IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL PROTECTION INFORMATION CENTER, et al.,

Plaintiffs,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Defendants.
_____/

No. C 04-4647 CRB

MEMORANDUM AND ORDER

This lawsuit arises out of an "incidental take permit" issued by the federal government under the Endangered Species Act to the Pacific Lumber logging company in connection with the 1999 Headwaters Forest accord. Plaintiff environmental groups have sued the United States Fish and Wildlife Service ("Fish and Wildlife Service" or "Service") and the National Oceanic and Atmospheric Administration Fisheries ("NOAA Fisheries") (collectively the "federal agencies or defendants"), as well as Pacific Lumber Company, Scotia Pacific Company LLC, and Salmon Creek LLC ("Pacific Lumber"). The federal defendants and Pacific Lumber have moved to dismiss. After carefully considering the papers filed by the parties, and having had the benefit of oral argument, the Court rules as is set forth below.

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1. The Second Cause of Action under the National Environmental Policy Act ("NEPA") is DISMISSED with 20 days leave to amend.

"NEPA mandates that federal agencies prepare an EIS *for major federal actions* 'significantly affecting the quality of the human environment.' 42 U.S.C. § 4332(2)(C)." Cold Mountain v. Garber, 375 F.3d 884, 892 (9th Cir. 2004) (emphasis added); see also Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 124 S. Ct. 2373, 2383 (2004) ("NEPA requires a federal agency to prepare an environmental impact statement (EIS) as part of any 'proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.'") (citation omitted). "NEPA also imposed on federal agencies an ongoing duty to issue supplemental environmental analyses." Cold Mountain, 375 F.3d at 892. Supplementation is required where "'[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.'" Southern Utah Wilderness Alliance, 542 U.S. at __, 124 S.Ct. at 2384 (citation omitted).

Plaintiffs' NEPA claim fails because the complaint does not allege any proposed "major federal action" which would trigger a duty to prepare a supplemental EIS. In Southern Utah Wilderness Society, for example, the government adopted a "land use plan" which permitted some off-road vehicles on certain Utah federal land. Id. at 2377. Plaintiffs argued, among other things, that the government had violated NEPA by failing to prepare a supplemental EIS for areas where off-road vehicle use had increased. Id. at 2378. The Supreme Court held that the government was not required to prepare a supplemental EIS because "supplementation is necessary only if there remains major Federal actio[n] to occur, as that term is used in § 4332(2)(C)." Id. at 2384-85. In an earlier Supreme Court case, Marsh, "that condition was met: the dam construction project that gave rise to environmental review was not yet completed." Id. at 2385. In Southern Utah Wilderness, in contrast, the government's approval of the land use plan was the major federal action requiring an EIS; when the plan was approved, the major federal action was complete and thus there was no ongoing federal action that could require supplementation. Id.

Similarly, in Cold Mountain, the Montana Department of Livestock applied to the Forest Service for a Special Use Permit to operate a bison-testing facility just outside of Yellowstone. The purpose of the facility was to ensure that bison infected with brucellosis do not contaminate Montana's livestock. In connection with the Permit, the Fish and Wildlife Service issued an "Incidental Take Statement," anticipating that the bison facility might lead to the take of certain bald eagles. Under the Endangered Species Act, a take committed pursuant to an incidental take statement is not considered a prohibited take. See 16 U.S.C. § 1536(o)(2). Plaintiffs filed suit, alleging that new information regarding Montana's violations of the government's conditions set forth in the Permit required the government to prepare a supplemental EIS. The Ninth Circuit held "that there is no ongoing 'major Federal action' requiring supplementation. . . . Because the Permit has been approved and issued, the Forest Service's obligation under NEPA has been fulfilled." Id. at 894.

The same reasoning applies here. In 1999 the government issued Pacific Lumber its incidental take permit. There is no other on-going major federal action; accordingly, NEPA does not apply.

Plaintiffs' attempt to distinguish Southern Utah Wilderness Alliance is unpersuasive. They claim the land use plan at issue there was merely a statement of priorities, rather than a final implementation decision, and that because the plans "have no real, on-the-ground effect, there is no 'ongoing major Federal action that could require supplementation' once a plan is approved." Opposition at 5. The Supreme Court's reasoning, however, was unrelated to the nature of the land use plan; instead, the Supreme Court noted that the "approval" of the plan was, in fact, a major Federal action, but once the plan was approved, there was no further "proposed" agency action that could require a supplemental EIS. 124 S.Ct. at 2385.

Plaintiffs also argue that the federal defendants are required to closely monitor Pacific Lumber's compliance with their permits and that the federal defendants "would actively oversee and collaborate" on implementation of Pacific Lumber's habitat conservation plan and incidental take permit. As to the first argument, in Cold Mountain the plaintiffs argued that Montana was violating the conditions of its permits; the Ninth Circuit still held that there

was no major federal activity. As to the second argument, the complaint does not allege any ongoing obligations of the federal agencies which would constitute "major federal action." At most, the complaint alleges that Pacific Lumber is violating state and federal law and that "[t]he Federal Defendants continue to sanction activities pursuant to the HCP." Complaint ¶ 126. These allegations do not sufficiently allege ongoing major federal action. Accordingly, the Second Cause of Action is dismissed with 20 days leave to amend, provided plaintiffs believe in good faith they can amend the complaint consistent with this Order.

2. The Third Cause of Action against the federal defendants for a violation of the Clean Water Act is DISMISSED without leave to amend.

The Clean Water Act's waiver of sovereign immunity appears in 33 U.S.C. § 1323, a section entitled "Federal facilities pollution control." The Supreme Court has referred to this provision as the "federal-facilities" section. U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 620 (1992). The section provides in relevant part:

> a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government
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> (1) having jurisdiction over any property or facility, or
> (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties,
>
> shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. § 1323(a). Thus, the Clean Water Act applies to a federal agency with respect to (1) property over which the agency has jurisdiction, or (2) activities of the federal agency that result in pollution.

Plaintiffs seek to apply the Clean Water Act to the federal defendants for pollution caused by Pacific Lumber on Pacific Lumber's own property. Defendants therefore argue that the federal agencies do not have "jurisdiction" of such property and the discharge is

caused by the activities of Pacific Lumber, not the federal agencies; therefore, sovereign immunity is not waived and the claim must be dismissed. Plaintiffs respond that the federal agencies have jurisdiction over the land because they issued the incidental take permit and approved the habitat conservation plan; they thus contend that, "regulatory jurisdiction," here, based on the Endangered Species Act, falls within the waiver of sovereign immunity.

Plaintiffs do not cite a single case that has interpreted "jurisdiction" so broadly. This omission is unsurprising given that to so interpret the statute would violate the rule that "any waiver of the National Government's sovereign immunity must be unequivocal," and that "[w]aivers of immunity must be construed strictly in favor of the sovereign." U.S. Dep't of Energy, 503 U.S. at 615. The cases cited by plaintiff involve pollution caused by logging on lands *owned* by the United States. See, e.g., Marble Mountain Audubon Soc. v. Rice, 914 F.2d 179, 182 (9th Cir. 1990). The Clean Water Act claim is dismissed for lack of subject matter jurisdiction because Congress has not waived the government's sovereign immunity for this claim.

3. Plaintiffs' Eighth Cause of Action against the Fish and Wildlife Service under the Endangered Species is DISMISSED without leave to amend.

Under the Endangered Species Act it is illegal for private parties to take threatened or endangered species. See 16 U.S.C. § 1540(a)(b). In certain limited circumstances, however, the federal defendants may authorize a private entity to engage in activity that results in the taking of a federally listed species. See 16 U.S.C. § 1536(b)(3)-(4); 1539(a)(1)(B). In particular, the federal defendants may authorize a "taking" otherwise prohibited by the Endangered Species Act, "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).

The federal defendants issued Pacific Lumber an incidental take permit authorizing Pacific Lumber to "take" spotted owls. Plaintiffs claim the federal defendants violated the Endangered Species Act by issuing the permit because the California Fish and Game Code prohibits the taking of birds of prey, including spotted owls. See Cal. Fish & Game Code § 3503.5. Thus, argues plaintiffs, the activity carried out by Pacific Lumber was not

"otherwise lawful" under state law, and therefore the federal agencies should not have issued the incidental take permit. As support for their argument, they cite the defendants' comment to their final rule which explains "that otherwise lawful activities are those actions that meet all State and Federal legal requirements except for the prohibition against taking in section 9 of the Act." 51 Fed. Reg. 19,926, 19,936 (June 3, 1986).

Plaintiffs' argument has some literal appeal, but it does not make sense. Congress could not have intended that the Fish and Wildlife Service investigate all possible state and local laws that could be potentially violated by a private entity's activities before the Service issue an incidental take permit. The Service merely exempted Pacific Lumber from the Endangered Species Act. If Pacific Lumber's activities also violate California law, California may enforce its laws against Pacific Lumber. Again, plaintiffs do not cite any case in which a court has recognized a cause of action based on the allegation that an incidental take permit exempted a private entity from the Endangered Species Act for conduct which would also violate state law. Accordingly, the Eighth Cause of Action is dismissed without leave to amend.

4. Plaintiffs sue Pacific Lumber under the California Unfair Competition Act (9th through 13th Causes of Action). They filed this action on election day, November 2, 2004. That same day the voters passed Proposition 64. Proposition 64 "repealed" the liberal standing provisions of the Act, and now requires a private plaintiff to show (1) injury in fact, and (2) that it lost money or property as a result of the defendant's alleged unfair or unlawful conduct. Plaintiffs do not, and presumably cannot, allege that Pacific Lumber has caused plaintiffs' members to lose money or property. Thus, the issue the Court must decide is whether Proposition 64 applies retroactively to a case filed the day before the new law went into effect.

Six published cases have held that Proposition 64's standing requirements apply retroactively. Thornston v. Career Training Center, Inc., ___Cal. Rptr. 3d___, 2005 WL 752349 (Cal. App. 4 Dist. April 4, 2005); Frey v. Trans Union Corp., 127 Cal. App. 4th 986 (2005); Bivens v. Corel Corp., 126 Cal.App.4th 1392 (2005); Lytwyn v. Fry's Electronics,

Inc., 126 Cal.App.4th 1455 (2005); Benson v. Kwikset Corp., 126 Cal.App.4th 887 (2005); Branick v. Downey Savings and Loan Ass'n, 126 Cal.App.4th 828 (2005). The courts based their holdings on the California Supreme Court's decision in Governing Board v. Mann, 558 P.2d 1 (1977). In Mann, the Supreme Court held that a legislative enactment repealed a certain law. The plaintiff argued that even if the law was repealed, it should not apply retroactively to the plaintiff's lawsuit based on the "traditional rule that statutory enactments are generally presumed to have prospective effect." The Supreme Court rejected that argument:

> A long well-established line of California decisions conclusively refutes plaintiff's contention. Although the courts normally construe statutes to operate prospectively, the courts correlatively hold under the common law that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, "a repeal of [the] statute without a saving clause will terminate all pending actions based thereon.

Id. at 6-7 (internal quotation marks and citation omitted). "The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time." Younger v. Superior Court, 21 Cal.3d 102, 109 (1978) (internal quotation marks and citation omitted).

As six published California Court of Appeal cases have held, the Mann repeal rule applies to Proposition 64: actions under section 17200 rest solely on a statute and there is no saving clause; accordingly, the initiative applies retroactively to this action.

Only one court has held to the contrary in a published opinion, in a decision that was issued before any of the above six Court of Appeals cases. Californians for Disability Rights v. Mervyn's, LLC, 126 Cal.App.4th 386 (2005). The court relied on the presumption against retroactive legislation. While it acknowledged the rule set forth in Mann, it simply found that the Mann rule "exposes a seeming conflict in canons of statutory interpretation," and then went on to ignore Mann. The Mann repeal rule, however, applies squarely to Proposition 64.

Others have suggested that Mann is limited to lawsuits prosecuted by the government. Mann, however, merely applied the law set forth in an earlier California Supreme Court case,

Callet v. Alioto, 210 Cal. 65 (1930). In Callet, the plaintiff was awarded money damages against the defendant for injuries sustained while the plaintiff was a passenger in the defendant's car. Before the judgment was final, the California legislature amended the Vehicle Code to take away the right of a guest in a vehicle to recover for ordinary negligence; instead, under the new law, the plaintiff must prove gross negligence, wilful misconduct or intoxication to recover against the driver. Id. at 66. With respect to whether the new law applied retroactively to the lawsuit, the California Supreme Court stated:

> It is also a general rule, subject to certain limitations not necessary to discuss here, that a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute. The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time.
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> This rule only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated, that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right, should not be construed to affect existing causes of action. It*, therefore, becomes incumbent upon us to determine whether the right of a guest in a vehicle to recover for personal injuries suffered as the result of the ordinary negligence of the driver in the operation of the vehicle is a right recognized at common law, or whether it is a right based entirely on statute*.

Id. at 67-68 (emphasis added). In light of Callet --an action between two private parties– Mann cannot be limited to actions prosecuted by the government.

Finally, in an unpublished decision another California court suggested that the California Supreme Court applied the presumption against retroactive application to a statutory repeal in Myers v. Philip Morris Cos., Inc., 28 Cal. 4th 828, 839-48 (2002), and therefore, the presumption applies Proposition 64. Myers, however, involved the repeal of a statutory affirmative defense. The rule articulated in Mann and Callent applies to statutory causes of action or remedies. This distinction, of course, makes sense: it is one thing to retroactively repeal the right to recover money from someone, it is quite another to retroactively make conduct unlawful that was lawful at the time it occurred.

In sum, in light of the California Supreme Court's rulings in Mann and Callet, the

Court concludes that Proposition 64 applies retroactively. At oral argument plaintiffs requested that the Court stay its dismissal so that if the California Supreme Court rules that Proposition 64 does not apply retroactively plaintiffs will not have lost their right to pursue their claims. As Pacific Lumber will not be prejudiced by a stay of the Court's dismissal of the California Unfair Competition claims, the Court stays the dismissal pending a ruling by the California Supreme Court. No discovery or motion practice shall occur with respect to these claims.

IT IS SO ORDERED.

Dated: April 22, 2005

/s/
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE