

Updates in Oregon Water Law, 2011

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Each year there are significant updates in the field of water law. This article highlights some of the most significant Oregon updates that occurred in 2011. The article does not provide every update to Oregon water law that happened in the last year.

1. Legislative

a. House Bill 2133

House Bill 2133 was adopted during the 2011 Session of the Legislature.¹ The bill allows the Oregon Water Resources Department (“OWRD”) to adopt rules to allow electronic document submission rather than requiring submission by U.S. mail. The bill also allows OWRD to send documents electronically with the consent of the recipient, and to reduce or waive fees for documents sent or received electronically. House Bill 2133 prohibits OWRD from requiring electronic delivery, and mandates that OWRD continue to use U.S. mail for service under Oregon Rule of Civil Procedure (“ORCP”) 7, and when giving notice of a hearing pursuant to Oregon Revised Statutes (“ORS”) 183.413 and 183.415.

b. House Bill 2134

House Bill 2134, adopted during the 2011 Legislative Session, amends ORS 540.533, related to applications for exchanges of water.² ORS 540.533 previously allowed certain water right holders to apply for permission to use stored, surface or groundwater from a different source in exchange for supplying replacement water in an equal amount to satisfy prior appropriations from the other source under certain conditions. House Bill 2134 amends the statute to clarify which water right holders are eligible, and to create special conditions for exchanges in the Umatilla Basin.

c. House Bill 2135

House Bill 2135 was adopted during the 2011 Legislative Session.³ The bill reduces newspaper notice requirements to two weeks for ORS 536.340, 537.145, 537.252, 537.805, 540.535, 541.329 and 543.220.

d. House Bills 2189 & 2700

¹ H.B. 2133, 2011 Leg., 76th Sess. (Or. 2011). The full text of House Bill 2133 may be found at <http://www.leg.state.or.us/11reg/measpdf/hb2100.dir/hb2133.en.pdf>. The bill is codified in Chapter 51 Oregon Laws 2011. Oregon Laws may be viewed at http://www.leg.state.or.us/bills_laws/.

² H.B. 2134, 2011 Leg., 76th Sess. (Or. 2011). The full text of House Bill 2134 may be found at <http://www.leg.state.or.us/11reg/measpdf/hb2100.dir/hb2134.en.pdf>. The bill is codified in Chapter 281 Oregon Laws 2011.

³ H.B. 2135, 2011 Leg., 76th Sess. (Or. 2011). The full text of House Bill 2135 may be found at <http://www.leg.state.or.us/11reg/measpdf/hb2100.dir/hb2135.en.pdf>. The bill is codified in Chapter 52 Oregon Laws 2011.

House Bills 2189 and 2700 were enacted during the 2011 Legislative Session.⁴ House Bill 2189 amends the statutory text of ORS 196.905, which lists exceptions to Oregon’s prohibition of placing fill material in waters of the state. The bill adds an exception to the list: “Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for a change in the point of diversion to withdraw surface water for a beneficial use if the change in the point of diversion is necessitated by a change in the location of the surface water and authorized by the Water Resources Department.” The law applies to permits issued or renewed after the effective date of the act.

House Bill 2700 amends ORS 196.620, 196.643, 196.682, 196.686 and 196.825. The bill adds a provision stating that if the Director of State Lands issues a removal or fill permit to an applicant, and the applicant is not a landowner or a person authorized to conduct the removal or fill activity, then the permittee cannot conduct the proposed activity until the landowner consents, the permittee gains the right, or a court order or judgment authorizes the use. Additionally, the Director must now give notice to landowners whose property is identified in applications for permits for removal, fill or construction of linear facilities, and landowners with property adjacent to the land identified in the application. Finally, the bill defines “linear facilities” as including “any railway, highway, road, pipeline, water or sewer line, communication line, overhead or underground electrical transmission or distribution line or similar facility.”

e. House Bills 3121 & 3399 and Senate Bill 81

House Bills 3121 and 3399 and Senate Bill 81 were enacted during the 2011 Legislative Session.⁵ ORS 830.565 prohibits persons from operating a manually propelled boat of over 10 feet in length or a motorboat without first obtaining an aquatic invasive species prevention permit from the State Marine Board. House Bill 3121 creates fines for violation of the statute.

Prior to House Bill 3399, ORS 570.855 permitted the Oregon Department of Fish & Wildlife (“ODFW”), the State Marine Board and the Oregon Department of Agriculture (“ODA”) to operate check stations to inspect transported recreational or commercial watercraft for aquatic invasive species. However, transporters were not required to stop at check stations. House Bill 3399 amends ORS 570.855 to require all persons transporting recreational or commercial watercraft to stop at check stations for an administrative inspection. The agency operating the check station must inspect all watercraft, and may decontaminate the vessel. Transporters who stop and allow inspection and decontamination are not subject to criminal sanctions for possessing or transporting aquatic invasive species.

⁴ H.B. 2189, 2011 Leg., 76th Sess. (Or. 2011). The full text of House Bill 2189 may be found at <http://www.leg.state.or.us/11reg/measpdf/hb2100.dir/hb2189.en.pdf>. The bill is codified in Chapter 16 Oregon Laws 2011. H.B. 2700, 2011 Leg., 76th Sess. (Or. 2011). The full text of House Bill 2700 may be found at <http://www.leg.state.or.us/11reg/measpdf/hb2700.dir/hb2700.en.pdf>. The bill is codified in Chapter 370 Oregon Laws 2011.

⁵ H.B. 3121, 2011 Leg., 76th Sess. (Or. 2011). The full text of House Bill 3121 may be found at <http://www.leg.state.or.us/11reg/measpdf/hb3100.dir/hb3121.en.pdf>. The bill is codified in Chapter 381 Oregon Laws 2011. H.B. 3399, 2011 Leg., 76th Sess. (Or. 2011). The full text of House Bill 3399 may be found at <http://www.leg.state.or.us/11reg/measpdf/hb3300.dir/hb3399.en.pdf>. The bill is codified in Chapter 683 Oregon Laws 2011. S.B. 81, 2011 Leg., 76th Sess. (Or. 2011). The full text of Senate Bill 81 may be found at <http://www.leg.state.or.us/11reg/measpdf/sb0001.dir/sb0081.en.pdf>. The bill is codified in Chapter 321 Oregon Laws 2011.

House Bill 3399 also amends ORS 570.990, making failure to stop and submit to inspection a Class D violation. An officer may issue a citation to the violator, even if the violation is not done in the officer's presence, so long as the officer has reasonable grounds.

Senate Bill 81 establishes a Ballast Water Fund. The Department of Environmental Quality will collect a \$70 fee for each trip by vessels regulated under ORS 783.625 to 783.640, related to releases of ballast water from ships. The fees, and late fees, will go into the Ballast Water Fund, which will be used for various purposes, including prevention of transportation of aquatic invasive species.

f. House Bill 3157

House Bill 3157,⁶ enacted during the 2011 Session of the Oregon State Legislature, amends ORS 830.055, which outlines Oregon's Adopt-a-River program. Ordinarily, the statute provided for volunteers to remove litter from rivers, but the bill adds the removal of invasive species as well. The bill directs the State Marine Board to compile a list of invasive species volunteers are permitted to remove.

g. House Bill 3451

House Bill 3451 was passed during the 2011 Legislative Session.⁷ The bill establishes the Task Force on the McKenzie River Subbasin for the purpose of preparing a set of proposals related to ODFW's implementation of the Upper Willamette River Conservation & Recovery Plan for Chinook Salmon and Steelhead.⁸

h. House Bill 3591

House Bill 3591 was enacted by the 2011 Legislature.⁹ The bill creates a new law that when the Department of Environmental Quality ("DEQ") issues variances to National Pollution Discharge Elimination System ("NPDES") permits, that DEQ balance the policies of protecting human health and the environment with minimizing negative economic impacts on the state's economy incurred through meeting conditions included in the variances. When granting a variance, DEQ must consult with the applicant, and, to the extent allowed by law, minimize negative economic impacts, and ensure conditions are directly related to the purpose of the variance. The bill also provides for DEQ to report to the Legislature by the 2013 Legislative Session to provide information about the number of variances granted, and the conditions imposed.

i. Senate Bill 126

⁶ H.B. 3157, 2011 Leg., 76th Sess. (Or. 2011). The full text of House Bill 3157 may be found at <http://www.leg.state.or.us/11reg/measpdf/hb3100.dir/hb3157.en.pdf>. The bill is codified in Chapter 63 Oregon Laws 2011.

⁷ H.B. 3451, 2011 Leg., 76th Sess. (Or. 2011). The full text of House Bill 3451 may be found at <http://www.leg.state.or.us/11reg/measpdf/hb3400.dir/hb3451.en.pdf>. The bill is codified in Chapter 534 Oregon Laws 2011.

⁸ See section (3)(f) herein, *infra*, discussing ODFW implementation of the Upper Willamette River Conservation & Recovery Plan for Chinook Salmon and Steelhead.

⁹ H.B. 3591, 2011 Leg., 76th Sess. (Or. 2011). The full text of House Bill 3591 may be found at <http://www.leg.state.or.us/11reg/measpdf/hb3500.dir/hb3591.en.pdf>. The bill is codified in Chapter 405 Oregon Laws 2011.

Senate Bill 126 was enacted during the 2011 Legislative Session.¹⁰ The bill amends ORS 537.798, relating to the certification of water right examiners. The bill specifies, among other things, that OWRD will prepare, administer and score the examination for certification, and that the Board of Examiners for Engineering and Land Surveying is permitted to investigate suspected violations of ORS 672.002 to 672.325 and suspend, revoke or modify a certificate previously issued to the violator. Actions to suspend, revoke or modify a certificate are contested case orders (ORS 183), as provided by the bill.

j. Senate Bill 342

ORS 541.397 through 541.401 establishes the Watershed Improvement Grant Fund. Senate Bill 342 was enacted during the 2011 Session of the Legislature,¹¹ and adds considerable substance to the laws related to the Parks and Natural Resources Funds, the Watershed Improvement Grant Fund, and establishes the Watershed Conservation Operating Fund. For example, one provision states that money received from the Oregon State Lottery will be split between the Watershed Conservation Grant Fund and Watershed Conservation Operating Fund, 65% to the former, and 35% to the latter. The purpose of the funds is to restore and protect native fish and wildlife, watersheds and water quality in Oregon.¹²

k. Senate Bill 600

Senate Bill 600 was passed during the 2011 Legislative Session.¹³ Among other things, the bill provides that notwithstanding ORS 196.810 (requiring permitting prior to removal and fill activities in waters of the state), the Department of State Lands may establish by rule a general permit that allows removal of 100 cubic yards or less of material from waters of the state, for the purpose of maintaining drainage and protecting agricultural land. The bill also provides that the Department may waive fees for removal under the general permit.

2. Judicial

a. Klamath River Basin Takings Update

In 2001, the Bureau of Reclamation terminated water delivery to landowners and irrigation districts in the Klamath River Basin due to drought conditions. The affected landowners and irrigation district brought suit, alleging the government committed a Fifth

¹⁰ S.B. 126, 2011 Leg., 76th Sess. (Or. 2011). The full text of Senate Bill 126 may be found at <http://www.leg.state.or.us/11reg/measpdf/sb0100.dir/sb0126.en.pdf>. The bill is codified in Chapter 167 Oregon Laws 2011.

¹¹ S.B. 342, 2011 Leg., 76th Sess. (Or. 2011). The full text of Senate Bill 342 may be found at <http://www.leg.state.or.us/11reg/measpdf/sb0300.dir/sb0342.en.pdf>. The bill is codified in Chapter 643 Oregon Laws 2011.

¹² *See also*, Senate Bill 5547, 2011 Leg., 76th Sess. (Or. 2011) (available at <http://www.leg.state.or.us/11reg/measpdf/sb5500.dir/sb5547.en.pdf>), codified in Chapter 588 Oregon Laws 2011, which establishes how the Oregon Watershed Enhancement Board will spend money deposited in the Watershed Funds.

¹³ S.B. 600, 2011 Leg., 76th Sess. (Or. 2011). The full text of Senate Bill 600 may be found at <http://www.leg.state.or.us/11reg/measpdf/sb0600.dir/sb0600.en.pdf>. The bill is codified in Chapter 713 Oregon Laws 2011.

Amendment taking of private property, or alternatively that the government breached its contractual duty to deliver the water. The U.S. Court of Federal Claims granted summary judgment for the government, and the plaintiffs appealed.¹⁴

On appeal, the court found that the case involved complex issues of Oregon state law, and certified questions to the Oregon Supreme Court.¹⁵ The Oregon Supreme Court's decision was issued on March 11, 2010, holding that water users can acquire an equitable or beneficial interest in water if they meet a three-prong test: 1) the water right must be appurtenant to the land; 2) the relationship between the parties is that of trustee and beneficiary; and 3) contractual agreements do not redefine or alter the trustee-beneficiary relationship.¹⁶ The Supreme Court held that Plaintiffs satisfied the first two prongs of the test, but declined to decide the ultimate issue because the court did not have all the contractual agreements before it.¹⁷

On February 17, 2011 the United States Court of Appeals accepted the Oregon Supreme Court's decision, vacating the U.S. Court of Federal Claims' decision and remanding for further proceedings, recognizing that water users may have cognizable interests in the water supplied by the Bureau of Reclamation sufficient to support Fifth Amendment takings claims.¹⁸ The Court of Appeals directed the Court of Federal Claims to determine the third prong of the test for whether water users have cognizable interests, since the first two prongs have been met.¹⁹ Then, the Court of Federal Claims must determine if any cognizable interests were taken or impaired.²⁰

In addition, the Court of Appeals overruled the Court of Federal Claims' decision that the breach of contract claims were barred due to the sovereign acts doctrine.²¹ The lower court failed to consider whether the sovereign acts doctrine would release the government from liability under ordinary principles of contract law.²² The Court of Appeals instructed the Court of Federal Claims to allow the government the opportunity to establish its burden that compliance with the contracts would have been impossible.²³

b. New Permitting Process for Alternative Reservoir Applications

On November 9, 2009, OWRD issued Robert Lytle a permit to store one acre-foot of water in a small ("alternative") reservoir. Two residents challenged the issuance of the permit in Clackamas County Circuit Court, alleging, among other things, that OWRD's procedure for processing the application did not comply with ORS 537.409(1).²⁴

In *Deborah Noble and David Hillison v. Oregon Water Resources Department*, the court held that ORS 537.409(1) requires an applicant to prove, upon application, that the reservoir would store less than 9.2 acre-feet or have an impoundment structure under 10 feet in height, would not injure an existing water right, would not pose a significant

¹⁴ *Klamath Irrigation District v. United States*, 75 Fed.Cl. 677 (Fed.Cl. 2007).

¹⁵ *Klamath Irrigation District*, 532 F.3d 1376 (Fed.Cir. 2008).

¹⁶ *Klamath Irrigation District*, 348 Or. 15, 47-52 (Or. 2010).

¹⁷ *Id.* at 50-52.

¹⁸ *Klamath Irrigation District*, 635 F.3d 505 (Fed.Cir. 2011).

¹⁹ *Id.* at 519.

²⁰ *Id.* at 520.

²¹ *Id.* at 522.

²² *Id.*

²³ *Id.*

²⁴ *Deborah Noble and David Hillison v. Oregon Water Resources Department*, CV-10-01-0159 (Or. Clackamas County Circuit Court January 25, 2011) (opinion letter and general judgment).

detrimental impact to existing fishery resources, and is not prohibited under ORS 390.835 (relating to scenic waterways).²⁵

Prior to this lawsuit, OWRD required applicants to submit an application requesting information about the applicant, the location and source of the water to be impounded, the intended use of the water, property ownership, environmental impacts and land uses. Then, OWRD would consult with the local watermaster, the Oregon Department of Environmental Quality, and the Oregon Department of Fish and Wildlife to determine whether the proposed use would effect other water rights, fishery resources, or other factors. The *Noble & Hillison* decision invalidated OWRD's procedure, prompting the creation of a new procedure.

OWRD developed a new permitting process for alternative reservoir permits. As part of the new application process, the applicant must set up meetings with their local planning department, their local watermaster, and the Oregon Department of Fish and Wildlife to sign off on their proposed reservoir project prior to submitting the application to OWRD.²⁶

c. U.S. Supreme Court on Return Flows & Water Reuse

On May 2, 2011, the United States Supreme Court decided the case of *Montana v. Wyoming*²⁷ after Montana brought suit against Wyoming and North Dakota, alleging Wyoming breached the Yellowstone River Compact to which all three states are parties. Although the case had to do with an interstate water compact, the court decided the case on general western water law principles.

Of particular interest, the Court determined that junior appropriators have no claim to customary return flows by senior users under the "no injury" principle when the efficiency of water-application practices by seniors increases consumptive rates. The Court held that the no injury rule only protects junior appropriators from changes in return flows due to a change in the senior's place of appropriation, place of use, or purpose of use (i.e., an "enlargement" of the senior's rights).²⁸ Thus, senior users may raise the efficiency of their water-application practices, thus reducing the amount of return flow, and junior users cannot complain.²⁹

The Court found support for this ruling in the rule of recapture, which allows appropriators to collect and reuse water so long as it remains on the appropriator's property. The Court determined that if an appropriator can capture and reuse his return flows, then a junior user should not be permitted to complain about reduced return flows due to increases in efficiency.³⁰ Montana and Wyoming have adopted the rule of recapture,³¹ as well as Oregon.³²

d. Pre-Enforcement Judicial Review under Clean Water Act

²⁵ ORS § 537.409(1).

²⁶ Oregon Water Resources Department, *Alternative Reservoir Process*, available at http://www.wrd.state.or.us/OWRD/PUBS/docs/forms/2011_08_02_alt_res.pdf.

²⁷ *State of Montana v. State of Wyoming and State of North Dakota*, 536 U.S. ___, 131 S. Ct. 1765 (2011), available at <http://www.supremecourt.gov/opinions/10pdf/137Orig.pdf>.

²⁸ *Id.* at 1772-1773.

²⁹ *Id.* at 1773-1775.

³⁰ *Id.* at 1774-1775.

³¹ *Id.*

³² *Cleaver v. Judd*, 238 Or. 266, 270-72 (Or. 1964); *Jones v. Warm Springs Irr. Dist.*, 162 Or. 186, 196 (Or. 1939); *Wood v. Woodcock*, 276 Or. 49, 59 (Or. 1976).

Landowners, Chantell and Michael Sackett filled one-half acre of land with dirt and rock in order to build a house on their property.³³ The Environmental Protection Agency (“EPA”) issued a compliance order alleging the property was a wetland and the fill activities violated the Clean Water Act (“CWA”).³⁴ The EPA required the Sacketts to remove the fill material and restore the wetland or face civil or administrative penalties up to \$32,500 or \$11,000 per day, respectively.³⁵

The Sacketts sought an EPA hearing to challenge CWA jurisdiction and the characterization of their property as a wetland, but the EPA denied the opportunity for hearing.³⁶ The Sacketts then sought judicial review of EPA’s compliance order in U.S. District Court for the District of Idaho.³⁷ The District Court held that judicial review of EPA compliance orders is precluded by the CWA until EPA has started an enforcement action.³⁸ The Sacketts appealed to the Ninth Circuit.

The Ninth Circuit Court of Appeals recognized that the CWA is silent on the matter of judicial review prior to EPA enforcement actions, but affirmed the District Court’s ruling.³⁹ The Ninth Circuit held that the CWA impliedly precludes judicial review of compliance orders prior to EPA bringing an enforcement action because allowance of pre-enforcement judicial review would hinder EPA’s ability to address environmental problems without becoming embroiled in litigation, as supported by similar case law precedent.⁴⁰

The Sacketts argued that preclusion of judicial review of the EPA’s compliance order violated their Due Process rights because they would be subject to a penalty without opportunity for a hearing.⁴¹ The Ninth Circuit denied this argument,⁴² but the United States Supreme Court granted certiorari on June 28, 2011.⁴³ The Supreme Court will determine two questions: 1) May petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, and 2) If not, does petitioners’ inability to seek pre-enforcement judicial review violate their rights under the Due Process Clause?⁴⁴

3. Administrative

a. Klamath Basin Adjudication Update

³³ *Sackett v. United States Environmental Protection Agency*, 622 F.3d 1139, 1141 (9th Cir. 2010).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 1143.

⁴⁰ *Id.* at 1143-1144.

⁴¹ *Id.* at 1144.

⁴² *Id.* at 1145.

⁴³ *Sackett*, 131 S.Ct. 3092 (2011), available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1062.htm>.

⁴⁴ *Id.*

The Klamath Basin Adjudication began in 1975.⁴⁵ In the Spring of 2011, the Office of Administrative Hearings (“OAH”) finished conducting contested case hearings on the Klamath Tribes’ federal reserved water rights, which were the last claims heard by the Administrative Law Judge.⁴⁶ On December 2, 2011 the Administrative Law Judge issued six proposed final orders, recommending approval of the Tribes’ claims on the Williamson River, Sprague River, Sycan River, Wood River, Klamath Marsh, their tributaries, and springs on the former reservation.⁴⁷ The Administrative Law Judge’s proposed final orders on the most contested water bodies, the Upper Klamath Lake and the Klamath River, are expected in April, 2012.⁴⁸ Proposed orders regarding non-Tribal claims are also expected in 2012.⁴⁹

b. Executive Order Implementing the Klamath Restoration Agreement & Klamath Hydroelectric Settlement Agreement

On February 18, 2010 the States of Oregon and California, the United States, the Klamath, Karuk, and Yurok Tribes, Klamath Project Water Users, and other stakeholders signed the Klamath Restoration Agreement and the Klamath Hydroelectric Settlement Agreement.⁵⁰ The Agreements, together, outline steps for removing four dams on the lower Klamath River and restoring the river.⁵¹ Three of these dams are located in California and one in Oregon.

The Secretary of the Interior, Ken Salazar, announced that the federal government will review the Draft and Final Environmental Impact Statement/Environmental Impact Report before making the determination about whether to remove the dams.⁵² The final decision is expected in March, 2012.⁵³

Oregon Governor, Theodore Kulongoski, issued an executive order on December 9, 2010, designating the Oregon Water Resources Department (“OWRD”) as the lead state agency tasked with implementing Oregon’s responsibilities under the Agreements.⁵⁴ The executive order requires OWRD and other coordinating agencies to determine how

⁴⁵ Western Water Law & Policy Reporter, *Klamath River Basin Adjudication Nears Critical Juncture, But is Far From Complete*, Vol. 15 No. 10, 296 (August/September 2011).

⁴⁶ *Id.*

⁴⁷ Pie N Politics, *Adjudication Confirms Tribes’ Water Rights*, available at <http://pienpolitics.com/?p=6875>.

⁴⁸ *Id.*

⁴⁹ Western Water Law & Policy Reporter, *Klamath River Basin Adjudication Nears Critical Juncture, But is Far From Complete*, Vol. 15 No. 10, 296 (August/September 2011).

⁵⁰ Or. Executive Order No. 10-10, *Implementing the Klamath Basin Restoration Agreement and Klamath Hydroelectric Settlement Agreement*, available at http://arcweb.sos.state.or.us/pages/rules/bulletin/0111_bulletin/0111_execorder_bulletin.html

⁵¹ U.S. Department of the Interior, *Press Release: Salazar Announces Release of Klamath Dam Removal Studies*, available at <http://www.doi.gov/news/pressreleases/Salazar-Announces-Release-of-Klamath-Dam-Removal-Studies.cfm>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Or. Executive Order No. 10-10, *Implementing the Klamath Basin Restoration Agreement and Klamath Hydroelectric Settlement Agreement*.

the Agreements will be implemented.⁵⁵ ORS 757.736⁵⁶ provides a mechanism for funding the decommission of the identified dams on the Klamath River.

- c. U.S. Environmental Protection Agency & Army Corps of Engineers Issue Guidance on Scope of “Waters of the United States” under Clean Water Act

On May 2, 2011, the EPA and the Army Corps of Engineers released a new guidance document (“Guidance”) explaining the agencies’ interpretation of federal jurisdiction under the CWA, i.e. “waters of the United States.”⁵⁷ In the last couple decades the scope of CWA jurisdiction has become confusing due to several Supreme Court decisions that seemed to muddy the waters more than clarify the issue.

In *US v. Riverside Bayview Homes*, the Supreme Court held that the Army Corps of Engineers’ regulations extended regulatory authority to wetlands, and that the Corps’ regulation which included wetlands adjacent to navigable waters, even if not inundated or frequently flooded by the navigable waters, was reasonable under the CWA.⁵⁸ In *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers* (“*SWANCC*”), the Supreme Court held that CWA jurisdiction does not extend to isolated, non-navigable intrastate waters, not adjacent to navigable waters.⁵⁹ Finally, in *Rapanos v. United States*, the Court decided the issue of whether wetlands which are near manmade ditches or drains that eventually empty into navigable waters come within the jurisdiction of the CWA.⁶⁰ However, the Supreme Court Justices could not come to a majority opinion on the matter. Justice Scalia’s plurality determined that waters are within jurisdiction if they have “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right.”⁶¹ Justice Kennedy concurred, deciding that wetlands are within jurisdiction if they possess a “significant nexus” with waters of the United States, meaning “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”⁶²

Circuit courts are split regarding which *Rapanos* opinion to follow. The Seventh, Ninth and Eleventh Circuits follow Justice Kennedy’s test.⁶³ The First, Third and the Eighth Circuits follow both the Plurality’s test and Justice Kennedy’s test, holding that a

⁵⁵ *Id.*

⁵⁶ ORS § 757.736 was amended during the 2011 Legislative Session by House Bill 3461 (available at <http://www.leg.state.or.us/11reg/measpdf/hb3400.dir/hb3461.en.pdf>), codified in Chapter 394 Oregon Laws 2011.

⁵⁷ EPA and Army Corps of Engineers, *Guidance Regarding Identification of Waters Protected by the Clean Water Act*, 76 Fed. Reg. 24479 (May 2, 2011), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/signed_epa-hq-ow-2011-0409_frn.pdf.

⁵⁸ *US v. Riverside Bayview Homes, Inc.*, 474 US 121, 106 S.Ct. 455 (1985).

⁵⁹ *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers*, 531 US 159, 121 S.Ct. 675 (2001).

⁶⁰ *Rapanos v. United States*, 547 US 715, 126 S.Ct. 2208 (2006).

⁶¹ *Id.* at 742.

⁶² *Id.* at 779.

⁶³ *US v. Donovan*, ___ F.3d ___, 2011 WL 5120605 *5 (October 31, 2011); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007).

water comes within the jurisdiction of the CWA if either test is met.⁶⁴ The new Guidance takes a similar approach to the First, Third and Eighth Circuits.

The Guidance states that waters come within the strictures of the CWA if they are traditionally navigable, are interstate waters, are wetlands adjacent to traditionally navigable waters or interstate waters, are non-navigable tributaries to traditionally navigable waters that contain water at least seasonally, or are wetlands abutting relatively permanent waters.⁶⁵ This approach follows the Plurality's "continuous surface connection" test. In addition, the Guidance states that waters come within the CWA's jurisdiction if they are determined to have a "significant nexus" to a traditionally navigable water or interstate water,⁶⁶ thus following Justice Kennedy's test. The Guidance excludes the following waters from coverage:

- Wet areas that are not tributaries or open waters and do not meet the agencies' regulatory definition of "wetlands";
- Waters excluded from coverage under the CWA by existing regulations;
- Waters that lack a "significant nexus" where one is required for a water to be protected by the CWA;
- Artificially irrigated areas that would revert to upland should irrigation cease;
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
- Water-filled depressions created incidental to construction activity;
- Groundwater drained through subsurface drainage systems; and
- Erosional features (gullies and rills), and swales and ditches that are not tributaries or wetlands.⁶⁷

The EPA and Army Corps predict that the new Guidance will result in more waters being included under CWA jurisdiction.⁶⁸

d. Oregon Water Resources Department

During the 2009 Session of the Oregon Legislature, House Bill 3369 was passed, directing OWRD to create a state-wide Integrated Water Resources Strategy ("IWRS").⁶⁹ In 2011 OWRD released the Draft Recommended Actions for the IWRS.⁷⁰ The Draft

⁶⁴ *Id.* at *6.

⁶⁵ EPA, *Guidance to Identify Waters Protected by the Clean Water Act*, available at http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters_guidesum.cfm.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ EPA and Army Corps of Engineers, *Guidance Regarding Identification of Waters Protected by the Clean Water Act*, 76 Fed. Reg. 24479 (May 2, 2011).

⁶⁹ H.B. 3369, 2009 Leg., 74th Sess. (Or. 2009). House Bill 3369 may be found at <http://www.leg.state.or.us/09reg/measpdf/hb3300.dir/hb3369.en.pdf>. The law is now part of Oregon's water code. ORS § 536.220(2), available at <http://www.leg.state.or.us/ors/536.html>.

⁷⁰ Oregon Water Resources Department, *Integrated Water Resources Strategy*, available at http://www.wrd.state.or.us/OWRD/LAW/Integrated_Water_Supply_Strategy.shtml.

Recommended Actions are comprised of 12 bulletins, each relating to different water issues and goals.⁷¹ The next step is creation of the IWRS, which is anticipated in 2012.

Also pursuant to House Bill 3369, Oregon Administrative Rule (“OAR”) 690-095 was promulgated to enact the procedures and standards for administration of the Columbia River Basin Water Development Loan Program.⁷² The provisions of the rule provide the procedure for obtaining funds for water development projects for irrigation, drainage, fish protection, watershed restoration and municipal uses, and for the acquisition of easements and other right-of-ways for the projects.⁷³

e. Oregon Department of Environmental Quality

In 2009, the *National Cotton* case established that CWA permits are required for pesticide applications of biological pesticides, and chemical pesticides that leave a residue in and above waters of the United States.⁷⁴ In response to the decision, the Oregon Department of Environmental Quality (“DEQ”) developed two pesticide permits in 2011 which will license pesticide applications in and above waters of the state. The Pesticide General Permit covers most applications of pesticides, while the Irrigation District General Permit covers applications by irrigation districts.⁷⁵ The Pesticide General Permit was effective on October 31, 2011, and the Irrigation District Permit will be available in 2012.⁷⁶ If an operator is not covered by the terms of either permit, then they must apply to DEQ for coverage under an individual permit.

Effective March 17, 2011, OAR 340-143-0001 through 0020 were amended and OAR 340-143-0030 through 0060 were adopted to reduce the risk of transporting invasive species in Oregon waterways by enhancing ballast water management for commercial vessels.⁷⁷ Specifically, the rules add to previous reporting requirements, providing for vessel inspections and emergency protocol, among other things.⁷⁸

As of June 30, 2011, the Oregon Environmental Quality Commission modified Oregon’s water quality criteria for arsenic and created an arsenic reduction policy.⁷⁹ The revised rule may be found at OAR 340-041-0033(2) and (4).⁸⁰ The water quality standard

⁷¹ *Id.*

⁷² Oregon Bulletin, Water Resources Department, January 1, 2011, available at http://arcweb.sos.state.or.us/pages/rules/bulletin/0111_bulletin/0111_ch690_bulletin.html

⁷³ *Id.*

⁷⁴ National Cotton Council of America, et al. v. United States Environmental Protection Agency, 553 F.3d 927, 934 (6th Cir. 2009).

⁷⁵ Oregon Department of Environmental Quality, *Water Quality: Water Quality Permit Program*, available at <http://www.oregondeq.com/wq/wqpermit/pesticides.htm>.

⁷⁶ *Id.*

⁷⁷ Oregon Bulletin, Oregon Department of Environmental Quality, May 1, 2011, available at http://arcweb.sos.state.or.us/pages/rules/bulletin/0511_bulletin/0511_ch340_bulletin.html

⁷⁸ *Id.*

⁷⁹ Oregon Bulletin, Oregon Department of Environmental Quality, August 1, 2011, available at http://arcweb.sos.state.or.us/pages/rules/bulletin/0811_bulletin/0811_ch340_bulletin.html

⁸⁰ *Id.*

for arsenic, and other substances, is used by DEQ and the EPA to implement CWA programs, such as discharge permits, water quality certifications, and Total Maximum Daily Loads.⁸¹

OAR 340-045-0075 and 340-071-0140 were amended to increase water quality permit fees for National Pollution Discharge Elimination System permits and Water Pollution Control Facility permits by two percent.⁸² The fee increase was effective as of June 30, 2011.⁸³

In 2010 the U.S. Environmental Protection Agency (“EPA”) disapproved Oregon’s 2004 proposed human health criteria for toxic pollutants. The proposed criteria were based on a 17.5 grams per day fish consumption rate. EPA determined that the fish consumption rate (set at the national average) was not sufficient for all Oregonians, especially certain tribal members. The Environmental Quality Commission revised the standards in 2011, based on a fish consumption rate of 175 grams per day (approximately 23 fish or shellfish meals each month).⁸⁴

On October 7, 2011 the EPA approved Oregon’s new human health water quality standards.⁸⁵ The Environmental Quality Commission adopted new rules and amended previous rules in OAR Chapter 340, Divisions 41, 42 and 45.⁸⁶ The new water quality criteria will affect water quality permits and compliance with water quality management area standards.

The Environmental Quality Commission adopted new rules for permitting graywater reuse and disposal under OAR Chapter 340, Divisions 45 and 53.⁸⁷ The rules create a public policy encouraging reuse for beneficial purposes, establish requirements for reuse and disposal to protect health and the environment, define three types of graywater based on the level of treatment and delineate reuse activities for the types of graywater, sets up a permitting system for use of graywater, and more.⁸⁸

f. Oregon Department of Fish & Wildlife

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *The Water Report*, Issue No. 89, 28-29 (July 15, 2011); Rocky Mountain Mineral Law Foundation, *Water Law Newsletter*, Volume XLIV No. 2, 8-9 (2011).

⁸⁵ Letter from US EPA to Oregon Department of Environmental Quality (October 17, 2011) (Re: EPA’s Approval of New and Revised Human Health Water Quality Criteria for Toxics and Implementation Provisions in Oregon’s Water Quality Standards Submitted on July 12 and 21, 2011), available at <http://www.deq.state.or.us/wq/standards/docs/toxics/humanhealth/EPAApprovalLetter20111017.pdf>.

⁸⁶ Oregon Bulletin, Oregon Department of Environmental Quality, August 1, 2011, available at http://arcweb.sos.state.or.us/pages/rules/bulletin/0811_bulletin/0811_ch340_bulletin.html

⁸⁷ Oregon Bulletin, Oregon Department of Environmental Quality, October 1, 2011, available at http://arcweb.sos.state.or.us/pages/rules/bulletin/1011_bulletin/1011_ch340_bulletin.html

⁸⁸ *Id.*

OAR 635-500-6600 was adopted to implement the Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead.⁸⁹ The plan, as implemented by rule, serves to comply with federal Endangered Species Act requirements.⁹⁰ The plan was also created to comply with Oregon's Native Fish Conservation Policy.⁹¹

g. Oregon Department of State Lands

OAR Chapter 141 Division 85, relating to removal and fill activities in waters of the state, was modified in 2011 to be consistent with statutory exemptions in ORS 196, Divisions 89, 93 and 100, to clarify the provisions, and to modify agricultural exemptions.⁹² The exemptions specific to agricultural activities are found in OAR 141-085-0535, and exemptions related to water structures are found in OAR 141-085-0530.⁹³

OAR Chapter 141 Division 93 was established for the issuance of general permits for removal and fill activities.⁹⁴ Two new general permits were established: 1) a state-wide general permit for transportation-related structures, and 2) a general permit for minor removal-fill impacts to certain non-tidal wetlands.⁹⁵ To be covered by the general permits, persons must apply to the agency and provide enough information for the agency to determine that their activities are substantially similar in nature, are ongoing or recurring, and have predictable consequences.⁹⁶

OAR Chapter 141 Division 100 was amended in 2011 to be consistent with ORS 390.835, relating to highest and best uses of waters within scenic waterways.⁹⁷ The amendments also clarify how the agency will issue permits for placer mining in scenic waterways.⁹⁸

h. Oregon State Marine Board

⁸⁹ Oregon Bulletin, Oregon Department of Fish & Wildlife, September 1, 2011, available at http://arcweb.sos.state.or.us/pages/rules/bulletin/0911_bulletin/0911_ch635_bulletin.html

⁹⁰ Oregon Department of Fish & Wildlife, *Upper Willamette River Conservation & Recovery for Chinook Salmon & Steelhead, Executive Summary*, 5 (August, 2011), available at http://www.dfw.state.or.us/fish/CRP/docs/upper_willamette/UWR%20FRN2%20Exec%20Sum%20final.pdf.

⁹¹ *Id.*

⁹² Oregon Bulletin, Department of State Lands, April 1, 2011, available at http://arcweb.sos.state.or.us/pages/rules/bulletin/0411_bulletin/0411_ch141_bulletin.html

⁹³ OAR Chapter 141 Division 85 is available at http://arcweb.sos.state.or.us/pages/rules/oars_100/oar_141/141_085.html.

⁹⁴ Oregon Bulletin, Department of State Lands, April 1, 2011.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

OAR 250-010-0650 was amended, relating to Aquatic Invasive Species Prevention Permits.⁹⁹ However, the rule has not yet been amended to incorporate fines for violation of permit requirements as established by House Bill 3121, discussed *supra*.

OAR 250-010-0660 is a temporary rule that was adopted in 2011¹⁰⁰ in conjunction with House Bill 3399, discussed *supra*, which establishes mandatory watercraft inspection stations to prevent the spread of aquatic invasive species.

⁹⁹ Oregon Bulletin, Oregon State Marine Board, October 1, 2011, available at http://arcweb.sos.state.or.us/pages/rules/bulletin/1011_bulletin/1011_ch250_bulletin.html

¹⁰⁰ *Id.*