and engaged in unsuccessful settlement discussions that the district court ordered. *See* KLCC Radio, "After six years, Teen Climate Suit Could End In Settlement," McDonald, Rachel (May 13, 2021), *available at* https://www.klcc.org/crime-law-justice/2021-05-13/after-six-years-teen-climate-suit-could-end-in-settlement.

Next, the Court analyzed the Ninth Circuit's opinion concerning the redressability requirement for Article III standing. *Id.* at *5–6. Redressability has two prongs; plaintiffs must show that "the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award." *Id.* at *5 (citing *Juliana VII*, 947 F.3d at 574). The Court noted that the Ninth Circuit concluded only that Plaintiffs' requested injunctive and remedial relief was beyond the power of the courts, the second prong, and did not address either prong of the claim for declaratory relief. *Id.* at *6.

The Court then stated that the proposed amended complaint's "factual allegations directly link[] how a declaratory judgment alone will redress plaintiffs' individual ongoing injuries." *Id.* (also noting that the relief that the Ninth Circuit held to be beyond the power of the courts was omitted in the amended complaint). The Court reviewed precedent for the proposition that "declaratory relief alone" "can provide redressability." *Id.* at *7–8 (citations omitted).

The Court then applied *Uzuegbunam* to the proposed amended complaint. *Id.* at *8. The district court noted that "the Supreme Court held that, for the purpose of Article III standing, nominal damages—a form of declaratory relief—provide the necessary redress for a completed violation of a legal right, even where the underlying unlawful conduct had ceased." *Id.* (citing *Uzuegbunam*, 141 S. Ct. at 802). The Court noted that although the Ninth Circuit was "'skeptical'" that declaratory relief alone would remediate plaintiffs' harms, controlling Supreme Court precedent holds that remediating all of plaintiffs' injuries is not a requirement for standing under the Declaratory Judgment Act. *Id.* (quoting *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 127 (2007)). The District Court then concluded that a "declaration" alone that the federal government's energy policies "violate plaintiffs' constitutional rights would itself be significant relief" thus satisfying the first of the two prongs of redressability. *Id.* And, of course, issuing a declaration is within the power of an Article III court, satisfying the second prong of redressability. *Id.* at *8–9.

Proceeding to Trial

The Court's ruling in *Juliana VIII* should mean that the case "can finally go to trial."[6] In *Juliana VIII*, the Court held that plaintiffs have standing to bring their claims, and the Court has already rejected other arguments that defendants raised in their motions to dismiss, for judgment on the pleadings, and for summary judgment. *Juliana VIII*, 2023 WL 3750334 at *2 (describing prior motions and rulings).

[6] YaleEnvironment360, "Youth Climate Lawsuit Against Federal Government Headed for Trial," (June 2, 2023), *available at* https://e360.yale.edu/digest/juliana-youth-climate-lawsuit-trial.

***Willamette Riverkeeper v. National Marine Fisheries Service*, No. 6:21-CV-00034-AA, 2023 WL 4173893 (D. Or. June 26, 2023);** *summarized by* Allison Rothgeb, Markowitz Herbold PC.

## Introduction

In this case before Judge Aiken in the District of Oregon, Plaintiffs Willamette Riverkeeper and Conservation Angler alleged that Defendants U.S. National Marine Fisheries Service ("NMFS"), U.S. Army Corps of Engineers ("COE"), U.S. Fish and Wildlife Service ("FWS"), and Defendant Intervenor, Oregon Department of Fish and Wildlife (collectively, "Defendants") violated the Endangered Species Act ("ESA") and National Environmental Policy Act ("NEPA") in their operation of a summer steelhead program on the North and South Santiam Rivers.

Specifically, Plaintiffs alleged (1) COE and FWS violated Section 7 of the ESA because they authorized, funded, or carried out aspects of a hatchery summer steelhead program, which jeopardized the continued existence of winter steelhead and caused destruction and adverse modification to winter steelhead habitat; (2) NMFS violated Section 7 of the ESA by issuing a Biological Opinion ("BiOp") that unlawfully determined that the hatchery summer steelhead program does not jeopardize winter steelhead or result in destruction or adverse modification to winter steelhead habitat and also by issuing an incidental take statement that fails to include reasonable or prudent measures necessary to minimize impact to winter steelhead habitat; and (3) NMFS violated NPEA when it issued an Environmental Impact Statement ("EIS") that failed to take a hard look at the consequences and effects of the summer steelhead hatchery program on winter steelhead.

## Procedural Posture

Plaintiffs alleged claims under the ESA citizen suit provision, NEPA, and the Administrative Procedure Act ("APA"). The matter was before the Court on Defendants' motion to limit review to the administrative record. At issue was the appropriate scope of review for Plaintiffs' claims under the citizen suit provision of the ESA. *See* 16 U.S.C. § 1540(g)(1). The parties agreed that the APA's arbitrary and capricious standard should apply to Plaintiffs' ESA claims. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). However, the parties disagreed as to whether the scope of review could extend beyond the administrative record.

## The District Court's Analysis

Plaintiffs argued that they were not limited to the administrative record, relying on *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005) and *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011). In *Washington Toxics Coalition*, the Ninth Circuit held that "suits to compel agencies to comply with the substantive provisions of the ESA arise under the ESA citizen suit provision, and not the APA," and that "[b]ecause this substantive statute independently authorizes a private right of action, the APA does not govern the plaintiff's claims." 413 F.3d at 1034. Then, in *Kraayenbrink*, the Ninth Circuit relied on *Washington Toxics Coalition* and held that it "may consider evidence outside the administrative record for the limited purpose of reviewing Plaintiff's ESA claim." *Kraayenbrink*, 632 F.3d at 497.

Defendants argued that the Ninth Circuit's subsequent en banc decision in *Karuk Tribe of California v. United States Forest Service*, 681 F.3d 1006 (9th Cir. 2012) clarified the scope of review for claims brought under the ESA citizen suit provision. In *Karuk Tribe*, the Ninth Circuit stated that "[a]n agency's compliance with the ESA is reviewed under the Administrative

Procedures Act," and that it is a "record review case" where summary judgment may "be granted to either party based upon our review of the administrative record." *Id*. at 1017.

In analyzing the parties' arguments, the Court here noted that courts within the District of Oregon have observed that *Kraayenbrink* has not been consistently applied, and also that district courts within the Ninth Circuit appear split as to the implications of *Washington Toxics Coalition* and *Kraayenbrink*. *See Nw. Env't Advocs. v. U.S. Fish & Wildlife Serv*., Case No. 3:18-CV-01420-AC, 2019 WL 6977406 at *13 (D. Or. Dec. 20, 2019) (collecting cases). The Court noted that the same standard of review issue was at issue in *Northwest Environmental Advocates*, and the government in that case also relied on *Karuk Tribe* to support its argument that review of an ESA claim must be limited to the administrative record.

Here, the Court noted that in *Northwest Environmental Advocates*, the court observed that the language the government relied on was found in the "Standard of Review" section of the opinion, and that the Ninth Circuit did not discuss either *Washington Toxics Coalition* or *Kraayenbrink* in its decision. Accordingly, the court concluded that the Ninth Circuit did not hold that ESA citizen-suits must adhere to the scope of review in the APA, and *Karuk Tribe* did not overrule *Washington Toxics Coalition* or *Kraayenbrink*. *Nw. Env't Advocs,* 2019 WL 6977406 at *14. The Court concurred and noted that other districts within the Ninth Circuit have reached this same conclusion.

Thus, relying on *Northwest Environmental Advocates*, the Court concluded that for Plaintiffs' claims under the ESA citizens suit provision, its review is not limited to the administrative record. Accordingly, the Court denied Defendants' motion.

**Comment: Oregon Wetlands Protection in a Post-*Sackett* World;**
*by* Anna Laird, DiCello Levitt, LLP.

The recent Supreme Court decision in *Sackett v. EPA* rolled back federal protection of wetlands across the nation. *Sackett v. EPA*, 598 U. S. ____ (2023), No. 21–454, slip op. (2023). Fortunately, due to Oregon's state law definition of "waters of this state," wetlands in Oregon remain protected despite *Sackett*. Oregon's Removal-Fill Law, passed in 1967, prohibits the filling of wetlands without a permit. ORS 196.795-990 (1967). According to the Oregon Department of State Lands ("DSL"), Oregon currently has approximately 1.4 million acres of wetlands providing extensive benefits to the environment and people, including storing floodwaters, supporting migratory waterfowl, providing food and shelter for threatened aquatic species, and filtering water pollution. *Wetland Planning and Conservation*, Oregon Department of State Lands. https://www.oregon.gov/dsl/ww/pages/wetlandconservation.aspx. Development of wetland areas, though providing significant socioeconomic benefits, has resulted in the loss of almost one million acres of wetlands across the state since the 1700s. *Id.*

Removal-Fill in Wetlands Under the Federal Clean Water Act

The Clean Water Act (the "Act"), like the Oregon Removal-Fill Law, prohibits placing dredged or fill material into a "water of the United States" ("WOTUS") without a permit. 33 U.S.C. §§ 1311(a), 1344(a), 1362. The Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") have historically found that the definition of WOTUS includes wetlands that are "adjacent" to traditionally navigable waters. 33 C.F.R. § 328.3(b) (2012), 40 C.F.R. § 122.2 (2012), 40 C.F.R. § 230.3(t) (2012). While the majority of Supreme Court justices have not, until now, agreed on what level of connection a wetland must have to a traditionally navigable water to be covered by the protections of the Act, the EPA and the Corps have followed Justice Kenney's "significant nexus" test when determining whether a wetland falls within the Act. *Rapanos v. United States*, 547 U.S. 715, 779–80 (2006) (Kennedy, J., concurring). A "significant nexus" exists where wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of a WOTUS. *Id.* at 779–80.

The Supreme Court in *Sackett* did away with this "significant nexus" test. *Sackett*, No. 21–454, slip op. at 1. The majority in *Sackett*, spearheaded by Justice Samuel Alito, adopted a new test: to be included under the Act, "adjacent" wetlands must have a continuous surface connection. The "continuous surface connection" test narrows the Act's coverage to only "adjoining," rather than "adjacent" wetlands.

> Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, *and* (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. By narrowing the Act's coverage of wetlands to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States.

*Id.* at 69. (Kavanaugh, J., concurring in judgment) (emphasis in original). Post-*Sackett*, wetlands across the nation without a "continuous surface connection" to a WOTUS may now be filled without a permit.

**Comment: Oregon Wetlands Protection in a Post-*Sackett* World;**
*by* Anna Laird, DiCello Levitt, LLP.

Oregon's Removal-Fill Law

Despite *Sackett*'s new "continuous surface connection" standard, Oregon's wetlands will remain protected. Under Oregon's Removal-Fill Law, a permit is required from DSL to fill or remove 50 cubic yards or more material in a "water of this state." The Removal-Fill Law definition of a "water of this state" affirmatively includes "wetlands." ORS 196.800(15).

Historically, DSL has worked with the Corps to issue joint removal-fill permits in Oregon. Joint permits delineate those wetlands covered by the Act from those covered by state law and impose separate but similar permit conditions for each. Moving forward post-*Sackett*, wetlands in Oregon that are no longer subject to federal permitting requirements will still fall under the jurisdiction of DSL's permitting authority. In practice, this shift will likely have minimal impacts on the removal-fill permitting process under the joint permit process in Oregon.