NFS Litigation Weekly
February 2, 2018

Ecosystem Management Coordination

Court Decisions

1. Nothing to report

Litigation Update

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New Cases

1. Wildlife | Region 4

A new Endangered Species Act (ESA) lawsuit alleges the Forest Service failed to complete Section 7 consultation on 23 surface water diversions and ditches on the Sawtooth National Forest in *Idaho Conservation Leagues v. U.S. Forest Service.* Plaintiffs claim these diversions are affecting sockeye salmon, Chinook salmon, steelhead, and bull trout in Idaho's Sawtooth Valley. Some of the cited detrimental effects of the diversions include reduced height of water and connectivity of stream segments, the creation of physical barriers to movement, and reduced plant biomass for insects which in turn reduce food for fish.

Section 7 (a)(2) requires agencies who take actions that may affect listed species or their critical habitat to consult with the Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS). When the action agency determines that its actions are "likely to adversely affect" a listed species or habitat, it must undergo "formal" consultation; however, if it is "not likely to affect" the species or habitat, then it may proceed with "informal consultation."

Photo credit: https://www.washingtonpost.com/news/capital-weather-gang/wp/2018/02/02/groundhog-day-2018-punxsutawney-phil-spots-shadow-and-forecasts-six-more-weeks-of-winter/?utm_term=.4306ed3e55d4

In 2001, the Forest Service prepared a Biological Assessment (BA) for special use permits and Ditch Bill Easements that authorized surface water diversions. **The Agency found these permits and easements were likely to adversely affect the above mentioned species**. As such the Forest Service submitted the BA to NMFS in 2001. **NMFS responded that further information was needed to support the agency's findings and to initiate consultation. Plaintiffs allege the Forest Service never sent NMFS the follow-up information or followed up in any way**.

Plaintiffs are seeking injunctive relief against the Forest Service alleging the Forest Service:

- Violated the ESA by **failing to complete consultation** over the 23 diversions and ditches;
- Violated the ESA by **irreversibly and irretrievably committing agency resources** by continuing to authorize, reauthorize, and/or allow the use of each diversion for the past 16 years without completing consultation; and
- **Violated the Administrative Procedures Act's duty on federal agencies to complete the matters presented to them within a reasonable time** by unlawfully and unreasonably failing to complete the required ESA consultations for the past 16 years.

(18-44, D. Idaho)

Notices of Intent

1. Nothing to report

Natural Resource Management Decisions Involving Other Agencies

1. Department of Defense | Clean Water Act (CWA)

The Supreme Court of the United States (SCOTUS) unanimously reversed a decision by the Court of Appeals for the Sixth Circuit that held it had jurisdiction over lawsuits challenging the Water of the United States Rule ("WOTUS Rule" or "Rule") in *National Association of Manufacturers v. Department of Defense*. SCOTUS held that the Rule falls outside of the §1369(b)(1) of the CWA; therefore, challenges to the rule must be exclusively filed in Federal District Courts. Industry groups, led by the National Association of Manufacturers (NAM), primarily argued that the CWA's plain language bars appellate jurisdiction over the rule.

Section 1369(b)(1) of the CWA lists seven types of actions that are reviewable exclusively in the courts of appeals. The issue in this case pertains to whether the WOTUS Rule-which lays out what constitutes waters of the United States- is reviewable under two of those actions: subparagraph (E), which encompasses actions "approving or promulgating any *effluent limitation* or other limitation under section 1311, 1312, 1316, or 1345,' and subparagraph (F), which covers "issuing or denying any [NPDES] permit].

SCOTUS rejected the argument that 33 U.S.C. § 1369(b)(1)(E) applied to the WOTUS Rule for two reasons. First, it held that **the Rule is not an "effluent limitation" or "other" limitation as defined by the CWA because it does not impose restrictions on the "quantities, rates, or concentrations" of a regulated discharge.** Rather, the Rule is a regulatory definition, and—on its own—does not limit action or impose any enforceable duty on the private sector. Second, the Court held the Rule was promulgated and approved under §1361(a), which grants the Environmental Protection Agency (EPA) the general rulemaking authority "to prescribe such regulations as are necessary to carry out [its] functions under" the CWA. Accordingly, it is not a limitation promulgated or approved under §1311, which generally bans the discharge of pollutants into navigable waters absent a permit.

As for Subsection (F), SCOTUS rejected the argument that the Rule issues or denies a permit under the NPDES permitting program. Relying on *Bedrock Limited, LLC v. United States*, 541 U.S. 176, 183 (2004), the Court held that the plain language of subparagraph (F) is "unambiguous"; therefore, "[their] inquiry begins with the statutory text, and ends there as well." Lastly, the Court rejected the Federal Government's policy arguments that the bifurcated judicial review scheme hinders efficiency and national uniformity. The Government argued that direct review of the Rule in federal courts of appeal would facilitate quick and orderly resolution of disputes. However, the Court held that **"[h]ad Congress wanted to promote efficiency, it could have authorized direct circuit-court review of all nationally applicable regulations as it did under the Clean Air Act."** Accordingly, the Government's policy arguments did not obscure what the statutory language made clear. Hence, the case was reversed and remanded with instructions to dismiss petitions for review for lack of jurisdiction. (16-299, U.S.)

2. Environmental Protection Agency (EPA) | CWA

The Menominee Indian Tribe of Wisconsin filed suit in the Eastern District of Wisconsin against the EPA and the Army Corps of Engineers alleging the agencies' failure to exercise jurisdiction over CWA Section 404 permitting for the proposed Back Forty Mine on the Menominee River is in violation of the CWA in *Menominee Indian Tribe of Wisconsin v. EPA, et al.* According to the complaint the Menominee River is the site of the Tribe's sacred place of origin and the river includes many cultural, ceremonial, and historic areas. **Plaintiffs also claim the Menominee River and adjacent wetlands are interstate waters which are presently used in their natural conditions as a means to transport interstate commerce.** The Back Forty Mine – a proposed sulfide mine- according to the complaint would impact a number of cultural and historic sites important to the tribe and would alter the hydrology of the entire area.

The CWA prohibits the discharge of dredged or fill materials into waters of the United States absent a Section 404 permit from the Corps of Engineers. The EPA is authorized to prohibit the discharge of dredge or fill materials at sites specified in a 404 permit where the EPA determines the discharge would have an unacceptable adverse effect on water supplies, wildlife, or recreational areas. **States can, however, apply to the EPA to be delegated the authority to administer a Section 404 permitting**

program for the discharge of materials so long as those waters do not and cannot include "waters which are presently used, or are susceptible to use in their natural condition ... as a means to transport interstate or foreign commerce … including wetlands adjacent thereto."

In 2016, as per the complaint, the Back Forty Mine proponent applied to the Michigan Department of Environmental Quality (DEQ) for a Section 404 permit to allow them to discharge dredge or fill material related to the construction and operation of the Mine into the waters and wetlands of the Menominee River. DEQ then supplied EPA with a copy of the permit application in May of 2016. Finding the proponent had not complied with EPA's 404 Guidelines, however, the EPA objected the proposed 404 permit. In January 2017 the proponent reapplied through DEQ and on December 8, 2017, the application was deemed administratively complete. In August of 2017, plaintiffs and Senator Baldwin of Wisconsin wrote the Corps requesting the federal agencies take jurisdiction of the 404 permitting for the mine, but the Corps declined and stated that the State of Michigan was delegated authority over the permitting process with EPA exercising its authority to review and comment on the permit at a later date.

The plaintiff's claims are that **as the Menominee River is used in its natural condition for interstate commerce the EPA and the Corps have a mandatory duty to exercise jurisdiction over the Mine's Section 404 permitting and cannot delegate that responsibility to a state**. (18-108, E.D. Wis.)

3. FWS | ESA

The District Court for the District of Columbia ruled against the FWS regarding the agency's determination on plaintiffs' petition to add the Yellowstone bison population to the federal endangered species list in *Buffalo Field Campaign, et al. v. Zinke, et al.* Under the ESA individuals may petition the Secretary of Interior "to add a species to, or to remove a species from" the list of endangered and threatened species. After receiving a petition the Secretary has 90 days to make a finding as to **whether the petition presents enough information that would lead a reasonable person to believe that the measures being proposed are warranted**. If the Secretary concludes there is enough evidence, then the petition advances to further review. The court noted that the evidence standard that applies to a 90-day finding period is not a rigorous one and that **"[a]t the 90-day stage, the question is not whether the designation *is* warranted, only whether it *may* be."**

On November 13, 2014, Western Watersheds Project and Buffalo Field Campaign filed a citizen petition to list the two bison herds located in and around Yellowstone as endangered or threatened species. On March 2, 2015 a second petition was filed by James Horsley. These petitions argued that the bison populations should be listed due to restrictions in their range due to historical loss, livestock grazing, infrastructure and development, invasive species, overutilization from hunting, disease, and climate change. The petitions also state that the current regulations protecting the two herds do not adequately ensure the survival of the bison and **fail to account for the two distinct genetic herds when setting population targets**.

"On December 15, 2015 – over six months after the second petition was filed and a year following the first – the FWS denied the two petitions." The FWS ultimately held the petitions failed to present substantial evidence of a threat from loss of historic range or disease, did not provide evidence of how livestock grazing or development affected Yellowstone bison, and **stated that the herds were not distinct from one another.**

Noting that there are two main studies into how the bison herds are to be managed – one that the herds should be managed separately, and one that they should be managed together – the court found that the FWS relied almost exclusively on the one study not supporting the plaintiffs' petitions. Since **the court thought that since reasonable scientists disagree on how to manage the herds the FWS could have just as easily agreed with the plaintiffs that listing the two herds may be warranted. At the 90-day review stage, the court concluded, it was improper for the agency to take a side in an outstanding scientific dispute and should have given equal weight to both studies.** The court thus remanded the issue to FWS to allow it to conduct a 90-day finding using the appropriate standard. (16-1909, D.D.C.)