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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. Any opinions expressed herein are of the author alone.

OREGON COURT OF APPEALS

Jack Scott Farms, Inc. v. Dep't of State Lands,
336 Or App 139 (Nov. 14, 2024)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Eagle Star Rock Prods. LLC v. PCC Structurals, Inc.,
No. 3:24-CV-00681-IM, 2024 WL 4751519 (D. Or. Nov. 11, 2024)

Thrive Hood River, et al. v. Loftsgaarden, *et al.*
No. 3:22-CV-01981-AR, ECF No. 45 (D. Or. Nov. 18, 2024)

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Jack Scott Farms, Inc. v. Dep't of State Lands, 336 Or App 139 (Nov. 14, 2024), *summarized by* Sarah Melton, American Forest Resource Council.

Introduction

On November 14, 2024, the Oregon Court of Appeals affirmed the Final Order from the Oregon Department of State Lands ("DSL" or "Respondent") in a challenge brought by Petitioner, Jack Scott Farms, Inc. ("JSF") to DSL's assertion of regulatory jurisdiction over wetlands on JSF's property under Oregon's Removal-Fill Law, ORS 196.800-990. The Court concluded that DSL's Final Order was supported by substantial evidence and reason, and therefore, rejected JSF's three claims of error against the agency.

Background

In 2013, Petitioner purchased a property on which to expand its hazelnut farming. In preparation of farming operations, JSF excavated and graded land on that property. DSL subsequently received a report of JSF's activities as a possible violation of the Removal-Fill Law, inspected the property, and determined that 4.5 acres of wetlands had existed on the property before JSF's excavation and grading work. In August 2019, DSL issued a Proposed Order for Corrective Action and Civil Penalty ("Proposed Order"), determining that JSF had violated the Removal-Fill Law. The Proposed Order required JSF to hire a wetland consultant to prepare and submit a "wetland delineation report" to DSL. JSF did not appeal the Proposed Order, which "became final as a matter of law." *Jack Scott Farms*, 336 Or. App. at 142.

JSF hired Terra Science, Inc. ("TSI") to perform the wetland delineation and subsequent report. TSI completed the report December 2019, in which it concurred with DSL's evaluation that wetlands had existed on the property before JSF's excavation and grading, and concluded that 2.33 acres of "pre-disturbance aquatic features" existed on the property, 0.36 acres of "excavated drainage," and 2.3 acres of a "historically excavated pond." *Id.* at 143. In April 2020, DSL reviewed TSI's report and affirmed TSI's wetland identification, made the determination that the wetland features on JSF's property fell within the agency's jurisdiction, and concluded that they were thus subject to the Removal-Fill Law.

JSF first sought reconsideration from DSL of its jurisdictional decision, but DSL determined again, in December 2020, that the "on-site drainage" and the "historically excavated pond" qualified as jurisdictional. *Id.* at 143. JSF then requested a contested case hearing before an Administrative Law Judge ("ALJ"), who issued a proposed order in December 2021 that affirmed DSL's findings, conclusions, and jurisdictional wetland determination. DSL adopted the ALJ's proposed order and issued its Final Order on May 2, 2022, affirming the agency's jurisdictional determination delineating a total of 2.33 acres of wetlands on JSF's property. JSF appealed.

The Court's Analysis

The appeals court reviews a state agency's final orders for substantial evidence, supported by substantial reason, and errors of law under ORS 183.482. *Id.* at 140 (citing ORS 183.482(8)(a), (c)). The court's review is "bound" by the agency's "findings of historical fact if they are supported by substantial evidence in the record." *SAIF v. Coria*, 371 Or. 1, 4 (2023). Further, DSL has authority to enforce regulations pertaining to removal and fill "occurring in any waters of the state." *Jack Scott Farms*, 336 Or. App. at 140 (citing ORS 196.860(1), (3)). The waters of the state include "wetlands" as defined in ORS 196.800(17).

As stated in the Final Order, the burden of proof for both DSL and JSF is a preponderance of the evidence—that the factfinder must be convinced that the facts asserted are more likely true than false—to which both parties agreed. As the Respondent and proponent of its jurisdictional determination, DSL must demonstrate that it correctly determined the area at dispute was jurisdictional wetlands. JSF, as the Petitioner, must suitably establish any claimed exemptions or affirmative defenses asserted against DSL's determination.

1. Petitioner's Third Assignment of Error: Historic Pond as Jurisdictional Water Feature

The Court began its analysis with JSF's third assignment of error for DSL's conclusion that the historic pond was a jurisdictional water feature. JSF argued that the pond was exempt from jurisdiction because it was an artificially created pond constructed for log storage. But in its Final Order, DSL concluded that the pond was created from a pre-existing, naturally occurring wetland feature and not from "uplands," which are defined as "'any land that is not a wetland or other water.'" *Jack Scott Farms*, 336 Or. App. at 144-45 (citing OAR 141-090-0020(41)).

JSF claimed that DSL erred in its reliance on the expert testimony of agency employees over the testimony of JSF's witnesses, "without explanation or reasoning," and that the ALJ appeared to have accepted the testimony of DSL's experts as conclusive, to the exclusion of the contrary testimony from JSF's witnesses, leaving the Final Order "bereft of substantial evidence and substantial reason." *Id.* at 146. The Court disagreed with JSF's characterization of the Final Order, noting that the facts articulated in it were supported by the record—including how DSL's experts came to their conclusions and summarizing DSL's evidence—and that the Final Order explained why DSL was not persuaded by the "anecdotal at best" testimony from JSF's witnesses. *Jack Scott Farms*, 336 Or. App. at 144-48.

2. Petitioner's First Assignment of Error: Connecting Ditch as Jurisdictional Water Feature

The Court next turned to JSF's first assignment of error, which is related to its third. JSF claimed that a third water feature, which JSF termed as a "connecting ditch," linked the two jurisdictional water features identified on the property, the historic pond and irrigation ditch, arguing that DSL had—"by implication and without discussion"—then tacitly assumed its jurisdiction over this third water feature, the connecting ditch, contrary to the Remove-Fill Law and DSL's own administrative rules. *Id.* at 148.

The Court was not swayed by JSF's argument, explaining that, although JSF claimed it had repeatedly raised the connecting ditch as a jurisdictionally distinct body of water throughout the administrative process, JSF also repeatedly referred to the connecting ditch and the pond as one unit (as part of the property's 2.3-acre wetland feature), and did not dispute that the ditch was within that 2.3 acres of wetlands. The Court concurred with DSL's assessment in the Final Order, that the connecting ditch was created in wetlands, and the record supported it.

3. Petitioner's Second Assignment of Error: Irrigation Ditch as Jurisdictional Water Feature

The Court then turned to JSF's second assignment of error, that DSL erred in concluding that the irrigation ditch was a jurisdictional water feature. JSF first argued that the irrigation ditch was not a "water of this state," as the Removal-Fill Law defined state waters; and second argued that, in the alternative, were the irrigation ditch a water of the state, then it was exempt as a non-jurisdictional irrigation ditch. The Court again disagreed with JSF's characterization of the water feature, noting that DSL explained the irrigation ditch had been created from a "pre-existing perennial stream" and was instead a "channel," and had determined in the Final Order that it was a channel, a water of the state, and did not qualify for the exception for irrigation ditches. *Id.* at 150 (citing OAR 141-085-0010(30) and OAR 141-085-0515(9)).

Having concluded that the Final Order was supported by substantial evidence and reason regarding its determination that the drainage channel (JSF's alleged irrigation ditch) was a jurisdictional wetland subject to the Removal-Fill Law, and that the channel was not a ditch, the Court declined to address JSF's argument that the drainage channel qualified as a non-jurisdictional ditch, exempt from the Removal-Fill Law, and that DSL erred in concluding otherwise.

Conclusion

The Court affirmed DSL's Final Order asserting the agency's regulatory jurisdiction over the wetlands on JSF's property under Oregon's Removal-Fill Law, as supported by substantial evidence and substantial reason. The Court rejected all of JSF's assignments of error claims against DSL and held that substantial evidence and reason supported DSL's findings that the pond, connecting ditch, and drainage channel (JSF's alleged irrigation ditch) were all jurisdictional water features, subject to the Removal-Fill Law and to DSL's authority to require permitting before engaging in excavation and grading activities.

***Eagle Star Rock Prods. LLC v. PCC Structurals, Inc.*, No. 3:24-CV-00681-IM, 2024 WL 4751519 (D. Or. Nov. 11, 2024)**, *summarized by* Brenden Catt.

The views and opinions expressed in this summary are those of the author and do not necessarily reflect the views and opinions of the Utah Attorney General or the Utah Attorney General's Office.

Factual Background

Plaintiff Wilkins Trucking Co., Inc. ("Wilkins") accepts clean fill from construction projects, and Plaintiff Eagle Star Rock Products LLC ("Eagle Star") accepts clean fill from Wilkins (collectively, the "Plaintiffs"). Defendant PCC Structurals, Inc. ("PCC") contracted with Defendant Red Hawk Fire Protection, LLC ("Red Hawk") to upgrade its fire suppression system. Red Hawk subcontracted with Defendant Lovett, Inc. ("Lovett") to dispose of soil excavated during the fire system upgrades. PCC, Red Hawk, and Lovett are collectively the "Defendants."

While upgrading the fire system, Defendants excavated soil from PCC's facility and disposed of that soil at Wilkins' facility. Wilkins transported that soil to Eagle Star who then covered the soil with clean fill from another source. The remaining soil at PCC's facility tested high for concentrations of polychlorinated biphenyls ("PCBs"), which exceeded Oregon clean fill standards.

Legal Background

Plaintiffs brought a Resource Conservation and Recovery Act ("RCRA") claim, alleging Defendants contributed to the handling of solid or hazardous waste, and Defendants thereby created an imminent and substantial endangerment. Plaintiffs also alleged state law claims, including (1) negligence, (2) negligence per se, (3) trespass or nuisance, and (4) indemnity against PCC. Plaintiffs finally requested leave to file an amended complaint to add a claim under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

PCC moved to dismiss Plaintiffs' RCRA and state law claims under Federal Rule of Civil Procedure 12(b)(6). PCC also opposed Plaintiffs' motion to amend their complaint. The Court denied in part and granted in part the Defendants' motion to dismiss. The Court held that Plaintiffs failed to state a claim under RCRA, negligence per se, trespass/nuisance, and indemnity, and stated only a claim for negligence under state law. The Court granted Plaintiffs leave to file a second amended complaint.

The Court's Analysis

1. Judicial Notice

Plaintiffs requested the Court take judicial notice of a letter issued by the Oregon Department of Environmental Quality ("DEQ") and email communications between Plaintiffs, DEQ, and the Environmental Protection Agency. Courts may take judicial notice of matters of public record when considering a motion to dismiss. *See Khoja v.*

Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018). The Court took judicial notice of the existence of this information.

2. RCRA Claim

a. Primary Jurisdiction Doctrine

PCC urged the Court to apply the primary jurisdiction doctrine, under which courts may determine that agencies have the initial decision-making responsibility rather than the courts. *Cohen v. ConAgra Brands, Inc.*, 16 F.4th 1283, 1291 (9th Cir. 2021). Under this doctrine, courts consider (1) the need to resolve an issue that (2) Congress has placed within the jurisdiction of an agency (3) pursuant to a statute that subjects an activity to a regulatory scheme that (4) requires uniform administration. *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015).

The Court concluded that (1) RCRA does not demonstrate a Congressional intent to assign the resolution of the issues in this case to an agency; (2) the issues did not require agency expertise just because they involved technical matters; and (3) the Court's resolution of this case would not jeopardize uniform administration of RCRA. The Court declined to apply the primary jurisdiction doctrine and continued to the merits of Plaintiffs' RCRA claim.

b. Merits of Plaintiffs' RCRA Claim

PCC argued that Plaintiffs failed to state a claim under RCRA's citizen suit provision. Under RCRA's citizen suit provision, a plaintiff must demonstrate a defendant (1) contributes to the handling of (2) any solid or hazardous waste that (3) may present an imminent and substantial endangerment to human health or the environment. 42 U.S.C. § 6972(a)(1)(B). PCC argued that Plaintiffs failed to meet the first and third elements of this provision.

i. PCC's Contribution to Handling of Solid or Hazardous Waste

To "contribute" to the handling of solid or hazardous waste, a plaintiff must allege that a defendant was actively involved in or had some degree of control over the waste disposal. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 80 F.4th 943, 950 (9th Cir. 2023). Mere passive ownership of property alone is insufficient to demonstrate a contribution. *Id.* at 955.

The Court concluded that PCC was not merely a passive landowner. Instead, PCC initiated the fire system upgrades that generated the contaminated soil. Although Red Hawk and Lovett were responsible for removing, transporting, and disposing of the waste, they undertook those actions at the direction of PCC. The Court therefore denied PCC's motion to dismiss on this issue.

ii. Imminent and Substantial Endangerment

Endangerment exists if there is a reasonable concern that someone may be harmed if remedial action is not taken. *Cal. Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 298 F. Supp. 2d 930, 980 (E.D. Cal. 2003). The threat of harm must be current, even if the impact may not be felt until later. *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994).

The Court concluded that Plaintiffs' complaint was devoid of both evidence demonstrating the presence of PCBs at the property above permitted levels and evidence demonstrating a pathway existed through which someone may be harmed. Instead, Plaintiffs' complaint demonstrated that potential pathways may have been closed because the contaminated soil was covered. Accordingly, the Court dismissed Plaintiffs' RCRA claim for failing to allege facts substantiating imminent and substantial endangerment.

3. *Leave to File an Amended Complaint*

Plaintiffs requested leave to file an amended complaint that includes a CERCLA claim. Courts may freely grant leave to amend absent (1) undue delay, (2) bad faith, (3) failure to cure deficiencies, (4) prejudice, or (5) futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962). PCC argued that Plaintiffs failed to meet the first, fourth, and fifth elements, and should thus not be granted leave.

a. Undue Delay

PCC first argued that granting Plaintiffs leave to amend would cause undue delay because Plaintiffs had the opportunity to include the CERCLA claim in its initial complaint. The case was initially filed in April 2024, and Plaintiffs sought leave to amend a mere four months later. Accordingly, the Court held that Plaintiffs did not unduly delay in asserting a CERCLA claim.

b. Prejudice

PCC next argued that granting Plaintiffs leave to amend would be prejudicial. The party opposing leave to amend bears the burden of demonstrating prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). In finding that the merits underlying Plaintiffs' RCRA claim were similar to those of the CERCLA claim and additional discovery costs would be minimal, the Court held that PCC failed to establish prejudice.

c. Futility

PCC finally argued that granting Plaintiffs leave to amend is futile because Plaintiffs could not establish that (1) the release caused them to incur costs that were necessary and consistent with the National Contingency Plan and (2) Defendants were liable

for arranging the disposal of hazardous waste under 42 U.S.C. § 9607(a). The Court held that Plaintiffs sufficiently pled necessary response costs. The Court also held that PCC was subject to arranger liability because it was not required to have knowledge of a substance's hazardous nature, and it contracted for the disposal of hazardous waste. Therefore, Plaintiffs' CERCLA claim was not futile, and the Court allowed the Plaintiffs leave to file a second amended complaint.

4. *State Law Claims*

Plaintiffs were able to state only a claim for negligence under state law. PCC argued that Plaintiffs' negligence claim failed to establish a breach of duty of care, a foreseeable risk of harm, and causation.

The Court concluded that a duty of care existed because a duty may exist where a defendant harms a plaintiff by exposing their land to toxic chemicals. *See Greenfield MHP Assocs., L.P. v. Ametek, Inc.*, 145 F. Supp. 3d 1000, 1015 (S.D. Cal. 2015). On foreseeability and causation, the Court held that PCC may be responsible for the contamination of Plaintiffs' properties because PCC may be held liable as a contributor under RCRA or arranger under CERCLA. The Court found that Plaintiffs' complaint was sufficient to state a claim for negligence under Oregon law.

Conclusion

The Court granted PCC's motion to dismiss Plaintiffs' RCRA claim, negligence per se claim, trespass or nuisance claim, and indemnity claim; denied PCC's motion to dismiss Plaintiffs' negligence claim; and granted Plaintiffs leave to file a second amended complaint.

Thrive Hood River, et al. v. Loftsgaarden, et al., Civ. No. 3:22-01981-AR (D. Or. Jan. 6, 2025), ECF No. 45, *overruling in part and affirming in part* ECF No. 36 (Nov. 18, 2024), *summarized by* Casey T. Clausen, Beveridge & Diamond P.C.

Background

Thrive Hood River, several other organizations, and an individual (together, "Plaintiffs") challenged the U.S. Forest Service's ("Forest Service") approval of a land exchange on Mt. Hood between the Forest Service and a private entity, Mt. Hood Meadows Oreg., LLC ("Mt. Hood Meadows"). Congress directed the Forest Service by legislation in 2009 and 2018 to exchange lands that it owns in Government Camp for lands that Mt. Hood Meadows owns in Copper Spur. The Forest Service issued a Record of Decision ("ROD") and Environmental Impact Statement ("EIS") on May 3, 2022. Plaintiffs allege that the ROD and EIS are arbitrary and capricious under the Administrative Procedure Act and National Environmental Policy Act and violate the intent of the Omnibus Public Land Management Act of 2009 (Pub. L. 111-11, 123 Stat. 1018), as amended by the Mt. Hood Cooper Spur Land Exchange Clarification Act of 2018 (Pub. L. 115-110, 131 Stat. 2270).

After the Forest Service filed the administrative record on September 7, 2023, Plaintiffs filed a motion to compel the agency to complete the administrative record and to produce a privilege log of documents withheld from the record based on the deliberative process privilege, attorney-client privilege, and any other privilege. On November 18, 2024, U.S. Magistrate Jeffrey Armistead issued an Opinion and Order granting Plaintiffs' motion in part, and denying it in part. Plaintiffs appealed Judge Armistead's Order to the district court, and on January 6, 2025, U.S. District Judge Michael H. Simon overruled in part and affirmed in part Judge Armistead's Order.

Analysis

1. Completion of the Record

The Court first reviewed Judge Armistead's findings regarding Plaintiffs' motion to compel the Forest Service to complete the record for clear error, and finding no clear error, affirmed those findings. Civ. No. 3:22-01981-AR (D. Or. Jan. 6, 2025), ECF No. 45 ("Order") at 3. Plaintiffs argued that the record was incomplete because the agency did not include three categories of documents: (1) the Clackamas County Comprehensive Plan; (2) documents from meetings with tribes and tribal organizations; and (3) a video record of a May 5, 2021 hearing. Judge Armistead considered Plaintiffs' arguments under the legal standard that the record is "subject to a presumption of regularity," which can only be overcome with "clear evidence to the contrary." 2024 WL 4825156, at *2.

Plaintiffs first argued that a PDF of the Clackamas County Comprehensive Plan should have been included in the record because the ROD referenced the Plan. The Forest Service responded that the record was sufficient because it included a hyperlink to the Plan. Judge Armistead agreed with Plaintiffs, finding that the reference to the Plan in the ROD and the inclusion of the hyperlink in the record was

clear evidence that the Forest Service considered the Plan. Judge Armistead found that a hyperlink was insufficient because the hyperlink could be altered or expire.

Plaintiffs next argued that the record improperly excluded certain tribal communications because the record contained some tribal communications, and the Forest Service did not deny that other communications were considered during conferral. Judge Armistead found that Plaintiffs did not show with "sufficient specificity" that additional tribal communication documents existed, and did not identify specific documents or details about the tribes consulted. Judge Armistead therefore found that Plaintiffs did not overcome the presumption of regularity.

Finally, Plaintiffs argued that a video recording of a May 5, 2021 hearing on objections to the land exchange should be included in the record. No contemporaneous recording of the hearing was made, and the video was only provided to the Forest Service by Plaintiffs in January 2024. Because the video was not available when the ROD was issued in 2022, Judge Armistead found that it could not have been considered in the Forest Service's decision.

2. Privilege Log

Next, the Court addressed Judge Armistead's findings with respect to Plaintiffs' motion to compel the Forest Service to produce a privilege log of documents omitted from the administrative record. Plaintiffs acknowledged that the Ninth Circuit's decision in *Blue Mountains Biodiversity Project v. Jeffries*, 99 F.4th 438 (9th Cir. 2014) does not require a privilege log for deliberative documents absent a showing of bad faith or improper behavior, because such materials are ordinarily "not part of the administrative record to begin with." *Id.* at 445. Plaintiffs argued, however, that *Jeffries* did not apply to documents privileged on other grounds, and a prior lawsuit related to the land exchange in which the Forest Service filed a privilege log showed that it had considered and omitted other privileged materials from the administrative record. Judge Armistead disagreed with Plaintiffs' argument *Jeffries* did not apply to privileges other than the deliberative process privilege. Accordingly, applying *Jeffries*, Judge Armistead found that Plaintiffs failed to show bad faith or improper behavior and denied their motion to compel a privilege log.

Judge Simon conducted *de novo* review on appeal. Judge Simon agreed with Plaintiffs that *Jeffries* "does *not* extend to documents that are privileged on other grounds" than the deliberative process privilege. Order at 4. Therefore, Judge Simon overruled Judge Armistead's ruling and ordered the Forest Service to produce a privilege log for materials that were withheld from the administrative record on the grounds of other privileges or the attorney work-product doctrine. As to documents falling under the deliberative process privilege, Judge Simon agreed with Judge Armistead's

finding that there was no showing of bad faith or impropriety that would require a privilege log for those documents.

Conclusion

The Court affirmed in part, and overruled in part, Judge Armistead's Opinion and Order. The Court directed Defendants to produce a privilege log for materials that would have been in the administrative record but were withheld due to privilege or the attorney work-product doctrine.