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**Natural Resource Defense Council v. McCarthy**—Tenth Circuit holds reopening area to off-highway vehicle use under BLM regulation is nondiscretionary action not subject to NEPA review

The Bureau of Land Management promulgated 43 C.F.R. § 8341.2(a) to implement its responsibility under the Federal Land Policy and Management Act to "take any action necessary to prevent unnecessary or undue degradation of the lands." The regulation states in part:

> [W]here the authorized officer determines that off-road vehicles are causing or will cause considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat, cultural resources, historical resources, threatened or endangered species, wilderness suitability, other authorized uses, or other resources, the authorized officer shall immediately close the areas affected to the type(s) of vehicle causing the adverse effect until the adverse effects are eliminated and measures implemented to prevent recurrence.

The Tenth Circuit held in *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125 (10th Cir. 2006), that § 8341.2(a) imposes a mandatory duty to close areas where off-highway vehicle use causes such "considerable adverse effects" and that such closure, as a nondiscretionary federal action, does not require environmental analysis under the National Environmental Policy Act.

The converse of the *Carpenter* scenario arose when BLM terminated in 2019 a 2008 OHV closure order without undertaking NEPA review and allowed access to an area where the endangered Wright fishhook cactus exists. Several environmental groups sued federal officials over this action, alleging that ending the closure order without an environmental assessment violated NEPA. The district court granted the defendants' motion to dismiss for failure to state a claim. *Natural Res. Def. Council v. McCarthy*, No. 4:19-cv-00055-DN-PK, 2020 WL 1692894 (D. Utah. Apr. 7, 2020). It reasoned that "the BLM has authority to determine that OHV's 'are causing or will cause considerable adverse effects.' The BLM also has authority to determine that 'the adverse effects have been eliminated and measures implemented to prevent recurrence.' But in both instances, once these determinations are made, the regulation mandates the BLM's action."

The Tenth Circuit affirmed. *Natural Res. Def. Council v. McCarthy*, No. 20-4064, 2021 WL 1310520 (10th Cir. Apr. 8, 2021). The panel began by noting that the plaintiffs limited their challenge to NEPA noncompliance; i.e., they did not question the underlying FLPMA resource management plan's designation of the involved area as open to OHV use or "at this juncture the merits of the BLM's decision to lift the temporary closure order." Thus, "[t]he issue in this case thus boils down to whether the BLM's decision to lift a temporary closure order under 43 C.F.R. § 8341.2(a) is likewise a non-discretionary action, such that environmental analysis under NEPA is not required." The panel looked first to the regulation's text and determined that "the plain meaning of 'until' is that the activity or situation that precedes the word ends at the specified time that follows." With that interpretation at hand, "§ 8341.2(a) requires the BLM to lift a temporary closure order once it finds that 'the adverse effects are eliminated and measures implemented to

prevent recurrence.' The regulation plainly does not allow the BLM to maintain the temporary closure order after it has made the requisite finding." The panel later observed that any other reading would be "asymmetrical" by construing "§ 8341.2(a) [to] operate[] as a one-way ratchet where the BLM 'exercise[s] judgment when implementing a closure order, [but] exercises discretion when lifting one.'"

The panel turned then to the plaintiffs' contention that "that the BLM's determination that 'the adverse effects are eliminated and measures implemented to prevent recurrence[]' ... is itself a discretionary act requiring NEPA analysis." Relying on *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), and *National Wildlife Federation v. Secretary of the United States Department of Transportation*, 960 F.3d 872 (6th Cir. 2020), it

> conclude[d] the BLM's determination of whether "the adverse effects are eliminated and measures implemented to prevent recurrence" more closely resembles judgment than it does discretion. Accordingly, when that determination is made, the BLM need not conduct environmental analysis before lifting a temporary closure order. As the Sixth Circuit noted, the Supreme Court's decision in "*Home Builders* makes clear that agency action need not be 'entirely mechanical' for the agency to still be exercising only 'judgment,' not 'discretion.'"

The panel distinguished precedent relied upon by the plaintiffs for the proposition that "'BLM's role is not simply evaluative: the agency must itself formulate and implement protective measures before lifting a closure[]' ... which are discretionary acts that 'form an inseparable part of the agency's ultimate decision'" because

> [t]his is not a case where the criteria "are so open-ended that they leave the agency significant flexibility on when or how to act." ... Section 8341.2(a) does not charge the BLM "with developing ... criteria" for when or how to lift a temporary closure order. ... Nor does the regulation instruct the BLM to consider criteria as vague and wide-ranging as "the public convenience and necessity." ... The BLM does not have "discretion to impose terms and conditions" on its decision to lift a temporary closure order. ... [T]his is plainly not a case where the agency was "authorized, but not required, to make" a certain decision, and therefore possessed total discretion to act.

Lastly, the panel stressed the temporary nature of § 8341.2(a) closures and the contrary effect of the plaintiffs' interpretation that would "transform[] [the regulation] into an all-consuming provision that would allow the BLM to maintain a temporary closure order indefinitely, even after the agency makes the requisite determination triggering a re-opening and despite an area's open designation under the relevant RMP."

Decision link: https://www.ca10.uscourts.gov/opinions/20/20-4064.pdf