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Inside...

KLAMATH DECISIONS

COURT RULINGS ON "TAKINGS" AND BIOP/RPA SUFFICIENCY

by Richard M. Glick, Davis Wright Tremaine LLP (Portland)

EDITOR'S NOTE: The following article has been adapted from materials first presented by Mr. Glick at the14th Annual Oregon Water Law Conference (Portland, November 3, 2005).

Two recent decisions handed down by federal courts have once again dashed the hopes of Klamath Basin irrigators and cheered their opponents. Both cases addressed the collision between the federal Endangered Species Act (16 USC § 1531 et seq.—"ESA") and water rights, but from different vantage points. In *Klamath Irrigation Dist. v. United States*, ___ Fed. Cl. ___, No. 01-591 L, (2005) the Court of Federal Claims held that denial of water deliveries to Klamath Project customers during the summer of 2001 in favor of listed species' needs did not constitute a "taking" under the Fifth Amendment. In a separate case, the Ninth Circuit held that the "reasonable and prudent alternatives" adopted under the 2002 biological opinion (BiOp), designed to allow continued water deliveries while safeguarding fish, is arbitrary and capricious. *Pacific Coast Federation of Fishermen's Assn. v. United States*, ___ F. 3d ____, No. 03-16718, (9th Cir. 2005).

This article briefly summarizes these two cases arising out of the troubled Klamath Basin. Both provide additional evidence, if any is needed, that the ESA is king in the battle over water use.

Klamath Irr. Dist. v. U.S. (Court of Federal Claims)

In a 52-page opinion, the court held that stopping water deliveries in accordance with jeopardy opinions issued by the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (now NOAA Fisheries) did not result in a taking that requires just compensation. Judge Allegra made a lengthy and careful analysis of the Klamath Project contracts and takings jurisprudence, and came to the opposite conclusion of the same court, different judge, just a few years earlier in *Tulare Lake Basin Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001). Judge Allegra did not so much distinguish the current case from *Tulare* as eviscerate the reasoning of the prior case.

The case arises out of the April 5, 2001 BiOp issued by FWS that the Bureau of Reclamation's (Reclamation's) proposed 2001 Operating Plan for the Klamath Project jeopardized endangered shortnose and Lost River sucker fish. The next day, NOAA Fisheries came to the same conclusion with regard to coho salmon. The BiOps recommended RPAs consisting of termination of water deliveries in 2001. Two of the affected irrigation districts immediately filed a breach of contract action in US District Court seeking a preliminary injunction. The District Court denied the districts' motion, and they then voluntarily dismissed their case. In October 2001, the irrigators filed the takings case.

The claim alleged that cessation of water deliveries deprived the districts and their members of their water rights under contract with Reclamation, and which were affirmed by the Klamath Basin Compact. The court rejected both these arguments, concluding that the plaintiffs lacked a protectible property interest in Klamath Basin waters under federal or state law. The court first rejects plaintiffs' assertion that the Reclamation Act creates a federal property right in the use of water on appurtenant lands, citing a long line of cases holding that the Reclamation Act is subject to state water law in the allocation of interests in reclamation waters.

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THE COURT STATES:

> In the last analysis, to rule in plaintiffs' favor on this issue, this court would not only have to defenestrate [i.e. "throw out the window"—Editor] this authority. . .but also be prepared to flip the statute onto its head, treating the majority of the language therein not as the embodiment of an important principle of cooperative Federalism, but rather as an empty formalism. While plaintiffs may cling to such a *res ficta* [i.e. matter of fiction—Editor], it remains that Congress enacted no such fantasy.

Klamath Irr. Dist., Slip Op. at 24.

Property Interests

Then the court examined state water law and found no basis for a property interest there either. The court concluded that through enabling state legislation, Reclamation had claimed water rights to all of the unappropriated water rights in the Klamath Basin in 1905. *Id.* at 28. The parties agreed that any pre-1905 rights were acquired by Reclamation soon thereafter, but the plaintiffs asserted a beneficial interest in these water rights that are reflected in the post-1905 contracts with Reclamation.

Liability

The court then turned to the property interests that might reside in the 250 or so of these contracts, many of which are still being administered by Reclamation today. Most of these contracts over time were supplanted by contracts between Reclamation and the irrigation districts. They typically include language absolving the United States from liability for failure to supply water due to "drought or other causes." Although a takings claim may sometimes be brought in a contractual context, the court refused to entertain one here:

> Both of the rationales favoring the use of contractual remedies over takings remedies apply here—that is, the United States may be viewed as acting in its proprietary capacity in entering into the water contracts in question, and it appears that the affected plaintiffs retain the full range of remedies with which to vindicate their contract rights.

Id. at 37.

The same conclusion applies equally to the districts as to individual irrigators. The former because they are in direct contractual privity (mutual interest) with Reclamation, and the latter as third-party beneficiaries. The irrigators have no superior constitutional property interest to the districts:

> Simply put, plaintiffs could not obtain an interest from the districts better than what the districts themselves possessed or once possessed—"*nemo dat qui non habet*," the venerable maxim provides, "one who does not have cannot give."

Id. at 41.

Contract "Observations"

The court acknowledges that the question of whether Reclamation breached its contracts with the districts is not at issue in this case, but offers several "observations" just the same. First, whatever beneficial interest the plaintiffs have is not an absolute right limited only by appurtenancy and beneficial use: The "plain language" of the contracts releases the United States from liability from water shortages of any kind. The court continues: "Notably, various courts have construed similar water shortage clauses as protecting the United States from damages based upon the enforcement of the ESA [citing *O'Neill v. U. S.*, 50 F.3d 577 (9th Cir. 1995)]." *Id.* at 42.

Sovereign Acts Doctrine

Second, even in contracts that do not contain this release language, the court suggests that halting water deliveries in the name of the ESA did not result in a breach under the "sovereign acts doctrine." This doctrine holds that contracts with the Government are subject to the sovereign's right to govern, either through executive or legislative action. If the impact to a contract of a governmental act is incidental to a larger governmental objective, the act will be found "sovereign." The court notes:

> If the contract rights possessed by the district were subject to the sovereign acts doctrine, and the ESA were viewed as a sovereign act under that doctrine, then the ESA could not effectuate a taking here, as it did not take a right that the district possessed (*i.e.*, the right to water as against the enforcement of the ESA).

Id. at 45, n. 58.

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Tulare Shortcomings

The judge dismissed as persuasive precedent the recent decision of the same court in *Tulare*. On roughly the same facts, the earlier court ruled that a taking had occurred. Judge Allegra was emphatically unimpressed with the reasoning of that court: "But, with all due respect, *Tulare* appears to be wrong on some counts, incomplete in others and, distinguishable, at all events." *Id.* at 45. The *Tulare* court assumed the districts' contract rights to water to be absolute, without considering whether they are limited by their terms or by state law. That court failed to examine the contracts, nor did it consider whether the plaintiffs' water use violated state doctrines for the protection of fish and wildlife. Since the state courts had not ruled, the *Tulare* court refused to. Thus, the underlying property interests under the contracts at issue were never examined and yet a taking was found. Finally, the *Tulare* court never reached the issue of whether the violation of contract rights should be seen as a breach, as opposed to a taking, and so never considered the sovereign acts and related doctrines.

Deeds & Permits

The court makes similarly short work of plaintiffs' claims based on patent deeds and state permits, which the court notes are junior in priority to Reclamation Klamath rights. Under the doctrine of prior appropriation, the junior appropriators have nothing to say about disposition of the federal water rights. For the same reason, the Klamath Basin Compact's provisions recognizing vested rights in the basin do not help plaintiffs, as the Compact provides that its terms do not impair the rights of the United States. *Id.* at 47.

Contract Claims

In summary, the court finds no basis for a taking claim based on the Klamath Project contracts or otherwise. The court concludes:

> Like it or not, water rights, though undeniably precious, are subject to the same rules that govern all forms of property—they enjoy no elevated or more protected status. In the case *sub judice* [i.e. before the court—Editor], those rights, such as they exist, take the form of contract claims and will be resolved as such.

Id. at 48.

Pacific Coast v. U.S. (9th Circuit)

Science Review

Hoping to avert a repeat of the disastrous 2001 irrigation season, the National Research Council (NRC) was asked by the Department of the Interior to independently review the science underlying the government's biological opinions that resulted in terminating water deliveries. The NRC concluded that there was insufficient information to support the contention that flows beyond historical levels would benefit coho, and questioned the validity of the 2001 BiOp. NOAA Fisheries did not adopt the NRC's conclusions in full.

Differing Analysis

At about the same time, Phase II of the so-called Hardy Report was released in draft form. That report's recommended flow requirements differed from the NRC's, and concluded that a minimum flow of 1,000 **c**ubic **f**eet per **s**econd (cfs) during the late summer is necessary to ensure low enough temperatures to avoid harm to coho. Against this backdrop, Reclamation proposed a ten-year plan in which flow regimes would be based on type of water year, wet or dry. The flows would be based on minimum flows that prevailed during the previous ten years for that type of year. Water in excess of flow targets would be available for appropriation. The plan also featured a 100,000 acre-feet water bank to ensure flow targets would be met.

Reclamation's Plan

Jeopardy

Following ESA § 7 consultations, NOAA Fisheries issued a jeopardy opinion. The agency was concerned that using minimum flows over a ten-year period as the target for monthly flows would lead to lower average flows. Reduced flows would mean reduction of rearing habitat and would make downstream and return migration more difficult. NOAA Fisheries then proposed "reasonable and prudent alternatives" (RPA) This RPA became the subject of this litigation. The RPA covers operations from 2002-2012 and is premised on the principle that Reclamation should bear responsibility only for flow reductions caused by the Klamath Project. The RPA allocated 57% of responsibility to Reclamation as the Klamath Project irrigates 57% of the Basin. The source of the remaining 43% of flows would be developed by an interagency work group. The RPA included a water bank from which Reclamation would meet its obligation.

"RPA" Contested

The RPA is in three phases. Phase I, from 2002-2005, directs Reclamation to set up the water bank, work out the intergovernmental agreement and conduct studies. Interim flows were to be as provided in Reclamation's **b**iological **a**ssessment (BA) and augmented in spring and summer as necessary through the water bank. During Phase II, from 2006-2010, Reclamation would increase water bank capacity to 100,000 acre feet and deliver its 57% allocation or the BA flows, whichever is greater. Phase III, from 2010-2011, called for flows at 100% of estimated coho needs through a combination of the 57% Reclamation share and the remainder from an unspecified source to be identified in the interagency

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group. NOAA Fisheries determined that during the RPA period, coho could survive a 20% reduction in habitat and calculated minimum flows accordingly. In the summer months, a minimum flow of 1,000 cfs was established.

Challenge

Plaintiffs challenged the RPA as being arbitrary and capricious. They argued that Phase I flows were at the same level a those proposed in the BA and which NOAA Fisheries had rejected as inadequate, and Phase II flows were only at 57% of necessary flows. The trial court rejected this argument, reasoning that NOAA Fisheries had "implicitly" determined that the coho could survive short-term, sub-optimal flows during the ten-year ramping up period.

Insufficient Reasoning

The Court of Appeals disagreed, concluding that implicit reasoning is not sufficient and that NOAA Fisheries needed to articulate is reasons why coho would not be harmed during Phases I and II:

> We must determine whether the NMFS's decision to delay the provision of the full quantity of water for eight years is supported by the record before us. We conclude that it is not. The BiOp contains no analysis of the effect on the [Klamath] coho of the first eight years of implementation of the RPA, and thus we cannot sustain the agency's decision.

Pacific Coast Federation, Slip Op. at 14309.

BiOp Analysis

The court then proceeded to analyze the BiOp in detail, taking NOAA Fisheries to task for failing to adequately explain how the interim measures would be protective. In its discussion of Phase II of the RPA, the court noted that the District Court accepted the interim allocation of 57% responsibility to Reclamation in Phase II, but struck down the 57% share in Phase III as inadequate. The reason is that the collaborative effort to find the remaining 43% flow was not "reasonably certain to occur." *Id.* at 14313, n. 5, quoting 50 CFR § 402.02. However, the Court of Appeals took issue with the RPA's expectation that only Reclamation's 57% would be assured in Phase II. In what might be dicta, the court announced the following test:

Baseline

> The proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency's proposed actions in the present and future human and natural contexts.

Id. at 14313.

Broadened Scope?

This test suggests that the scope of impact for BiOp purposes, and for establishing RPAs, is broader than the proposed federal action that gave rise to the Section 7 consultation in the first place. If so, this case may place the entire burden for addressing basin-wide habitat problems on the party or agency that happens to be going through the consultation process. In other words, if the new proposed action would be the final straw, then its sponsor must pay the price, while early contributors to the problem are left alone. In the context of the 2002 BiOp, the impact of this test is upon Reclamation, and by transference to customers of the Klamath Project, but no one else. Needless to say, the aquatic habitat problems in the Klamath Basin are of many origins and highly complex. Expecting the RPA to guarantee the basin-wide solution could be viewed as both highly impractical and grossly unfair.

Summary

In conclusion, the two cases reviewed here make it clear that Klamath irrigators have few judicial remedies for continued reductions in irrigation water deliveries. The ESA will continue to circumscribe Reclamation's operational flexibility in favor of preserving listed aquatic species, regardless of contract or water rights. Further, when Reclamation follows the direction of the courts to implement the ESA, there will be no compensation resulting from a taking under the Fifth Amendment. Ultimate resolution of the conflict between Government policies that, on the one hand encourage Klamath Basin agriculture and, on the other limit irrigation water in favor of fish, lies with Congress.

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Willamette Basin

THE WILLAMETTE PARTNERSHIP

COORDINATED WATERSHED RESTORATION PROJECT STARTUP

by David Light, Editor

EPA Grant

On November 10, "The Willamette Partnership"— a coalition of conservation, city, county, business, farm and scientific leaders – held a press conference to announce the award of $779,000 in US Environmental Protection Agency (EPA) "Targeted Watershed Grant" funds. The Partnership has also secured $800,000 in local matching resources, to enable a $1.6 million effort to create a "Willamette Ecosystem Marketplace." The Marketplace will establish a system of "conservation credits" as a form of environmental currency to assist in pooling and leveraging resources to pay for coordinated restoration and conservation projects designed to achieve the greatest environmental benefit. The initial focus of the Partnership will be establishing a "water quality trading" venue for reducing water temperatures in the Willamette River and its tributaries.

Water Quality Trading

WQ Trading

"Water quality trading" is based on the fact that sources of pollutants in a watershed can face very different costs to control the same pollutant. Some common watershed pollutants that a trading program could be used for are phosphorus, nitrogen, and temperature. Some examples of pollutant sources are municipal wastewater treatment plants, food processing companies, manufacturing facilities, and agricultural activities.

Lower Costs

Trading programs allow facilities facing higher pollution control costs to meet their regulatory obligations by purchasing environmentally equivalent, or superior, pollution reductions from other sources in the same watershed. These are purchased at a lower cost than it would take to achieve equivalent reductions at their own facilities. Trades between two or more sources can achieve the same or greater water quality improvement in the watershed at lower overall cost.

In announcing the grant award, M. Socorro Rodriguez, Director of Oregon Operations for EPA, noted, "The Willamette River Basin is the largest watershed in the country developing such a trading program. Water quality trading is an innovative approach to achieving water quality goals more efficiently. Trading programs allow facilities facing higher pollution control costs to meet their regulatory obligations by purchasing environmentally equivalent or superior pollution reductions from another source at lower cost."

Temperature Trading

TMDL Requirements

As part of the development of Total Maximum Daily Loads (TMDLs) for the Willamette Basin (see Rubin/Simpson/Aldrich, *Insider* 352), water treatment plants and industrial facilities operating under National Pollution Discharge Elimination System (NPDES) permits in the Basin will be facing requirements to mitigate for the release of warm effluent. Technological fixes (e.g., refrigeration) can be very expensive and energy intensive. Using the Willamette Ecosystem Marketplace, operators of these plants will be able to invest in thermal conservation credits that could pay for: planting trees along riverbanks; restoring floodplains and adjacent wetlands; and reusing water in ways which clean and cool water naturally at substantially lower cost.

Good Data

In a telephone interview, David Primozich, Executive Director of the Partnership, explained, "The TMDL provides a driver. The units of measure are well understood and well defined. And we know a lot about the effects of shade on water temperature." At the press conference, Karen Tarnow of the Oregon Department of Environmental Quality echoed these views, stating, " The Willamette Basin TMDL is adding a robust stream of data" which in addition increasing overall understanding should have practical application in determining the types of, and best locations for, remedial actions.

Example

A potential trade in the Willamette Ecosystem Marketplace might involve a municipal wastewater treatment facility and a group of farmers who own land along the banks of a Willamette River tributary. "Using the marketplace, a wastewater treatment plant could meet its regulatory requirements by contracting with farmers to create shade along streams with permanent plantings, instead of using lots of electricity to run expensive cooling equipment," said John Miller, a nursery and vineyard owner who serves as the Partnership's Vice Chair. "Conservation credits can benefit municipal water and sewer ratepayers, farm and forest owners and the critters that need better habitats...This doesn't just make economic and ecological sense—it's common sense," Miller emphasized.

The Tualatin Experience

Experience

At the press conference, EPA Oregon Operations Director Rodriguez acknowledged that the Willamette Marketplace will benefit from studying ongoing efforts in the Tualatin Basin. For over a

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year, Clean Water Services (CWS), the principal wastewater treatment facility in the Tualatin Basin, has operated under a basin-wide NPDES permit which allows for water quality credit trading (the first of its kind in the nation, see Biorn-Hansen, ***Insider*** #340). At the press conference, Bill Gaffi. CWS General Manager and Chair of the Willamette Partnership Board of Directors, related some of CWS' experiences.

Trees/Shade

Thus far, CWS temperature efforts have focussed primarily on riparian area tree planting to provide water-cooling shade. To further this effort, CWS has partnered with the US Department of Agriculture (USDA) Farm Service Agency, the USDA Natural Resources Conservation Service, the Tualatin Soil and Water Conservation District, the Oregon Water Trust, the Oregon Watershed Enhancement Board, and the Oregon Department of Forestry to establish an "enhanced" version of the USDA Conservation Reserve Enhancement Program (CREP) program. The CREP program was created to promote surface water friendly actions by agricultural operations—principally by subsidizing streamside reserves. The Tualatin Basin's Enhanced CREP provides for larger ongoing subsidies to participating landowners, as well as bearing any of the cost of site clearing, planting and maintenance not covered by the federal CREP. There are also enhanced incentives for leasing or transferring water rights to instream use. Gaffi stated that CWS has already committed $5 million in CREP enhancement funds, an investment which makes both economic and ecological sense. "We had a choice," Gaffi said. CWS could perhaps be able to cool its effluent on site at great expense and massive energy use and provide some downstream benefits. "We chose to pursue providing shade throughout the Basin. This provides benefits throughout the Basin," he stated. [For more information regarding Enhanced CREP, contact Bruce Cordon, CWS, 503/ 681-3627 or email: cordonb@cleanwaterservices.org]

"Enhanced" CREP

Water Reuse

CWS is also reusing some of the effluent from its Durham treatment plant to water a golf course and other fields, relying on the water's subsequent subterranean sojourn to cool it before it recharges surface water. CWS is researching the feasibility of expanding into additional reused-water land applications.

Marketplace Parameters

Credit Variety

The vision for the Willamette Ecosystem Marketplace addresses more than just water temperature. The Partnership's long-term objective is to facilitate trading in a variety of conservation credits to improve the Basin's ecosystems from ridge top to ridge top. Sara Vickerman, Secretary of the Board of the Willamette Partnership and Senior Director of Biodiversity Partnerships for Defenders of Wildlife said, "Water quality trading for temperature is the first step in the process of creating a marketplace that can direct significant new conservation investments to places most important to fish, wildlife and people."

Ecosystem Services

Citing research conducted by the consulting and engineering firm of David Evans and Associates, Partnership literature points to a number of "ecosystem services" which might be quantified, priced, and traded. A partial list includes: real estate value enhancement; cultural values; recreation; genetic resources; species refugia/habitat; biological control/stability; pollination; urban runoff (pollution) treatment; nutrient cycling; erosion control and sediment retention; water supply; water regulation; natural disturbance regulation (from floods, droughts, etc.); and climate regulation.

Market Incentives

As described in Partnership documents:

> The ecosystem marketplace is designed to tap market forces and incentives to capture value from development and direct it toward conserving natural places that provide the greatest benefit at the lowest cost. An organizational framework will efficiently match buyers and sellers. Administrative costs will be kept to a minimum to allow greater investment in the resources. The desired outcome is an attractive and productive landscape that supports human and ecological needs in a manner that minimizes land use and resource conflicts.
>
> The marketplace concept assumes that development will occur, but that the most ecologically sensitive sites are avoided and adverse impacts minimized. It is also assumed that developers are willing to pay a premium to avoid the cost and inconvenience of on-site mitigation requirements, and expensive delays associated with lengthy permitting processes. Greater ecological benefits will accrue to the public by concentrating investments in large priority areas rather than scattering small restoration sites randomly across the landscape.

Conclusion

Involvement

The Willamette Partnership has already succeeded in bringing together an impressive range of diverse interests, expertise, and get-it-done know-how (see Board of Directors, next page). At the recent Willamette River Basin Conference, Executive Director David Primozich made it abundantly clear that the Partnership is very interested in expanding its base, stating, "Just let us know what we need to do to get you involved."

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NEW SOURCE REVIEW UPDATE

EPA PROPOSES DRAMATIC CHANGES FOR POWER PLANTS

by Tom Wood, Stoel Rives LLP (PORTLAND

New Source Review

Over the course of the summer, your author has discussed several recent court decisions addressing what sorts of changes at existing major sources of air emissions trigger new source review. (See Wood, ***Insider*** #371, 375). Those articles discussed several federal trial court decisions endorsing EPA's position that new source review is triggered based on whether the changes at issue caused in increase in the annual emission rate. The articles also discussed a single federal appeals court decision that dismissed EPA's position, instead concluding that the Clean Air Act mandates that new source review is only triggered if there is an increase in the hourly emissions rate. These diametrically opposed court decisions created a high probability that the question of whether hourly or annual emission increases trigger new source review would ultimately go before the Supreme Court. However, late last month EPA proposed a new rule adopting the same hourly trigger for new source review that it had so vehemently and consistently fought in its enforcement actions. This article discusses the proposed rule and what it could mean to Oregon.

New EPA Rule Proposal

New Source Review

Emission Control

New source review requires that new major sources and modified existing major sources undergo a comprehensive permitting process and install state-of-the-art emission control technology. While the new source review trigger for new major sources is relatively straightforward, the trigger for modifications at existing major sources has been questioned in the courts. Whether a modification triggers new source review hinges on the difference between the emissions before the change and the anticipated emissions after the change. If post-change emissions exceed pre-change emissions by more than one of the predetermined "significant emissions rates," then the change is considered a major modification and new source review is required.

Emission Potential

Historically, EPA's position has been that post-change emissions must be calculated based upon the source's potential to emit, as opposed to what its owners reasonably believed the source will emit. Calculating emissions based on potential to emit typically requires a project owner to assume that the source will operate 24 hours per day, 365 days per year unless the source's permit limits operation. However, approximately ten years ago EPA lost a court case (referred to as the *WEPCO* decision) where

New Source Review

the judges concluded that this requirement to consider post-change potential to emit was inconsistent with the law. EPA then changed the federal rules changed to allow electric utility steam generating units (and only these units) to calculate post-change emissions based on projected actual emissions, exclusive of increases that could have been accommodated prior to the change. It was not until late 2002 that EPA changed its rules to allow sources other than electric utility steam generation units to calculate post-change emissions based on projected actual emission rates.

Enforcement Actions

In 1999, the US Justice Department filed a series of enforcement actions against thirteen utilities that owned a total of 51 power plants alleging that the defendants had made major modifications at existing coal fired facilities that triggered new source review. A number of the utilities challenged EPA's allegations that the plant renovations at issue triggered new source review. Instead, the utilities countered, the renovations never triggered new source review because while the annual emissions did increase due to the change, the hourly emissions did not. The difference was because while the changes tended to reduce short term emissions, they enabled the unit to be operated more hours in the year.

Challenges

Conflicting Rulings

The first two of these PSD enforcement cases were decided in 2003. In one of the cases, *U.S. v. Ohio Edison*, 276 F.Supp.2d 829 (S.D. Ohio 2003) the federal trial court ruled in favor of EPA, concluding that new source review was triggered if there was an increase in the annual emission rate. The second case, *U.S. v. Duke Energy*, 278 F.Supp.2d 619 (M.D.N.C. 2003), a different federal trial court reached the exact opposite conclusion, holding that new source review is only triggered by an increase in the hourly capacity to emit. On June 3, 2005, a third federal trial court issued another decision (*U.S. v. Alabama Power Company*) which emphatically agreed with the *Ohio Edison* court. However, each of these decisions came only from a federal trial court. Trial courts have no precedential effect on other courts; only appeals courts can create binding precedential effect. Once a federal appeals court for one of the federal circuits decides a point, that decision is the law for that circuit unless and until it is withdrawn by the appeals court or overruled by the US Supreme Court. Therefore, while each of these trial court decisions was important, EPA and regulated sources alike looked to the appellate courts to issue a decision on the point.

Precedent

Appellate Decision

The *Duke* case was the first to reach a decision at the appellate level. The *Duke* appeals court agreed with the trial court and concluded that the hourly test was required by the Clean Air Act. Shortly after the *Duke* decision, Cinergy, a utility, tried to present the *Duke* decision as a basis to dismiss the new source review enforcement action it was embroiled in. The court hearing that case disagreed, issuing yet another trial court decision siding with *Ohio Edison* and the use of the annual emissions test. EPA gave every indication in court that it would fight to preserve the annual emissions test.

EPA's Proposed Rule

EPA Policy Change

On October 20, 2005, EPA proposed revising the new source review program to adopt the *Duke* court's hourly emissions test for electric generating units. In this rulemaking EPA proposes to change the new source review trigger for changes to existing electric generating units. The new test would compare the maximum hourly emissions achievable by an electric generating unit during the five years proceeding the change to the maximum hourly emissions rate achievable after the change. This test would only be available for electric generating units, harkening back to EPA's *WEPCO* rulemaking where the agency decreased the stringency of the new source review program exclusively for electric utility steam generating units. The recent proposal is available to a slightly broader array of sources, but still excludes the majority of businesses from utilizing the increased flexibility. This approach is particularly unsatisfying if you follow the *Duke* court's logic that the Clean Air Act requires that new source review utilize the hourly capacity to emit increase trigger. If that is the case, there is a strong argument that EPA has no legal basis to discriminate against other industry categories.

Limited Application

Alternatives

As part of EPA's proposal, the agency floated multiple alternatives and variations on the revised new source review trigger. For example, one alternative was to use a trigger based on the change in hourly actual emissions as opposed to hourly capacity to emit. This approach would again appear to contradict the *Duke* court's conclusion that the Clean Air Act mandates an hourly capacity to emit test. Another variation on which EPA sought comment was to dispense with the time based test entirely and instead focus on whether there was an increase in emissions per unit of energy output (e.g., pounds per megawatt-hour). EPA also starts off the rule proposal saying that under the new approach there would be no de minimis threshold, but then requests comment on whether it should create a de minimis threshold. EPA also questions whether some version of netting should still be allowed under its proposed test. In short, the rulemaking creates a dizzying array of options on which the agency solicits comments.

Threshold?

New Source Review

Policy Implications Unclear

Impacts in Oregon

It is unclear what effect the proposed rule could have in Oregon. Oregon has a different new source review program from the federal program. However, the Oregon new source review program shares with the federal program an exclusive focus on annual emission increases as opposed to short term emission increases. EPA threatened as part of its controversial 2002 new source review revision package to force states to adopt its new approaches. This attitude was not well received by many states, spurring such excessive reactions as California's legislature passing a law prohibiting the adoption of any of the federal new source review changes. In this rulemaking EPA again rattles its saber suggesting that states will have to consider the new approach a minimum element of their new source review program. This certainly suggests that a state's program could be disapproved if it was inconsistent with the federal rules. For Oregon this would mean a fundamental shift in the way that sources are permitted. EPA's proposal is so sparse in details of how the proposed changes could really be applied to an industrial facility that it is hard to know what would have to change. At the very least, the implementation of the proposal in Oregon calls into question how the plant site emission limit, a fundamental building block of the Oregon program, could still be utilized.

The EPA proposal is likely to set off a flood of interest ranging from those opposed to anyone having the proposed options to those demanding that the new options apply to all industries. How soon EPA will act on the proposal is anyone's guess. The courts are likely to move faster than EPA which will likely result in further confusion and call into question some of the proposed options. The comment period is currently scheduled to close on December 19, 2005. For information about how to submit comments, consult the October 20, 2005 Federal Register at page 61081.

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ENVIRO BRIEFS

BROWNFIELDS RULE

ALL APPROPRIATE INQUIRIES

On November 2, EPA Administrator Stephen Johnson, announced a final All Appropriate Inquiries rule at this year's Brownfields Conference in Denver, Colorado. The new rule establishes clear standards for environmental due diligence that will encourage more urban redevelopment, according to EPA.

The All Appropriate Inquiries rule is expected to increase private cleanups of brownfields while reducing urban sprawl, affecting more than 250,000 commercial real estate transactions nationwide annually. The rule's process of evaluating a property for potential environmental contamination and assessing potential liability for any contamination at the property increases certainty of Superfund liability protection, and improves information about environmental conditions of properties.

EPA noted that over the last decade EPA's brownfields program has attracted more than $7 billion in public and private investments for the cleanup and redevelopment of brownfield properties in cities and towns across the nation, creating more than 33,000 thousand jobs. During this time, more than 7,000 properties have been assessed for environmental contamination.

For info: Kerry Humphrey, EPA, 202/ 564-4355 or email: humphrey.kerry@epa.gov; EPA website: www.epa.gov/brownfields/

MTBE & NATURAL ATTENUATION

EPA REPORT

EPA has recently produced a report titled Monitored Natural Attenuation of MTBE as a Risk Management Option at Leaking Underground Storage Tank Sites. The report reviews the current state of knowledge on the transport and fate of MTBE in ground water, with emphasis on the natural processes that can be used to manage the risk associated with MTBE in ground water or that contribute to natural attenuation of MTBE as a remedy. It provides recommendations on the site characterization data that are necessary to manage risk or to evaluate **m**onitored **n**atural **a**ttenuation (MNA) of MTBE, and it illustrate procedures that can be used to work up data to evaluate risk or assess MNA at a specific site.

For info: The report can be downloaded from EPA's website: www.epa.gov/ada/pubs/reports.html

AG/PESTICIDES

EVALUATING FOR DEVELOPMENT

DEQ has posted on its webpage a draft document entitled "Guidance for Evaluating Residual Pesticides on Lands Formerly Used for Agricultural Production." DEQ's Cleanup Program is soliciting comments on this document through November 30, 2005.

To view a brief fact sheet summarizing this guidance, which includes instructions on accessing the guidance itself and commenting on it, access wepage: www.deq.state.or.us/wmc/documents/AgLandsComment.pdf

For info, contact: Gil Wistar, DEQ Cleanup Program, 503/ 229-5512

ENVIRO BRIEFS

DEQ OCTOBER PENALTY ACTIONS

Responsible Party & Location	Violation(s)	Penalty	Status
Chinook Bend RV Resort Inc. Lincoln City	Connecting an onsite sewage disposal system for commercial operation to an existing system not designed for an increased sewage flow and not upgrading or repairing existing septic system to properly treat the increased sewage flow	$19,602	Appealed
Beaver Bark Inc. Scappoose	Emitting particulate matter (fine bark dust) greater than 250 microns in size from compost facility onto adjacent property	$1,400	Appealed
J.R. Simplot Co. Hermiston	Discharging approximately 80 million gallons of potato processing, energy cogeneration process wastewater and irrigation water to groundwater and Umatilla River after a storage lagoon failed on its property.	$9,600	Paid
William L. and Elaine N. Kitcher dba/Curtin General Store Curtin	Failing since June 2004 to conduct release detection monitoring for underground storage tanks ($900); failing since June 1999 to install and operate a release detection system and failing to maintain release detection records for piping on underground tank system ($2,622); failing to demonstrate to DEQ that an overfill device on tank system is functioning properly ($900)	$4,422 (total)	No Response Penalty Due
Oak Harbor Freight Lines Inc. Carter Creek	Polluting state waters (spilling approximately 500 gallons of the herbicide 2,4-D into Carter Creek) on Oct. 23, 2004, as a result of a truck accident.	$8,800	Appealed
Abel Solorzano dba/Scholfield Market and Deli Reedsport	Failing to conduct release detection monitoring and maintain records for underground storage tank system ($4,800); failing to demonstrate financial responsibility to take action in case of a spill from tank system ($7,216)	$12,016 (total)	No Response Penalty Due
Mt. Hood LLC Government Camp	Discharging sediment and turbid water from the development of a condominium project into state waters (Camp Creek) in violation of water quality standards	$6,000	Appealed
City of Madras Madras	Discharging about 3,700 gallons of raw sewage into state waters (Willow Creek) from a manhole in city's wastewater collection system on 5/16/05	$1,800	No Response Penalty Due
Electronic Controls Design Mulino	Failing to meet various effluent limitations set forth in wastewater discharge permit for printed circuit board manufacturing facility.	$1,000	Paid
Lowell E. Patton dba/Pacific Western Co. Rhododendron	Operating a solid waste disposal site (disposing about 740 cubic yards, or more than 900 tons) of discarded asphalt roofing shingles on property he owns, without a permit	$55,261	Appealed
Pacific Western Co. Carver	Since 5/12/05, violating Oregon Environmental Quality Commission order by failing to remove solid waste (roofing shingles) disposed of at its facility and failing to transport the waste to a permitted solid waste facility for disposal	$78,486	Appealed
City of Bend Bend	Discharging approximately 200 gallons of raw sewage into state waters (Deschutes River) on 5/29/05 from storm drain.	$2,000	Paid
Marilyn, Jeffrey, & Sandra Newell, dba/Newell's Chevron & Food Mart Oakland	From September 1994 through August 2005, failing to install leak detection equipment and failing to perform and record leak detection work for underground storage tank system in violation of state permit	$4,818	No Response Penalty Due
Duncan Foods Inc. Drain	Failing to conduct release detection monitoring and maintain records on monitoring for UST system from February 2002 to February 2005 ($3,736); failing to demonstrate an overfill protection device for tank system was installed and functioning ($5,294); failing to provide proper protection on underground piping for tank system ($1,264)	$10,294 (total)	Appealed
Tran Co. Silverton	Failing to implement Stormwater Sediment and Erosion Control Plan, allowing sediment and turbid water to discharge from Pioneer Village construction site into state waters (Silver Creek), in violation of its permit and state water quality standards	$6,828	Appealed
Oakridge Estates Development Corp. Newberg	Failing to implement Stormwater Sediment and Erosion Control Plan, allowing sediment and turbid water from construction activities to discharge into state waters (Spring Brook), in violation of its permit and state water quality statutes	$6,362	Paid
Superior Tank Wash Inc. Portland	Failing to determine if 250 gallons of arsenic acid waste water and sump wastes generated at facility was hazardous ($1,000); failing to provide hazardous waste training to employees ($1,588)	$2,588 (total)	Response Due
Patrick Redman dba/Redman's Recycling Weston	Open burning of prohibited materials (machinery parts, oil filters, wiring) in salvage yard at Smith Frozen Foods Inc.	$2,000	Paid
Tommy Lee Belding Powers	Open burning of prohibited material (tubes of glue or paint, fiberglass sheets, tires, household garbage) at Powers Valley Mobile Home Park.	$12,038	Appealed
Brace Autos Inc. The Dalles	Open burning of prohibited material (tires, metal parts, carpet, aerosol paint cans, platsic, rubber, fiberglass and other materials).	$3,041	Response Due
Harris Transportation Co. LLC Harrisburg	Polluting state waters after a one-vehicle tanker-trailer truck crash spilled approximately 2,100 gallons of jet fuel, entering nearby drainage ditches and the City of Harrisburg sewer and storm drain systems, as well as contaminating groundwater in the area	$10,000	Response Due
Georgia-Pacific West Inc. Toledo	Violating AQ permit by causing or allowing particulate matter emissions from combined lime kilns at pulp and paper facility to exceed acceptable limits, from about 8/31/04 to 9/17/04 ($3,600); causing or allowing particulate matter emissions from smelt dissolving tank at facility to exceed acceptable limits, from about 9/1/04 to 9/13/04 ($7,200)	$10,800 (total)	Response Due
City of Salem Salem	Discharging an estimated 23,635 gallons of raw sewage into Willamette River on 3/5/05 due to malfunction at Union Street Pump Station, violating state water quality standards	$7,800	Response Due

For info, contact: Jane Hickman, DEQ Enforcement, 503/ 229-5555

ENVIRO BRIEFS

DIESEL EMISSIONS

LRAPA PROGRAM

EPA announced last month that the Lane Regional Air Pollution Authority (LRAPA) has won a $500,000 grant award to further the agency's efforts to reduce diesel emissions from tractor-trailer rigs running along the I-5 corridor. The project helps equip an additional 250 trucks with small power units that allow the trucks to save diesel and reduce emissions while idling and includes a GPS (global positioning system) mapping system to determine where trucks are traveling and how many hours the small engines are actually in use. Of the 250 trucks equipped, 100 will be fitted with tracking equipment that will be used to study air quality improvements throughout the region. The tracking equipment will allow LRAPA to establish baseline emissions prior to installation and again after two years of use with the new equipment; will track the number of hours the equipment was used; where the equipment was used; amount of fuel saved; and total emissions reduced. LRAPA has partnered with the Lane Council of Governments (LCOG) to collect and analyze the GPS mapping system data. LRAPA, in coordination with LCOG will provide the results to EPA. EPA will use results from the study to demonstrate real air pollution reductions in an effort to give states and regions another strategy for meeting federal air quality standards. LRAPA has already helped nearly 100 truck owners install the fuel-saving units on their trucks, saving about 200,000 gallons of diesel per year collectively, and resulting in reduction of nearly 2,000 tons of carbon dioxide, a major green house gas, from being released into the air. That number will more than double when this project is completed. Through a partnership with the Oregon Department of Energy, LRAPA has been able to offer the fuel-saving equipment to truck drivers through a lease-to-buy program. Truckers have up to five years to pay for the equipment, which saves the owner about $400 per month in fuel expenses.

For info, contact: Kim Metzler, LRAPA, 541/ 736-1056 x218

EPA, ESA & PESTICIDES

On Nov. 2, EPA published in the Federal Register a notice that finalizes its approach to field implementation of the agency's ESA Program for pesticides. The goal of the program is to carry out EPA's responsibilities under FIFRA in compliance with the ESA, while at the same time not placing an unnecessary burden on pesticide users. Under the program, if EPA determines that use of a pesticide poses a risk of harm to listed species or their designated critical habitat that merits additional restriction, the pesticide label will refer the user to the Endangered Species Protection Bulletins, which contain the enforceable, geographically-specific use limitations for the pesticide. These bulletins, available by web or phone, will include a map of the area to which it applies, a description of the protected species, a list of the pesticides of concern and their use limitations.

For info, contact: Kerry Humphrey, EPA, 202/ 564-4355 or email: humphrey.kerry@epa.gov
EPA website: www.epa.gov/espp

CALENDAR

November 17-18

Oregon Wetlands, Portland, 5th Avenue Suites Hotel. RE: Implications of State & Federal Regulations. For info: The Seminar Group, 800/ 574-4852, or website: www.TheSeminarGroup.net

November 18

Environmental Enforcement Workshop: Criminal Prosecution, Civil Enforcement and Citizen Suits, Portland, World Trade Center, 8am - Noon. RE: Clean Water Act, Clean Air Act, Hazardous and Solid Waste Laws, Endangered Species Act, and State Environmental Statutes. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220 or email hduncan@elecenter.com or website: www.elecenter.com

November 21-22

Oregon Board of Forestry Meeting, Salem, ODF Headquarters, 2600 State. St, 8am. RE: Urban and Community Forestry Program; Riparian Area Forest Practices Rules; NW & SW Forest Management Plans; House Bill 3264; ESA Take-Avoidance Strategies for Western Oregon Habitat Conservation Plan, More. For info, Rod Nichols, ODF, 503/ 945-7425

November 29

Water Quality Rulemaking: Turbidity & Other Standards, Public Hearing, Portland, DEQ Headquarters, 811 SW Sixth Ave, 6pm: Information Meeting; 6:30pm: Public Hearing. (See Article, ***Insider*** #374 & Brief, ***Insider*** #379) For info: Tom Rosetta, DEQ/WQ, 503/ 229-5053 or email: rosetta.thomas.n@deq.state.or.us or DEQ website: www.deq.state.or.us/wq/standards/WQStdsReview.htm

November 29-December 1

Partners in Environmental Technology Technical Symposium & Workshop, Washington, DC. RE: Sustainable DoD Facilities and Communities; Environmental Impacts of Nanotechnologies; Environmentally Benign Corrosion Protection Technologies; Green Energetics; Managing Threatened and Endangered Species (TES) for DoD Sustainability; Marine Mammals and Military Operations; Management Options for Chlorinated Solvents; Metals Bioavailability and Risk Assessment; Perchlorate Remediation and Treatment and More. For info: Website: www.fedcenter.gov/Events/index.cfm?id=1836

November 30

Water Quality Rulemaking: Turbidity & Other Standards, Public Hearing, Eugene, University of Oregon, Knight Library, Room 106, 1501 Kincaid St, 6pm: Information Meeting; 6:30pm: Public Hearing. **tland,** DEQ Headquarters, 811 SW Sixth Ave, 6pm: Information Meeting; 6:30pm: Public Hearing. (See Article, ***Insider*** #374 & Brief, ***Insider*** #379) For info: Tom Rosetta, DEQ/WQ, 503/ 229-5053 or email: rosetta.thomas.n@deq.state.or.us or DEQ website: www.deq.state.or.us/wq/standards/WQStdsReview.htm

November 30-December 2

Land Conservation & Development Commission Meeting, Medford, For info: Sarah Watson, DLCD, 503/ 373-0050 x271 or email sarah.watson@sate.or.us

November 30-December 2

Navigating New Frontiers: 2005 Oregon Water Resources Congress Annual Conference, Hood River, Hood River Inn. RE: ESA, Droughts, Klamath Takings Decisions, & More. Sponsored by . For info: OWRC, 503/ 363-0121 or website: www.owrc.org/

(continued from previous page)

December 1

Water Quality Rulemaking: Turbidity & Other Standards, Public Hearing, North Bend, North Bend Public Library, 1800 Sherman Ave, 6pm: Information Meeting; 6:30pm: Public Hearing. (See Article, ***Insider*** #374 & Brief, ***Insider*** #379) For info: Tom Rosetta, DEQ/WQ, 503/ 229-5053 or email: rosetta.thomas.n@deq.state.or.us or DEQ website: www.deq.state.or.us/wq/standards/WQStdsReview.htm

December 1

Profit in The Water Industry: Tap the Reservoir of Wealth, Conference, San Francisco, RE: Opportunities in Latin America; Where the Venture Capital is Flowing; Impact of Regulation on Water-Related Investments; Overview of Regulatory Changes in California. For info: Naomi Barazani, The Water Strategist, 212-952-7400 x126 or email: naomi@twst.com

December 1-2

Government "Takings" Conference, Seattle, Renaissance Hotel. RE: Kelo Decision. For info: Karen Fox, Law Seminars Int'l, 206/ 567-4490 or, 800/ 854-8009, or website: www.lawseminars.com/seminars

December 1-2 ID

22nd Annual Water Law & Resource Issues Seminar, Boise, ID, DoubleTree Riverside. RE: Defending Private Property, Clean Water Act, Water Storage Assessments, Public Works Contracting, Water Supplies & Water Markets, Water Transactions in the Columbia Basin & Idaho, ESA Litigation, Water Policy Challenges, Conservation Security Program, Conjunctive Administration, and Practical Solutions. Sponsored by Idaho Water Users Association. For info: IWUA, 208/ 344-6690, website: www.iwua.org

December 2

Water Quality Rulemaking: Turbidity & Other Standards, Public Hearing, Bend, Central Oregon Board of Realtors Office, 2112 NE Fourth St, 2pm: Information Meeting; 2:30pm: Public Hearing. **tland,** DEQ Headquarters, 811 SW Sixth Ave, 6pm: Information Meeting; 6:30pm: Public Hearing. (See Article, ***Insider*** #374 & Brief, ***Insider*** #379) For info: Tom Rosetta, DEQ/WQ, 503/ 229-5053 or email: rosetta.thomas.n@deq.state.or.us or DEQ website: www.deq.state.or.us/wq/standards/WQStdsReview.htm

December 2

Oregon Fish & Wildlife Commission, Salem, 8am. For info: Cristy Mosset, ODFW, 503/ 947-6044, www.dfw.state.or.us/Comm/schedule.htm

December 6

Northwest Section/AWWA: General Membership Meeting, Location TBA. For info: NW Section website: www.pnws-awwa.org/training.cfm

December 8-9

Northwest Environmental Conference and Tradeshow (17th Annual), Portland, Red Lion Hotel on the River - Jantzen Beach. RE: Compliance, Technical Sessions, Hazardous Materials Training & More. For info: Cara Bergeson, NEBC, 503/ 227-6361, email: cara@nebc.org, or NWEC website: www.nwec.org

December 9

Water Intrusion Seminar, Seattle. For info: The Seminar Group, 800/ 574-4852, or website: www.TheSeminarGroup.net

December 12-13

Endangered Species Act Conference, San Francisco. For info: CLE Int'l, 800/873-7130, or website: www.cle.com

December 13

State Land Board Meeting, Salem, Department of State Lands, 775 Summer St. NE, 10am. Agenda TBA. For info: Gail Lowry, DSL, 503/ 378-3805 x224 or email: Gail.Lowry@dsl.state.or.us

December 22-23

Oregon Environmental Quality Commission Meeting, Portland, DEQ Rm 3A, 811 SW 6th Ave. For info: Day Marshall, Office of DEQ Director, 503/ 229-5990, website: www.deq.state.or.us/news/events/asp

January 12-13

Oregon Water Resources Commission Meeting, Corvallis. For info: Cindy Smith (OWRD), 503/ 986-0876, website: www.wrd.state.or.us/commission/index.shtml

January 25

Salmon 2100 Project: Alternative Futures for Wild Pacific Salmon in Western North America, Conference, Portland, RE: 33 Salmon Scientists, Policy Analysts, & Salmon Advocates Discuss Outlook for Wild Salmon in California, Oregon, Washington, Idaho, and southern British Columbia. Keynote Speaker: William Ruckelshaus, Chairman of the Salmon Recovery Funding Board for the State of Washington. For info: Robert T. Lackey, EPA, 541/ 754-4607 or email: lackey.robert@epa.gov

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