

Northwest Environmental Advocates v. Locke, et al., Civil No. 09-0017-PK

What was the basis of the lawsuit?

Northwest Environmental Advocates (NWEA) sued the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) on January 6, 2009 for violations of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). CZARA requires certain states to develop and implement coastal nonpoint source pollution control programs and requires EPA and NOAA to withhold a percentage of Clean Water Act (CWA) and Coastal Zone Management Act (CZMA) grant funds from states that fail to submit approvable programs that protect water quality.

Why did NWEA file the lawsuit?

NWEA filed the lawsuit because EPA and NOAA have repeatedly found that Oregon has failed to submit an approvable coastal nonpoint program but the federal agencies failed to disapprove Oregon's program or withhold the grant funds for over 13 years. As a consequence, Oregon has not improved its logging practices to protect coastal water quality.

How did the federal agencies avoid CZARA's mandatory funding cuts?

EPA and NOAA avoided the mandatory withholding of grant funds by issuing a "conditional approval" of Oregon's program. By "conditionally" approving an otherwise unapprovable programs, EPA and NOAA impermissibly avoided withholding CWA and CZMA funds.

What was at stake?

Since EPA and NOAA first found Oregon's program deficient, Oregon has received over \$50 million in federal grant funding. Oregon DEQ receives approximately \$3 million annually. The law requires EPA to withhold a portion of grants available to the state under CWA section 319 beginning in 1996. For fiscal years 1999 and thereafter CZARA requires EPA to withhold 30 percent of CWA grant funds from states that failed to submit an approvable program.

What is the history of Oregon's plan?

In July 1995, Oregon submitted its Coastal Nonpoint Program to EPA and NOAA for review. On January 13, 1998, EPA and NOAA granted conditional approval of the program and established conditions that required compliance by January 13, 2001. In their 1998 findings, EPA and NOAA stated that Oregon's "tools are inadequate to ensure that water quality standards are attained and maintained and beneficial uses protected. . . . Related to these water quality impairments, Oregon has a number of aquatic species, in particular anadromous salmonids, that are endangered, threatened, or otherwise seriously at risk, due in part to forestry activities that impair coastal water quality and beneficial uses, including salmon spawning, rearing, and migration habitat. . . . Oregon will need to adopt additional management measures for forestry in areas adjacent to coastal waters not attaining or maintaining applicable water quality standards or protecting beneficial uses, or that are threatened by reasonably foreseeable increases in pollutant loadings from new or expanding forestry operations. . . . These areas included protection of medium, small, and non-fish bearing streams, including intermittent streams; protection of areas at high risk for landslides; the ability of forest practices to address cumulative impacts of forestry activities; road density and maintenance, particularly on so-called "legacy" roads; and the adequacy of stream buffers for application of certain chemicals."

What happened after the federal agencies first found Oregon's plan deficient?

EPA and NOAA required Oregon to identify and begin applying additional management measures for forestry by January 13, 2000. On December 21, 2000, the federal agencies extended the conditional approval to January 13, 2003. On April 20, 2004, the federal agencies once again found that "Oregon has not satisfied the condition for additional management measures for forestry." And, finally, on June 25, 2008, EPA and NOAA once again concluded Oregon's program did not satisfy the conditions for additional management measures for forestry, stating "Oregon still lacks adequate measures for protecting riparian areas of medium, small and non-fish bearing streams, high risk landslide areas, and for addressing the impacts of legacy roads. A broad body of science continues to demonstrate that the [Oregon Forest Practices Act] rules do not adequately protect water quality."

In the settlement with NWEA, what have the federal agencies agreed to do?

The federal agencies have agreed to make a final decision on Oregon's coastal plan. First, EPA and NOAA will issue a draft decision to fully approve or disapprove Oregon's plan by November 15, 2013. Second, the federal agencies have agreed to make a final decision by May 15, 2014. If the final decision is a disapproval, the federal agencies have agreed to immediately begin withholding grant funds from Oregon.

What has Oregon done so far?

Oregon has committed to a new approach to ensure that forest practices attain and maintain water quality standards. On July 2, 2010, the Oregon Attorney General sent a legal opinion to the federal agencies that describes a new approach to developing CWA-required Total Maximum Daily Loads (TMDLs). TMDLs are scientifically-based clean-up plans. Currently TMDLs analyze problems with water quality but they do little or nothing to actually restrict runoff from nonpoint sources such as logging. The Oregon Coastal TMDL Approach is a new process that will make TMDLs enforceable against nonpoint sources, setting a national precedent.

The legal opinion addresses whether ODEQ has legal authority over logging given the state Forest Practices Act which puts the Oregon Department of Forestry in charge of logging practices. The legal opinion states that ODEQ is authorized to establish its own requirements to the extent required by the federal Clean Water Act and to the extent DEQ deems the ODF practices inadequate to implement the TMDL. It goes on to say that ODEQ "may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required" and further that ODEQ "has the authority to directly order compliance with the load allocation because such measures are required by the [Clean Water Act]."

What else has Oregon agreed to do?

Oregon has agreed to:

- (1) *Identify specific nonpoint sources*, including logging, in each TMDL;
- (2) *Identify the logging practices necessary* to meet the TMDL load allocations;
- (3) Issue the load allocations as *enforceable orders* to significant land owners and agencies;
- (4) Provide a schedule (March 2011) for developing coastal TMDLs with the new approach;
- (5) Develop the Mid-Coast TMDLs by June 30, 2012 using the new approach in order to demonstrate that ODEQ can and will use TMDLs to control water pollution from logging.