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Recent Environmental Cases and Rules

Jessica Bernardini &
Hannah Goldblatt, Editors

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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.

A special thank you to our contributors: Cameron Catanzano, Praedium Law Group, PLLC; David Samuels, Larkins Vacura Kayser LLP; and Peter Hurd.

OREGON COURT OF APPEALS

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**If you are interested in contributing to future editions, please contact the editors:*

Jessica Bernardini, jessica.bernardini@millernash.com
Hannah Goldblatt, hgoldblatt@advocateswest.org

***Columbia Riverkeeper v. Oregon Department of Fish and Wildlife,* 345 Or App 213 (Nov. 26, 2025),** *summarized by* David Samuels, Larkins Vacura Kayser LLP.

Introduction

On November 26, 2025, the Oregon Court of Appeals invalidated amendments by the Oregon Fish and Wildlife Commission ("Commission") to the Oregon Department of Fish and Wildlife's ("ODFW") administrative rules governing Oregon's Fish Passage Program, concluding that the Commission did not substantially comply with the notice requirements under the Oregon Administrative Procedures Act ("APA"). The amendments fundamentally altered the definition of "fish passage" to include trap collection and transport as an alternative to "volitional" passage (*i.e.*, without being trapped, transferred, or handled by any person), but these significant changes were not included in the Commission's notice of proposed rulemaking and instead appeared for the first time in a meeting packet distributed less than two weeks before the Commission's vote.

Background

Oregon's Fish Passage Program rules protect the ability of native migratory fish to pass through human-made barriers, such as dams and roads. The original rules adopted in 2006 required that fish be able to pass through obstructions volitionally on their own without being trapped, transferred, or handled, except "at traps" preventing them from passing volitionally. In 2021, the Commission began a two-year rule revision process that resulted in over 400 public comments.

In October 2022, the Commission published its notice of proposed rulemaking. The proposed change addressed only the definition of "fish passage," not amendments affecting volitional passage. Proposed amendments to "Fish Passage Criteria" (OAR 635-412-0035(6)) controlling fish passage "at traps" did not include giving ODFW discretionary authority to approve trapping and transporting fish. The last day for public comment was December 16, 2022, when the Commission would meet to vote on the proposed amendments.

Days before the Commission's vote on the proposed amendments, the agency distributed a meeting packet containing revised proposed rules related to trap and transport that were substantially different from those in the public notice. The revisions: (1) changed the definition of "fish passage" to include "trap collection and transport" as an alternative to volitional passage; (2) removed language in the definition of "volitionally" that had limited non-volitional passage to fish at traps; and (3) added a new provision to the Fish Passage Criteria at OAR 635-412-0035(6), authorizing ODFW to approve trapping and transporting fish. The Commission adopted the revised rules at the December 16 meeting.

Petitioners—environmental nonprofits, commercial fishing associations, and affected tribal nations—challenged the revised proposed amendments under the

APA, ORS 183.400, arguing the agency failed to substantially comply with the public notice requirements of ORS 183.335.

Standard of Review

Under the APA, the Court of Appeals will declare an agency's rule to be invalid if it, among other things, "was adopted without compliance with applicable rulemaking procedures." ORS 183.400. As part of the rulemaking process, an agency must issue a public notice that is in "substantial compliance" with ORS 183.335.

The Commission argued that substantial compliance requires only that the adopted rules fall within the general subject matter described in the notice, citing *Bassett v. Fish & Wildlife Comm.*, 27 Or App 639 (1976). The Court rejected this view based on its more recent ruling in *N.W. Natural Gas Co. v. Environ. Quality Comm.*, 329 Or App 648 (2023). The Court held that substantial compliance requires not only that the rules fall withing the notice's general subject matter, but the notice must also fulfill "the essential matters necessary to assure every reasonable objective of the statute," which here was the notice statute, ORS 183.335.

The Court identified three objectives of the notice requirements: (1) to inform the interested public about intended agency action that might affect them; (2) to trigger the agency's opportunity to receive the benefit of public feedback on the proposed action; and (3) to ensure that interested persons can "meaningfully participate in the public comment period by submitting data and arguments that [are] responsive to the agency's concerns in proposing the rule or rule change."

The Court's Analysis

Applying its two-prong standard of review, the Court concluded that even though the revised rules the Commission adopted were within the subject matter of the notice, the Commission did not substantially comply with the requirements of ORS 183.335 because the notice did not satisfy the three objectives of the statute.

1. *Informing Public of Intended Agency Action*

As to the first objective, the Court found that the notice satisfied the purpose of informing the public about intended agency action that might affect their interests. The notice stated the Commission intended to amend the Fish Passage Program rules to "provide clarity on existing standards, establish new standards, and ensure alignment with the ODFW Climate and Ocean Change Policy." Because the challenged rules either clarified existing standards or established new standards, the notice generally informed the public about the intended action in a way that

allowed parties with an interest in the Fish Passage Rules to be informed that their interests may have been affected.

2. Failure to Trigger Public Feedback

As to the second objective, the Court found the notice did not trigger the Commission's opportunity to receive the benefit of public feedback on the challenged amendments. Throughout the two-year rulemaking process, there was no mention of amendments to trap and transport policies, leading to no public comments about that issue. Only after the meeting packet was distributed did stakeholders raise concerns about the trap and transport revisions. But by then, it was too late.

3. Failure to Enable Meaningful Participation

As to the third objective, the Court found that the notice did not enable the petitioners to meaningfully participate in the public comment period because the notice contained no indication that trap and transport provisions would be revised. As the Court observed, "Common sense dictates that the public cannot provide feedback, data, and arguments when it is not notified what to provide feedback, data, and arguments about." The Court specifically noted that the lack of notice about changes to trap and transport rules "had the effect of depriving [sovereign tribal nations] whose interests are historically, culturally, and integrally intertwined with the policies at issue of a role in the process, which is exactly what the notice requirements are designed to prevent."

4. Notice Was Required Because the Revisions Were Not Mere Clarifications of the Existing Rules

Finally, the Court rejected arguments that the revisions were simply clarifications of existing rules rather than substantive changes. The 2006 rules required volitional fish passage at all artificial obstructions except at traps. Meanwhile, the 2023 amendments made "trap and transport" an *alternative* to volitional fish passage. The Court found that allowing more human involvement went beyond clarifying rules meant to let fish move freely on their own.

Conclusion

The Court's decision underscores that the APA notice requirements demand both identifying the general subject matter of rulemaking and enabling all interested parties to participate in formulating policies. While an agency may revise proposed rules during a rulemaking, if a revision addresses topics not identified as relevant to the rulemaking in the notice or fundamentally alters the nature of the proposed rules, the agency must issue new notice and reopen public comment.

***Northwest Environmental Defense Center v. City of Portland,* 344 Or App 678 (Nov. 13, 2025),** *summarized by* Cameron Catanzano, Praedium Law Group, PLLC.

Introduction

Petitioners, the Northwest Environmental Defense Counsel ("NEDC") and 350PDX, sought the judicial review of a Land Use Board of Appeals ("LUBA") order, determining that LUBA lacked jurisdiction under ORS 197.015(1)(b)(H)(ii) to review the City of Portland's Land Use Compatibility Statement ("LUCS") issued to Zenith Energy Terminals Holdings, LLC ("Zenith"). The Court reversed LUBA's decision, determining that it did have jurisdiction, and remanded Petitioners' challenge for a decision on the merits.

Background

Zenith operates a bulk petroleum and renewable fuels distribution terminal and asphalt refinery in Portland, zoned as Heavy Industrial. Under the City's land use code, the facility is categorized as a Bulk Fossil Fuel Terminal. In 2022, Zenith requested a LUCS from the City to obtain an Air Contaminant Discharge Permit ("ACDP"), issued by the Oregon Department of Environmental Quality ("ODEQ"). Zenith applied for its LUCS using a form application provided by ODEQ, and attached a written statement that included four conditions on Zenith's operations. Upon approval, the four conditions became enforceable under PCC 33.700.030 ("It is unlawful to violate any… conditions of a land use approval…"). No one challenged this 2022 approval.

The current challenge revolves around Zenith's recent request to update its ACDP permit to accommodate operational changes[1] at Zenith's facility. In 2025, Zenith submitted a new LUCS request using ODEQ's standard form. The City approved Zenith's new LUCS in February 2025, but this time checking two boxes: one stating that "the activity or use is allowed outright" and noting below that it is allowed under the City's Zoning Code; another stating that "the activity or use is allowed; findings attached" and re-attaching Zenith's written statement, with the same four conditions as the 2022 LUCS, but with some additional details.

Petitioners appealed the City's 2025 LUCS to the LUBA. On the City's motion to dismiss, LUBA determined that the 2025 LUCS was not a "land use decision" under ORS 197.015(1)(b)(H)(ii), transferring the appeal to Multnomah Circuit Court. The Court reviewed LUBA's dismissal, determining that LUBA failed to properly interpret the relevant law.

[1] The Court identified two operational changes: (1) expanding the permit's scope to include adjacent, third-party land, and (2) adding new equipment for managing sustainable jet fuel.

Court's Analysis

1. The City's LUCS approval is the 'final decision,' establishing jurisdiction.

LUBA has exclusive jurisdiction to review local government land use decisions, ORS 197.825(1), and it is the burden of the petitioner to show that the challenged action falls within that jurisdiction. *Niece v. Prosper Portland*, 334 Or App 735, 737 (2024). Analysis of this jurisdictional question "must begin by identifying the 'final decision'. . . at issue." *Grabhorn, Inc. v. Washington County*, 255 Or App 369, 375, 297 P3d 524, *rev den*, 353 Or 867 (2013). The City's decision here is the LUCS form it approved from ODEQ, it is not ODEQ's permit approval.

2. The City's LUCS was a discretionary land use decision.

A land use decision is "a local government decision that concerns the application of [] statewide planning goals, a comprehensive plan, or a land use regulation." *NEDC v. Portland*, 344 Or App 678, 683 (November 13, 2025) (citing ORS 197.015(10)(a)(A)). LUCS are a common example because they are used by state agencies "to determine whether permits and approvals affecting land use are consistent with local government comprehensive plans." *Id.* at 683 (citing *Grabhorn, Inc. v. Washington County*, 255 Or App 369, 371 n.1, *rev den*, 353 Or 867 (2013)). By statute, however, three types of LUCS are excluded from the definition of land use decision, including when a proposed activity "is allowed without review under [a] comprehensive plan" and its implementing regulations. ORS 197.015(10)(b)(H)(ii).

Petitioners' chief argument was that the inclusion of four binding conditions converts the LUCS into a discretionary land use decision.[2] The Court agreed.[3] Under Oregon law, a LUCS that attaches an additional land use decision becomes a "LUCS-plus," and falls outside of the ORS 197.015(10)(b)(H)(ii) exception. By including enforceable conditions, the City transformed the LUCS into a LUCS-plus. In stating that the conditions were enforceable under PCC 33.700.030, the City also appeared to concede that it was imposing "conditions of a land use approval," and that it had discretion to impose those conditions.[4]

Under LUBA's framing, the City's decision would be included in the exception because Zennith's activity was allowed under the comprehensive code *without*

[2] Petitioners further argued that the decision is in the form of a permit, as defined by ORS 227.160(2), but this was outside of the Court's review. *NEDC*, 344 Or App at 684 n.4.

[3] The Court further determined that the 2025 LUCS met the general definition for a land use decision, as defined in ORS 197.015(1)(a)(A), but this did not appear to be at issue.

[4] PCC 33.910.030 and 33.800.070 further implies that attachment of conditions only occur for "land use decisions."

conditions, so the City actually did not have legal discretion to impose the conditions. As the Court notes, however, "It does not matter that the city could have issued the 2025 LUCS without inclusion of the four enforceable land use conditions, because that is not what the city did." *NEDC*, 344 Or App at 685.

Conclusion

Rejecting LUBA's framing of the issues, the Court held that the imposition of conditions turned the City's LUCS into a discretionary land use decision. Therefore, the LUCS fell outside of the ORS 197.015(10)(b)(H)(ii) exception, and LUBA had jurisdiction to review Petitioners' challenge.

***Michael Pearson, et al. v. Port of Morrow et al.*, No. 2:24-CV-362-HL, 2025 WL 3691202 (D. Or. Dec. 19, 2025),** *summarized by* Peter Hurd.

Introduction

Plaintiffs sued Defendants on the bases that Defendants had contributed or caused dangerous levels of nitrate pollution in their water and on their properties. On December 19, 2025, the Court issued its ruling on Defendants' motions for dismissal of Plaintiffs' federal claim under the Resource Conservation and Recovery Act ("RCRA") and state claims of negligence, negligence *per se*, trespass, private nuisance, public nuisance, and inverse condemnation. The court also ruled on Defendants' related motions to take judicial notice.

Background

Plaintiffs filed suit against the Port of Morrow ("the Port"), Lamb Weston Holdings, Inc. ("Lamb Weston"), Madison Ranches, Inc. ("Madison"), Threemile Canyon Farms, LLC ("Threemile"), and Beef Northwest Feeders, LLC ("BNW"). All five defendants produce, transport, or disperse substances which have the potential to cause nitrate pollution such as fertilizer, wastewater treatment product, and animal waste. The defendants fall into three overlapping groups: Wastewater Defendants (the Port and Lamb Weston); Farm Defendants (Lamb Weston, Madison, and Threemile); and concentrated animal feeding operation ("CAFO") Defendants (Threemile and BNW). Plaintiffs allege three classes: residents of the Lower Umatilla Basin Groundwater Management Area ("LUBGWMA"); people who rely on private wells in the LUBGWMA; and owners/renters of property in the LUBGWMA.

The Environmental Protection Agency ("EPA") has declared water unsafe for human consumption when it contains a nitrate concentration of 10 mg/L or greater, and Oregon's Department of Environmental Quality ("DEQ") has designated an area as a Groundwater Management Area if water there reaches a nitrate concentration of 7 mg/L or greater.
Nitrate-contaminated water can cause numerous health issues including reproductive complications, cancer, kidney and spleen disorders, and respiratory diseases.

Groundwater in the Lower Umatilla Basin has been heavily polluted with nitrates since the mid-1990s. Farm defendants, who control nearly 107,000 acres of irrigated agricultural land in Umatilla and Morrow Counties, regularly and intentionally apply nitrogen fertilizer to their crops knowing that the extra nitrogen will leach and convert to nitrates. Meanwhile, CAFOs in the LUBGWMA house more than 148,000 animals in dairies and feedlots that excrete more than 9,000 tons of nitrogen per year. The DEQ has found the greatest increases in nitrate contamination on lands subjected to CAFO manure land applications. Finally, the wastewater defendants pump high-nitrate wastewater to farm defendants year-round, routinely violating the limits of their wastewater discharge permits by

dumping excessively and improperly discarding wastewater through leaks in several wastewater pipelines.

Plaintiff residents of the LUBGWMA who normally rely on private well water for drinking, bathing, and cooking have found nitrate concentrations in their well water as high as 47mg/L, more than four times higher than EPA's 10mg/L safety standard. In June 2022, Morrow County (which contains roughly half of the LUBGWMA) declared a local state of emergency over groundwater nitrate pollution.

Procedural History

This action was first heard by U.S. Magistrate Judge Hallman, who issued findings and recommendations ("F&R") to grant defendant's motions for judicial notice, grant in part defendants' motions to dismiss under Rule 12(b)(6), and deny Defendants' motions to dismiss under Rules 8 and 12(b)(1). Defendants filed objections to the F&R and Plaintiffs responded.

The Court's Analysis

1. *Judicial Notice Granted for Documents but Limited to Exclude Facts Within Documents*

As an initial matter, Defendants sought judicial notice of documents and facts in support of their motions to dismiss. The Court granted Defendants' motions for judicial notice of documents supporting their motions to dismiss, but did not take judicial notice of facts within those documents. The Court explained that it had discretion to accept new evidence submitted with a party's objections to the magistrate's F&R regardless of whether those documents were part of the record before the magistrate judge.

2. *Rule 8 Motion to Dismiss Denied*

Defendants moved to dismiss on the basis that Plaintiffs made an improper "shotgun pleading" under Rule 8 of the Federal Rules of Civil Procedure. Rule 8 requires that allegations be more than generic and conclusory with at least some degree of specificity as to defendants' alleged collective activity. The Court reasoned that although Plaintiffs' Amended Complaint lacked clarity as to the role that each Defendant played in the groundwater contamination and Plaintiffs' injuries, the Complaint sufficiently differentiated among the three groups of Defendants and adequately specified the harm allegedly caused by each group as well as the allegedly wrongful actions taken by each. The Court therefore denied Defendants' motion to dismiss.

3. The Court Declined to Abstain Under Both the Doctrine of Primary Jurisdiction and Burford Abstention

Defendants requested that the Court abstain under (a) the doctrine of primary jurisdiction and (b) *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The court refused to abstain on either grounds.

a. Primary Jurisdiction and Efficiency Factors did not Favor Abstention

In evaluating Defendants' request to abstain under primary jurisdiction doctrine, the Court considered the four factors laid out in *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987): (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration. Parties did not object to the magistrate's application of the first factor, but Defendants did object to the magistrate's analysis of the other three factors which weighed against abstention. The Court reasoned that factors 2 and 3 weighed against abstention because RCRA explicitly authorizes citizen suits for violations, indicating Congress' intent to place some enforcement authority outside of any administrative body or regulatory scheme. On the fourth factor, the Court agreed with the magistrate that the Court was competent to resolve RCRA and state law claims brought in this action despite Defendants' assertions that any relief granted by the Court would conflict or duplicate DEQ enforcement actions, or would not adequately remedy Plaintiffs' harms due to the size of LUBGWMA and number of non-parties contributing to nitrate pollution.

Defendants also argued that abstention would lead to the most efficient resolution because the Oregon DEQ is the agency that could most effectively remediate the nitrate contamination in the LUBGWMA. The Court rejected this argument on the grounds that RCRA does not require agency action before Plaintiffs bring claims. Additionally, agency actions such as fines and penalties would flow to the state whereas the Court could award money damages to Plaintiffs or order injunctive remedies such as ordering Defendants provide clean water to Plaintiffs.

b. The Court Declined to Abstain under Burford

The Court rejected Defendants' argument for abstention under *Burford*, 319 U.S. 315 (1943). The first of three factors for *Burford* abstention requires a challenge to agency action. Because Plaintiffs were not seeking to change a state-issued determination, the Court reasoned that the first factor did not apply. Further, because *Burford's* factors are conjunctive, the Court did not need to address the other three factors in its decision not to abstain.

4. Motions to Dismiss under Rule 12(b)(6) Granted in Part and Denied in Part

a. RCRA Claims: Granted in Part and Denied in Part

Plaintiffs alleged that Defendants violated RCRA by: (i) over-applying fertilizer to agricultural fields; (ii) over-applying animal waste to agricultural fields; (iii) over-applying wastewater and allowing wastewater to spill by leaks from wastewater pipes while the water is being pumped to local farms; and (iv) allowing industrial waste, wastewater, and other industrial effluent containing nitrogen to leach from waste lagoons into the soil. For a RCRA claim to survive a motion to dismiss, a plaintiff must plausibly allege: (1) that the defendant has contributed to the past or is contributing to the present handling, treatment, transportation, or disposal of certain material; (2) that this material constitutes "solid waste" under RCRA; and (3) that the solid waste may present an imminent and substantial endangerment to health or the environment.

i. Over-Applying Fertilizer: Dismissed

The Court concurred with the magistrate that fertilizer is not a "discarded" material as required to fit RCRA's definition of "solid waste" because it is applied to crops for its beneficial use and therefore is still wanted by the consumer. No parties objected to the magistrate's determination, and the Court dismissed this count brought against the Farm Defendants.

ii. Over-Applying Animal Waste: Dismissed

The Court dismissed Plaintiffs' animal waste claims against the CAFO Defendants. Plaintiffs' allegation that CAFOs merely "*may* cause nitrate contamination" when animal waste is spilled or otherwise leaks during handling did not constitute facts plausibly showing that CAFO defendants disposed of solid waste in violation of RCRA.

iii. Over-Applying Wastewater and Spilling Wastewater from Pipes: Plausibly Alleged

The Court found that Plaintiffs did state a claim against Wastewater Defendants for their application of excess wastewater to crops and spilling wastewater from their transportation pipes. Unlike the fertilizer claim, the wastewater in question did qualify as a "solid waste" under RCRA because it was applied in excess of permits to fallow fields at no or low cost to the recipient, and was therefore "discarded." Additionally, wastewater did not qualify for RCRA's solid waste definition exemption for "solid or dissolved material in irrigation return flow"

because the water was regularly being applied as an excess product to fallow fields. The Court also found that Plaintiffs had sufficiently alleged a threat of harm, and that agency activity had not mitigated that threat.

iv. Allowing Wastewater and Effluent to Leach from Lagoons: Plausibly Alleged

The Court found that Plaintiffs stated a claim against the Wastewater Defendants for allowing wastewater and nitrogen effluent to leach from lagoons. Because the effluent lagoons were designed to leak, Defendants had a measure of control over the waste when it was disposed of and also "discarded" the material by allowing it to leak.

b. Plaintiffs Met Notice Requirements of Oregon Tort Claims Act but Failed to Allege Compliance in Pleading

The Port moved to dismiss all state law tort claims against it on the grounds that Plaintiffs failed to comply with the Oregon Tort Claims Act ("OTCA"). Under the OTCA, notice of an action arising from any act or omission of a public body must be provided within 180 days after the alleged loss or injury. The Court held that a reasonable person in Plaintiffs' position would not have learned of the nitrate contamination or the Port's relationship to that contamination before June 2022, making Plaintiffs' December 2022 notice timely. Although high nitrate contamination in the LUBGWMA was established in the mid-1990s, that establishment did not put Plaintiffs on sufficient notice that their personal wells or water supplies were dangerously polluted. Further, although Plaintiffs were warned in January of 2022 to get their private wells tested, they could not have actually discovered whether they were injured until they obtained testing on those wells because the injury required specialized equipment to detect.

The Port also moved for a Rule 12(b)(1) subject-matter jurisdiction dismissal on the basis that Plaintiffs never explicitly alleged that they served the Port with a OTCA notice. However, the Port itself acknowledged in filings that Plaintiffs did serve an OTCA notice. Because the OTCA strictly requires a plaintiff to allege compliance with the law, the Court dismissed all tort claims against the Port but gave Plaintiffs the opportunity to replead and properly allege OTCA compliance.

c. Negligence Claims: Plausibly Alleged Except Against BNW and the Port

The Court found that Plaintiffs properly stated all elements of a claim for negligence against the Farm Defendants, but not BNW or the Port. Plaintiffs adequately alleged that the Farm Defendants, by intentionally over-applying

nitrogen-rich fertilizers and products to their farmlands, caused a foreseeable and unreasonable risk of harm to Plaintiffs' legally protected property interest in nitrate-free water. However, as discussed above, Plaintiffs failed to state a negligence claim against BNW because Plaintiffs made no definite allegations about what BNW did in the LUBGWMA, only what they *may* have done. *See supra* Section 4.a.ii. Plaintiffs also failed to state a claim against the Port under the OTCA, as discussed above. *See supra* Section 4.b.

d. *Negligence* Per Se*: Dismissed Without Objection*

Per the magistrate's recommendation, and without objection from any party, the Court dismissed Plaintiffs' claim for negligence *per se*.

e. Trespass: Sufficiently Alleged Except Against BNW and the Port

The Court held that Plaintiffs sufficiently alleged the required elements of trespass except by BNW and the Port for reasons discussed above. *See supra* Sections 4.a.ii, 4.b. Per the Magistrate, each Plaintiff sufficiently alleged that nitrate contamination compromised the drinking water on their properties and that these Defendants knew that their actions were contaminating the groundwater in the LUBGWMA.

f. Private Nuisance: Sufficiently Alleged Except Against BNW and the Port

The Court determined that Plaintiffs sufficiently alleged the required elements of private nuisance except by BNW and the Port for reasons discussed above. *See supra* Sections 4.a.ii, 4.b. Plaintiffs alleged that they could not consume their well or tap water and instead purchased bottled water because nitrate contamination had rendered their water unsafe. This hardship qualified as substantial and unreasonable interference with their use and enjoyment of their properties because (i) access to safe drinking water is fundamental to the use and enjoyment of any residential property, (ii) the frequency of the intrusion was constant, (iii) lack of clean drinking water has a profound and substantial effect upon the enjoyment of life, health, and property, and (iv) the interference was unreasonable given the lack of benefit to overapplying nitrogen.

g. Public Nuisance: Sufficiently Alleged by Owner Plaintiffs Except Against BNW and the Port

The Court found that property Owner Plaintiffs did sufficiently allege a claim for public nuisance, except as to BNW and the Port for reasons discussed above. *See supra* Sections 4.a.ii, 4.b. However, Plaintiff Strange, a renter, did not allege a

special injury sufficient to meet the requirements of public nuisance. The Court reasoned that property Owner Plaintiffs had suffered an unreasonable interference with a right which is common to members of the public generally because they had experienced an actual loss of value to their property. Although Plaintiff Strange was forced to use bottled water, the Court determined that her injury was not different in kind from the injury suffered by the public at large. As a result, the Court dismissed Plaintiff Strange and the renter subclass's claims for public nuisance.

h. Inverse Condemnation Under Or. Const. art. 1, § 18: Sufficiently Alleged by Owner Plaintiffs against the Port

The Port moved to dismiss Renter and Owner Plaintiffs' claims for governmental taking, arguing that Plaintiffs failed to allege: (1) that any taking by the Port was intentional, (2) that any taking was for "public use", and (3) that any interference with the Renter/Owner Subclass's property by the port was substantial. Again, the Court dismissed Renter Plaintiffs' claims but accepted Owner Plaintiffs' claims as plausibly alleged. Because taking has been defined as an infringement on *the owner's* fundamental legal interests in the property, a renter cannot allege a claim for governmental taking of the property. *Dunn v. City of Milwaukie*, 355 Or. 339, 347-48, 328 P.3d 1261 (2014) (emphasis added).

As for Owner Plaintiffs, the Court wrote "the intentional physical occupation or invasion of property by government for a public purpose generally amounts to a taking, if there is a substantial interference with the property owner's protected interests[.]" *Dunn*, 355 Or. at 349 (collecting cases). Owner Plaintiffs sufficiently alleged that the taking was (1) intentional, (2) for a public use, and (3) resulted in substantial interference with the property owner's protected interests.

First, the Plaintiffs plausibly alleged that the Port acted with intent when it dumped wastewater, and that the "inevitable result" of that action, "in the ordinary course of events," was the contamination of Plaintiffs' water. *See Dunn*, 355 Or. at 358-59. Second, Owner Plaintiffs plausibly alleged the Port's excessive dumping was for a public purpose because, as the Port admitted, the only alternative to applying fertilizer in the winter would be to shut treatment plants down—a move which would cost the Port money. Further, there was plausibly a public "use" because Plaintiffs alleged that, by dumping contaminated water in the LUBGWMA in excess of its permits, the Port contaminated Plaintiffs' wells and infringed on their property interests. Third, there was plausibly a substantial interference with Plaintiffs' use and enjoyment of their property because their well water was above EPA safety limits for nitrates and "dangerously high" according to an at-home test kit. Plaintiffs alleged that they were forced to rely on bottled water for drinking and cooking, and that their property values went down. The Court therefore determined that Owner Plaintiffs had sufficiently alleged all elements of Inverse Condemnation necessary at the dismissal stage.

i. Medical Monitoring: Dismissed Without Objection

Per the magistrate's recommendation, and without objection from any party, the Court dismissed Plaintiffs' request for medical monitoring.

Conclusion

After granting Defendants' motions for judicial notice and declining to abstain, the Court granted in part and denied in part Defendants' motions to dismiss. The court concluded by giving Plaintiffs leave to replead their dismissed claims.

***United States v. ACF Industries, LLC*, No. 3:23-CV-1603-SI, 2025 WL 2985281 (D. Or. Oct. 23, 2025),** *summarized by* Cameron Catanzano, Praedium Law Group, PLLC.

Introduction

After nearly two decades of negotiations, environmental impact studies, and notice and comment periods, the Portland Harbor Superfund Trustees (the "Trustees") moved to enter and approve two settlement agreements (the "Consent Decrees") with several Potentially Responsible Parties (the "Settling Defendants"). Four other Potentially Responsible Parties intervened (the "Intervenors") to oppose entry and approval of the Consent Decrees. The District Court approved the Consent Decrees over these objections.

Background

Portland Harbor has been the site of industrial pollution, including oil and heavy pollutants, since it became a manufacturing and shipping hub in the late 1800s. By 2010, the Trustees sought to finally address this legacy pollution and initiated a Natural Resource Damage Assessment ("NRDA") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 USC §§ 9601, *et seq*. The Trustee's split this NRDA into four phases: (1) assess pollution damages, including by filling data gaps, and begin public outreach; (2) identify Potentially Responsible Parties and propose settlement agreements; (3) complete all ecological studies; and (4) sue all Potentially Responsible Parties who had not yet settled. This dispute occurred during Phase 2, as a challenge to the Trustees methodology for assigning responsibility and negotiating initial settlements.

The Trustees' assessment relied on a habitat equivalency analysis, which establishes a standardized metric for quantifying habitat services, known as a discount service acre year ("DSAY"). Once the total quantity of DSAYs was established, the Trustees assigned each Potentially Responsible Party an estimate DSAY responsibility. The Trustees shared this allocation with each PRP and gave them an opportunity to rebut it with additional information. The Trustees claim that downward revisions for factors like litigation risk or uncertainty were "modest" if at all. However, the Trustees never published its precise DSAY allocated figures, claiming those figures were privileged settlement communications.

Each Settling Defendant opted into one of two Consent Decrees: (1) the $70,500/DSAY 'Cash-Out' settlement, or (2) the Restoration Credit settlement. The Cash-Out settlement is exactly as it appears; each Settling Defendant pays the Trustees a cash equivalent for its DSAY liability, and the Trustees can do what they wish with the money. The Restoration Credit settlement, by contrast, includes a combination of cash payments and restoration projects to meet an entity's DSAY liability. In exchange, the Trustees' agree not to sue the Settling Defendants for natural resources damages in the assessment area, unless additional factors (unknown at the time) indicate additional damages of an unknown "type" or "magnitude."

The Intervenors challenge both the Consent Decrees, arguing that the Consent Decrees benefit the Trustees *more* than the Trustees' own analysis would suggest. Based on the Trustees own DSAYs allocation, the Settling Defendants should owe approximately $33.2 million. However, under the Consent Decrees, the Settling Defendants are liable for an additional $3 million in Trustees costs and $8 million in money *already* advanced in support of early restoration projects.

The Court's Analysis

To approve CERCLA consent decree, the Trustees must (1). provide sufficient evidence to "evaluate the terms of the agreement," and the Consent Decrees must (2) be procedurally fair, (3)substantively fair, (4) reasonable, and (5) consistent with CERCLA's objectives.

1. *The Trustees provided sufficient information to evaluate the Consent Decrees.*

The Intervenors argued that the Court had insufficient information to evaluate the Consent Decrees' reasonableness. For example, Intervenors point out that no specific formula was provided, explaining each party's DSAYS allocation, or the discount each was given. The Intervenors also argued that the Court's record was lacking since the *entire* administrative record was not filed with the Court's docket. The Court rejected both arguments, stating that the record's general description of Trustee's analysis and allocation of DSAYs was sufficient, and that reviewing the *entire* administrative record would be unduly burdensome.

2. *The Consent Decrees were procedurally fair.*

In evaluating procedural fairness, courts look "to the negotiation process" and "gauge its candor, openness, and bargaining balance." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 86 (1st Cir. 1990). The Court did not state whether Intervenors had challenged this point. Instead, it jumped into two facts that support procedural fairness. First, Trustees set DSAYs "collaboratively," giving Potentially Responsible Parties an opportunity to rebut and recalculate DSAY allocations. Second, Trustees opened the negotiation process to the public by holding meetings, releasing technical reports, and publishing YouTube videos. Based on these facts, the Court found procedural fairness.

3. *The Consent Decrees were substantively fair.*

    a. *The Court reviewed the Consent Decrees with considerable discretion.*

On substantive fairness, the Court gave the Trustees "considerable discretion." *ACF Indus., LLC, et al,* LEXIS 208843 at 6 (citing *Montrose,* 50 F.3d 741, 746 (9th Cir. 1995); *Arizona*, 761 F.3d 1005, 1013-15 (9th Cir. 2014)). The Court based this high

level of deference on *Montrose*, which emphasized CERCLA's "policy of encouraging settlements," and the presumed reasonableness of a document "hammered out" by "so many affected parties, themselves knowledgeable and represented by experienced lawyers." *Id.* at 6 (citing *Montrose,* 50 F.3d at 746; 42 U.S.C. § 9622(a)). The Court acknowledged, however, that the deference described in *Cannons,* and quoted by *Montrose*, "looks like *Skidmore* deference," which is typically considered a much weaker form of deference. *Id.* at 7 n.2 (citing *Cannons*, 899 F.2d at 84 and *Montrose*, 50 F.3d at 746); *see also Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).

b. The Consent Decrees are substantively fair, given the context of CERCLA liability.

To measure substantive fairness, courts look to the end result, asking whether the Consent Decrees are "based upon, and roughly correlated with, some acceptable measure of comparative fault." *Arizona*, 761 F.3d at 1012 (quoting *Cannons*, 899 F.2d at 87). This includes comparing the Settling Defendants' total proportionate liability with their total projected obligations. *Arizona*, 761 F.3d at 1012. The Court can then factor in other issues like litigation risks, time savings, and other intangible benefits for either the Trustees or the Settling Defendants. *Id.*

Intervenors challenged the substantive fairness of the Trustees DSAY methodology, claiming that the assessment was unreliable, that the record lacked sufficient information on DSAY allocation, and that DSAY allocation was too imprecise. The Court found these arguments unpersuasive, arguing that the Trustees' methodology evidenced at least a *rough* correlation between the severity of a site's pollution and DSAY liability.

Intervenors also claimed that Consent Decrees cannot be substantively fair when NRDA Phase 3 ecological testing was not complete, and that the record failed to explain how Trustees allocated between multiple parties operating out of the same site. The fundamental issue with these challenges is that Intervenors might be left with a much higher share of liability than they should. The Court found this unpersuasive, because CERCLA imposes joint and several liability, and non-settling defendants always risk "a disproportionate share of the [ ] liability." *AmeriPride Servs. Inc. v. Tex. E. Overseas, Inc.,* 782 F.3d 474, 487 (9th Cir. 2015) (quoting *United States v. Coeur d'Alenes Co.*, 767 F.3d 873, 875 (9th Cir. 2014)).

4. The Consent Decrees were reasonable.

In evaluating reasonableness, courts look to its environmental and public benefits. Settlement should adequately reimburse the public for the costs of restoration, but may be tempered by the relative strength of the Settling Defendants litigating position. *Cannons*, 899 F.2d at 89-90. The Court does not state whether Intervenors challenged this point. Instead, it jumps straight to he affirmative facts establishing the reasonableness of each of the two Consent Decrees. First, the Cash-Out

settlement funds inject millions of dollars in cash for restoration costs. Second, the Restoration Credit settlement is structured to reward actual, effective habitat restoration; credits won't be disbursed if milestones are not met, and each project contains *permanent* stewardship requirements.

5. *The Consent Decrees were consistent with CERCLA's policy objectives.*

In tension are two key CERCLA's objections: the prompt and effective remediation of legacy pollution, and making those responsible for pollution bear the responsibility. *Cannons*, 899 F.2d at 90-91 (citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc.,* 805 F.2d 1074, 1081 (1st Cir. 1986)). Intervenors argued that the Consent Decrees go against the latter objective of CERCLA, providing the Settling Defendants overly expansive contribution protections. Textually, however, the Court appeared to disagree with this construction of the Consent Decrees. The Court also emphasized that Settling Defendants are paying a "premium" to enjoy some legal protections, but that Trustees can always reinitiate litigation to recoup on significant unforeseen damages.

Conclusion

The Court appeared to concede that these Consent Decrees might not include "the best or most neutral terms." *ACF, Industries, LLC,* LEXIS 208843 at 41. Still, under the circumstances, the Court found that the Trustees "collected enough information" on comparative fault, and that the Consent Decrees were "fair, reasonable, and consistent with [CERCLA]." *ACF, Industries, LLC,* LEXIS 208843 at 41.