

# Environmental & Land Use Law Newsletter



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## Section Report

By Jill Guernsey, Section Chair

The Midyear at the Alderbrook Resort was a success and the evaluations will be helpful in planning for upcoming programs (yes, we agree that the fresh muffins were much better than the pre-packaged breakfast bars). Based on the feedback we anticipate returning to Alderbrook in the near future.

Our focus this past year has been to remain a financially viable section which provides value to our membership. To that end, the survey that many of you returned earlier this year has led to the following which will be implemented over the next several months, including:

- The Midyear will change to a 2-day format, May 4-5, 2012, at the Icicle Inn in Leavenworth;
- The Newsletter will be published electronically and emailed to the membership;
- Three Mini-CLEs (free to members) will be offered, including a 2-hour Ethics presentation in December;
- There will be no increase in Section dues for the upcoming year.

As always, we encourage you to contact members of the Executive Board with your suggestions and comments.

By the time you read this the elections will have taken place. It is anticipated that Chair-Elect Millie Judge will be the new Chair and that we will have new members on the Executive Committee.

I want to thank outgoing Past-Chair Stacy Bjordahl for the endless hours she put in during her years on the Executive Committee. We will miss her! And finally, thank you for the opportunity to serve as Chair of the ELUL Executive Committee this past year. I have thoroughly enjoyed it!

## Editor's Message

By Michael P. O'Connell, Stoel Rives LLP

Welcome to the September issue of the Newsletter. The first article in this issue, by Scott Missall, addresses use of the Public Records Act to your client's advantage. The second article, by Ryan Steen, reports on the federal district court decision upholding listing of polar bears as a threatened species under the Endangered Species Act. The third article, by Tracy Williams, provides an overview of a Washington Court of Appeals decision in a case of first impression regarding two MTCA defenses and their applicability to a leak from a residential heating oil system. The fourth article, by Karen Terwilliger, provides an update on the 2011 Legislative session.

The Editorial Board welcomes Tadas Kisielius as the newest member of the Board. The Editorial Board invites suggestions for articles for the next issue, which will also include federal environmental, land use, and board updates.

### Pollution Control Hearings Board Vacancy

The Pollution Control Hearings Board has one board member vacancy, who also serves as a member of the Shorelines Hearings Board. This position is open to individuals qualified by experience or training in matters relating to the environment, and otherwise meeting the qualifications of RCW 43.21B.020. The current vacancy is for a term ending June 30, 2014. Interested applicants should apply as soon as possible through Governor Gregoire's website at: <http://www.governor.wa.gov/appointments/default.asp>.

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## Using the Public Records Act to Your Client's Advantage

By Scott Missall, Short Cressman & Burgess PLLC

### 1. Introduction

Land use law is inherently tied to local and regional governmental practice, and has grown in scope and complexity with every passing year. In the past, it dealt with classic subjects such as zoning, setbacks, plats, and actual land uses. In the 1970s and 1980s, it started to encompass environmental, hazardous waste cleanup, and resource management issues; wetland protections and wildlife habitat; and shoreline management activities. In the 1990s and 2000s, land use planning came of age in Washington through the Growth Management Act, becoming more closely tied to urban and rural development dichotomies; regional transportation planning; infrastructure development; protection of various critical areas; stormwater management; drainage and flooding issues; and urban growth and annexation planning.

In an accelerating trend initiated in the 1970s, land use law has become thoroughly enmeshed with governmental procedural laws and practice, notably the Open Public Meetings Act and Public Records Act. Behind nearly every land use action and decision are issues of constitutional stature involving due process, takings, and damages. The Public Records Act is a dynamic and evolving tool that can have a significant effect on how such matters are evidenced, characterized and resolved.

### 2. While One Sided, the "Rules" Can Provide Advantages to All Practitioners

It may be obvious, but it is no less important, to understand that the procedural requirements created by the Public Records Act, Chapter 42.56 RCW ("PRA"), are not intended to create a level playing field. Rather, the PRA is a remedial statute intended to open up previously shadowy or closed governmental decision making practices.<sup>1</sup> At its core, the PRA requires that nearly everything done by government in a non-verbal fashion be subject to public review, and that documents of every sort related to governmental actions be freely available to anyone upon request.

From the private practitioner's perspective, government actions in land use cases have literally become an open book. The PRA thus provides an important, statutory mechanism that enables lawyers to find out and understand what is or may be occurring "behind the scenes" with regard to a project you may be proposing, have an interest in, or be opposed to. It is not necessary that the matter be in a contested case posture or that litigation have been commenced.

For public law practitioners like city and county attorneys, the now transparent nature of agency activities must be an ever-present consideration when consulting with clients, evaluating issues, planning strategy, rendering informal advice and formal opinions, and advising on projects, process, decisions, and legislation. While it may seem that the PRA creates significant problems for government agencies, the converse is equally true – the statutes and the case law serve as detailed instruction manuals for managing government actions. If the "rules" are followed, they can effectively prevent problems from arising today and in the future, significantly reducing the risk and liability profile for public entity actions.

Not surprisingly, the PRA has become a battlefield for political and social causes, and there are healthy debates on how the PRA and government should function. For a flavor of this dispute, see *City Vision Magazine* (January / February 2011), describing how extensive and repeated PRA requests have caused the city of Prosser to incur substantial expense and staff time commitments far beyond their budget, and compare that with a guest editorial appearing in *The Seattle Times* (Feb. 14 and 15, 2011), reflecting the view that government is inherently untrustworthy and thus everything occurring in a public agency should be freely available upon request and without charge.

### 3. Public Records in the Electronic World

The power of the PRA as a discovery device is evident from the Washington Supreme Court's expression of the essential role it plays in governmental activities:

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. Without tools such as the Public Records Act, government of the people, by the people, for the people risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."<sup>2</sup>

Under RCW 42.56.010(2), a "public record" is defined to include "any writing containing information relating to the conduct of government [that is] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3) broadly defines "writing" using such phrases as "every other means of recording any form of communication or representation," and "including any data compilations from which information may be obtained or translated." RCW 42.56.070(1) provides that every governmental agency is directed to "make available for public inspection and copying all public records" that

are not exempt under the PRA. RCW 42.56.030 requires the PRA to be liberally construed in favor of disclosure, and its exemptions are to be narrowly construed for that same purpose. The courts have long taken this legislative mandate to heart, and these tenants are central pillars in construing the PRA.<sup>3</sup>

Although written in the 1970s, the PRA definitions today can be easily read to encompass the whole array of electronic “data compilations,” including emails, web pages, scanned images, database files and software programs, GIS files, word processing files, text messages, voice messages, digital videos and photographs, blog posts, social media posts on Linked-In, Facebook, etc., tweets (*i.e.*, Twitter posts), and the like.<sup>4</sup> In short, the physical form of a “data compilation” can be and often is effectively irrelevant to whether such a compilation constitutes a “public record ... relating to the conduct of government,” which is then subject to identification, retention, and disclosure under the PRA.

**Using the PRA to Your Advantage:** When making requests for public records, do not unintentionally or artificially limit the physical form of the records sought. If you know or suspect that certain information exists in a particular form, specifically request that form. Conversely, avoid extremely broad PRA requests because that may simply delay the receipt of the desired information. There is no limit to the number of PRA requests that can be made, so follow up requests are always available.

**Using the PRA to Your Advantage:** Because the PRA allows records requests to be refined, narrowed, or clarified, and allows responses to be provided in installments,<sup>5</sup> agencies receiving broad requests should be ready to contact a requestor to see if the request is inartfully drafted or can be defined in a more useful way to make a records search faster and more certain in its outcome.

Electronic records are easy to transmit and replicate, and if provided in particular formats, easy to search for specific data. Agencies must provide electronic records in electronic format when requested to do so.<sup>6</sup>

**Using the PRA to Your Advantage:** Particularly for large PRA requests or responses, electronic transfer of records can save substantial time and money. For the PRA requestor, the cost may no longer be tied to a per-page copying fee. Responses can be entirely free if made by email, and negligible if loaded onto a CD. For the producing agency, it is far less expensive to transfer records electronically than it is to pay staff time and overhead (none of which is recoverable) for paper copying.

**Using the PRA to Your Advantage:** Receiving records in electronic formats can also result in immediate and low-cost creation of searchable databases, substantially increasing efficiency and utility. Some cities will give requestors a selection of searchable formats for receipt of their records.

Electronic records consist of more than the mere record itself, and include an array of related production and transmittal data called metadata.<sup>7</sup> Metadata is “most clearly defined as ‘data about data’ or hidden information about electronic documents created by software programs.”<sup>8</sup> Email metadata may include “about 1,200 or more properties [such as] dates that the mail was sent, received, replied to or forwarded, blind carbon copy ... information, and sender address book information.”<sup>9</sup>

The Supreme Court in *O’Neill v. City of Shoreline* held that metadata connected with public records must be disclosed under the PRA. In that case, the City of Shoreline produced email records of its councilmembers in response to a PRA request, but the emails produced were altered copies that deleted certain information, including names of the sender and recipients. In this case of first impression, the Court ruled strongly in favor of disclosure, saying:

Metadata may contain information that relates to the conduct of government and is important for the public to know. It could conceivably include information about whether a document was altered, what time a document was created, or who sent a document to whom. Our broad PRA exists to ensure that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information. We agree with the Supreme Court of Arizona that an electronic version of a record, including its embedded metadata, is a public record subject to disclosure. There is no doubt here that the relevant e-mail itself is a public record, so its embedded metadata is also a public record and must be disclosed.<sup>10</sup>

To resolve the City’s problem of having failed to disclose necessary records, and because the original emails had been received and sent from a councilmember’s home computer, the Court ordered the City to perform a forensic inspection of the councilmember’s home computer hard drive to try and resurrect the metadata.

**Comment:** *O’Neill* has broad consequences. Embedded information about the document is not only as equally subject to the PRA as is the original record itself, but could be the subject of its own PRA request. Agencies may not unilaterally decide whether a public record in some altered form is just as good to (or is good enough to) satisfy a PRA request. Records include all of the various iterations a single docu-

ment may have undergone in the course of various transmittals if those versions are otherwise within the scope of the PRA request.

**Using the PRA to Your Advantage:** Because a hard drive inspection of a home computer is likely to be far more intrusive than its owner will imagine (*e.g.*, rendering financial, personal and other information subject to inspection), most public-sector attorneys advise agency personnel (particularly elected officials) not to use home computers, smart phones, PDAs, etc. for public business-related tasks. Agencies should establish and use an agency-operated communications system to better control and maintain the dispersal and sources of public records subject to review.

Land use matters are invariably decided on the administrative record compiled by the reviewing agency. Given the ease of electronic communication, agencies are typically the recipient of numerous email external inquires and comments, not to mention the internal communications needed to facilitate processing or reach decisions.

**Using the PRA to Your Advantage:** If you represent a project proponent on a contested matter, develop a relationship with the agency reviewer(s) to ensure that you receive timely notice or copies of external comments. Use specific and targeted PRA requests if you don't have such a relationship, or consider such use as a verification tool to ensure that you have complete information about what may be happening behind the scenes.

**Example:** Several years ago a city received a PRA request seeking all electronic communications between councilmembers, including those on personal communication devices (*e.g.*, text messages, Blackberries, smart phones, etc.) on very specific dates and times. Upon examination, the dates and times all turned out to be city council meetings. It appears that audience members observed councilmembers ducking their heads to use their PDAs while on the dais during the council meeting, and believed that the councilmembers were texting each other "behind the scenes" to pre-arrange votes or make non-public comments about public business.

**Comment:** Attorneys with public-sector clients should caution agency personnel to forego the use of PDAs during public meetings if for no other reason than to avoid the appearance of non-public communication and preclude needless PRA requests.

Every agency will typically have some sort of internal policy statement or procedure on the use of email and the

Internet in the workplace, use of government equipment for personal use, and perhaps the use of social media while on duty or even outside the workplace. The reality, however, is that few if any employees will have read or been recently reminded of the policy, and may not be consciously aware of misusing their equipment.

**Using the PRA to Your Advantage:** In you are a public attorney, set up a system for periodic reminders to staff about the need to follow internal electronic equipment/messaging policies. Document the reminders so that you can reliably state the fact of such reminders/reviews. On the private side, you can request a copy of agency emails and computer use policies, and check that against the types of records received, using metadata to evaluate compliance with the policies.

In 2009, new regulations for the preservation of electronic public records went into effect under WAC Chapter 434-662. WAC 434-662-030 requires that electronic records must be retained "by the same provisions as paper documents as set forth in chapter 40.14 RCW." Thus, the retention schedules established by the State Archives and its Local Government Committee apply equally to electronic as to paper records.

Electronic public records must be kept in electronic format and "remain usable, searchable, retrievable and authentic for the length of the designated retention period."<sup>11</sup> In practice, this means that as hardware and software is updated, agencies must be sure to keep a computer type or software version that can still retrieve and read the public records saved using older technology. By way of example, an agency may have data stored on hard or floppy discs, but have no computer with a hard or floppy disc drive to retrieve those records, or may lack the software program needed to produce that record. Significantly, printing and retaining a hard copy of an electronic record is *not* an acceptable substitute for the electronic records "unless approved by the [local] records committee."<sup>12</sup>

Retention of electronic public records becomes even more difficult for those designated as "archival." For such records, computer technology will surely evolve during the retained life of the electronic records. The WAC regulations require that archival electronic records must either be "retained in their original format along with the hardware and software required to read the data in that format," or as technology changes, they may be converted into a new electronic format.<sup>13</sup> Converted records must be "sampled for completeness and accuracy" before the old software and hardware may be disposed, and the agency is responsible for a security backup of active electronic records.<sup>14</sup> To assure the integrity of an electronic record, an agency is required to maintain the "chain of custody of the record" that will prevent "additions, modifications, or deletion of a record by unauthorized parties."<sup>15</sup>

**Using the PRA to Your Advantage:** Separate and apart from the PRA requirement that public records must be maintained, failure to follow the applicable records retention schedules, or failure to maintain methods and means to review electronic records, could be viewed as spoliation of evidence or as a discovery violation under FRCP/CR 26.

**Using the PRA to Your Advantage:** For attorneys representing public entities especially, care should be taken to immediately notify the records custodian or PRA officer or the agency, and as necessary other appointed and elected officials, that a pending matter might require production of documents at some future point.

The dynamic nature of the PRA is illustrated by a recent, serious discussion within the State Archives office concerning whether the PRA requires retention of blood, tissue, and bodily fluid samples obtained by public hospitals in the course of performing their activities.<sup>16</sup> On the surface, at least, such material might arguably constitute a “means of recording” a representation or data compilation “from which information may be obtained or translated,” and the Archives’ *Summary* itself acknowledges that the receptacles in/on which biological samples are collected or examined (e.g., cups and microscope slides) would qualify if they had writing on them. The Summary reached no conclusion, but noted that the majority of states do not presently consider biological samples to be public records. However, assuming the current direction of the courts remains directed at broadly applying the PRA to any governmental conduct, it more than likely that this question will be soon be posed to the courts.

**Using the PRA to Your Advantage:** In the land use and environmental law context, be open-minded on whether the PRA extends to such things as physical soil logs, test borings or samples, cuttings and tailings, road surface asphalt cores, building or construction material samples, or any other type of physical substance that might be a means of recording or serving as a data compilation from which information may be obtained.

The interconnected nature of the electronic world, and the increasingly pervasive role that electronic media play in the conduct of daily activities, creates opportunities and potential problems for attorneys, clients and public entities. Consider the interactive nature of social media sites such as Facebook, Linked-In and Twitter. As practicing lawyers, what does it mean to “friend” someone on a Facebook page? If you are an elected or appointed official and “friend” someone who now appears before you in a contested case, does that raise a potential conflict issue (whether real or apparent)? If you are an employee or ap-

pointed/elected official and merely mention a land use or environmental matter on your Facebook page, does your page become a public record because it was prepared by a public official and relates to the conduct of government? What if your Facebook avatar has perceived biases, or pro or con land use, environmental or development characteristics? And not least, what is the effect of third-party postings to your Facebook wall? Can those constitute *ex parte* communications for examiners and judges that must be disclosed and/or that could result in a required recusal? Can they constitute actual or potential conflict situations that could prevent attorneys from representing present or future clients?

The cities of Seattle, Bellevue and Redmond have formally incorporated links to the City’s Facebook and/or Twitter pages on their city government websites. The City of Seattle website provides links to subject-based Facebook pages and to Facebook pages for the mayor and each of the City councilmembers. The following disclaimer notice is posted under on Seattle’s Facebook page on the subject of “Walk Bike Ride”:

#### **Walk Bike Ride Public Disclosure and Comments**

SDOT is a department of the City of Seattle, [www.seattle.gov](http://www.seattle.gov). This site is intended to serve as a mechanism for communication between the public and SDOT on the listed topics. Any comments submitted to this page and its list of fans are public records subject to disclosure pursuant to RCW 42.56. Public disclosure requests must be directed to the SDOT public disclosure officer.

Comments posted to this page will be monitored. Under the City of Seattle blogging policy, the City reserves the right to remove inappropriate comments including those that have obscene language or sexual content, threaten or defame any person or organization, violate the legal ownership interest of another party, support or oppose political candidates or ballot propositions, promote illegal activity, promote commercial services or products or are not topically related to the particular posting.

The Seattle City Council maintains a Twitter page (linked from the City’s official website) that is striking in the number of tweets per day, the number of tweets concerning routine activities (“Morning briefing just started”; “Watch the Public Safety & Education Cmte mtg live [now]”), and tweets concerning current political topics (“CMMikeObrien defends the right to vote on the #99tunnel”).

**Using the PRA to Your Advantage:** Do some internet research on important staff or appointed/elected officials involved in your case. Check for Facebook or other social media links on agency websites and

follow them. That information may be useful to frame issues, arguments, PRA requests, and may be subject to PRA disclosure.

#### 4. Redaction and Withholding of Public Records

In *Sanders v. State*,<sup>17</sup> the Court found that the Attorney General's Office ("AGO") failed to adequately explain why certain requested records were withheld. It was not enough, the Court said, for the AGO to identify "each withheld document's author, recipient, date of creation, and broad subject matter along with its specification of the exemption," because the PRA also specifically requires agencies to "give a brief explanation of how the exemption applies to the document" in RCW 42.56.210(3).<sup>18</sup> "Allowing the mere identification of a document and the claimed exemption to count as a 'brief explanation' would render [RCW 42.56.210(3)] superfluous."<sup>19</sup> Because the PRA does not have a separate penalty for a failure to provide such a brief explanation, a violation of that provision may be (and was found in the *Sanders* case to be) an aggravating factor in setting the penalty, fees and costs for wrongfully withholding a public record.

**Using the PRA to Your Advantage:** The PRA requires a detailed privilege or exemption log concerning all redactions or withheld documents. On the public side, the time invested in properly preparing that log will more than justify the potential back end penalties that might accrue if explanations or documents are omitted. On the private side, do not assume that the privilege or exemption log supplied with a PRA response is necessarily complete or sufficient. Cross-check the log against each cited document.

#### 5. PRA Penalties

In a PRA lawsuit, the prevailing party "shall be awarded all costs, including reasonable attorney fees."<sup>20</sup> There is little to no room for mercy under the PRA – "Attorneys fees, costs, and penalties for late disclosure are mandatory."<sup>21</sup> If improperly redacted or withheld records do not fall within an exemption to disclosure, "the prevailing party is entitled to costs and penalties from the agency."<sup>22</sup> The court has discretion to set the fine between \$5 and \$100 per day, and determine reasonable attorneys' fees and costs on top of that.

In *Yousoufian v. Office of Ron Sims*,<sup>23</sup> the Supreme Court released a much-anticipated decision and went out of its way to create guidance for determining how penalties should be evaluated and assessed against public agencies that fail to comply with the PRA. The Court's guidance came in the form of 16 factors, and resulted in the largest PRA judgment in Washington state history.

*Yousoufian* is the definitive decision in a long line of appellate decisions involving a PRA request by Armen Yousoufian for King County studies and reports concerning the financing and economic impacts of the then-new sports

stadium. King County's disorganization, lack of diligence, lack of good faith, and poor staff training resulted in a delay of several years before Mr. Yousoufian obtained all of the records he requested in his initial PRA request. In describing how 16 different factors would be used to guide trial court judges in setting PRA penalties,<sup>24</sup> the Court said the first task is to determine where to begin within the statutory range of \$5 to \$100 per day, and then adjust the penalty using the mitigating and aggravating factors.

The Court explicitly stated that its 16 new factors are not an exclusive list of considerations, and that no single factor should control the penalty outcome. But it did say that mitigating factors that could be used to support a decrease of the initial penalty amount included:

- Lack of clarity in the PRA request
- The agency's prompt response or legitimate follow-up inquiry for clarification
- The agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions
- Proper training and supervision of the agency's personnel
- The reasonableness of any explanation for the agency's noncompliance
- The agency's helpfulness to the requestor
- The existence of agency systems to track and retrieve public records

Conversely, aggravating factors that could be used to support an increase of the penalty amount included:

- A delayed response by the agency, especially in circumstances where time is of the essence
- Lack of strict compliance by the agency with the PRA's procedural requirements and exceptions
- Lack of proper training and supervision of agency personnel
- Unreasonableness of any explanations for the agency's noncompliance
- The agency's negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA
- Dishonesty by the agency
- The public importance of the issue to which the request is related, where such importance was foreseeable to the agency
- Any actual personal economic loss to the requestor from the agency's misconduct, where such loss was foreseeable to the agency

- Deterrence of future agency misconduct considering the size of the agency and the facts of the case

After creating these factors, the Supreme Court concluded that the trial court abused its discretion by setting the penalty for King County's PRA failures at only \$15 per day.<sup>25</sup> Because the Court found King County grossly negligent in its handling of Yousoufian's PRA request, the Supreme Court tripled the trial court's penalty to \$45 per day. Multiplied by the 8,252 days of violations, the total award was \$371,340 plus reasonable attorney fees and costs on top of that.<sup>26</sup>

**Using the PRA to Your Advantage:** Attorneys must know the *Yousoufian* factors and counsel their clients accordingly to enhance the likelihood of success in the event that litigation ensues over PRA requests and responses.

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- 1 RCW 42.56.030; WAC 44-14-01003.
- 2 *Progressive Animal Welfare Society v. University of Washington*, 125 Wn. 2d 243, 251, 884 P.2d 592 (1994) (citations omitted) ("PAWS").
- 3 See, e.g., *King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002); PAWS at 251; *Brouillett v. Cowles Publ'g Co.*, 114 Wn. 2d 788, 793, 791 P.2d 526 (1990); RCW 42.56.030.
- 4 See, e.g., WAC 44-14-03001.
- 5 See RCW 42.56.520.
- 6 *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.2d 808 (2009).
- 7 See *O'Neill v. City of Shoreline*, 170 Wn. 2d 138, 240 P.3d 1149 (2010).
- 8 *Id.*
- 9 *Id.* at 145.
- 10 *Id.* at 147-48.
- 11 WAC 434-662-040.
- 12 WAC 434-662-040.
- 13 WAC 434-662-050.
- 14 WAC 434-662-040.
- 15 WAC 434-662-060; -020.
- 16 See Bezzo, *Summary of Factors Effecting the Decision to Create Disposition Authorities for Laboratory and Pathology Samples in Washington State Archives Records Retention Schedules* (March 23, 2011). The *Summary* reports that at least 4 states (Texas, Oregon, North Carolina and Wyoming) so categorize biological samples, while the majority of states appear not to do so.
- 17 169 Wn. 2d 827, 240 P.3d 120 (2010).
- 18 *Id.* at 845-46.
- 19 *Id.* at 846.
- 20 RCW 42.56.550(4).
- 21 *Kitsap County Prosecutor's Guild v. Kitsap County*, 156 Wn. App. 110, 118, 231 P.3d 219 (2010).
- 22 *Id.* at 118-19.
- 23 168 Wn. 2d 444, 229 P.3d 735 (2010).
- 24 *Yousoufian* at 467-68.
- 25 *Yousoufian* at 469.
- 26 *Yousoufian* at 470.

## District Court Upholds Federal Rule Listing the Polar Bear as Threatened Under the Endangered Species Act

By Ryan Steen, Stoel Rives LLP

On June 30, 2011, U.S. District Court Judge Emmet Sullivan issued a 116-page opinion upholding the U.S. Fish and Wildlife Service's ("Service") listing of the polar bear as a "threatened" species under the federal Endangered Species Act ("ESA").<sup>1</sup> The ruling marks a partial end to multidistrict federal court litigation initiated by several groups upon the listing of the polar bear on May 15, 2008. In confirming the Service's listing decision, Judge Sullivan found "that the Service's decision to list the polar bear as a threatened species under the ESA represents a reasoned exercise of the agency's discretion based upon the facts and the best available science as of 2008 when the agency made its listing determination."<sup>2</sup>

Also at issue in the polar bear litigation is an ESA Section 4(d) rule (the "4(d) Rule") issued by the Service in conjunction with its decision to list the polar bear as threatened. The Court has not yet ruled on the 4(d) Rule claims. This article briefly traces the history of the polar bear litigation, describes some of the challenges to the Service's decisions, and summarizes the Court's recent opinion.<sup>3</sup>

### I. Background

In February 2005, the Center for Biological Diversity ("CBD") submitted a petition to the Service to list the polar bear as a threatened species under the ESA due to the loss of the bear's sea ice habitat, which CBD attributed to global climate change. CBD's petition to list a high-profile species for protection under the ESA based upon the projected effects of climate change attributed to anthropogenic greenhouse gas ("GHG") emissions has triggered vast media attention, extensive administrative proceedings leading to precedent-setting decisions, past and ongoing multidistrict litigation, and an array of novel legal and practical issues.

#### A. Listing Rule

On May 15, 2008, the Service issued its 91-page final rule determining that the polar bear species should be listed under the ESA as a threatened species (the "Listing Rule").<sup>4</sup> The Service's principal findings and rationale for the listing are summarized as follows:

1. The polar bear is a sea ice-dependent species.
2. The link between sea ice reduction and global climate change has been established.

3. Reductions in sea ice are occurring now and are likely to continue to occur within the “foreseeable future” (defined as the next 45 years).
4. The link between sea ice reduction and polar bear population reductions has been established.
5. The impacts on polar bear populations will vary, but all populations are likely to be adversely affected within the foreseeable future.
6. The rate and the magnitude of the predicted changes in sea ice will make adaptation by polar bears unrealistic.
7. There are no known regulatory mechanisms that directly and effectively address reductions in sea ice habitat at this time.

In the Listing Rule, the Service found that the observed declines in sea ice, and the anticipated increase in the rate of that decline, are attributable to “three confla[ting] factors: warming, atmospheric changes (including circulation and clouds), and changes in oceanic circulation.”<sup>5</sup> Based upon model simulations, the Service concluded that currently observed and projected declines in Arctic sea ice are “due to increased GHG concentrations.”<sup>6</sup> Although the final listing decision links GHG emissions to sea ice recession to projections of polar bear decline, the Service found that there is no scientifically established causal connection between GHG emissions from any specific source and impacts to polar bears:

The significant cause of the decline of the polar bear, and thus the basis for this action to list it as a threatened species, is the loss of arctic sea ice that is expected to continue to occur over the next 45 years. The best scientific information available to us today, however, has not established a causal connection between specific sources and locations of [GHG] emissions to specific impacts posed to polar bears or their habitat.<sup>7</sup>

At the time of listing, there were estimated to be approximately 20,000 to 25,000 polar bears worldwide, distributed throughout the species’ entire range.

#### B. 4(d) Rule

When the Service listed the polar bear as a threatened species in May 2008, it issued an interim special rule for the polar bear under ESA Section 4(d).<sup>8</sup> The interim rule, which became effective immediately, was promulgated at 50 C.F.R. § 17.40(q). The interim rule was issued in final, nearly identical, form in December 2008.<sup>9</sup> The final 4(d) Rule imposes take prohibitions of Section 9 of the ESA<sup>10</sup> while limiting application of the take prohibition in three key ways:

1. The 4(d) Rule limits application of the take prohibitions of the ESA to activities occurring within the habitat range of the polar bear.<sup>11</sup> The intent and practical impact of this provision are to exclude activities that emit GHGs outside the polar bear’s range from the ESA’s take prohibition.
2. The 4(d) Rule provides that the take prohibitions of the ESA do not apply to activities that comply with the Marine Mammal Protection Act (“MMPA”).<sup>12</sup>
3. The 4(d) Rule provides that the take prohibitions of the ESA do not apply to activities that comply with the requirements of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”).<sup>13</sup>

## II. Legal Challenges

On the same day that the Service issued the Listing Rule, CBD, in combination with other conservation advocacy groups, filed a challenge to the Listing Rule and the interim 4(d) Rule in the federal District Court for the Northern District of California. CBD’s challenge was the first in a series of claims and procedural skirmishes over the polar bear listing decision that were ultimately consolidated by the Judicial Panel on Multi-District Litigation before Judge Emmet Sullivan in the U.S. District Court for the District of Columbia.

Three general categories of polar bear lawsuits were consolidated. First, CBD and other conservation advocacy groups (*i.e.*, Greenpeace, Natural Resources Defense Council, and Defenders of Wildlife) raised claims challenging the Listing Rule and the 4(d) Rule. CBD challenged the listing of the polar bear as a “threatened” species, arguing that the Service should have instead listed polar bears under the more dire category of “endangered.” CBD and others also asserted claims against the 4(d) Rule on multiple grounds under the ESA, NEPA, and the APA. The Alaska Oil and Gas Association, the State of Alaska, the Arctic Slope Regional Corporation, the American Petroleum Institute (in combination with the U.S. Chamber of Commerce, the National Mining Association, the National Association of Manufacturers, and the American Iron and Steel Institute), the Edison Electric Institute, and the National Petrochemical and Refiners Association intervened to defend some or all of CBD’s claims.

A second category of lawsuits challenges the Service’s Listing Rule on the grounds that the polar bear species should not have been listed under the ESA at all. Claims of this nature were brought by the State of Alaska, Safari Club International, the California Cattlemen’s Association, the Congress on Racial Equality, and others. CBD and other conservation advocacy groups have intervened in opposition to these claims.

Finally, a third category of lawsuits seeks relief from the implementation of the Listing Rule in a manner that prevents trophy-hunted polar bears from being imported

from Canada, where they were lawfully taken prior to the listing decision, into the United States. Claims of this type have been asserted by Safari Club International, Conservation Force, and others.

The overarching issues in the various challenges to the Listing Rule involve the Service's interpretation and application of the statutory definitions for "endangered" and "threatened" species. An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range."<sup>14</sup> A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."<sup>15</sup> A listing determination is made on the basis of one or more of five statutorily prescribed factors:

- (a) the present or threatened destruction, modification, or curtailment of the species' habitat or range;
- (b) overutilization for commercial, recreational, scientific, or educational purposes;
- (c) disease or predation;
- (d) the inadequacy of existing regulatory mechanisms; or
- (e) other natural or manmade factors affecting the species' continued existence.<sup>16</sup>

### III. Litigation Summary & Recent Ruling

The polar bear litigation has proceeded under a phased approach in which the merits briefing and oral argument for the Listing Rule and the 4(d) Rule, respectively, have been addressed on separate tracks. Summary judgment briefing on both rules took place from approximately fall 2009 to fall 2010. As described below, the Court subsequently held three hearings, issued one remand order, and, most recently, issued a substantive decision on the Listing Rule claims.

#### A. Remand on *Chevron* Grounds

The Court held an initial hearing on the parties' summary judgment motions on October 20, 2010. This hearing focused on a discrete issue: "whether [the Court] must review the agency's interpretation of the ESA listing classifications under step one or step two of the familiar framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 ... (1984)."<sup>17</sup>

On November 4, 2010, the Court held that the Service improperly relied on a plain-meaning reading of the definition of an "endangered" species that the Court found could not be upheld under step one of *Chevron*.<sup>18</sup> Specifically, the Court found that the term "endangered species" under the ESA is ambiguous and remanded the Listing Rule to the agency "to treat the statutory language as ambiguous."<sup>19</sup>

In response to the Court's remand order, on December 22, 2010, the Service submitted its memorandum of supplemental explanation ("Supplemental Explanation").<sup>20</sup> In its

Supplemental Explanation, the Service concluded that the polar bear does not qualify for "endangered" status even if the phrase "in danger of extinction" is treated as ambiguous. Specifically, the Service explained that its general understanding is the phrase "in danger of extinction" describes a species that is "currently on the brink of extinction in the wild."<sup>21</sup> According to the Service, to be "currently on the brink of extinction" does not necessarily mean that extinction is certain or inevitable. Instead, whether a species is currently on the brink of extinction "depends on the life history and ecology of the species, the nature of the threats, and the species' response to those threats."<sup>22</sup>

The Service's Supplemental Explanation went on to show that past "endangered" listings can be broken out into roughly four categories:

1. Species facing a catastrophic threat from which the risk of extinction is imminent and certain. In this category, the timing of the threat alone is sufficient to deem the species in danger of extinction. The snail darter is the classic example of a species in this category.<sup>23</sup>
2. Narrowly restricted endemics that, as a result of their limited range or population size, are vulnerable to extinction from elevated threats. This category applies to species found in an extremely limited range that, in addition, are facing increasing threats. A large portion of listed species fall in this category. An example of one of these species is the Devil's Hole pupfish, which lives in a single sinkhole in the southern Nevada desert that is experiencing a drop in groundwater level.<sup>24</sup>
3. Species formerly more widespread that have been reduced to critically low numbers or restricted ranges and, consequently, are at a high risk of extinction due to threats that would not otherwise imperil the species. This category represents a class of species experiencing both a severe range reduction and/or a precipitous population crash combined with ongoing threats. Some examples of species falling in this category include California condors, whooping cranes, and vernal pool species, many of which have been all but wiped out by development and related factors.<sup>25</sup>
4. Species with relatively widespread distribution that have nevertheless suffered ongoing major reductions in numbers, range, or both as a result of persistent threats. This category shares common characteristics with threatened species in that they have suffered some recent decline in numbers, range, or both but to a more severe extent. An example of a species falling in this category is the red-cockaded woodpecker, which was formerly a common bird but experienced a precipitous decline in 1970 caused by an almost complete loss of its primary longleaf pine habitat.<sup>26</sup>

The Service found that the polar bear was not “on the brink of extinction” and, therefore, confirmed its decision to list the polar bear as “threatened.”<sup>27</sup> After the filing of the Service’s Supplemental Explanation, the parties engaged in another round of briefing, and another hearing on the merits of the Listing Rule was held on February 23, 2011.

## B. Decision on Listing Rule Claims

On June 30, 2011, the Court issued its ruling on the Listing Rule claims. The Court’s ruling rejects all of the arguments lodged by CBD and others, who argued that the polar bear should have been listed as endangered, and by the State of Alaska and others, who argued that the polar bear should not have been listed at all. The overarching theme in the Court’s opinion centers on the high level of deference that is accorded to agency decision-making “at the frontiers of science”:

After careful consideration of the numerous objections to the Listing Rule, the Court finds that plaintiffs have failed to demonstrate that the agency’s listing determination rises to the level of irrationality. In the Court’s opinion, plaintiffs’ challenges amount to nothing more than competing views about policy and science. Some plaintiffs in this case believe that the Service went too far in protecting the polar bear; others contend that the Service did not go far enough. According to some plaintiffs, mainstream climate science shows that the polar bear is already irretrievably headed toward extinction throughout its range. According to others, climate science is too uncertain to support any reliable predictions about the future of polar bears. However, this Court is not empowered to choose among these competing views.... [And] the Court cannot substitute either the plaintiffs’ or its own judgment for that of the agency.<sup>[28]</sup>

As a threshold matter, the Court held that the Service’s Supplemental Explanation was entitled to *Chevron* deference, over CBD’s objections.<sup>29</sup> The Court then proceeded to reject CBD’s argument that the polar bear should have been listed as “endangered” instead of “threatened.” CBD argued that the Service’s description – “brink of extinction” – set the “endangered” bar impermissibly high and that species facing threats that would manifest in the future could nonetheless be “in danger” now if the magnitude and certainty of the threat were sufficiently high.<sup>30</sup> CBD also argued that the polar bear, in CBD’s view, already satisfied three of the four categories identified by the Service’s Supplemental Explanation.<sup>31</sup> The Court rejected CBD’s arguments, finding that “[w]hile CBD would have weighed the facts differently, the Court is persuaded that [the Service] carefully considered all of the available scientific information before it, and its reasoned judgment is entitled to deference.”<sup>32</sup>

The State of Alaska and others argued that the polar bear should not have been listed at all and specifically took issue with the Service’s application of the phrase “likely to become an endangered species within the foreseeable future.”<sup>33</sup> Specifically, the State of Alaska and others argued that: (i) the Service failed to demonstrate that the polar bear is sufficiently “likely” to become endangered and (ii) the Service arbitrarily selected a 45-year time period as the “foreseeable future” for the polar bear, when a shorter time period would have been more appropriate.<sup>34</sup> The Court rejected both arguments, deferring to the Service’s interpretation and application of the “likely” and “foreseeable future” terms:

The applicable standard, however, is not whether the agency could have taken a more reasonable approach. The agency must only show that the approach it took was a rational one .... Although Joint Plaintiffs may have less confidence than FWS in the conclusions that the agency reached, that is not an appropriate basis for invalidating an agency’s rational choice, particularly in matters requiring scientific or technical expertise. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375-77 ... (1989). Accordingly, the Court concludes that FWS appropriately exercised its discretion in selecting a 45-year “foreseeable future” timeframe for the polar bear.<sup>[35]</sup>

Finally, a variety of parties challenged the Service’s finding that the polar bear species cannot be divided into any “distinct population segments” (“DPS”), as that term is used under the ESA. While the polar bear has been divided into roughly 19 subpopulations for management purposes, the Service found that none of these subpopulations, separately or grouped as larger “ecoregions,” satisfied applicable DPS criteria:

[W]hile these recognized distinctions would seem to be enough to satisfy the minimal criterion that a DPS must be “adequately defined and described,” 61 Fed. Reg. at 4724, the Court is not persuaded that the agency’s contrary conclusion rises to the level of irrationality.

... The Court finds that FWS articulated a reasonable basis for its conclusion that no polar bear population or ecoregion is meaningfully “discrete” for the purposes of DPS designation: even if there are behavioral differences among polar bear population segments, polar bears are universally similar in one crucial respect - namely, their dependence on sea ice habitat and negative response to the loss of that habitat.<sup>[36]</sup>

As of August 30, 2011, the Court's decision on the Listing Rule claims has been appealed by a number of plaintiffs, including Safari Club International, Conservation Force, and the State of Alaska.<sup>37</sup>

### C. Pending 4(d) Rule Claims

The Court held oral argument on the 4(d) Rule claims on April 13, 2011. After oral argument, the Court ordered the parties to submit supplemental briefing "addressing the issue of an appropriate remedy in the event this Court finds that the 4(d) Rule violates either (a) the Endangered Species Act or (b) the National Environmental Policy Act."<sup>38</sup> Supplemental briefing in response to the Court's order has concluded, and the parties are awaiting Judge Sullivan's decision on the 4(d) Rule claims.

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- 1 In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig. ("Polar Bear Litigation"), Misc. No. 08-764, 2011 U.S. Dist. LEXIS 70172 (D.D.C. June 30, 2011).
- 2 *Id.* at \*11-12.
- 3 This article does not comprehensively address all of the issues or claims presented in the *Polar Bear Litigation*. The Court's recent opinion provides a thorough summary of the history of the case and all of the claims challenging the Service's listing decision.
- 4 73 Fed. Reg. 28,212 (May 15, 2008).
- 5 *Id.* at 28,223.
- 6 *Id.* at 28,227.
- 7 *Id.* at 28, 299.
- 8 See 73 Fed. Reg. 28,306 (May 15, 2008). Section 4(d) of the ESA allows the Service and the National Marine Fisheries Service to extend the prohibitions set forth in Section 9(a)(1) of the ESA to species listed as threatened under the ESA and to issue such other regulations as the Service deems necessary and advisable to provide for the conservation of such threatened species.
- 9 73 Fed. Reg. 76,249 (Dec. 16, 2008) (effective Jan. 15, 2009).
- 10 16 U.S.C. § 1538.
- 11 50 C.F.R. § 17.40(q)(4).
- 12 See 16 U.S.C. § 1361, *et seq.* The MMPA sets forth a regulatory scheme for obtaining incidental take authorizations for marine mammals, including polar bears, provided that, among other things, the authorized take has no more than a "negligible impact" on the affected stock. *Id.* § 1371(a)(5). The MMPA also provides certain statutory exemptions for actions taken in defense of human life and property. See *id.* §§ 1371(a)(4)(A), (b)-(e), 1379(h)(1).
- 13 See 50 C.F.R. § 17.40(q)(2). CITES and its U.S. implementing regulations monitor and regulate the trade in legally possessed CITES specimens during international transit.
- 14 16 U.S.C. § 1532(6).
- 15 *Id.* § 1532(20).
- 16 *Id.* § 1533(a)(1)(A)-(E); see also 50 C.F.R. § 424.11(c).
- 17 *Polar Bear Litigation*, 2011 U.S. Dist. LEXIS 70172, at \*38.
- 18 *Polar Bear Litigation*, 748 F. Supp. 2d 19 (D.D.C. 2010).
- 19 *Id.* at 22.
- 20 See *Polar Bear Litigation*, Supplemental Explanation for the Legal Basis of the Department's May 15, 2008, Determination of Threatened Status for Polar Bears, Dkt. 237-1 (Dec. 22, 2010).
- 21 *Id.* at 3 (emphasis omitted).
- 22 *Id.*
- 23 *Id.* at 4.
- 24 *Id.* at 4-5.
- 25 *Id.* at 5.
- 26 *Id.* at 6.
- 27 *Id.* at 18.
- 28 See *Polar Bear Litigation*, 2011 U.S. Dist. LEXIS 70172, at \*10-11.
- 29 *Id.* at \*63-69.
- 30 *Id.* at \*56-63.
- 31 *Id.*
- 32 *Id.* at \*72.
- 33 *Id.* at \*74-92.
- 34 *Id.*
- 35 *Id.* at \*91-92.
- 36 *Id.* at \*104-05.
- 37 See *Polar Bear Litigation*, Dkts. 269, 270, 271, 272.
- 38 See *id.*, Minute Order dated April 19, 2011.

## Court of Appeals Narrowly Construes MTCA Homeowner Defenses

By Tracy Williams, Johannessen & Associates, P.S.

The Washington Court of Appeals (Division One) ruling in *Grey v. Leach*, 158 Wn. App. 837, 244 P.3d 970 (2010), is a case of first impression regarding two Washington Model Toxics Control Act ("MTCA") defenses and their applicability to a leak from a residential heating oil system. Neither party sought review of the decision by the Supreme Court.

### Background

The critical facts underlying the dispute are as follows. In April 2000, the Greys purchased the home from the Leaches, who had owned the property since approximately October 1966. The residence was built in 1924. The heat source used during the entirety of the Leaches' ownership was oil from a furnace connected by piping running underneath the concrete slab basement to a 720-gallon underground storage tank ("UST"). During a remodel that took place in 2004, the Greys had the heating oil UST decommissioned in place in order to switch the home to a natural gas heating system.

In January 2007, over two years after the UST was decommissioned and the gas furnace was installed, the Greys noticed that the linoleum in the basement had curled and begun to turn yellow. They also began to smell fuel oil vapors in the basement. That same month, they called in a tank removal company to determine the source of the odors. It was at that time that the Greys learned that the UST had not leaked, but a return line that had carried excess (i.e., unused) heating oil from the furnace back to the UST had leaked, releasing significant quantities of heating oil over time into the ground underneath the basement floor. Testing results of soil samples confirmed petroleum contaminated soils at concentrations far exceeding MTCA cleanup levels and to a depth of approximately 15 feet below the basement floor. Subsequent forensics analysis showed that the releases of heating oil began as far back as 1971. The Greys incurred expenses of approximately \$200,000 to remove the soils and remediate the property.

Because the Greys had registered the UST with the Washington Pollution Liability Insurance Agency ("PLIA"), the Greys tendered a claim upon discovery of the contamination. PLIA, however, denied the claim on the grounds that the tank was inactive in 2007, when the contamination was discovered and the claim submitted. The Greys filed an administrative appeal, and a \$25,000 settlement was subsequently reached between the Greys and that agency.

In September 2007, the Greys filed a lawsuit in King County Superior Court against the Leaches. The action sought declaratory relief regarding the Leaches' liability and recovery of remedial action costs pursuant to MTCA, RCW 70.105D.080, as well as unjust enrichment/restitution claims. The Leaches asserted a number of affirmative defenses, including the innocent purchaser defense (RCW 70.105D.040(3)(b)) and the domestic purpose defense (RCW 70.105D.040(3)(c)). They also claimed that the parties' real estate purchase and sale agreement ("RESPA") allocated liability for the cleanup solely to the Greys. Additionally, the Leaches filed three counterclaims, alleging that the Greys were also liable under MTCA, the Leaches were entitled to recovery of the PLIA insurance settlement, and the Leaches were entitled to a setoff for the settlement proceeds.

Before summary judgment motions were filed, the Greys successfully dismissed the Leaches' MTCA and insurance recovery counterclaims. The Greys also obtained rulings from the trial court, striking all non-MTCA defenses as inapplicable to defeat MTCA liability, striking the Leaches' jury demand, and defeating an attempt by the Leaches to assert what was then referred to as the "economic loss rule" as a defense to the MTCA claims.

In December 2008, the Greys filed a motion for partial summary judgment seeking: (1) a determination of the Leaches' liability under RCW 70.105D.040(1)(b), as persons who owned or operated a facility at the time of disposal or release of a hazardous substance and who were not entitled to the MTCA innocent purchaser and domestic purposes defenses; (2) a ruling that, contrary to the Leaches' affirmative defense, the Greys' claims were not barred by the terms of the RESPA; and (3) a ruling that the Leaches were not entitled to a setoff for the Greys' settlement with PLIA. The Leaches filed a cross-motion for summary judgment in January 2009. They asked the court to dismiss the Greys' claims on the grounds that the Leaches were entitled to the "innocent purchaser" and "domestic purposes" defenses under MTCA, and that the RESPA barred the Greys' MTCA claims. In February 2009, the trial court denied both parties' motions. It held that the RESPA did not bar the Greys' MTCA claims, but also ruled that the Leaches could assert the two MTCA defenses at trial. It reserved any ruling on the setoff issue.

The trial court certified for review whether the "innocent purchaser" and "domestic purpose" defenses were available to the Leaches. In a separate motion, the Leaches sought discretionary review of three trial court orders. Division One granted review of the two certified issues and whether the RESPA barred the Grey's MTCA claim.<sup>1</sup> However, it denied discretionary review of the other issues raised by the Leaches. Division One consolidated the two cases.

### Summary of MTCA Liability

MTCA is a strict liability statute. Liability extends to owners who own or operate a property at the time of disposal or release of a hazardous substance. Heating oil falls

within the statutory definition of “hazardous substance.” The statute contains certain limited defenses to liability, which are found at RCW 70.105D.040(3). A party cannot avoid MTCA liability based on defenses not asserted in the statute. *Pederson’s Fryer Farms, Inc. v. Transamerica Insurance Co.*, 83 Wn. App. 432, 440, 922 P.2d 126 (1996).

To assert the innocent purchaser defense, RCW 70.105D.040(3)(b), a party has to

[E]stablish by a preponderance of the evidence that at the time the facility was acquired by the person, the person had no knowledge or reason to know that any hazardous substance, the release or threatened release of which has resulted in or contributed to the need for the remedial action, was released or disposed of on, in, or at the facility.

The statute goes on to establish three other requirements to establish the innocent purchaser defense: (1) that the person undertook, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice; (2) that the person did not have actual knowledge of the release or threatened release of hazardous substance during his or her ownership and transfer of ownership without first disclosing such knowledge; and (3) that the person did not, by any act or omission, cause or contribute to the release or threatened release. RCW 70.105D.040(3)(b)(i) – (iii).

On appeal, the Leaches argued that they qualified for this defense under Section 3(b)(iii) because the phrase “caused or contributed to the release or threatened release of a hazardous substance” implied intentional or negligent conduct. They contended that they had neither intentionally nor negligently released heating oil. The Greys maintained that the plain and ordinary meaning of the words did not include any element of intent or negligence. They argued that by operating a heating system that released oil, the Leaches had caused or contributed to the release or threatened release of a hazardous substance. The Court of Appeals agreed with the Greys.

Noting that MTCA did not define the words “caused” or “contributed,” the Court resorted to the dictionary definition of the terms which allowed it to give undefined terms their plain and ordinary meaning. An appellate court is able to review dictionary definitions for undefined words contained in a statute unless a contrary intent appears in the statute. *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991). After reviewing the definitions for “cause” and “contribute,” the Court concluded that the definitions did not include any scienter element. Nor did the Court find a contrary intent in the statute. Therefore, the Court of Appeals found that a “reasonably informed voter would understand from the statute’s plain language that an owner of a facility who deposits hazardous substances – even if unknowingly, unintentionally,

and without negligence – is not an ‘innocent purchaser.’” 158 Wn. App. at 847. The Court noted that the Leaches acknowledged that heating oil had leaked into the ground during their ownership through the operation of the heating system. Hence, they “caused” or “contributed” to the release of heating oil, which led to the contamination of soils that required remediation. As such, the Court held that the innocent purchaser defense was inapplicable to the Leaches.

The Court of Appeals next discussed the Leaches’ arguments regarding the applicability of the domestic purpose defense. This defense can be asserted by:

Any natural person who uses a hazardous substance lawfully and without negligence for any personal or domestic purpose in or near a dwelling or accessory structure when that person is: (i) a resident of the dwelling; (ii) a person who, without compensation, assists the resident in the use of the substance; or (iii) a person who is employed by the resident, but who is not an independent contractor[.]

RCW 70.105D.040(3)(c). The Leaches contended that the defense applied to past owners, who lawfully used home heating oil and without negligence in their home heating system. The Greys argued that the “domestic uses” envisioned by MTCA did not include leaking home heating oil. Once again, the Court of Appeals agreed with the Greys.

MTCA does not define “use.” Thus, the Court again looked to the dictionary definition of the word. Based upon the definition, it found the clause “‘uses a hazardous substance lawfully and without negligence for any personal or domestic purpose’ fairly connotes the lawful and non-negligent utilization of a hazardous substance for a customary domestic purpose that, in order to fulfill this intended purpose, also involves an incidental release.” 158 Wn. App. at 848. The Court concluded that under MTCA, use of home heating oil for a domestic purpose does not include leaking oil from defective underground pipes into the ground.

### Implications from Grey Decision

Washington voters enacted MTCA through Initiative Measure No. 97 in November 1988. One of the public policy considerations behind the enactment of MTCA was that cleanups be conducted quickly and be performed well. This sentiment is captured in the “Declaration of Policy” at the beginning of the Act. RCW 70.105D.010(5) states:

Because it is often difficult or impossible to allocate responsibility among persons liable for hazardous waste sites and because it is essential that sites be cleaned up well and expeditiously, each responsible person should be liable jointly and severally.

This sentiment often is lost during the resolution of MTCA cases. Many defendants would rather fight over inapplicable defenses than admit or stipulate to liability. The fight over liability often impedes or delays cleanups from moving forward. In addition, where a party has already completed a cleanup, the liability fight further delays that party from recovering their remedial action costs.

Prior to the Court of Appeals' ruling, the courts had not addressed the applicability of the innocent purchaser or domestic purpose defenses in a residential setting. In fact, only a few published cases addressed the MTCA defenses. The Court of Appeals (Division One) considered the applicability of the innocent purchaser defense in *Taliesen Corp v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006). However, because the party seeking to claim the defense did not fit MTCA's definition of an "owner," the Court did not discuss the defense in any detail other than to quote the MTCA provision where the defense is found. Moreover, *Taliesen* did not involve residential property.

In *Pederson's Fryer Farms*, 83 Wn. App. 432, the Court of Appeals (Division Two) addressed the innocent purchaser defense. It found that the defense did not apply because, amongst other reasons, Pederson's Fryer Farms had contributed to the release of the hazardous substance at the site. *Id.* at 440-41. This case also did not involve a residential property.

Finally, in *Martin v. Johnson*, 141 Wn. App. 611, 170 P.3d 1198 (2007), the Court of Appeals (Division Two) addressed an insurance coverage dispute over a leaking home heating oil tank. The former homeowner's insurance company intervened to challenge the reasonableness of a settlement reached between the current owners and the former owner's estate. The insurer argued that the claim against its insured was "entirely defensible" because the "domestic purposes" defense (which is referred to in the *Martin* case as the "consumer exemption") absolved the former homeowner from any MTCA liability. *Id.* at 621. The Court declined to address the issue, stating that "[n]either party cites authority directly supporting its interpretation of the [defense]" and acknowledging that the case turned on a complicated issue of statutory construction. It thus found that "a decision to settle for an amount within the range of the evidence is reasonable." *Id.* Therefore, the applicability of the domestic purpose defense to leaking heating oil systems was never decided.

As seen from the above cases, the Court of Appeals' *Grey* ruling provides much-needed direction regarding the applicability of the innocent purchaser or domestic purpose defenses in a residential setting. In theory, the Court of Appeals' ruling should now make it more difficult for former owners to try to escape MTCA liability. Pursuant to the *Grey* ruling, a former owner who uses a heating oil system later discovered to have been leaking during his or her ownership will not be considered to be an innocent purchaser or landowner, even if they did not know or have

any reason to believe that leakage from the tank or piping was occurring.

Likewise, the Court's interpretation of the domestic purpose defense establishes that although home heating oil is a hazardous substance, there is no liability for that use when it is used in a properly functioning heating system. However, when a heating system is being operated and heating oil escapes from the UST or piping into the environment, then those who owned the property during the time of that release will not be protected by the domestic purpose defense.

Only time will tell whether Division One's ruling in *Grey* leads to a quicker resolution of MTCA cases. The one thing that is clear is that the two defenses offer far less protection from liability than previously asserted by former owners and their insurance companies.

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<sup>1</sup> This article does not address the details of Division One's ruling regarding the RESPA. The Court of Appeals upheld the trial court's dismissal of the Leaches' contract bar defense.

## Legislative Update, 2011 Session

By Karen Terwilleger, Director of Governmental Relations,  
Washington State Department of Ecology

The defining legislative issue during the 2011 session was a significant general fund budget deficit. Budget cuts again hit state natural resource agencies and programs. Detailed budget information is available at: <http://leap.leg.wa.gov/leap/default.asp>.

With budget restrictions, much legislative energy was focused on consolidating state agency services, enhancing revenue for environmental programs and streamlining regulatory requirements. For example, **SB 5669 Natural resource agencies** would have directed significant consolidation of administrative regions, services and functions. Fee increases for major regulatory programs (hydraulic code, forest practices, water rights processing) became linked to significant policy changes. **SB 5862 Natural resources programs** would have established hydraulic project approval fees, increased forest practices application fees, integrated hydraulic project approvals for forestry activities into the associated forest practices application, and substantially modified both regulatory programs. **SB 5934 Administration of water right permits** would have increased water rights application fees and made changes in various statutory provisions including application data requirements, relinquishment, streamflow enforcement, and data management. In a regulatory streamline vein, **HB 1952 State Environment Policy Act process** attempted to modify the State Environment Policy Act to create certain statutory categorical exemptions. None of these major streamlining, consolidation or fee bills became law.

Despite budget challenges, the Legislature did pass several significant bills during the 2011 regular and special sessions. Listed below are brief descriptions of many of the bills enacted into law related to energy, land use, water, toxics and natural resources issues. The author wishes to acknowledge the significant contribution to this article from staff members of the House of Representatives and the Senate. Legislative staff members' bill reports and documents provided the baseline information and material in this update. Full reports, as well as other legislative information, can be found on the Legislature's website: [www.leg.wa.gov](http://www.leg.wa.gov). During the legislative session, electronic copies of documents used during House and Senate Committee meetings can be accessed through the electronic bill book at: <http://apps.leg.wa.gov/cmd/start.aspx>.

### Energy and Climate Change

**SHB 1422 Forest biomass for aviation fuel:** SHB 1422 directs the Department of Natural Resources ("DNR"), the University of Washington and Washington State University

to collaborate on a project to develop forest biomass to aviation fuel on state trust lands.

**SHB 1570 Energy facility siting:** HB 1570 requires the state Energy Facility Site Evaluation Council ("EFSEC") and local governments to provide written notice to the United States Department of Defense when they receive an application for an energy plant or alternative energy resource facility if the facility is connected to a transmission line of at least 115 kilovolts. The notification must include: a description of the proposed plant or facility; the location of the site; the placement of the plant or facility on the site; the date and time by which comments must be received; and contact information for the EFSEC or the local government permitting agency and the applicant.

**E2SSB 5769 Coal fired generation:** E2SSB 5769 requires the TransAlta coal plant in Centralia to reduce greenhouse gas emissions. By December 31, 2020, the facility must reduce emissions to for one boiler to 1100 pounds of Green House Gas ("GHG") per megawatt-hour. All other generating boilers must meet this standard by December 31, 2025. If the Department of Commerce lowers the emission standard, boilers must meet the lower limit by the deadlines. By April 1, 2012, the state and the facility owners must enter into a Memorandum of Agreement ("MOA") for achieving these specified emissions reductions, including binding commitments to install pollution control technology by January 1, 2013. The MOA must also require the facility to provide financial assistance to the affected community, including \$30 million for economic development, energy efficiency and weatherization, and \$25 million for energy technologies with the potential to create energy, economic development, and air quality, haze, or other environmental benefits. If the facility is slated for closure, the owners must submit a facility closure plan to the Department of Ecology ("Ecology") at least 24 months prior to closure or decommissioning work.

**SHB 1571 Electric vehicles:** In 2009, the Legislature acted to support the planning for, and development of, electric vehicle infrastructure in the state, including the deployment of stations to charge electric vehicle batteries. SHB 1571 prohibits the Utilities and Transportation Commission ("UTC") from regulating the rates, services, facilities, and practices of any entity that offers battery charging facilities to the public for hire if that entity: is not otherwise subject to the UTC's jurisdiction as an electrical company; or is otherwise subject to the UTC's jurisdiction as an electrical company, but its battery charging facilities are not subsidized by any regulated service. An electrical company may offer battery charging facilities as a regulated service, if the UTC approves.

### Toxics and pollution

**E2SHB 1186 State's oil spill program:** E2SHB 1186 updates state contingency planning requirements for oil spill response. The bill requires the Ecology to evaluate and update planning standards for oil spill response

equipment every five years. Ecology must also establish a volunteer coordination system to be used as part of an oil spill response. The bill increases the penalties for vessels violating the state's oil spill laws by discharging 1,000 or more gallons of oil and requires state notification of vessel emergencies resulting in the discharge of oil or the threat of oil discharge.

**ESHB 1489 Fertilizer with phosphorus:** Beginning on January 1, 2013, ESHB 1489 prohibits the sale and application of turf fertilizer that is labeled as containing phosphorus to turf. The prohibition does not apply if the fertilizer is being used to establish or repair grass during a growing season, for addition of phosphorus to soils with deficient plant-available phosphorus levels, or for application to pasture lands, houseplants, flower or vegetable gardens, or agricultural or silvicultural lands. Retailers may not display turf fertilizers labeled as containing phosphorus unless the product is also labeled for one of the permitted uses. Retailers may continue to display otherwise prohibited turf fertilizers that were in stock prior to 2012. The bill also prohibits local governments from adopting less restrictive ordinances on the use of phosphorus-containing fertilizer.

**ESHB 1721 Coal tar sealant pollution:** ESHB 1721 prohibits any person from selling a coal tar pavement product that is labeled as containing coal tar after January 1, 2012. After July 1, 2013, individuals may not apply a coal tar pavement product on a driveway or parking area. The bill authorizes cities or counties to adopt an ordinance to concurrently enforce the ban with Ecology.

**SSB 5271 Abandoned and derelict vessels:** SSB 5271 creates a misdemeanor for any person causing a vessel to become abandoned or derelict, or who intentionally and without authorization causes a vessel to sink, break up, or block a navigation channel.

**SSB 5350 Unlawful solid waste dumping:** SSB 5350 clarifies the responsibility of local governments is assisting property owners in cleaning up illegal dumping on their property. Current law (before enactment of SSB 5350) establishes a comprehensive statewide program for handling, recovering, and recycling solid waste to prevent pollution and conserve the resources of the state. Local governments have the primary responsibility to manage solid waste. It is illegal to dump or allow solid waste to be dumped anywhere except at a permitted solid waste site or facility except that individuals may dump solid waste onto their own property if it does not violate any statutes or create a nuisance. SSB 5350 requires local government to take reasonable action to determine and identify the person responsible for illegal dumping before requiring the property owner to clean up the site. Local health jurisdictions receiving restitution payments for illegal dumping must use one-half of the amount received to assist property owners with cleanup of illegal dumping where the responsible person cannot be determined. A landowner is not entitled

to any restitution if the landowner gave written permission authorizing the disposal on their land.

**SSB 5436 Vessel antifouling paints:** After January 1, 2018, SSB 5436 prohibits new recreational water vessels with antifouling paint containing copper to be sold in the state. On January 1, 2020, the sale of copper antifouling paint intended for use on recreational water vessels is prohibited.

## Water

**ESHB 1332 Joint water utility services:** ESHB 1332 allows joint municipal utility services authorities to be formed by two or more county, city, town, special purpose district or other units of local government to perform or provide any or all of the utility service or services that all of its members provide. Services include the provision of retail or wholesale water supply and conservation services; the provision of wastewater, sewage, or septage collection, handling, treatment, transmission, or disposal services; and management and handling of stormwater, surface water, drainage, and flood waters.

**HB 1391 Columbia Basin project water:** Within the Columbia Basin Project ("Project"), HB 1391 modifies the allowable quantity of water permitted for irrigation in circumstances where a person has a groundwater right within a subarea using surface water from the Project. The total acreage irrigated under the subarea groundwater right and delivered Project water must not exceed the quantity of water authorized by the Bureau or acreage limits described in the groundwater permit or certificate.

**SHB 1467 Definition of a well:** SHB 1467 exempts the following from the requirement to obtain a well drilling permit: siting and constructing an on-site sewage disposal system or a large on-site sewage system; or inserting any device or instrument less than 10 feet in depth into the soil for the sole purpose of performing soil or water testing or analysis or establishing soil moisture content as long as there is no withdrawal of water in any quantity other than as necessary to perform the intended testing or analysis.

**2SHB 1803 Columbia River Basin management:** 2SHB 1803 authorizes Ecology to enter into water service contracts with applicants receiving water from the program to recover all or a portion of the cost of developing the water supply. The bill also allocates two-thirds of the water made available through reoperation of Sullivan Lake to be available for supply or instream uses in Ferry, Douglas, Lincoln, Okanogan, Pend Oreille, and Stevens counties. At least one-half of this quantity must be made available for municipal, domestic, and industrial uses.

**2SSB 5034 Private infrastructure:** 2SSB 5034 authorizes the UTC to regulate private wastewater companies to provide sewerage services for compensation. Wastewater companies subject to UTC jurisdiction are entities owning or proposing to develop and own sewerage systems (facilities and services to collect, treat, and dispose of sewage or storm or surface run-off) that are designed for a peak

daily flow of 27,000 to 100,000 gallons if treatment is by large onsite septic system, or to serve 100 or more customers. Publicly owned wastewater systems and wastewater company service to customers outside of an urban growth area are excluded from regulation

**SSB 5364 Public water system permits:** Public water systems with more than 15 hook-ups must receive an annual operating permit from the Department of Health (“DOH”). SSB 5364 authorizes DOH to adopt rules to establish annual fees establishing categories of annual operating permit fees based on system size, complexity, and number of service connections. Fees charged must be sufficient to cover, but not exceed, DOH’s costs of administering the program for safe and reliable drinking water. Prior to this bill, fees were set in statute.

**ESSB 5555 Water rights transfers:** For counties located east of the crest of the Cascade Mountains, ESSB 5555 authorizes Ecology to approve a change or transfer application for an interbasin water rights transfer only after providing electronic notice to the board of county commissioners in the county of origin upon receipt of an application.

**SSB 5635 Surface water right permits:** Under current law (before enactment of SSB 5635), Ecology may allow a change of the point of diversion to a downstream intake structure when a modification will provide both environmental benefits and water supply benefits. To take advantage of this provision, the structure must be located downstream, have an existing approved intake structure with capacity to transport the additional diversion, and have the same ownership, purpose of use, season of use, and place of use. SSB 5635 modifies this provision and by authorizing Ecology to allow a change of the point of diversion to a point of diversion located between Columbia River miles 215.6 and 292 if the existing point of diversion is also within those miles on the Columbia River.

### Natural Resources

**SHB 1294 Puget Sound Corps:** SHB 1294 consolidates the administrative functions of the Washington Conservation Corps (“WCC”) into Ecology. The bill creates a Puget Sound Corps within the WCC to focus on projects related to the recovery of Puget Sound and allows WCC projects to receive grant funding priority by the Salmon Recovery Funding Board.

**ESHB 1421 Community forest trust:** ESHB 1421 authorizes DNR to create and manage the Community Forest Trust, a discrete category of non-fiduciary trust lands held by the DNR, actively managed to generate financial support for the trust, and sustain working forest conservation objectives including: protecting in perpetuity working forest lands that are at a significant risk of conversion to another land use; securing financial and social viability through sound management plans and objectives that are consistent with the values of the local community; maintaining the land in a working status; generating revenue at levels that are, at a minimum, capable of reimbursing the DNR

for management costs; providing for ongoing, sustainable public recreational access; and providing educational opportunities for local communities regarding the benefits that working forests provide to Washington’s economy, communities, environment, and quality of life.

**SHB 1453 Shellfish enforcement:** HB 1453 requires an approved shellfish tag or label be affixed to each container of shellfish prior to removal from the growing area. Any shellfish removed from a growing area without a tag may be seized by the DOH or the Washington Department of Fish & Wildlife (“WDFW”). Persons found in violation of shellfish requirements are prohibited from brokering the sale of shellfish or in any way participating in the shellfish sales.

**ESHB 1509 Forestry riparian easement:** ESHB 1509 modifies the Forest Riparian Easement Program (“FREP”) by adding to the existing unharvested trees that are eligible for compensation from the FREP, including forest trees located within riparian habitats, channel migration zones, and on potentially unstable slopes or landforms. The value of compensation must be calculated at the time the FREP application was completed and not at the time of the underlying harvest.

**HB 1698 Recreational fishing opportunities in Puget Sound:** HB 1698 updates the Puget Sound Recreational Salmon and Marine Fish Enhancement Program (“Program”). The bill requires WDFW and the associated oversight committee to adaptively manage the Program to maximize benefits to the Puget Sound recreational fishery, consistent with available revenue, Fish and Wildlife Commission policies, tribal co-manager agreements, and limitations of the Endangered Species Act. The bill modifies WDFW’s responsibilities including: using a program of hatchery-based salmon enhancement and soliciting support from cooperative projects, regional enhancement groups, and others to improve fishing; conducting comprehensive research on salmon and marine bottomfish production limitations and methods for artificially propagating depleted marine bottomfish; and facilitating continued fishing opportunity improvement as measured by angler trips expended.

**SSB 5036 Vessel and species removal fee:** SSB 5036 eliminated an expiration date for vessel registration fees that fund invasive species and algae programs at WDFW and Ecology.

**SSB 5300 Washington natural resources:** In 2005, the Legislature enacted high-performance Building Standards requiring all major facility projects funded in the capital budget or financed through a financing contract to be designed, constructed, and certified to at least the United States Green Building Council Leadership in Energy and Environmental Design (“LEED™”) Silver standard. When determining compliance with the requirement for a project to be designed, constructed, and certified to at least the LEED™ Silver standard, SSB 5300 requires the Department of General Administration and the Superintendent

of Public Instruction to credit one additional point for a project that uses wood products with a third party certification or from forests regulated under Washington's Forest Practices Act.

**SSB 5385 Increasing revenue to the state wildlife account:** SSB 5385 increases revenue into state Wildlife Account by increasing fees for recreational hunting and fishing licenses; dedicating all recreational hunting and fishing license revenue to the account; creating a new administrative surcharge for commercial hunting and fishing licenses; and allowing the Wildlife Account to retain interest from funds in the account.

**2SSB 5622 Recreation on state lands:** 2SSB 5622 creates the Discover Pass for access to certain state lands. The \$30 fee is available for purchase at the Department of Licensing at the time of vehicle registration, through the WDFW's automated system, and through the state parks reservation system. Fee revenue will support recreational access for WDFW and DNR lands, and state parks.

**SSB 5784 Regional ocean partnership:** SSB 5784 strengthens state policy support for regional ocean planning and collaboration based on the 2006 West Coast Governors' Agreement on Ocean Health. The bill declares that Washington, Oregon, and California have a common interest in marine waters management and that coordination between these states is essential to achieve effective resource management.

## Land Use

**ESHB 1478 City and county fiscal relief:** ESHB 1478 modifies several state deadlines for local governments requirements, including growth management comprehensive plan updates; public fleet fuel restrictions, housing program compliance with Washington Quality Award timelines; transportation preservation rating reporting; timeframes for expending impact fees, new reclaimed water rules, and new municipal stormwater permits.

**SHB 1783 Houseboats and moorages:** HB 1783 requires floating homes that were permitted or legally established before January 1, 2011, to be classified under the Shoreline Management Act as a conforming preferred use. A "floating home" is a single-family dwelling unit constructed on a float that is moored, anchored, or otherwise secured in waters. Although a floating home may be capable of being towed, a floating home may not be a vessel. "Conforming preferred use" means that applicable development and master program regulations may only impose reasonable conditions and mitigation that will not effectively preclude the maintenance, repair, replacement, and remodeling of existing floating homes and moorages by rendering those actions impracticable.

**ESHB 1886 Ruckelshaus Center process:** ESHB 1886 establishes a Voluntary Stewardship Program to protect and enhance critical areas on lands used for agricultural activities through voluntary actions by agricultural operators.

**SSB 5192 Shoreline Management Act Appeals:** In 2010, the Legislature passed HB 2935, which consolidated several environmental hearings boards and modified the Growth Management Hearings Boards. SSB 5192 clarifies several issues identified during the implementation of HB 2935 to ensure that local governments, applicants, and other concerned parties have consistent, timely notice of the opportunity to appeal government actions taken under the Shoreline Management Act. SSB 5192 returns to the "date of filing" to set the beginning of the shoreline permit appeal period; clarifies the time frame to appeal a Shoreline Master Program ("SMP") update so it starts with the publication of a notice of adoption by Ecology; and revises the SMP adoption notice procedures in the Growth Management Act, and clarifies the process for Ecology's final action on an updated, locally crafted SMP.

**ESSB 5253 Landscape conservation:** ESSB 5253 authorizes limited tax increment financing for local governments as a tool to increase transfer of development programs.

**SSB 5451 Shoreline structures:** After September 1, 2011, SSB 5451 authorizes Ecology-approved new or amended SMPs to include provisions authorizing qualifying residential structures and appurtenant structures to be considered conforming structures; and to allow redevelopment, expansion, change with the class of occupancy, or replacement of the residential structure if it is consistent with the local shoreline master program.

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