# Environmental & Land Use Law Newsletter

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## Section Report

*By Jill Guernsey, ELUL Section Chair*

Greetings to all ELUL Section members! I am honored to take on the role as Chair of the ELUL Section this year. The Executive Committee would like to thank Stacy Bjordahl for her leadership and attention to detail as ELUL Section Chair during the past year. The ELUL Executive Committee is pleased to announce that Kristie Carevich, Jay Derr, Laura Kisielius, and Tom McDonald have been elected as Directors. They join Directors Courtney Flora, Steve Jones, Treasurer Jamie Carmody, President-Elect Millie Judge and Past-President Stacy Bjordahl on the Executive Committee.

As you may know, we have increased our Section dues to $35 per year to cover the costs of our CLEs, the Newsletter, the Midyear, scholarships, and other increased charges from the WSBA. To ensure that Section dues fund items and events which are beneficial to our members, we will be sending a survey soon. Please take time to complete the survey and let us know your priorities and thoughts.

Lastly, please mark your calendar for the 2011 ELUL Midyear, which will be held at Alderbrook Resort on Hood Canal on April 28-30, 2011. Please visit Alderbrook's website at *http://alderbrookresort.com*. For a list of our Section's upcoming activities, please check our website at *http://www.wsba.org*.

## Editor's Message

*By Michael P. O'Connell, Newsletter Editor*

Welcome to the December issue of the ELUL Newsletter! This issue includes articles, updates and reports. The first article, by Adam Gravely, Tadas Kisielius and Peter Smith, reviews the Washington Supreme Court's decision on the challenges to the 2003 Municipal Water Law. The second article, by Connie Sue Martin, addresses development and implementation of tribal environmental and land use codes to ensure that future renewable energy projects are consistent with the applicable tribe's environmental as well as its economic development objectives. The third article, by Jason Morgan and Corinna McMackin, reviews four recent Endangered Species Act federal court decisions highlighting a continuing dispute over consideration of economic impacts of critical habitat designations on local economies.

In addition, this issue includes Ashley Peck and Marie Quasius' update on federal court decisions on federal environmental law, Richard Settle's update on significant recent judicial decisions in land use law, Andrea McNamara Doyle's update from Environmental Hearings Boards decisions, and Laura Kisielius and Tadas Kisielius' update on Growth Management Hearings Board decisions. Finally, there are reports from each of Washington's law schools.

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The Editorial Board will soon be developing content for the next issue of the Newsletter. Anyone who would like to contribute an article for the next issue or who has comments, questions, or suggestions regarding the Newsletter, its content, or the Editorial Board is encouraged to contact me or another member of the Editorial Board listed on the back page of this Newsletter. Thank you for your interest in the Newsletter.

# Not a Performing Bear: The Supreme Court's Decision in *Lummi Indian Nation v. State*

*By Adam W. Gravley, Tadas Kisielius, and Peter J. Smith, GordonDerr LLP*[1]

Under attack since its passage in 2003, the Municipal Water Law ("MWL" or the "Act")[2] has prevailed against a series of facial constitutional claims. In a 9-0 opinion delivered by Justice Chambers in *Lummi Indian Nation v. State of Washington* ("*Lummi*"),[3] the Washington State Supreme Court held that the MWL does not violate separation of powers or facially violate procedural and substantive due process.

*Lummi* is significant on several fronts. For water and municipal lawyers, the decision clarifies the status of municipal water certificates and provides an important measure of stability. Land use practitioners will be interested in the decision's impact on long-range planning under the Growth Management Act as well as project-specific decisions, both of which rely on availability of water from public water systems. And all practitioners will rely on *Lummi* as a landmark opinion for constitutional challenges to Washington statutes. *Lummi* solidifies the standard for facial challenges to a statute, arguably unsettled before the opinion,[4] and it further defines the constitutional boundaries within which the legislature may pass laws with retroactive application. The Court flatly rejected due process challenges based on the mere possibility of injury to unknown and hypothetical rights. In the same breath, however, the Court left the door open for "as applied" challenges based on a specific set of facts.

### Background: the Uncertain Application of Washington's Water Law Before the MWL

Washington has historically treated water utilities differently than other water rights holders because of their unique need to serve fluctuating populations and plan for growth. For example, municipal water rights are exempt from statutory relinquishment that generally applies to water rights not used, in whole or in part, for five consecutive years.[5] Compared with other types of uses where water needs are controlled by the owner, a water utility responds to the dynamic demand of the community and to population and economic growth. Accordingly, since 1967 water rights that are "claimed for municipal water supply purposes" have been exempt from relinquishment.[6] That term, however, was not defined in statute before the MWL, and as a result uncertainty arose as to the category of water rights it covered.

In the administrative arena, for several decades the Department of Ecology ("Ecology") implemented a water rights permitting policy for water utilities that became known as the "pumps and pipes" policy. Typically, to acquire a new water right, Ecology issues a permit specifying the amount of water that can be used and the "beneficial use" to which the water may be applied.[7] A water right permit is only an inchoate, or incomplete, right that must be developed and becomes perfected, or vested, when the water is put to actual use, and a water right certificate is then issued.[8] By contrast, Ecology often issued certificates under the pumps and pipes policy when the utility demonstrated built capacity of a water system in recognition that water utilities typically planned to serve population growth over several decades.

This approach was good public policy because it allowed water utilities to securely invest in infrastructure and land use jurisdictions to plan for growth based on water system capacity. However, the pumps and pipes policy was problematic because it departed from statute, and by the mid-1990s inconsistencies and concerns had reached a critical point. As the Court put it, "[u]neasiness developed among Washington's water users as different adminstrations of the Department of Ecology dealt differently with application of the statutory term 'beneficial use.' The tension between the application of the 'beneficial use' and the 'pumps and pipes' capacity standards came to a head with this court's decision in *Theodoratus*[.]"[9]

*Department of Ecology v. Theodoratus*[10] concerned a water right permit for a private development, but the decision became the driver of municipal water policy debate that led to the MWL. And the meaning of *Theodoratus* is the pivotal issue in *Lummi*. Mr. Theodoratus was a private developer who had obtained a water right permit for a residential development of 253 lots. His project limped along for decades and he was forced to ask Ecology for several extensions of the water permit. On the last permit extension, Ecology imposed a condition that the water right permit would not vest and a certificate would not issue until the water was put to actual beneficial use. Theodoratus appealed this condition and argued that system capacity should be the proper measure of his vested water right. He argued that his proposal was akin to a public water system that required special treatment.

The Washington Supreme Court rejected Mr. Theodoratus's argument and upheld Ecology's permit condition

requiring actual beneficial use. While the Court agreed that the "statutory scheme allows for differences between municipal and other water uses," it noted that he was a private developer, not a municipality, and that his system would serve a finite number of residents, instead of the ever-growing number of residents a municipal system would serve.[11] With respect to the pumps and pipes policy, the Court held that water rights perfect upon putting water to actual beneficial use, not system capacity. Therefore, Ecology's policy to issue certificates based on system capacity was unlawful.[12]

Even though *Theodoratus* explicitly "decline[d] to address issues concerning municipal water suppliers,"[13] the decision prompted questions as to the status and validity of the thousands of water rights certificates previously issued to water utilities under the pumps and pipes policy. A draft Ecology policy proposed to extend the agency's interpretation of *Theodoratus* to previously issued pumps and pipes certificates. The draft policy opined that those certificates were no longer valid and proposed a range of corrective actions. Although the draft policy was never adopted, it stoked controversy, and the level of uncertainty relating to municipal water rights interfered with growth management and land use planning, provision of water service to new areas, and coordination of water system functions.

**The Municipal Water Law**

The legislature responded to the uncertainties by enacting the MWL. For the first time in the Washington code, the Act defined "municipal water supplier" and "municipal water supply purposes" (the "Definitions").[14] The Definitions include the "governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district or water district."[15] In addition, non-governmental and private water systems serving[15] or more residential connections qualify as municipal water suppliers.[16] To resolve the uncertainty created by *Theodoratus* over pumps and pipes certificates, the MWL prospectively codified *Theodoratus*'s central holding by requiring Ecology to issue a new certificate only upon "actual beneficial use."[17] In a new subsection codified as RCW 90.03.330(3), the legislature declared that existing pumps and pipes certificates are rights "in good standing."

In addition, the MWL provided planning flexibility to municipal water suppliers through several key provisions. The MWL amended the process for a change to place of use. Before the MWL, many argued that a water utility that desired to change its service area (*e.g.*, in response to an annexation) generally had to apply to Ecology for an amendment of its water right terms and conditions under RCW 90.03.380(1) or RCW 90.44.100(2)(d). The MWL defines a municipal water supplier's place of use to include the service area as approved by the Department of Health or by a local jurisdiction under the Public Water System Coordination Act ("Place Of Use Provision").[18] Also, the MWL clarified the legal significance of population and connection figures that are typically collected in a water right application. While many had argued that the water rights were limited to the amount necessary to serve the projected population provided in a public water supplier's application, the MWL clarifies that water rights are not limited to the number of connections or population figures as long as the quantity is consistent with an approved water system plan and/or approved number of service connections.[19]

In addition to these provisions designed to provide certainty and flexibility, the MWL also required municipal water suppliers to adopt water conservation measures.[20] With these twin legislative purposes, the MWL provided a balanced approach to water policy. The MWL facilitates the provision of service to growing communities while simultaneously requiring those systems to be better stewards of a valuable resource.

**Constitutional Challenges to the Municipal Water Law and Trial Court Decision**

In 2006, two separate sets of plaintiffs (collectively, "Plaintiffs")[21] brought suit in King County Superior Court alleging that eight provisions of the MWL[22] were unconstitutional. The Plaintiffs consisted of Indian tribes, environmental groups, individual water right holders, and a commercial fisherman.[23] The Plaintiffs brought the actions as "taxpayers" and asserted taxpayer standing.

The Plaintiffs alleged that certain provisions of the MWL facially violated three constitutional doctrines: (1) the separation of powers doctrine by contravening the Supreme Court's holding in *Theodoratus*; (2) substantive due process under the Washington and federal constitutions because it retroactively expanded senior water rights at the expense of junior water rights holders; and (3) procedural due process under the Washington and federal constitutions because some senior water rights could be expanded at the expense of a junior water rights holder without notice or an opportunity to be heard.

The trial court granted defendant-intervenor status to three parties: Washington State University, the Cascade Water Alliance, and the Washington Water Utilities Council ("WWUC"), an association whose members collectively supply drinking water to approximately 80 percent of the state's population.

On cross motions for summary judgment, the trial court agreed with the Plaintiffs that certain provisions of the MWL violated the separation of powers doctrine, but agreed with the defendants that the remaining provisions did not suffer from substantive or procedural due process flaws.[24] The trial court ruled that the MWL's Definitions and RCW 90.03.330(3) violated the separation of powers doctrine by attempting to overrule the Supreme Court's interpretation of the water code in *Theodoratus*.[25] In the alternative, the trial court concluded that the legislature made an unconstitutional conclusion of adjudicative facts by declaring that a pumps and pipes certificate is a "right in good standing."[26] Because the trial court decided the chal-

lenges to the Definitions and RCW 90.03.330(3) on separation of powers grounds, the trial court declined to rule on the substantive due process claims pertaining to those provisions. All parties successfully applied for direct appellate review from the Washington State Supreme Court.

**Supreme Court's Opinion: *Lummi Indian Tribe v. State***

In a unanimous decision, the Court reversed the trial court's separation of powers rulings as to the Definitions and RCW 90.03.330(3) and affirmed the rest of the trial court decision. In sum, *Lummi* rejects all of Plaintiffs' facial constitutional challenges.

At the outset of its analysis, the Court highlighted the difference between a "facial" and an "as applied" constitutional challenge:

> An "as applied" challenge occurs where a plaintiff contends that a statute's application in the context of the plaintiff's actions or proposed actions is unconstitutional. If a statute is held unconstitutional as applied, it cannot be applied in the future in a similar context, but it is not rendered completely inoperative. A statute is rendered completely inoperative if it is declared facially unconstitutional. However, a facial challenge must be rejected *if there are any circumstances where the statute can constitutionally be applied*.[27]

The Court noted that many of the Plaintiffs' arguments "might be better raised in an 'as applied' challenge."[28] Thus, *Lummi* stands for the broad proposition that a party raising a facial constitutional challenge in Washington courts must show that there is "no set of circumstances" under which the law can be applied constitutionally.[29]

Before *Lummi*, some questioned the proper standard for a facial constitutional challenge under Washington law.[30] Federal courts have not uniformly applied the "no set of circumstances" standard, instead choosing to apply a less rigorous standard for certain facial constitutional claims such as challenges to abortion regulations.[31] Although most Washington cases have applied the "no set of circumstances" standard,[32] the Court of Appeals in *Robinson v. City of Seattle* refused to apply the test to facial challenges brought by those with taxpayer standing.[33] Some of the *Lummi* Plaintiffs unsuccessfully argued that as taxpayers they were similarly entitled to a less onerous standard. Interestingly, the Court did not comment on the taxpayer aspect of the challenges.

Applying the "no set of circumstances" test, the Court found that the Plaintiffs failed to carry their burden for each of their three facial constitutional claims.[34] The Court generally found that any harm to the Plaintiffs was simply too speculative to meet the standard. The Court did allow Plaintiffs' proffered evidence of illustrative examples of water rights impairment, as the Court upheld the trial court's denial of defendant-intervenor WWUC's motion to exclude Plaintiffs' evidence.[35] Without discussing any specific evidence, however, the Court concluded that, at best, the Plaintiffs' theories could only demonstrate that the Act might harm some rights under some circumstances.[36] Moreover, because the MWL regulates municipal water suppliers, any harm to the Plaintiffs is too indirect and remote to support a facial challenge.

**Plaintiffs' Facial Separation of Powers Claims**

The Court rejected the Plaintiffs' arguments that the Definitions and the "right in good standing" language violated the separation of powers doctrine.[37] Plaintiffs' separation of powers claim was based on their view that the MWL retroactively overruled *Theodoratus.* According to the Plaintiffs, *Theodoratus* held that all previously issued pumps and pipes certificates are void and private water systems could not be "municipal water suppliers." Because the Definitions encompass private systems that serve 15 residences or more, the Plaintiffs contended that Theodoratus himself would now be considered a municipal water supplier.[38] Moreover, the Plaintiffs read the MWL to overrule *Theodoratus* on grounds that it retroactively restored pumps and pipes certificates by declaring them "rights in good standing."

Ultimately, the Court disagreed that *Theodoratus* reached those issues or otherwise limited the legislature's ability to make policy decisions and resolve uncertainty in the wake of its decision. The Court noted that *Theodoratus* explicitly "declined to address issues concerning municipal water suppliers."[39] It bristled at the Plaintiffs' efforts to push *Theodoratus* beyond its scope, noting several reasons why arguments raised in briefs may not be addressed in a court's decision, and concluding that an "appellate court is not a performing bear, required to dance to each and every tune played on appeal."[40] Instead, the Court acknowledged the present facts and issues were not before the court in *Theodoratus.* The Court held that the legislature had not violated separation of powers because it had not threatened "the independence or integrity or invade[d] the prerogatives of" the judicial branch by upsetting prior judicial decisions.[41] To the contrary, the Court observed that "[t]he Legislature approached its legislative task both thoughtfully and with deference to this court's construction in *Theodoratus*."[42] The Court further held that the MWL's retroactive application is constitutionally justified as a "legislative refinement in the face of changing conditions."[43] The legislature may enact a retroactive law to cure or clarify ambiguous or confusing law, as was the state of municipal water law after *Theodoratus*.

Similarly, the Court also disagreed with the trial court's alternative holding that the "right in good standing" provision in RCW 90.03.330(3) is a legislative determination of adjudicative facts. The Court noted that the Plaintiffs' claim relied on a contested interpretation of the operation of the statute. Relying on the maxim that courts "must give statutes constitutional constructions when possible,"[44] the Court concluded that the rights in good standing language

can and should be construed as a general legislative policy decision instead of an adjudication of any particular water right certificate.[45]

**Plaintiffs' Facial Substantive Due Process Claims**

Because Plaintiffs' substantive due process claims were also largely based on their broad interpretation of *Theodoratus*, the Court rejected their substantive due process claims on similar grounds. The Plaintiffs theorized that the MWL retroactively impacted junior water rights because various provisions retroactively changed the law, thereby expanding or strengthening some water rights at the expense of others. Plaintiffs' claims were based on a fundamental characterization of water rights as pieces in a jigsaw puzzle or a zero-sum game, where one right's "gain" is another right's loss.

For example, the Plaintiffs argued that RCW 90.03.015(4)'s definition of "municipal water supply purposes" would retroactively widen the class of municipal water providers to include water systems (such as private systems) that previously might not have been defined as such. Because municipal water rights enjoy exemption from relinquishment, the Plaintiffs argued that the MWL might protect the rights of an entity that might not have previously been considered a "municipal water supplier" if that entity held rights that were subject to relinquishment due to non-use predating the adoption of the MWL. Similarly, the Plaintiffs alleged that the MWL "restored" pumps and pipes certificates invalidated by *Theodoratus*, effectively impairing other water rights. The Plaintiffs argued that these gains to municipal water suppliers must, on their face, equal a loss to other water rights.

The Court rejected the Plaintiffs' substantive due process theory for two reasons. First, the Court determined that the Plaintiffs' concerns were speculative and hypothetical. The Court noted that "the challengers have cited no case and we have found none, where mere potential impairment of some hypothetical person's enjoyment of a right has been held to be sufficient for a successful facial due process challenge."[46] Although the Court acknowledged that the MWL could potentially affect *some* water rights, the concern that something "might happen to some unknown water rights holders is not a fatal facial due process fault."[47] Moreover, the Court noted that any rights the Plaintiffs held were not directly regulated by the law,[48] further exacerbating the speculative nature of their claims.

Second, as noted above, the Court rejected Plaintiffs' broad characterization of *Theodoratus* and the operation of the challenged MWL provisions: "There was no party before the Court [in *Theodoratus*] with a perfected right under challenge, and thus we had no occasion to consider whether an erroneously perfected right would be invalidated by the department's mistaken practice."[49] Thus, the Definitions and the "right in good standing" policy declaration do not by themselves resurrect any relinquished rights to the detriment of vested rights.[50]

**Plaintiffs' Facial Procedural Due Process Claims**

Finally, the Court rejected the Plaintiffs' claims that the MWL facially deprived their vested rights without due process. While the Court was sympathetic to the possibility that the Plaintiffs' water rights might be impacted by actual application of the MWL's procedures without notice and an opportunity to be heard, it again concluded that the Plaintiffs could not satisfy their standard for a facial challenge because they did not prove that this would be the case under all circumstances as a matter of law.[51]

With specific respect to the MWL's Place of Use Provision, Plaintiffs argued that the MWL effectively exempts municipal water suppliers from the procedures under RCW 90.03.380(1) and RCW 90.44.100(2)(d) designed to give other water right holders notice and an opportunity to be heard. Change in a place of use, the Plaintiffs' asserted, would negatively impact junior water right holders by affecting the pattern of return flows that both senior and junior water rights holders rely on.

The Court held that the Change of Use Provision does not by itself divest a vested water right.[52] Any impact to the rights of others, from return flows or otherwise, that might arise from a municipality changing its place of use is collateral and indirect.[53] Moreover, the fact that the MWL removed a degree of process to interested parties is not a fatal facial flaw so long as the remaining process is able to meet constitutional minimums. The Court found that Washington law still gives "considerable process" before any change of use can be made and returned to the conclusion that any alleged impairment would be best addressed on "a case by case basis."[54] Broadly viewed, *Lummi* signals problems for a procedural due process plaintiff who complains of a governmental process that directly applies to the rights of others with only a potential indirect impact on the plaintiff's rights.

**Conclusion**

The *Lummi* case should restore the certainty and flexibility that the legislature intended for municipal water rights as a general matter. However, the decision is narrowly drafted and leaves some remaining issues for another day.

First, while the Court held that any harm to the Plaintiffs was too indirect for a facial challenge to the MWL, the Court left the door open for "as applied" challenges. The Court explicitly stated that its decision did not preclude an "as applied" challenge four times.[55] Nevertheless, *Lummi* indicates that the "as applied" plaintiff will still bear a heavy burden to overcome the presumption of constitutionality and to prove that a specific water right is actually and directly injured by application of a provision of the Act. The success of "as applied" challenges may soon be tested because such a challenge concerning Washington State University's water rights is currently pending in superior court.[56]

Second, the Court did not find it necessary to decide when a water right relinquishes to the state. The Plaintiffs

argued that relinquishment occurs by operation of law, or automatically, when five consecutive years of nonuse elapse. Some of the defendant-intervenors argued that relinquishment can only occur after final agency or judicial action, consistent with due process. The issue could have importance in an "as applied" challenge to a statutory provision with retroactive application.

Finally, the Court declined to address an interpretation of the Definitions offered by the State "that even municipal water supply rights may be relinquished under certain circumstances when the water is not beneficially used for a sufficient period of time."57 This so-called "active compliance" interpretation would require actual use of a water right to qualify as a municipal purpose right. If a water right is not actively in use as described in the Definitions, then it would become subject to relinquishment. At the trial court, defendant-intervenor WWUC argued against this interpretation because it would illogically stand the relinquishment exemption on its head, but the Supreme Court found the issue unnecessary for its decision.[58]

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1 The authors represented defendant-intervenor Washington Water Utilities Council throughout the litigation. All of the pleadings filed and orders entered in King County Superior Court and Supreme Court are available at *www.gordonderr.com* (Municipal Water Law Case Update Center). The views expressed are the authors' and not those of any client.

2 2E2SHB No. 1338, 58th Leg., Laws of 2003, 1st Spec. Sess., ch. 5.

3 *Lummi Indian Nation et al. v. State of Washington et al.*, Supreme Court Case No. 81809-6, slip op. (Oct. 28, 2010) ("*Lummi*").

4 *Compare State v. Hughes*, 154 Wn.2d 118, 133, 110 P.3d 192 (2005) ("[b]ecause there is at least one way in which RCW 9.94A.535 can be applied constitutionally, it cannot be declared facially unconstitutional.") *with Robinson v. City of Seattle*, 102 Wn. App. 795, 806, 10 P.3d 452 (Div. I 2000) (declining to apply "no set of circumstances" test to a facial constitutional challenge).

5 RCW 90.14.160–.180.

6 RCW 90.14.140(2)(d).

7 RCW 90.03.290(1).

8 RCW 90.03.330.

9 *Lummi*, at 7.

10 135 Wn.2d 582, 957 P.2d 1241 (1998).

11 *Id.* at 592.

12 *Id*.

13 *Id.* at 594.

14 RCW 90.03.015(3) and (4).

15 RCW 90.03.015(4)(b).

16 RCW 90.03.015(4)(a).

17 RCW 90.03.330(4).

18 RCW 90.03.386(2).

19 RCW 90.03.260(4) and (5).

20 *See e.g.*, MWL §7 (codified at RCW 70.119A.180).

21 *Burlingame et al. v. State* (King County Superior Court No. 06-2-28667-7SEA) and the *Lummi Indian Tribe et al. v. State* (King County Superior Court No. 06-2-40103-4SEA).

22 As codified, RCW 90.03.015(3); RCW 90.03.015(4); RCW 90.03.330(2); RCW 90.03.330(3); RCW 90.03.560; RCW 90.03.260(4); RCW 90.03.260(5); and RCW 90.03.386(2).

23 On March 20, 2007, these cases were consolidated. Order Consolidating Cases (King County Superior Court No. 06-2-28667-7, March 20, 2007).

24 Order on Summary Judgment at 5 (King County Superior Court No. 06-2-40103-4 SEA, June 11, 2008).

25 *Id*.

26 *Id.*

27 *Lummi*, at 11(emphasis added) (quoting *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n. 14, 4 P.3d 808 (2000)).

28 *Lummi*, at 11.

29 Articulated in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

30 *See Robinson v. City of Seattle*, 102 Wn. App. 795, 806–808, 10 P.3d 452 (2000) (listing state and federal court decisions declining to apply "no set of circumstances" test ).

31 *See, e.g., Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1457 (8th Cir. 1995) (identifying a circuit split).

32 *See, e.g., City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004).

33 102 Wn. App. at 806.

34 *Lummi*, at 2.

35 *Id.* at 22, n. 11.

36 *Id.* at 19, 20, 22.

37 *Id.* at 15.

38 *Id.* at 13.

39 *Id.* at 16.

40 *Id.* at 8, n. 1 (quoting *State v. Waste Mgmt. of Wis., Inc.*, 261 N.W.2d 147 (1978)).

41 *Lummi* at 15.

42 *Id.* at 16.

43 *Id.* at 17.

44 *Id.* at 19.

45 *Id.* at 18–19.

46 *Id.* at 21.

47 *Id.* at 22.

48 *Id.* at 24.

49 *Id.* at 23.

50 *Id.*

51 *Id.* at 25.

52 *Id.* at 26.

53 *Id.*

54 *Id.* at 25–26.

55 *Id.* at 11, 17, 18, and 28.

56 Id. at 11 n.4, Cornelius v. Dep't of Ecology, No. 06-099 (Wash. Pollution Control Hr'gs Bd. Dec. 7, 2007).

57 *Id.* at 20 n. 9.

58 *Id*.

# Tribal Environmental and Land Use Codes: Ensuring that Renewable Energy Projects Comply with Tribal Environmental Objectives

*By Connie Sue Manos Martin, Bullivant Houser Bailey, PC*

With the interest and investment in alternative energy resources, renewable energy projects appear to present tremendous opportunities for Indian tribes, especially when tribes' desires to diversify their economic development and move beyond casino-based economies are factored in.

The Department of the Interior identified 77 Indian reservations with the most wind-energy potential, and has been surveying the land and introducing wind developers to tribal councils.[1] At a tribal leaders' summit in January 2010, Interior Secretary Ken Salazar said that energy and economic development initiatives on reservations will be a priority for the Obama administration. "Tribal lands offer great opportunities for renewable resources…. We need to make sure Indian communities are grasping these opportunities."[2] In March, Secretary Salazar touted wind energy potential on reservations, saying "Indian country offers some of the premier wind energy sites in the United States."[3]

Examples of tribal renewable energy projects abound.[4] In Washington, the Colville Confederated Tribes are working on two potential clean energy products – wind power projects on the reservation, and an improved woody biomass incinerator at the Colville Indian Plywood and Veneer plant – that could mean millions for the tribe and a steady flow of jobs.[5] In Oregon, the Klamath Tribes have proposed a Green Energy Park on the reservation, which would include a biomass conversion plant on the former Crater Lake Mill site to transform woody materials from thinning and clearing of underbrush, and possibly solid waste from nearby municipalities and counties, to electricity.[6] The Northwest Band of Shoshone Nation is building a biothermal plant to produce electricity in Utah. The St. Croix Chippewa built a biomass plant to turn logging waste into electricity in Wisconsin. Tribes in Minnesota, the Dakotas and elsewhere have wind turbines operating or in planning stages. In California, the Ramona Band of Cahuilla Mission Indians is developing an eco-tourism resort powered with renewable energy. The Campo Kumeyaay Nation has a 25-turbine wind power project which generates 50 megawatts ("MW") of electricity annually, enough to power 30,000 homes.[7]

Some tribes may be reluctant to dive into renewable energy projects on the reservation, however, out of concerns about environmental protection or the effect such projects may have on other tribal enterprises. Tribal governments considering energy development on the reservation should assess existing land use, permitting, and environmental protection ordinances and codes to determine whether the existing laws provide sufficient protection, to ensure that projects will be consistent with the tribe's environmental and land use objectives.

**Overview of Regulatory Authority**

Determining a tribe's regulatory authority requires an analysis of several factors, including the sources and limitations of tribal power and whether federal statutory delegations, land holding, or demographic patterns suggest federal or state primacy with respect to regulatory authority.

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate … the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements…. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[8]

Important sources of authority by which tribes may protect their on- and off-reservation natural resource interests are: tribes' inherent authority to exercise their sovereign powers; treaties with the United States as well as federal statutes and executive orders which specifically reserve the rights of Indian tribes to their lands, waters, and natural resources; and federal statutory delegations of authority granted to tribes through federal environmental laws that include provisions permitting tribal governments to assume regulatory responsibility for program implementation within the exterior boundaries of their reservations.

In general, tribal power will be greatest over tribally owned "trust or restricted" land, lands within a formally established reservation, and where the lands are located within a block of solidly Indian-owned and Indian-occupied lands. By contrast, tribal power will be weakest (if existent at all) and state power correspondingly greater over non-Indian fee lands, Indian lands outside the reservation boundaries, or reservation lands located within a "checkerboarded" area with dense non-Indian development. Determining a tribe's regulatory authority requires an analysis of several factors, including the sources and limitations of tribal power and whether federal statutory delegations, land holding, or demographic patterns suggest federal or state primacy with respect to regulatory authority.

**a. Zoning**

Although states may exercise some control over tribal lands under certain circumstances, states cannot regulate the use of trust property in a manner that is inconsistent with federal treaty, statute, or agreement. This prohibition extends to the application of state and county zoning regulations to Indian trust lands. In *Santa Rosa Band of Indians v. Kings County*,[9] the Ninth Circuit made it clear that the

> application of state or local zoning regulations to Indian trust lands threatens the use and economic development of the main tribal resource … handicaps the Indians … living on the reservation and interferes with tribal government of the reservation.

In reaching its decision, the court held that if tribes were subjected to local jurisdictional control, it would dilute, if not altogether eliminate, tribal political control of the timing and scope of the development of reservation resources and subject tribal economic development to the veto power of potentially hostile non-Indian majorities in local communities.

In the absence of state and local zoning regulations, many tribes have adopted their own tribal zoning ordinances. These ordinances often establish comprehensive systems of land use regulations and the development of administrative structures for implementing these regulations. In addition, such ordinances frequently include use and density restrictions, requirements for building permits, and compliance with the Uniform Building Code.

**b. Environmental Protection**

The authority to delegate specific enforcement and regulatory authority to tribes under many federal environmental statutes lies most often with the U.S. Environmental Protection Agency ("EPA"). In addition to statutory delegations, tribal collaboration with federal agencies is an important avenue by which Indian tribes may become involved in environmental management and decision making. The EPA has developed several national and regional "Indian policies" designed to promote the federal government's general policy respecting tribal self-determination, which recognizes that Indians should play a central role in decisions affecting the future of reservation life. EPA's Indian Policy includes two primary principles: implementation of federal environmental statutes in Indian Country should be done by EPA or by tribes rather than states; and where authorized, EPA will cooperate with and assist tribes in the development and implementation of tribal programs that arise under federal environmental statutes.

Nationally, EPA has authorized tribes to manage environmental programs under several federal laws that provide specific authority for tribal management, including the Clean Water Act ("CWA")[10] and the Clean Air Act ("CAA").[11] Where Congress has not provided specifically for tribal assumption of authority, EPA has determined that the decision to allow tribal management of environmental programs is within the Agency's discretion. Examples of EPA's exercise of its discretionary authority include the Resource Conservation and Recovery Act ("RCRA")[12] and the Toxic Substance Control Act ("TSCA").[13] In addition, three other federal environmental laws provide for a limited tribal role similar to that provided to states: the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA");[14] the Emergency Response and Community Right to Know Act;[15] and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[16]

Tribes wishing to build the capacity necessary to enable them to participate effectively in the management of environmental programs may request "Treatment as a State" ("TAS") eligibility from the EPA. A TAS designation requires EPA to treat Indian tribes that meet certain statutory and regulatory requirements at states under specific environmental statutes. Examples of statutes that embrace this option include the CAA and the CWA. To qualify for TAS designation, a tribe must meet the following criteria: the tribe is recognized by the Secretary of Interior; the tribe's government body is carrying out substantial governmental duties and functions; and the tribe has the jurisdiction and capability to carry out the proposed activities.

Environmental regulatory jurisdiction within a reservation is not dependent solely on the ownership status of the land in question.[17]

**Development of a Renewable Energy Project**

Renewable energy developers must comply with federal, state, and local regulations pertaining to facilities siting and environmental permitting. For example, permitting entities at the federal, state, and local levels may have jurisdiction over development of a wind project, and usually all three levels of government will be involved regardless of where the facility is sited. Local agency involvement typically entails local land use and zoning codes, building permits and codes, and project siting.

Considerations that need to be addressed in permitting wind projects include the following:

- Land use
- Noise
- Birds and other biological resources
- Visual / aesthetic resources
- Soil erosion and water quality
- Public health and safety
- Cultural resources
- Solid and hazardous wastes
- Air quality and climate
- Distance and terrain over which transmission lines must pass

However, those considerations are not unique to wind projects – most are applicable to any energy project. As such, they provide a good starting point for identifying impacts a tribe may wish to control or prevent through tribal codes.

**Tribal Codes**

The primary means of protecting tribal lands from the negative effects of an energy project (tribal or otherwise) are through land use planning and environmental regulation:

> Land use planning and environmental regulation are, of course, different concepts. Land use planning is concerned primarily with actual use of the land, while environmental regulation is concerned with controlling the environmental damage resulting from use of the land. Nonetheless, land use controls represent a prior restraint on pollution problems: separating, controlling, and preventing environmentally incompatible uses of neighboring lands. Accordingly, a government that has lost the authority to zone its lands-the authority to control land use planning-has lost as well the full capability to control environmentally harmful land uses. It can neither exclude those uses altogether, nor control the location of those uses that are permitted.[18]

Deciding whether to adopt various types of land use or environmental codes is an important question faced by tribes.

The first step in developing a comprehensive tribal code for energy development is identifying existing zoning and uses of tribal land, and comparing that information with information regarding the best locations for energy development, whether it is wind energy, solar, biomass, or any other means of generating power. It may be that the best sites for power generation (because of wind potential, available sunlight, or biomass sources) are sites where tribal members engage in traditional practices such as root gathering, or sweat lodges; or hunting and fishing areas that would be negatively affected by an energy project.

Similarly, a prime site for power generation may be adjacent to a tribal hotel or casino, where the project could be used to power the tribal operation, but which might not be visually appealing. The potential for visual resource impacts is considered as part of the evaluation of land use compatibility. The degree to which aesthetic impacts may become an issue is a function of the value people place on the visual quality of the project setting. Elements which may influence visual impacts include the spacing, design and uniformity of the turbines, markings or lighting, and contrast with the surrounding environment.

Tribal land use planners and code writers should consider whether a site or area of the reservation proposed for a power project is compatible with existing and planned adjacent uses, whether it will change the overall character of the surrounding area, disrupt established communities or traditional practices, harm or interfere with wildlife resources, or physically intrude upon the landscape. Even if it appears that prime energy development sites are inconsistent or incompatible with existing land use plans, the tribe may still decide to allow energy development in those sites, and may use a number of different tools to accomplish it: through a change to the existing zoning code, the establishment of special energy development districts or overlays, or through a variance or conditional use permit granted on a case-by-case basis.

Projects may have a number of physical impacts to the environment that tribal codes may control or prevent, or which require coordination with, or review by, a number of different tribal departments. For example, land disturbance from construction and operation of a project can remove vegetation and loosen soil particles, allowing them to be swept away by wind or water. Wind-induced erosion can increase fine particulate matter in the air which can adversely impact human health and reduce visibility. Water-induced erosion can result in sedimentation of nearby streams or wetlands, which degrades water quality. Spills resulting from project construction and operation activities, such as refueling heavy equipment, may also impact surface and groundwater quality. Project construction or operation may require a certain volume of water, secured through a water right or use permit, which may need to be allocated from a tribe's reserved water right.

Waste materials may be generated during construction as well as operation of the project. If wind turbines are not well-designed and maintained, fluid leaks (gearbox oils, hydraulic and insulating fluids) may occur, resulting in contamination of the soil at the site. Some fluids may become hazardous wastes when spilled on the ground. Solid and hazardous wastes generated by a project must be properly stored and disposed of at a licensed disposal facility. And, a project will need to be decommissioned at the end of its service life, with the waste properly disposed of and the site returned to pre-project condition. A tribal code may require that, or require that provision for decommissioning be included as a term of a project's permit.

There may be impacts to wildlife during construction or operation of a power project, which require modifications, monitoring, or mitigation. For example, a prime location for a wind turbine may also be within the flight path of birds that are protected under tribal, state or federal law, or otherwise significant to a tribe. The turbine may still be installed, but it may be oriented in such a way, or operated at reduced speeds during migration times, so as to minimize the impact on flight paths and decrease the likelihood of bird strikes. The assessment of likely impacts to wildlife, and conditions for allowing development of a project in a given wildlife area, may be the responsibility of a tribal fish and wildlife department.

Impacts to cultural resources also may occur during construction. These can be prevented through pre-development consultation with the Tribal Historic Preservation Officer or cultural resource department. Consultation may already be required under existing tribal codes, or it could be included in a tribal code for energy development.

Ideally, a comprehensive tribal code for energy development would include at least the following elements: (1) zoning and land use ordinances; (2) environmental review; (3) environmental protection (air/water/noise/aesthetics/hazardous waste/decommissioning); (4) wildlife protection; and (5) cultural resource protection. A tribe that already has one or more of those elements in its code could incorporate the existing codes into an energy code by reference, and adopt new provisions for those elements that are not covered by existing tribal law. Code language need not be drafted from scratch, it can be drawn from a variety of sources, and revised to suit the needs and fit the circumstances of a particular tribe.

**Sample Codes**

Below are sources of information for developing tribal land use and environmental codes. This list is not intended to be, nor is it, exhaustive.

The Tribal Legal Code Project offers tribal governments representative examples of different types of land use, building, and zoning codes along with explanatory resource materials. The project was prepared for the Office of Native American Programs ("ONAP") of the U.S. Department of Housing and Urban Development ("HUD") by the Tribal Law and Policy Institute under a contract with ICF Housing and Community Development Group. It was designed to allow tribal governments to easily access tribal-specific resources in a cost-effective manner, and to demystify the code development process – making it easier for those involved in tribal housing and community development to develop tribal code provisions that more effectively reflect their individual community needs. http://www.tribal-institute.org/codes/overview.htm.

Tribal codes (including land use and environmental protection codes) are also available at http://www.tribal-institute.org/lists/codes.htm and http://www.ntjrc.org/triballaw/codes.asp.

The Navajo Nation Environmental Protection Agency has fairly comprehensive environmental review and protection codes and regulations, which may be found at http://www.navajonationepa.org/laws&regulations.html.

The Agua Caliente Band of Cahuilla Indians has developed a Master Plan for land use and development on its lands, with maps, forms, applications, and checklists which may be found at http://www.aguacaliente.org/PlanningDevelopment/tabid/59/Default.aspx.

The American Planning Association has assembled a bibliography of resources for Planning and Zoning for Renewable Energy: http://www.planning.org/pas/infopackets/subscribers/pdf/EIP-18.pdf.

**Conclusion**

Tribal governments considering embarking on a tribal energy development project, or allowing outside interests to develop energy projects on the reservation, should assess existing land use, permitting, and environmental protection ordinances and codes to determine whether the existing laws provide sufficient protection to existing and planned tribal uses and natural and cultural resources. A comprehensive tribal code for energy development will help to ensure that future projects are consistent with the tribe's environmental as well as its economic development objectives.

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7 Daniel Coffey, "The Kumeyaay way and wind power." (April 2, 2009), *San Diego Source*, available at http://www.sddt.com/Commentary/article.cfm?Commentary_ID=176&SourceCode=20090402tza; *see, also,* http://www.campo-nsn.gov/windfarm.html.

8 *Montana v. United States*, 450 U.S. 544, 565-66, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

9 532 F.2d 655 (9th Cir. 1975).

10 33 U.S.C. §§ 1251 *et seq.*

11 42 U.S.C. §§ 7401 *et seq.*

12 42 U.S.C. §§ 6901 *et seq.*

13 15 U.S.C. §§ 2601 *et seq.*

14 7 U.S.C. §§ 136 *et seq.*

15 42 U.S.C. §§ 11001 *et seq.*

16 42 U.S.C. §§ 9601 *et seq.*

17 *See Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1221 (9th Cir. 2001).

18 Judith V. Royster, Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation, 1 Kan. J. L. & Pub. Pol'y 86 (1991).

# Four Recent Critical Habitat Designations Highlight Continuing Dispute over Economic Impacts

*By Jason T. Morgan and Corinna McMackin, Stoel Rives LLP*

Last summer produced a new wave of federal court decisions involving the U.S. Fish and Wildlife Service's ("Service") obligations to designate critical habitat under section 4 of the Endangered Species Act ("ESA" or "Act").[1] Four of these decisions – two in the Ninth Circuit, one in Wyoming, and one in D.C. – involved claims by industry and recreational associations that the Service failed to properly consider the economic impact of the critical habitat designation on local economies. The dispute in these cases centers on section 4(b)(2) of the ESA, which instructs the Service to consider the economic and any other relevant impact of designating critical habitat.[2] After taking those factors into consideration, section 4(b)(2) instructs the Service to conduct a cost-benefit analysis and authorizes the Service to exclude any areas from the critical habitat where the impacts outweigh the benefits.[3]

In an effort to avoid critical habitat designation of particular areas, industry groups, landowners, and even other federal agencies commonly participate in the critical habitat designation rulemaking process and request exclusion of particular areas from the critical habitat designation. These requests are generally supported by comments and other data demonstrating the anticipated economic impacts from a critical habitat designation to the Service during the designation process. These comments typically contend that a critical habitat designation will have significant economic impacts by prohibiting or curtailing development or access to lands designated as critical habitat.[4]

Such requests for exclusion typically meet with limited success. That is so because the Service has long taken the position that the protections afforded to a listed species by a critical habitat designation are largely duplicative of the protections afforded by the prerequisite decision to list the species as threatened or endangered in the first place.[5] The Service reasons that once a species is listed as threatened or endangered, certain protections immediately apply. These protections, and the associated impacts to development and other human activities, form the baseline of impacts. When considering the economic impact of subsequently designating critical habitat, the Service evaluates only the incremental impact over the baseline caused by the critical habitat designation. Based on its belief that the protections afforded by listing are largely duplicative of the protections afforded by critical habitat designation, the Service typically finds that the incremental impact of critical habitat is negligible. Based on that reason, the Service disregards public complaints about the economic impact of critical habitat designation.

The four cases discussed in detail below all stem from Service refusals to exclude particular areas from a critical habitat designation. These cases reveal a couple of developments in the Service's critical habitat process. First, the Service remains fully committed to its belief that critical habitat designation has no meaningful impact on the regulated community. Second, there is now a firmly established circuit split between the Ninth and Tenth Circuit Courts of Appeals over the Service's baseline approach. The Tenth Circuit rejected the baseline approach several years ago in *New Mexico Cattle Growers Association v. U.S. Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). In the first of four cases discussed below, the District of Wyoming followed the Tenth Circuit, invalidating part of a critical habitat designation where the Service applied the baseline approach. In contrast, the two Ninth Circuit cases discussed below (as well as the D.C. case) rejected the *New Mexico Cattle* decision, setting up a well-defined circuit split with pending petitions for certiorari before the U.S. Supreme Court. Third, there is an increasing trend for courts to conclude that the Service's decision to exclude or not exclude an area under section 4(b)(2) is unreviewable as a matter of law. Although no circuit court has yet endorsed this position, a number of district courts have. If no party can challenge the Service's refusal to exclude a particular area from the critical habitat designation, then the entire baseline discussion ultimately becomes an academic exercise.

**Legal Background**

Congress passed the ESA to serve as a comprehensive program for the conservation of endangered species and threatened species and "the ecosystems upon which . . . [they] depend."[6] The first step in the ESA's process is to determine whether a species should be listed as threatened or endangered.[7] The next, and perhaps more important step for the Service, is to identify and designate the habitat that is "essential to the conservation of the species."[8] Designation of this habitat is supposed to occur at the time of initial listing, and can be revised from time to time as appropriate.[9]

Although critical habitat was always an essential part of the ESA, few people realized the impact of a critical habitat designation until the U.S. Supreme Court in *TVA v. Hill* halted the construction of a federal dam in 1978 to protect the critical habitat of the little-known fish called the snail darter.[10] The Court in *TVA v. Hill* enjoined construction based on section 7(a)(2) of the ESA. That provision requires every federal agency to ensure that every action authorized, funded, or carried out will not jeopardize the continued existence of the species, or adversely modify or destroy its critical habitat.[11] Because the federal action at issue in *TVA v. Hill* – the construction of a dam – would destroy a significant portion of known and designated snail darter

critical habitat, the Court enjoined further construction of the project.

The Court's decision in *TVA v. Hill* prompted immediate action from Congress. Concerned that the growing number of critical habitat designations could lead to any number of similar injunctions and economic paralysis,[12] Congress in 1978 amended the ESA's critical habitat provisions, adding section 4(b)(2), which, among other things, requires the Service to consider the economic impact of a critical habitat designation. In addition, section 4(b)(2) as amended expressly authorized the Service to "exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless the exclusion would result in extinction of the species.[13]

Despite the central relevance of critical habitat in species conservation, the Service has a checkered past with critical habitat designations, often refusing to designate critical habitat at all unless forced to do so by litigation. The Service's unwillingness to designate critical habitat stems from its "long held policy position" that critical habitat designations are "unhelpful, duplicative, and unnecessary."[14] Specifically, the Service generally believes that the species gains much, if not all, of the protections of the ESA from the listing itself. Once a species is listed it is protected from "take" under section 9 of the ESA, and is also protected from any federal action that will jeopardize the continued existence of the species under section 7(a)(2).[15] The designation of critical habitat and the associated section 7(a)(2) prohibition on adverse modification or destruction of that habitat does little to increase those protections. That is so, reasons the Service, because any action that adversely modifies or destroys critical habitat also likely jeopardizes the continued existence of the species under section 7(a)(2).[16]

Based on that reasoning, the Service began producing economic evaluations under section 4(b)(2) that looked only to the incremental impact of critical habitat above and beyond the impact of the listing decision or other conservation measures. The Service effectively used a "but for" method for determining those impacts that should be attributed to the critical habitat designation, and did not account for (or in many cases even discuss) the economic impacts that were part of the baseline.[17] These economic evaluations were often perfunctory, concluding that the designation would have little or no impact above the listing baseline.

In 2001, the Tenth Circuit Court of Appeals in *New Mexico Cattle Growers* expressly rejected the baseline model. The court in *New Mexico Cattle Growers* reasoned that the baseline approach, whereby the impacts of critical habitat are considered coextensive with listing, effectively renders Congress' instruction to conduct an economic analysis meaningless.[18] The court therefore concluded that Congress intended the Service to conduct "a full analysis of all the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable coextensively to other causes."[19]

Part of the holding in *New Mexico Cattle Growers* was based on an analysis of the Service's regulations defining the appropriate standards for "jeopardy" and "adverse modification" under section 7(a)(2). As defined, those regulations are almost completely overlapping. The Service defined the jeopardy standard as an action that is reasonably expected "to reduce appreciably the likelihood of both the survival and recovery of a listed species."[20] Similarly, action that violates the adverse modification standards included actions "that appreciably diminish[] the value of critical habitat for both the survival and recovery of a listed species."[21] As the court explained, these regulations are "virtually identical."[22]

Three years later, the Ninth Circuit in *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*[23] invalidated the Service's critical habitat regulation as defining the adverse modification standard too narrowly. The Service has subsequently used that decision to argue that *New Mexico Cattle Growers* is no longer good law. Following *Gifford Pinchot*, the Service has utilized a slightly modified baseline approach to try to give some meaning to the economic analysis. Now, rather than determining that all impacts are coextensive, the economic analysis carefully documents all the baseline costs (attributed to the listing), and then documents those costs that are attributed solely to the designation (above the baseline incremental costs). As a practical matter, the result is the same: little or no impact is attributed to the critical habitat designation. All four cases below utilized this modified baseline approach.

**Recent Cases**

***Wyo. State Snowmobile Ass'n v. U.S. Fish & Wildlife Serv.***, NO. 09-CV-00095-f, 2010 U.S. Dist. Lexis 102550 (D. Wyo. Sept. 10, 2010):

*Wyoming State Snowmobile* dealt with a challenge to the revised critical habitat designation for the contiguous U.S. distinct population segment of the Canada lynx filed by the Washington and Wyoming Snowmobile Associations (the "Associations").[24] The Service designated nearly 40,000 square miles of critical habitat for the lynx, including nearly 2,000 square miles in Washington State. Among other claims, the Associations challenged (1) the adequacy of the economic analysis, and (2) the Service's failure to grant the Associations' request to exclude all federal lands in Washington State from the designation under ESA section 4(b)(2).[25]

Despite the enormous designation of critical habitat for the lynx, the Service's economic analysis identified only a single incremental cost: the administrative cost of considering critical habitat in a section 7 consultation. Accordingly, with respect to the adequacy of the economic analysis, the Associations argued that the Service's economic analysis was inadequate because it failed to consider "co-extensive"

economic impacts, as required by the Tenth Circuit in *New Mexico Cattle Growers*. The Service defended the economic analysis arguing (1) that *New Mexico Cattle Growers* was based on regulations that were subsequently invalidated, and (2) that in any event, its modified baseline approach, which outlined all the baseline impacts, satisfied *New Mexico Cattle Growers.* The district court rejected those arguments, agreeing with the Associations that this analysis was legally inadequate under *New Mexico Cattle Growers*, because the ESA requires a "full economic analysis" that includes the baseline impacts (generally those caused by listing) and those incremental impacts above the baseline (those caused by designation).[26]

In addition to its economic analysis arguments, the Associations also asserted that the Service erred by arbitrarily refusing to respond to their request for an exclusion under section 4(b)(2). The Associations had supported their request with an economic study showing the anticipated economic impact of the critical habitat designation to the North Cascades recreational industry. The Service tried to defend its refusal to exclude lands under section 4(b)(2) on the grounds that such actions were committed to agency discretion by law, and therefore unreviewable. [27] The court refused to directly answer the question of whether the agency's failure to respond to the Associations' request for a section 4(b)(2) exclusion was reviewable under the Administrative Procedure Act.[28] Instead, it found that, because the economic analysis conducted by the Service failed to comply with the Tenth Circuit's coextensive analysis requirement, any decision on the section 4(b)(2) exclusion was necessarily not in accordance with the ESA.[29]

Based on these errors, the district court enjoined the critical habitat designation, but only as to those U.S. Forest Service lands in Washington for which the Associations requested an exclusion under section 4(b)(2). The injunction remains in effect until the Service conducts a full assessment of the full economic impacts of designation and, accordingly, a determination on the section 4(b)(2) exclusion request. This case is currently pending on appeal before the Tenth Circuit.

***Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior***, No. 09-0236, 2010 U.S. Dist. Lexis 84515 (D.D.C. Aug. 17, 2010):

This case concerned a 2008 rule designating critical habitat for the piping plover in North Carolina. The 2008 rule was a revised critical habitat designation that followed a court decision vacating the Service's original designation in 2001. The revised designation included approximately 2,053 acres in two counties, consisting of four habitat units. The plaintiffs, a coalition established for the purpose of preserving the Outer Banks lifestyle, including recreational activities such as the use of off-road vehicles, challenged the revised designation under the ESA alleging that the Service (1) failed to exclude areas as requested by the plaintiffs, and (2) failed to adequately consider the economic impacts of designation.[30]

Unlike the Wyoming district court, the D.C. court went directly to the reviewability issue. It concluded that the decision not to exclude an area under section 4(b)(2) was unreviewable as a matter of law. Despite the court's recognition that "there is a strong presumption that agency action is reviewable,"[31] the court found that section 4(b)(2) "fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."[32] In so doing, the court followed an unpublished district court decision from California reaching the same result.[33]

With respect to economic impact analysis, the court upheld the Service's "baseline" approach. It found that a baseline approach that required the agency "to compare 'the state of the world without or before the designation, the baseline, with the state of the world with or after the designation,'" was entirely reasonable. [34] The court's decision was based, in large part, on its own prior ruling, in the same case, affirming the baseline approach. Plaintiffs tried to avoid the same result this time by arguing the Service failed to properly apply the baseline approach or consider the relevant costs. Although it found the new analysis "convoluted," the court disagreed, finding the Service adequately considered two primary costs: the administrative costs of section 7(a)(2) consultations and the costs of changes to off-road vehicle use. [35] No appeal of this decision was filed.

***Ariz. Cattle Growers' Ass'n v. Salazar***, 606 F.3d 1160 (9th Cir. 2010):

In *Arizona Cattle Growers'*, an industry group ("Arizona Cattle Growers") appealed a district court grant of summary judgment, which rejected its challenge to the Service's designation of critical habitat for the Mexican spotted owl. The Arizona Cattle Growers principally attacked the Service's baseline economic model.[36] Relying on the Tenth Circuit's reasoning in *New Mexico Cattle Growers*, the Arizona Cattle Growers argued for a "co-extensive" approach to economic analysis, not a "baseline" approach.

The Ninth Circuit rejected the Tenth Circuit's reasoning. It found the "co-extensive" approach inconsistent with Ninth Circuit case law as well as with the "very notion of conducting a cost/benefit analysis."[37] According to the Ninth Circuit, the Tenth Circuit "co-extensive" approach requires that (1) "the agency must ignore the protection of a species that results from the listing decision in considering whether to designate an area as critical habitat"; and (2) "[a]ny economic burden that designating an area would cause must be counted in the economic analysis, even if the same burden is already imposed by listing the species and, therefore, would exist even if the area were not designated."[38] Moreover, the court concluded that following Gifford Pinchot and the invalidation of the adverse modification regulation, the Tenth Circuit's decision relied on "a faulty premise."[39] Accordingly, the court determined that

the Service "permissibly applied the baseline approach," and dismissed the Arizona Cattle Growers' challenge.[40] The Arizona Cattle Growers have filed a petition for certiorari before the U.S. Supreme Court, which cites the intra-circuit split as a basis for granting review.

***Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.***, 616 F.3d 983 (9th Cir. 2010):

In *Home Builders*, an industry group ("Home Builders") challenged a revised critical habitat rule for vernal pool crustaceans. Following a previous remand order, the Service revised its vernal pool crustacean critical habitat designation to include 858,846 acres.[41] As part of the revised critical habitat designation, the Service conducted a new economic analysis adopting the "baseline" approach.

The Home Builders, much like the Arizona Cattle Growers, argued that the ESA mandates the consideration of economic impacts before the designation of critical habitat, including those impacts caused by listing. The Ninth Circuit made quick work of those arguments, relying on its recent decision in *Arizona Cattle Growers'* to reject the Home Builders' argument that the Service was required to consider "cumulative" economic impacts. Instead, the court found that, although such impacts must be analyzed under the National Environmental Policy Act, "the plain language of ESA directs the agency to consider only those impacts caused by the critical habitat designation itself."[42] The Home Builders have also petitioned the U.S. Supreme Court for certiorari on this issue.

**Conclusion**

With the exception of the decision in *Wyoming State Snowmobile*, these cases significantly restrict the ability of the regulated community to seek exclusions from the critical habitat designation. The baseline approach effectively ensures that most critical habitat designations will show little or no economic impact from a critical habitat designation. Meanwhile, under the *Cape Hatteras* decision, the Service can freely deny any request for exclusion, and that denial is unreviewable. Taken together, these decisions contemplate a narrow role for economics in the critical habitat designation process. This narrow role seems far removed from the intent of the 1978 amendments, where Congress clearly "wanted the Secretary to understand the costs on human activity of making a designation before he made a decision and thereby provide an opportunity to minimize potential future conflicts between species conservation and other relevant priorities at an early opportunity."[43] Stay tuned to see if the U.S. Supreme Court grants certiorari to resolve this intra-circuit conflict.

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1 16 U.S.C. § 1533.
2 16 U.S.C. § 1533(b)(2).
3 *Id*.
4 *See, e.g., Wyo. State Snowmobile Ass'n v. U.S. Fish & Wildlife Serv.*, No. 09-cv-00095-F, 2010 U.S. Dist. LEXIS 102550, at *12 (D. Wyo. Sept. 10, 2010).
5 *See New Mexico Cattle*, 248 F.3d at 1283.
6 16 U.S.C. § 1531(b).
7 16 U.S.C. § 1533(a)(1).
8 16 U.S.C. §§ 1532(5)(A)(i)(I), 1533(a).
9 16 U.S.C. § 1533(a)(6)(C).
10 437 U.S. 153 (1978).
11 16 U.S.C. § 1536(a)(2).
12 *See* House Consideration and Passage of H.R. 14104, with amendments, at 817, 823 (Oct. 14, 1978).
13 16 U.S.C. § 1533(b)(2).
14 *N.M. Cattle*, 248 F.3d at 1283.
15 16 U.S.C. §§ 1536(a)(2), 1540.
16 *See N.M. Cattle*, 248 F.3d at 1283.
17 *Id*.
18 *Id*. at 1285.
19 *Id*.
20 50 C.F.R. § 402.02.
21 *Id*.
22 *See N.M. Cattle*, 248 F.3d at 1283.
23 378 F.3d 1059, 1069 (9th Cir. 2004).
24 Jason T. Morgan was an attorney of record for the Wyoming and Washington Snowmobile Associations in this case.
25 2010 U.S. Dist. LEXIS 102550, at *3-4.
26 *Id.* at *53-55.
27 *Id.* at *57.
28 *Id.* at *58.
29 *Id.* at *59.
30 2010 U.S. Dist. LEXIS 84515, at *2-3.
31 *Id.* at *36.
32 *Id.* at *38.
33 *Id.* (*citing Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006).
34 *Id.* at *40.
35 *See id.* at *42-52.
36 606 F.3d at 1161.
37 *Id.* at 1173.
38 *Id.* at 1172.
39 *Id*. at 1173.
40 *Id.* at 1174.
41 *Home Builders*, 616 F.3d at 986-88.
42 *Id.* at 992.
43 *Wyo. State Snowmobile Ass'n*, 2010 U.S. Dist. LEXIS 102550, at *56 (internal quotation marks and citation omitted).

# Environmental Law Update

## Federal Environmental Law Update

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### I. Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")

***City of Emeryville v. Robinson***, 621 F.3d 1251 (9th Cir. 2010).

The Ninth Circuit held that a settlement agreement resolving a city's CERCLA and state law claims against a potentially responsible party ("PRP") over contamination at one site cannot be used to bar separate claims brought against the PRP by third-party private defendants for contribution in subsequent litigation over an adjacent contaminated site.

PRP Sherwin-Williams historically manufactured pesticides at Site A in Emeryville, California. The City of Emeryville filed suit in federal court against Sherwin-Williams in the late 1990s alleging it was responsible for soil and groundwater contamination on Site A. The parties entered into a settlement, which purported to bar all "further claims, cross-claims or counterclaims against the Settling Defendants or any one of them for matters addressed in the settlement agreement." In 2005, the City of Emeryville investigated Site B and concluded that hazardous substances there were also from the Sherwin-Williams facility. The City brought suit in state court against Sherwin-Williams and several third parties, including the owners of Site B. These third parties filed cross-claims for contribution against Sherwin-Williams. Sherwin-Williams then brought the instant action in the district court to enforce the Site A settlement agreement, arguing that its provisions barred all claims in the Site B state court litigation. The district court found that the settlement barred the City's claims against Sherwin-Williams, but did not bar the third-party cross-claims for contribution.

The Ninth Circuit explained that CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), which expressly authorizes contribution claims, cannot be read to give district courts the authority to approve settlement agreements barring contribution claims by non-parties, particularly where those non-parties were not potentially liable parties for the site. The Ninth Circuit reasoned that CERCLA should not be construed to ambush persons who were not party to the prior litigation, had no connection with or responsibility for the pollution at the site at issue in the settlement, and received no notice that their contribution claims could be extinguished by the settlement.

***Celanese Corporation v. Martin K. Eby Construction Company***, 620 F.3d 529 (5th Cir. 2010).

The Fifth Circuit held that a water pipeline installer that inadvertently struck and damaged a methanol pipeline could not be held liable as an "arranger" under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), where the installer did not know what it had struck or that it had caused damage to the methanol pipeline.

The defendant, Eby Construction Company, was hired by a Texas state agency to install a water pipeline from Clear Lake, Texas to a marine terminal in Harris County, Texas. The water pipeline corridor crossed several existing pipelines, including a methanol pipeline owned by plaintiff Celanese. In 1979, when excavating an area where the water pipeline was to cross underneath Celanese's methanol pipeline, an Eby employee struck and damaged the methanol pipeline with a backhoe. The employee did not know what he struck and neither Eby nor its employees knew that Eby's work on the water pipeline had damaged the Celanese pipeline. In 2002, Celanese discovered a leak in the methanol pipeline, which it determined was the result of Eby's original denting of the pipe with the backhoe more than 20 years earlier. Celanese fixed the leak and commenced remediation, which included the removal of more than 232,028 gallons of methanol from the subsurface of the site.

Celanese sued Eby for its cleanup costs, contending in part that Eby was liable as an arranger under CERCLA. Celanese predicated its arranger claim on an allegation that Eby consciously disregarded an obligation to investigate what it hit in the pipeline corridor. The Fifth Circuit relied on the U.S. Supreme Court's decision in *Burlington Northern & Santa Fe Ry. Co. v. United States*, – U.S. –, 129 S.Ct. 1870 (2009) ("*BNSF*"), which held that "an entity's knowledge that its action will result in a spill or leak is insufficient, by itself, to establish arranger liability; instead, the entity must take intentional steps or plan for the disposal of the hazardous substance." Under *BNSF*, the Fifth Circuit held that these allegations did not establish arranger liability because Eby did not plan or take any intentional steps to release methanol from the Celanese pipeline. The court reasoned that compared to *BNSF*, where the Supreme Court declined to impose liability on a defendant that had actually arranged to ship hazardous chemicals under conditions it knew would result in spills by the purchaser or common carrier (referred to by the Fifth Circuit as a "more culpable *mens rea*"), Eby could not be held liable as

an arranger when it did not even know that it had struck the Celanese pipeline, much less caused a release.

***City of Colton v. American Promotional Events***, 614 F.3d 998 (9th Cir. 2010).

The Ninth Circuit held in part that a plaintiff's failure to establish recoverable past response costs under CERCLA § 107(a), 42 U.S.C. § 9607(a), due to its failure to comply with the national contingency plan ("NCP") prevented the plaintiff from obtaining a declaratory judgment as to defendants' liability for future response costs under CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2).

The case involved the City of Colton's response to perchlorate contamination of its water supply. The City detected perchlorate in its municipal wells in concentrations exceeding "action levels" established by the California Department of Health Services ("CDHS"). CDHS informed the City that the perchlorate "action level" was advisory only and not enforceable, and that Colton could continue using the impacted wells. The City nonetheless prohibited use of water with concentrations exceeding the action levels, took the effected wells out of service and instituted a well treatment program. It then filed suit against numerous PRPs, alleging that their industrial activities in the basin caused the release of perchlorate into groundwater. The City alleged that it had incurred $4 million in response costs to implement the well treatment program and that future costs associated with a basin-wide cleanup could reach $55-75 million. The defendants moved for summary judgment, contending that the City could not recover its wellhead treatment program costs under CERCLA. In opposition, the City argued that defendants were liable for future costs. The district court found that the City could not recover its past costs because it could not demonstrate consistency with the NCP. Because it could not show it was entitled to any of its past costs, its claim for declaratory relief for future costs also failed.

On appeal, the City conceded that it failed to comply with the NCP, but argued it was still entitled to declaratory relief as to future costs. The Ninth Circuit disagreed, holding that the district court's disposal of past response cost-recovery claims under § 107(a) necessarily deprived the court of subject matter jurisdiction over the City's claim for declaratory relief as to future costs under § 113(g)(2). The Ninth Circuit explained that declaratory relief for response costs in § 113(g)(2) was dependent on response costs sought in the initial recovery action given the statutory reference to "any *subsequent action* or actions to recover *further* response costs." (Emphasis in original.)

***United States v. Aerojet General Corporation***, 606 F.3d 1142 (9th Cir. 2010).

The Ninth Circuit held that a non-settling potentially responsible party ("PRP") may intervene as of right in litigation to oppose a consent decree incorporating a settlement that, if approved, would bar contribution from the settling PRPs.

Applying the standard four-part test for intervention as of right, the Ninth Circuit joined the Eighth and Tenth Circuits in holding that: (1) the application was timely; (2) the non-settling PRPs have significantly protectable interests; (3) which will be impaired if they are denied the right to intervene; and (4) which will not be adequately represented by the existing parties. First, the court held that non-settling PRPs' interests were "significant" because they may be liable for all response costs not paid in the settlement and approval of the consent decree would cut off their contribution rights. Further, sections 113(f) and 113(i) of CERCLA confer a right to intervene on "any person" who "claims an interest" in the litigation if the litigation "impair[s] or impede[s]" that interest without restricting such intervention. The court rejected the asserted policy arguments against intervention – encouraging early settlement, ensuring rapid and thorough cleanup, and avoiding the expenditure of limited resources on protracted litigation – in favor of countervailing policy arguments such as treating all PRPs fairly and ensuring that costs of cleanup are borne by those responsible for the contamination.

Second, the Ninth Circuit found that that the potential for joint and several liability for all response costs, minus the amount of the settlement, impairs or impedes non-settling PRPs' interests. It dismissed the argument that notice-and-comment procedures provide non-settling PRPs with "other means" of protecting their interests, reasoning that "[o]nce a consent decree has been negotiated and agreed upon, the interests of the government and settling PRPs are essentially aligned," and the government is unlikely to abandon or substantially modify the proposed consent decree in response to non-settling PRPs' comments. Further, CERCLA's requirement that a court approve consent decrees to ensure they are "fair, reasonable, and consistent with the objectives of CERCLA" reflects Congress's intent to consider the interests of entities other than the settling PRPs and the government.

Lastly, the court concluded that under either the Federal Rule of Civil Procedure 24(a)(2) standard (where intervenors bear the burden of showing their interests are not adequately represented) or the CERCLA section 113(i) standard (which puts the burden on the government), the interests of the non-settling PRPs would not be adequately represented because settling PRPs are motivated to limit their share of the liability and the EPA is motivated to secure approval of the consent decree.

***United States v. Washington Dept. of Transportation***, ___F.3d___, 2010 U.S. App. LEXIS 58952, 2010 WL 2302502 (W.D. Wash. June 7, 2010).

On motions for partial summary judgment, the district court held in part that the Washington Department of Transportation ("WSDOT") could be held liable as an "arranger" under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)

(3), where stormwater runoff containing hazardous substances was conveyed to surface waters from highways under WSDOT's control via drainage structures WSDOT designed, constructed and operated.

The case involved portions of the Thea Foss and Wheeler Osgood Waterways within the Commencement Bay-Nearshore Tideflats Superfund Site in Tacoma. The United States filed suit against WSDOT to recover past and future response costs, contending in part that WSDOT was liable due to its ownership and operation of the I-5, SR 705 and SR 509 highways and their associated storm drains. The United States alleged that highway runoff containing hazardous substances, including phthalates, heavy metals and petroleum hydrocarbons has been transported from these highways and disposed of in the Thea Foss and/or Wheeler Osgood waterways. WSDOT filed a motion for partial summary judgment, arguing in part that it was not liable as an arranger for the disposal of hazardous substances based on its operation of the stormwater system on state highways because it did not control the release of contaminants that polluted the stormwater and lacked the intent to dispose of the hazardous substances.

The district court disagreed, holding that WSDOT's design, construction and operation of the stormwater systems was sufficient to establish its liability as an arranger. Applying the U.S. Supreme Court's decision in *Burlington Northern & Santa Fe Ry. Co. v. United States*, – U.S. –, 129 S.Ct. 1870 (2009), the district court held that WSDOT designed the stormwater systems with the specific purpose of discharging highway runoff into the environment. The court determined that WSDOT had knowledge that the runoff contained hazardous substances and had the ability to redirect, contain or treat its contaminated runoff. WSDOT therefore took sufficient "intentional steps to dispose of a hazardous substance" to support its liability as an arranger.

## II. Clean Water Act ("CWA")

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

The Ninth Circuit held on an issue of first impression that compliance orders issued by the U.S. Environmental Protection Agency ("EPA) under the CWA are not subject to judicial review prior to EPA bringing an enforcement action in federal court. In so holding, the Ninth Circuit joined the Fourth, Sixth, Seventh and Tenth Circuits, which had previously addressed the issue.

The plaintiff landowners, Chantell and Michael Sackett, filled approximately one-half acre of wetlands on a property they owned near Priest Lake, Idaho in preparation for building a house. The EPA issued a compliance order against the Sacketts concluding that the filled area was a jurisdictional wetland under the CWA and that the Sacketts violated the CWA by filling the wetland without first obtaining a permit. The compliance order required the Sacketts to remove the fill material and restore the parcel to its original condition or risk incurring civil or administrative penalties. The Sacketts first sought a hearing within EPA to challenge the finding that the area was subject to the CWA; EPA did not grant the Sacketts a hearing and continued to assert CWA jurisdiction over the parcel. They then filed an action in federal district court challenging the compliance order under the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A), and arguing that it violated their constitutional rights to due process. Their complaint was dismissed for lack of subject matter jurisdiction.

The Ninth Circuit affirmed the district court's dismissal of the complaint, holding that the CWA impliedly precludes pre-enforcement review of compliance orders. Under the CWA, 33 U.S.C. § 1319, the EPA has three civil enforcement options: (1) assess an administrative penalty, for which the statute expressly provides for judicial review; (2) initiate a civil enforcement action in federal court; and (3) issue an administrative compliance order. The Ninth Circuit found it persuasive that Congress did not expressly provide for judicial review of compliance orders as it had for civil penalties. It also found that allowing for judicial review would frustrate the CWA's goal of enabling swift corrective action because it would force EPA into immediate litigation. Lastly, it held that Congress'sintent to preclude pre-enforcement review could be inferred from the CWA legislative history. The Ninth Circuit likewise held that preclusion of pre-enforcement review did not violate the Sacketts' due process rights because civil penalties could only be assessed after EPA proved, in district court, that they violated the CWA as alleged in the compliance order.

***Northwest Environmental Defense Center v. Brown***, 617 F.3d 1176 (9th Cir. 2010).

The Ninth Circuit held that stormwater runoff from logging roads that was collected in a system of ditches, culverts, and channels, and then discharged to surface waters covered by the CWA, is a "point source" requiring a National Pollutant Discharge Elimination System ("NPDES") permit. It further held that EPA's "Silvicultural Rule" cannot exempt such stormwater runoff from the definition of "point source discharge" and that the 1987 amendments to the CWA did not constitute congressional acquiescence to the Silvicultural Rule.

Plaintiff Northwest Environmental Defense Center sued the Oregon State Forester and various timber companies for not obtaining NPDES permits for stormwater runoff that flows from logging roads. Defendants argued that the Silvicultural Rule (which defines the phrase "silvicultural point source" as limited to discharge associated with certain activities—rock crushing, gravel washing, log sorting, and log storage—and categorically exempts discharges associated with road construction and maintenance) exempts such discharge from the definition of "point source discharge" under the CWA and thus the NPDES permitting regime. They also argued that Congress acquiesced to EPA's exemp-

tion by failing to revise or repeal the Silvicultural Rule in its 1987 CWA amendments.

In finding that stormwater runoff from logging roads requires NPDES permits, the Ninth Circuit first observed that the discharges constitute "point sources" under the text of the CWA ("any discernible, confined and discrete conveyance, including . . . any *pipe, ditch, channel, conduit* . . . from which pollutants are or may be discharged" (emphasis in original)) and that Congress sought to require a permit for any activity that met the definition of a "point source," regardless of feasibility. The court examined the CWA's legislative history and concluded that while Congress expressly exempted certain discharges from the definition of "point source," it chose not to exempt the silvicultural discharges at issue. The court also reasoned that prior cases examining a very similar early version of the Silvicultural Rule held that EPA lacked authority to categorically exempt facilities from the definition of "point source" in contravention of the CWA's statutory definition.

Of note, the Ninth Circuit recently granted a petition for rehearing in this case on two limited issues: (1) whether a suit challenging EPA's interpretation of its regulations implementing the CWA's permitting requirements can be brought under the statute's citizen suit provision, 33 U.S.C. § 1365; and (2) whether a suit challenging EPA's decision to exempt the discharge of a pollutant from the CWA's permitting requirements must be brought under the statute's agency review provision, 33 U.S.C. § 1369(b). Briefs were due on December 13, 2010.

## III. Clean Air Act ("CAA")

***Association of American Railroads v. South Coast Air Quality Management District***, 622 F.3d 1094 (9th Cir. 2010).

The Ninth Circuit held that the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICCTA"), preempted rules adopted by a local air agency aimed at controlling air pollution from idling trains where the rules had not yet been made part of California's state implementation plan ("SIP") under the CAA.

The defendant South Coast Air Quality Management District ("District") is one of 35 local air quality agencies in California. Under California law, the District had the authority adopt regulations comprising its own air quality management plan for its region. If approved by the California Air Resources Board ("Board"), the local plan then becomes part of the statewide plan. The Board then submits the statewide plan to the EPA for approval as part of California's federally enforceable SIP. The District identified emissions from idling trains as a source of pollution and adopted rules limiting emissions and imposing reporting requirements with penalties for noncompliance. Plaintiffs (the Association of American Railroads, BNSF Railway Company and the Union Pacific Railroad) challenged the rules shortly after their adoption, arguing that they were preempted by the ICCTA, a federal act that substantially deregulated the railroad industry. The district court entered a permanent injunction, precluding the District from implementing or enforcing the rules.

The Ninth Circuit affirmed, explaining that the ICCTA generally does not preempt EPA-approved statewide plans under federal environmental laws, including the CAA, because they have the force and effect of federal law. Here, however, the rules had not yet been federally approved and thus had only the force and effect of state law. The ICCTA also does not preempt state and local laws of general applicability that do not unreasonably interfere with interstate commerce, but because the District rules applied exclusively and directly to railroad activity, they were preempted by the ICCTA.

***Sierra Club v. Otter Tail Power Company***, 615 F.3d 1008 (8th Cir. 2010).

The Eighth Circuit held in part that the prevention of significant deterioration ("PSD") provisions of the CAA applied only at the time of construction and did not impose ongoing obligations on air polluting facilities. In so holding, the Eighth Circuit joined the Eleventh Circuit in a split of authority with the Sixth Circuit.

The defendant, Otter Tail Power Co., operated and partly owned the Big Stone Generating Station, a 450-megawatt coal-fired power plant in South Dakota. Sierra Club brought suit as a result of various physical and operational changes that had been made at the plant, including a change in the primary fuel source from lignite to subbituminous coal in 1995 and modification of the boiler to increase surface area of the facility's primary superheater in 1998. Sierra Club alleged these changes significantly increased emissions, thus requiring a PSD permit. Under the PSD program, facilities that are constructed or modified must obtain permits setting forth emission limitations, and in particular, must be subject to best available control technology ("BACT"). Sierra Club brought its claims under the CAA's citizen suit provision, 42 U.S.C. § 7604(a), seeking assessment of civil penalties and declaratory and injunctive relief. Because CAA claims are subject to the 5-year federal limitations period for civil claims, 28 U.S.C. § 2462, the district court held that the PSD claims accrued at the time of construction or modification and thus dismissed them as untimely.

On appeal, Sierra Club argued that the PSD provisions imposed ongoing obligations on emissions sources and because Otter Tail continued to violate those obligations, the claims were not untimely. The Eighth Circuit disagreed, holding that the language of both the PSD provision, 42 U.S.C. § 7475(a), and the citizen suit provision, 42 U.S.C. § 7604(a)(3), was expressly related to construction or modification rather than operation. "Thus, neither the statutory provision that creates the legal duty at issue here nor the provision for private enforcement gives any indication that the CAA imposes ongoing operational conditions under

the PSD program." The court noted that Congress clearly provided for ongoing operational requirements in other parts of the CAA such as the new source performance standards ("NSPS") and Title V operating permit provision and could have done so with the PSD provision. The court also rejected Sierra Club's argument that provisions of South Dakota's state implementation plan ("SIP") or federal regulations related to the PSD program imposed ongoing obligations on facilities. The Eighth Circuit affirmed the district court's dismissal holding that if Otter Tail violated the PSD provisions, it did so at the time of the modifications, which was more than five years before Sierra Club brought its action.

## IV. National Environmental Policy Act ("NEPA")

***Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers***, 619 F.3d 1289 (11th Cir. 2010).

The Eleventh Circuit held that a 2009 appropriations act authorizing funding for construction of a bridge preempted, *inter alia*, application of NEPA and the Endangered Species Act ("ESA") to the project.

After years of controversy and litigation over improvements to the Tamiami Trail (Highway 41) through the Everglades, Congress passed an appropriations act that directly authorized the construction of a bridge project that would raise water levels and flood certain tribal lands. Specifically, the act provided funding to the "Army Corps of Engineers, which shall, notwithstanding any other provision of law, immediately and without further delay construct or cause to be constructed Alternative 3.2.2.a to U.S. Highway 41 (the Tamiami Trail) consistent with [a specific report]…." The Tribe sued to enjoin construction under NEPA, alleging that the Corps failed to prepare an adequate environmental impact statement; and ESA, alleging that a biological opinion failed to address the threat to two endangered species.

The Eleventh Circuit noted that both it and the Ninth Circuit had interpreted the phrase "notwithstanding any other provision of law" as superseding all other laws, and adopted the Ninth Circuit's approach of taking into account the statutory context in deciding whether to construe the phrase literally. In holding that the "notwithstanding" clause barred judicial review under NEPA and ESA, the Eleventh Circuit reasoned that placement of the clause in the middle of "shall . . . construct or cause to be constructed" clearly encompassed environmental laws that would otherwise apply to the construction of the bridge and indicated that Congress intended to foreclose application of such laws. Further, the use of the language "immediately and without further delay" indicated that Congress wanted the bridge built and sought to facilitate this goal by preventing application of laws like NEPA and ESA. Finally, the mandatory language denied the Corps any discretion to choose between alternatives pursuant to the procedural requirements of NEPA and ESA.

## V. Endangered Species Act ("ESA")

***Northern California River Watch v. Wilcox***, 620 F.3d 1075 (9th Cir. 2010).

The Ninth Circuit held that the phrase "areas under federal jurisdiction" in section 9(a) of the ESA, 42 U.S.C. § 1538, does not encompass privately owned wetlands subject to Army Corps of Engineers ("Corps") jurisdiction under the Clean Water Act ("CWA").

A nonprofit environmental organization and an amateur naturalist sued California Department of Fish and Game employees who removed specimens of the endangered plant species *Sebastopol meadowfoam* from privately owned wetlands that were subject to the Corps' jurisdiction under section 404 of the Clean Water Act, 33 U.S.C. § 1344. The ESA prohibits the removal of an endangered plant species from "areas under federal jurisdiction" but the term is not defined in the statute, legislative history, or regulations, nor has it been interpreted in U.S. Fish and Wildlife Service ("FWS") guidance.

The Ninth Circuit rejected the plaintiff environmental organization's argument that "areas under federal jurisdiction" includes all "waters of the United States" as defined by the CWA and interpreted by the Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006). It reasoned that such a rule was potentially overbroad and could be expanded to apply to private lands which are not subject to any federal regulatory jurisdiction under any federal statute, and that such piecemeal expansion was not prudent when the FWS had yet to address the issue in guidance or regulations. The court also noted that the some members of the *Rapanos* plurality expressed concern about overextending the Corps' regulatory capacity. The court further explained that ESA section 9 also prohibited the removal and destruction of plants from "any other area," and thus the plaintiff's broad construction of the phrase "areas under Federal jurisdiction" rendered the phrase "any other area" superfluous. However, in affirming the district court's grant of summary judgment to defendants, the Ninth Circuit specified that its decision would not prevent the FWS from adopting some version of the plaintiff's interpretation in the future.

***Modesto Irrigation District v. Gutierrez***, 619 F.3d 1024 (9th Cir. 2010).

The Ninth Circuit held that (1) the National Marine Fisheries Service ("NMFS") may separate interbreeding species into different Distinct Population Segments ("DPSs") for listing under the ESA where factors other than their ability to interbreed distinguish the species.

Plaintiff irrigation districts challenged NMFS's listing of steelhead in California's Central Valley as a DPS separate from rainbow trout under both the ESA and the Administrative Procedures Act. NMFS historically applied the "Evolutionarily Significant Unit" ("ESU") policy to Pacific salmon, which distinguished between ESUs on the basis of whether they were "substantially reproductively

isolated." In response to litigation prohibiting the listing of less than an entire DPS or ESU, *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001), NMFS abandoned the ESU policy and adopted the DPS policy for steelhead. It reasoned that its decision was necessary for administrative consistency because the U.S. Fish and Wildlife Service ("FWS") used the DPS policy for anadromous fish and in light of new information on the steelhead's differences from other Pacific salmon. Application of the new policy allowed NMFS to list the steelhead under the ESA.

Even though steelhead and rainbow trout are biologically capable of interbreeding, they grow to differing sizes, have different predators and prey, and steelhead migrate to the ocean and return to spawn while rainbow trout remain in fresh water their entire lives. In recent years, it became clear to NMFS that excess steelhead can regenerate the rainbow trout population but rainbow trout cannot do the same for steelhead. Thus, offspring of interbreeding steelhead and rainbow trout can belong to either species, but rainbow trout populations are in no way threatened and steelhead populations continue to decline.

Plaintiffs first argued that the ESA's definition of "species" – "any subspecies of fish or wildlife or plaints, and any distinct vertebrae fish or wildlife which interbreeds when mature" – requires agencies to place all interbreeding organisms in the same DPS. The Ninth Circuit rejected this argument, finding the definition ambiguous and applying *Chevron* deference to adopt NMFS' interpretation that interbreeding is a necessary, but not sufficient condition for classification as a DPS. Thus, a species must be able to interbreed to constitute a DPS, but the fact that steelhead and rainbow trout can interbreed does not require that both species be included in the same DPS if other factors distinguish them. Plaintiffs next contended that NMFS did not adequately explain its change in policy from using the ESU policy to using the DPS policy. Noting that an agency has considerable latitude to change course under the Supreme Court's recent decision in *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), the Ninth Circuit reasoned that NMFS met all requirements under the APA by recognizing the policy change and offering good reasons to explain the change, including administrative consistency between agencies that share jurisdiction over anadromous fish.

***Arizona Cattle Growers' Association v. Salazar***, 606 F.3d 1160 (9th Cir. 2010).

The Ninth Circuit held that the U.S. Fish and Wildlife Service ("FWS") may use the economic baseline approach in analyzing the economic impact of critical habitat designation under the ESA. The Tenth Circuit has disapproved the economic baseline approach.

The FWS designated approximately 8.6 million acres of federal land as critical habitat under the ESA for the Mexican spotted owl. Plaintiffs challenged the designation on two grounds: (1) they argued the FWS unlawfully designated areas not containing owls as "occupied" habitat, bypassing the statutory requirements for designating "unoccupied" areas; and (2) they argued the FWS's use of the economic "baseline" approach to calculate the economic impacts of the designation was arbitrary and capricious. Regarding the critical habitat designation, the Ninth Circuit held that the FWS designated only "occupied" areas as critical habitat because the word "occupied" does not require a species' continuous presence (especially if the species is nonterritorial, mobile, or migratory), and did not act arbitrarily or capriciously with respect to individual parcels.

The Ninth Circuit also expressly approved the FWS's use of the economic baseline approach to determine the economic impacts of critical habitat designation on any particular area. Under the baseline approach, any economic impacts of protecting a species that will occur regardless of the designation (such as the burdens imposed by listing the species) are treated as part of the "baseline" and not factored into the analysis of the economic impacts of the critical habitat designation. The Tenth Circuit, in contrast, has held that the baseline approach is impermissible because it renders economic analyses "meaningless" and allows the agency in all cases to find no economic impact. Reasoning that the Ninth Circuit (and other courts) had rejected the Tenth Circuit's premise for disapproving the approach, the court also reasoned that the baseline approach was more consistent with the ESA, which prohibits the FWS from considering, for example, the costs of listing a species, at the listing phase. The Ninth Circuit rejected plaintiffs' contention that the FWS might abuse the baseline approach and act in an arbitrary and capricious manner as contrary to the deference afforded to agencies.

Plaintiffs have petitioned for certiorari to the U.S. Supreme Court.

***Home Builders Association of Northern California v. U.S. Fish & Wildlife Service***, 616 F.3d 983 (9th Cir. 2010).

The Ninth Circuit, in addition to reiterating its approval of the economic baseline approach for analyzing the economic impact of listing critical habitat, held that (1) the ESA does not require all Primary Constituent Elements ("PCEs") in one area to justify designation as critical habitat; (2) the ESA does not require critical habitat to be deemed either "occupied" or "unoccupied"; and (3) in applying the economic baseline approach, the Fish & Wildlife Service ("FWS") is not required to conduct a "cumulative assessment" that considers the costs of complying with other regulations.

The FWS designated 850,000 acres of land in California and Oregon as critical habitat under the ESA for fifteen endangered or threatened vernal pool species. FWS had initially designated more than 1.6 million acres, but the final designation reduced the area by more than 1 million acres by excluding five rapidly growing counties for economic reasons and other areas for non-economic reasons. In response to litigation, FWS reopened the comment period on the exclusions and performed a new economic

analysis using the "baseline approach." FWS ultimately chose to exclude twenty-three census tracts instead of the five counties in their entirety.

Plaintiff industry groups challenged the designation under the ESA, arguing that the designation included lands that contained some – but not all – of the PCEs. PCEs are those physical or biological features essential to the conservation of the species and which may require special management protections. 50 C.F.R. § 424.12(b). Therefore, plaintiffs argued, either (1) the PCEs not present are not essential to the conservation of the species and should not be considered PCEs at all; or (2) if the absent elements are truly PCEs, then their absence means that the area cannot be essential to the conservation of the species. The Ninth Circuit quickly disposed of this argument by noting that the elements necessary for vernal pool species survival are present in distinct areas and the ESA does not require all PCEs to be present at the same time. Plaintiffs next contended that FWS was required by the ESA to determine *when* the protected species will be conserved, and its failure to do so indicated that it could not know what physical or biological features were required to achieve the goal of conservation. The court held the ESA does not require such a determination for critical habitat designation.

Plaintiffs also challenged overlapping designations for "occupied" and "unoccupied" habitat. The court reasoned that the ESA does not require every area to be classified as one or the other, and the FWS's decision to include an area under the more demanding standard for "unoccupied" habitat is supported by precedent. The fourth issue centered on the FWS's explicit exclusion of "structures left inside critical habitat boundaries." Plaintiffs argued that the exclusion suggested that the designation was insufficiently specific, but the court deferred to the FWS, reasoning that the agency engaged in extensive analysis and that plaintiffs neither attacked the procedures used nor suggested more precise methods.

Finally, the Ninth Circuit relied on *Arizona Cattle Growers' Association* (*supra*) in rejecting plaintiff's final argument that instead of the baseline approach, FWS should use a "co-extensive" approach that considers all of the economic impacts of the designation, including those caused coextensively by any other agency action (e.g., species listing), even if those impacts would exist in the absence of the designation. Reasoning that plaintiff should not be allowed to extrapolate the cumulative impact assessment requirement under the National Environmental Policy Act to critical habitat designation under the ESA, the Ninth Circuit reiterated its approval of the economic baseline approach.

Plaintiffs have petitioned for certiorari to the U.S. Supreme Court.

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# Land Use Law Update

## Significant Recent Land Use Decisions

*By Richard L. Settle, Foster Pepper PLLC*

### I. CONSITUTIONAL ISSUES

**A. Federal Regulatory Taking Doctrine not judicially violated: *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. ___(2010).**

Please see article by Roger A. Pearce, "The United States Supreme Court Takes Up Takings Again," in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, **Environmental & Land Use Law Newsletter**, Vol. 32, Number 2, September 2010, p.10.

**B. Due Process and 42 U.S.C. § 1983 actions arising out of land use decisions may be brought only through timely LUPA action: *Mercer Island Citizens for Fair Process v. Tent City*, 156 Wn. App. 393, 232 P.3d 1163 (2010).**

The Mercer Island Clergy Association proposed "Tent City 4," a temporary encampment for homeless people hosted by a church located in a single-family residential zone of the City of Mercer Island. The Mercer Island City Code does not allow such temporary encampments in the single-family residential zone. After extensive negotiations between the City and interested parties, the City, after notice and hearing, entered into a binding "Temporary Use Agreement (TUA)" authorizing the church to host Tent City 4. The City utilized the TUA to allow the temporary encampment "[r]ather than passing an ordinance authorizing the encampment and amending the city code as other cities have done," in the words of the Court. Citizens for Fair Process (Citizens) filed a lawsuit seeking injunctive relief and damages for violation of procedural due process under 42 U.S.C. §1983 (§1983).

The City successfully moved for dismissal of the actions because they depended on the invalidity of a land use decision, the TUA, which could be challenged only through a timely Land Use Petition Act (LUPA) action. Division 1 of the Court of Appeals upheld the dismissal.

The Court agreed with the City that the TUA was a land use decision reviewable exclusively under LUPA because the TUA was a decision of an application for a "project permit or other governmental approval required by law," under RCW 36.70C.020(2)(a). The Court reasoned that the TUA was "required by law" because accommodating the church-sponsored encampment was required by the religious exercise guarantee of the Washington Constitution, the federal Religious Land Use and Institutionalized Persons Act, and the state constitutional mandate that the city protect the health, safety, and welfare of its citizens. Because the TUA was a land use decision subject to LUPA, the court held that it became final and unassailable after the expiration of LUPA's 21-day limitation period.

Citizens also argued that their due process claims under §1983 were not challenges of the TUA but were separate causes of action that did not challenge the validity of the TUA even if it was a land use decision subject to LUPA. The Court disagreed holding that the Citizens' claims for injunctive relief and damages were dependent on the invalidation of the TUA and, thus, were barred by failure to file a timely LUPA action challenging the TUA.

Finally, Citizens argued that damage actions are not subject to LUPA's limitations because RCW 36.70C.030(1)(c) specifically excludes damage actions from LUPA time limitations: "If one or more claims for damages…are set forth in the same complaint with a land use petition brought under [LUPA], the claims are not subject to the procedures and standards, including deadlines, provided in [LUPA]." The Court disagreed without specifying: whether the quoted language did not dispense damage actions that were filed separately from a LUPA action from LUPA's limitation period; whether, regardless of the dispensation, damage actions that depend on a successful challenge of a land use decision may not be maintained unless the land use decision was challenged in a timely LUPA action; and, if so, whether damage actions filed subsequent to a LUPA petition may be maintained as long as the land use decision, itself, was challenged in a timely LUPA action.

The decision does not explicitly answer the provocative question whether a city action allowing a proposed use prohibited by the city's code is a land use decision that becomes unassailable, if not timely challenged under LUPA, simply because the city concluded it was required to allow the use under constitutional or statutory provisions, or only if the court agrees with the city's conclusion that it was required to allow the use. Or, in other words, if the Court had not agreed that the City was legally required to allow the encampment, would the Court have held that the TUA was not a land use decision subject to LUPA's 21-day limitation period, and a timely damage action filed after the LUPA limitation period could be maintained?

**C. Local regulation prohibiting the placement of recreational vehicles in residential mobile home parks not preempted by state Manufactured/ Mobile Home Landlord-Tenant Act: *Lawson v. City of Pasco*, 168 Wn.2d 675, 230 P.3d 1038 (2010).**

In a 5-4 decision, with separate concurring opinions agreeing with the majority and dissenting opinions, the Supreme Court upheld local authority to prohibit lots for recreational vehicle (RV) occupancy in residential mobile home parks, holding that such a local prohibition by the City of Pasco was not preempted by the state Manufactured / Mobile Home Landlord-Tenant Act (MHLTA).

Lawson owns and operates a mobile home park in Pasco. One of his tenants permanently resided in a RV on a lot in the park. A former Pasco code provision prohibited RV sites within residential mobile home parks. On the basis of this provision, Pasco issued a notice of violation. Lawson acknowledged that he was in violation of the ordinance, arguing that the ordinance was preempted by MHLTA.

Pasco's Code Enforcement Board conducted a compliance hearing and upheld the notice of violation. Lawson filed a LUPA action challenging the enforcement order. The Franklin County Superior Court ruled that the ordinance was preempted under article XI, section 11 of the Washington Constitution because the ordinance was in conflict with the MHLTA.

The majority opinion held that challenged ordinance was not preempted by the MHLTA because there was no irreconcilable conflict between the two laws and MHLTA and the legislature had not implied intent to occupy the field. The dissenting opinion disagreed on both counts, concluding that there was irreconcilable conflict and implied intent to occupy the field.

## II. VESTED RIGHTS

**A. Vested Rights in critical area regulations in effect when application for building permit for single-family home was complete in 2004 required that 2007 variance application be governed by the 2004 critical area regulations: *Lauer v. Pierce County*, ___Wn. App.___, 238 P.3d 539 (September 8, 2010).**

In a significant vested rights case, Division 2 of the Court of Appeals has confirmed that the critical area regulations in effect on the date a complete building permit application is filed govern not only the proposed construction but also any subsequent land use approvals necessary to carry out the proposed construction previously approved by the building permit.

The Garrisons applied for and were granted a building permit in 2004. After they had commenced construction, neighbors complained that the foundation of the new home encroached upon a stream buffer; and the County issued a stop work order and corrective action notice directing the Garrisons to apply for a fish and wildlife variance. The Garrisons appealed the stop work order to the hearing examiner and then superior court , but settled the dispute by agreeing to apply for a fish and wildlife variance in 2007. Several months later, the hearing examiner granted the fish and wildlife variance. The Lauers filed a LUPA action appealing the variance.

The Pierce County Superior Court reversed the hearing examiner, ruling that the 2004 building permit application was not complete and did not vest the Garrisons' rights in the critical area regulations in effect in 2004. The hearing examiner was directed to decide the remanded variance application under the amended critical area regulations in force in 2007. The Garrisons appealed.

The Court of Appeals reversed the lower court, holding that the 2004 building permit application was complete and, as a result, the critical area regulations in effect on the date in 2004 governed not only the building permit application but also the subsequent 2007 fish and wildlife variance application. The decision contains an extensive discussion of the law governing the completeness of building permit applications. The Court reinstated the hearing examiner's decision, granting the variance under the 2004 critical area regulations.

**B. Developer of phased residential project did not have vested rights in subsequently superseded residential zoning to complete Phase II because no application for building permit or other regulatory permit was filed while the residential zoning was in effect; denial of application for conditional use permit, to allow residential development and the completion of Phase II, on the basis of detriment to public health, safety, and welfare was supported by substantial evidence: *Deer Creek Developers v. Spokane County*, 157 Wn. App. 1, 236 P.3d 906 (Publication Ordered July 22, 2010).**

The Deer Creek Project (Project) contemplated 280 residential units in 23 buildings built in two phases on property near Spokane International Airport and Fairchild Air Force Base. The property is zoned Light Industrial (LI). Deer Creek Developers (Deer Creek) applied for and obtained a building permit for Phase I of the Project when residential uses were allowed in the LI zone. Subsequently, after the LI zone was amended to prohibit residential uses in the geographic area where the Project was located, Deer Creek applied for a conditional use permit (CUP) to allow residential development in Phase II of the Project. The hearing examiner denied the CUP, and Deer Creek filed a LUPA action challenging the denial in Spokane County Superior Court. The hearing examiner's decision denying Deer Creek's petition was affirmed.

Before Division 3 of the Court of Appeals, Deer Creek argued: (1) that its rights to develop Phase II vested before the LI zoning text was amended to prohibit residential development; and (2) regardless of whether Deer Creek's rights to develop Phase II had vested, the hearing exam-

iner's denial of the CUP was not supported by substantial evidence.

The Court held that Deer Creek's rights to develop Phase II had not vested under either state vesting law or the County vesting ordinance. Deer Creek had not applied for a building permit, plat approval, or any other regulatory approval for Phase II that would have vested its rights in the existing zoning under either state or local vesting law. Nor did the SEPA Environmental Checklist's statement that it covered Phase I and Phase II of the Project, but only Phase I would be built at that time, serve to vest Deer Creek's rights.

The court also rejected Deer Creek's argument that the hearing examiner's denial of the CUP application because of detriment to the public health, safety and welfare was not supported by substantial evidence. The Court held that extensive evidence of the adverse affects of the proposed residential development on expansion and operation of the adjacent airports and the safety of residents amply supported the hearing examiner's denial.

## III. GROWTH MANAGEMENT ACT (GMA)

**A. Appeal of Growth Board decision that UGA was too large became moot because Board later ruled that UGA was compliant on the basis of updated population projection: *Thurston County v. Western Washington Growth Management Hearings Board*, 2010 WL 4188528 (Wash. App. Div. 2)(October 26, 2010).**

Division 2 of the Court of Appeals affirmed a superior court decision, reversing a Growth Management Hearings Board (Growth Board) decision that was based on an obsolete population projection, because the case had become moot.

The Growth Board had ruled that the Urban Growth Area (UGA) for the City of Yelm was too large on the basis of a population projection in a City of Yelm/Thurston County Joint Plan. Subsequently, the population projection had been updated in the Thurston County Comprehensive Plan (without a corresponding amendment of the Thurston County/City of Yelm Joint Plan) and the Yelm UGA had not been challenged on the basis of that updated population projection.

The Court agreed with the County that as a result of the updated population projection the issue of whether the sizing of the Yelm UGA was compliant with GMA requirements had become moot. The Court rejected the argument by Futurewise that the case was not moot because the population projection in the Joint Plan had not been updated, reasoning that "the County Comprehensive Plan is the 'master plan' that governs several subordinate plans, including Joint Plans," and "the GMA specifically authorizes one entity to designate urban growth areas—the county."

The Court noted that the issue of whether the Joint Plan and the County Comprehensive Plan were consistent was not before the Court. However, in light of the Court's reasoning on the mootness issue, it seems likely that, if the plan-consistency issue had been raised, inconsistency would have been resolved in favor of the County Comprehensive Plan.

**B. Growth Board barred from using one unit per five acre "bright-line" rural density rule to *uphold* challenged rural and urban densities: *Suquamish Tribe v. Central Puget Sound Growth Management Hearings Board*, 2010 WL 2679841 (Wash. App. Div.2) (July 7, 2010).**

In this case, Division 2 of the Court of Appeals significantly expanded the Supreme Court's principle that the Growth Board lacks authority to establish "bright-line" rules for maximum rural density, minimum urban density, maximum market supply factor, and other areas of GMA compliance that are not specifically established in the statute. *See, e.g., Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 190 P.3d 38 (2008). In previous cases, such "bright-line" rules of presumptive compliance were explicitly stated by the Growth Board, and inconsistent local enactments were explicitly subject to increased scrutiny. Moreover, in those cases, "bright-line" rules had been employed by the Growth Board as a basis for ruling that local plan provisions or development regulations were *noncompliant* with GMA requirements. In overturning such Board rulings, the Court stressed the presumption of validity to which local government enactments were entitled and the broad range of local discretion to make land use policy choices.

However, in the *Kitsap County* case, the Court inferred that the Growth Board had relied on "bright-line" rules even though the Board had not done so explicitly. And the Court reversed the Board's implicit reliance on such rules even though they were used to find local enactments *compliant*, rather than *noncompliant*. The Court reasoned that the Growth Board must base both approvals and disapprovals of local GMA enactments on "local circumstances," rather than even implicit "bright-line" rules.

**C. Growth Board barred by *res judicata* from adjudicating, in a petition for review, a claim previously adjudicated in a compliance proceeding: *Spokane County v. Miotke*, 2010 WL 3959633 (Wash. App. Div. 3)(Oct. 12, 2010).**

When local governments found to be noncompliant with GMA requirements by the Growth Board subsequently take action designed to achieve compliance, opponents often challenge the action through a new petition for review to the Board in addition to arguing in Board compliance proceedings that the action does not achieve compliance. This case makes clear that an issue decided by the Board in

a compliance proceeding may not be readjudicated through a new petition for review.

Spokane County adopted two comprehensive plan amendments expanding its UGA in the west plains and five mile areas of the County. The amendments expanding the UGA were appealed to the Growth Board by Miotke. The Board ruled that the amendments were noncompliant with GMA requirements and the Board directed the County to update its capital facilities plan, perform a land capacity analysis, and appropriately reduce its UGA.

Rather than conducting the studies prescribed by the Board, the County subsequently adopted a resolution repealing the amendments and restoring the UGA to its previous state. The Board decided that, by repealing the UGA expansion amendments, the County achieved compliance. However, Miotke was not satisfied by the County's repeal of the amendments, apparently because of her concern about development that had occurred or vested in the UGA expansion area before the repeal. However, the Board noted that such development was "not the subject of this case." Miotke appealed the Board's order finding compliance to Thurston County Superior Court.

In addition to opposing compliance in the Board's compliance hearing, Miotke filed a new petition for review challenging the resolution repealing the UGA expansion amendments. In deciding the petition for review, the Board changed its mind and ruled that the County's action repealing the amendments was not compliant with GMA requirements. The County appealed this decision to Spokane County Superior Court, successfully arguing that Miotke's second petition to the Board was precluded on the basis of *res judicata* principles by the Board's order finding that the resolution repealing the amendments had achieved compliance.

Division 3 of the Court of Appeals affirmed the lower court's decision that *res judicata* principles barred the Board from readjudicating an issue raised in a new petition for review that previously had been decided in a compliance proceeding. The Court rejected Miotke's argument that she made some different arguments in the new petition than she had in the compliance proceeding, noting that *res judicata* bars claims and arguments that were previously raised and those that could have been raised. Elevating substance over form, the Court also denied Miotke's argument that the subject matter differed in the two proceedings because the Board's order in the compliance proceeding did not identify the challenged resolution by number while the Board's order on the new petition did specifically identify the resolution.

**D. Unauthorized Practice of Law and Standing: Non-Attorney barred from representing in court an association previously represented by the non-attorney before the Growth Board; and the non-attorney lacked standing to represent himself,** *pro se,* **in court where he had not participated on behalf of himself in prior admistrative proceedings.** ***Advocates for Responsible Development v. Western Washington Growth Management hearings Board,*** **155 Wn. App. 479, 230 P.3d 608 (Publication ordered April 27, 2010).**

This is an important case revealing traps for unwary non-lawyers who represent others before the Growth Board and attempt to participate in judicial review of Board decisions.

John Diehl, a non-lawyer and frequent participant of GMA litigation regarding Mason County, challenged local GMA enactments before the Board. The Shaw Family Trust, one of the parties before the Growth Board, moved to dismiss Diehl. The Board ruled that Diehl did not meet the GMA prerequisites for personal participation standing and, thus, was dismissed as a party in the Board proceedings. However, the Board ruled that Diehl, the president of Advocates for Responsible Development (ARD), could represent ARD before the Board, consistent with previous Growth Board holdings that a non-lawyer member of a group with standing may represent that group before the Board. Diehl appealed the Board's decision to Mason County Superior Court, and the court ruled (1) that Diehl, as a non-lawyer, was barred from representing ARD in the judicial review proceeding, and (2) affirming the Board's ruling that Diehl did not have personal participation standing, and that Diehl was barred from representing himself in court.

Division 2 of the Court of Appeals affirmed. First, the Court held that the non-lawyer was barred from representing others in court, distinguishing cases that occasionally had allowed such representation under a narrow exception to the general prohibition. Thus, even though the Board allows non-lawyer members of groups with standing to represent such groups before the Board, such non-lawyer members are barred from representing the groups in subsequent judicial review of the Board decisions.

Second, the Court held that Diehl could not represent himself in court because he had not established personal standing, under RCW 36.70A.280, on the basis of his actual participation, orally or in writing, in local proceedings related to the enactments appealed to the Board. In such local proceedings, Diehl's comments consistently were made on behalf of ARD and failed to indicate the he, personally, had interests or concerns related to the local ordinances which, as an advocate, he opposed for the sake of ARD.

Third, the Court awarded attorney fees and costs to the Shaw Family Trust against Diehl and ARD, under RAP 18.9, because their joint appeal of the lower court's deci-

sion that non-lawyer Diehl was barred from representing others in court was frivolous.

**E. Growth Board had jurisdiction to decide petition for review of Mason County Comprehensive Plan Amendment apparently designed to accommodate a site rezone. Sanctions against non-lawyer advocate, under CR 11, conditionally upheld.** ***Shaw Family LLC v. Advocates for Responsible Development and Western Washington Growth Management Hearings Board*****, 157 Wn. App.364, 236 P.3d 975 (2010).**

This Division 2 decision involves the same parties and underlying facts as the Court's previous decision in the *Advocates for Responsible Development (ARD)* case, above. In this case, the Court addressed the merits of ARD's appeal. However, only part of the decision was published, and, as a result the Court's reasons for upholding the Growth Board's decision on the merits appear to be nonprecedential.

For nearly a century, the Shaw Family (Family) had owned a single parcel of more than 90 acres in rural Mason County. The parcel previously was designated as "Long-Term Commercial Forest." While most of the surrounding area shared that designation, other landowners had been allowed to develop their properties in this area. The Shaw Family apparently applied for a comprehensive plan amendment and rezone in order to develop the Family property. ARD opposed the Family's proposed comprehensive plan amendment and parcel rezone. The Board of County Commissioners (BOCC) approved the proposed comprehensive plan amendment (to accommodate a rezone of the Family property) that was appealed to the Growth Board. Apparently, the BOCC also adopted a parcel rezone of the Family property that was not challenged in ARD's petition to the Growth Board.

The Growth Board ruled that the comprehensive plan amendment violated (1) GMA's internal consistency requirement and (2) the County's Countywide Planning Policy that allowed Long-Term Commercial Forest designation amendments only if applicants "demonstrate that the property can no longer be feasibly used as a commercial forest."

Before the Court of Appeals, the Family apparently argued that the Growth Board lacked jurisdiction to decide the challenge of the comprehensive plan amendment because its purpose was to accommodate a parcel rezone over which the Board lacked jurisdiction. Parcel rezones are not appealable to the Growth Board and may be challenged only in court pursuant to the Land Use Petition Act (LUPA). *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007). It is not clear whether the Family made the related argument that the appeal of the comprehensive plan amendment to the Board was moot because, assuming a parcel rezone had been adopted, it would prevail over an inconsistent comprehensive plan amendment, even if the enabling plan amendment were overturned by the Growth Board.

The Court held that the Growth Board did have jurisdiction over the challenged comprehensive plan amendment even though it was site-specific, requested by the owner of the site, and designed to accommodate a parcel rezone that was not before the Board. The Court upheld the Growth Board decision but included its reasons for affirming the Board decision only in the unpublished portion of the decision.

The Court also affirmed the imposition of sanctions under CR 11 against John Diehl, the non-lawyer who attempted to represent himself and ARD (s*ee ARD* case, above) by a Lewis County Superior Court judge in one of the case's many byzantine procedural twists and turns, remanding to that court for entry of written findings and conclusions, as required by CR 11.

## IV. SHORELINE MANAGEMENT ACT

**A. Local Shoreline Master Programs (SMPs) are not subject to the statutory prohibition in RCW 82.02.020 of direct or indirect taxes, fees, or charges on development:** ***Citizens for Rational Shoreline Planning v. Whatcom County*****, 155 Wn. App. 937, 230 P.3d 1074 (May 10, 2010).**

Division 1 of the Court of Appeals held that because of the state's pervasive and ultimately determinative role in the content of Shoreline Master Programs (SMPs), they are not subject to the statutory prohibition of direct or indirect taxes, fees, or charges not reasonably necessary as a direct result of development, RCW 82.02.020, which applies to local governments and not the state. Citizens for Rational Shoreline Planning (CRSP) challenged the Whatcom County Shoreline Master Program soon after it was updated, as required by RCW 90.58.080(2)(a)(i), in Skagit County Superior Court. The nature of the action filed and remedies sought by CRSP were not specified by the Court's opinion. However, the action was based exclusively on RCW 82.02.020 and focused on the SMP's setbacks and buffers and a restriction on the buildable area of nonconforming lots to 2,500 square feet.

The lower court granted a CR 12(b)(6) motion, dismissing the lawsuit. CRSP's appeal raised the sole issue of whether local SMPs are actions of local government subject to the limitations of RCW 82.02.020 or, because of the state's extensive authority in the development and adoption of SMPs, they are actions of state government and, thus, not subject to RCW 82.02.020.

The Court emphasized the state's pervasive role in the development and adoption of SMPs, rejecting the argument that under the Shoreline Guidelines, WAC Ch. 173-26, local governments' proposed SMPs are to be accorded substantial deference by Ecology:

> If the local government does not discharge this obligation [to develop and submit to Ecology an SMP], Ecology is empowered to unilaterally develop and impose a SMP on that jurisdiction. RCW 90.58.070(2), .090(5). Such a heavy-handed statutory authorization is the opposite of legislatively-mandated deference.

155 Wn.App, at 947.

The Court rejected the argument that the Shoreline Guidelines call-out RCW Ch. 82.02 as a limitation on SMP provisions, e.*g.*, WAC 173-26-186(5), reasoning that "[i]t is the intent of the legislature, not the executive branch, that is at issue… ." 155 Wn.App.at 948. The 1995 GMA amendments whereby SMPs became part of local comprehensive plan and development regulations also did not sway the Court.

The Court rejected even CRSP's much narrower alternative argument that specific SMP provisions that are developed "entirely at the local government's discretion are subject to RCW 82.02.020," reasoning that "the state's statutorily-required role in oversight and approval dictates that RCW 82.02.020 does not apply." 155 Wn.App. at 950.

**B. County's interpretation and application of common-line seback provisions in Shoreline Master Program was not legally erroneous or a clearly erroneous application of law to facts and was supported by substantial evidence; recovery of attorney fees denied: *Curhan v. Chelan County*, 156 Wn. App. 30, 230 P. 3d 1083 (May 11, 2010).**

This decision by Division 3 of the Court of Appeals pertains to the Chelan County Shoreline Master Program (SMP) common line shoreline setback provisions for Lake Wenatchee. The significance of the case is limited to these Chelan County SMP provisions.

Although the building permit granted by the County was upheld by the superior court and Court of Appeals, recovery of attorney fees on appeal by the party who prevailed at all levels was denied.

## V. STATE ENVIRONMENTAL POLICY ACT (SEPA)

**A. *Chuckanut Conservancy v. Washington State Department of Natural Resources*, 156 Wn. App. 274, 232 P.3d 1154 (2010).**

In this case, Division 1 of the Court of Appeals upheld the SEPA review by the state Department of Natural Resources (DNR) for proposed new Strategies for the management of the Blanchard Forest, characterized by the Court as "one of the treasures of the Pacific Northwest… atop the sourheastern peak of the Chuckanut Range, a 4,827-acre area…that lies west of Interstate 5 and south of Bellingham… ." .

The Court's rhapsodic description of the Blanchard Forest and detailed description of the proposed management strategies are worth repeating:

> Blanchard Forest is one of the treasures of the Pacific Northwest. It sits atop the southeastern peak of the Chuckanut Range, a 4,827-acre area of land that lies west of Interstate 5 and south of Bellingham and Larabee State Park.
>
> Only in Blanchard Forest do the Cascade foothills come down to the sea. The Forest rises 2,000 feet above Puget Sound. Within it are two lakes, metamorphic cliffs and talus caves, five creeks, and a variety of freshwater ponds and wetlands. The Forest has a high diversity of fish, wildlife, and invertebrates, and is home to several endangered species, including the Townsend's big-eared bat and the marbled murrelet, a marine bird that roosts in old, upland forests whose habitat has been severely restricted due to the logging of old growth stands.
>
> Close to a major urban area, Blanchard Forest receives 30,000 to 50,000 visitors every year, and their number is expected to increase with the growing populations in Skagit and Whatcom Counties. Visitors come to enjoy hiking and camping at Lily and Lizard Lakes, hang gliding at Samish Overlook, rock climbing at the Oyster Dome, and panoramic vistas of Puget Sound, the San Juan Islands, and the Olympic mountains, all accessible by a system of about 20 miles of intricate, high quality trails.
>
> These recreational uses coexist with foresting activities. During the first three decades of the twentieth century, Blanchard Forest was logged almost entirely and only a small amount of old growth was spared. In the early 1930s, the land was transferred to the State Forest Board in trust, to be managed for the benefit of the local taxing districts for which the land had been the revenue base. The land was reforested, and in the early 1970s, the Department of Natural Resources (DNR) began to harvest second growth stands. Approximately 36 percent of the Blanchard block was harvested and regenerated in the third rotation between 1982 and 1992. Between 1992 and 2002, DNR harvested an average of 1.7 million board feet annually. As of 2002, the third generation was ready for harvest and DNR anticipated harvesting approximately 4 million board feet annually in three to four units ranging from 25 to 40 acres each.
>
> Attempts have been made to take Blanchard Forest land out of timber production and devote it to recreational and ecological uses, including a 1992

proposal by Habitat Watch to set aside 2,200 acres as a natural resources conservation area.

The present case involves another such effort. In 2006, with sizeable acreage ready for harvest, DNR sought to balance its legal obligations with community interests. DNR convened a stakeholder group called the Blanchard Forest Strategies Group, with 10 members representing various interests including recreation, conservation, and the timber industry. Over eight months, the group held 12 public meetings, considered the existing data and previous assessments, and reached a consensus recommendation for management of the Forest. This recommendation is known as the Blanchard Forest Strategies (the Strategies).

The Strategies propose to divide Blanchard Forest into four management zones: a core zone for conservation and recreation, a zone consisting of scattered areas to be managed for habitat conservation, a zone to be logged but subject to mitigation of visual impact, and a general management zone to be managed for revenue production. Because the plan calls for eliminating the timber harvest in the core zone (approximately one-third of the forest), the plan requires legislative appropriation of funds to compensate the trust beneficiaries for the lost revenue stream. The necessary compensation amounts to some $12 million, of which the legislature has thus far appropriated $4 million.

The core zone is an area of approximately 1,600 acres in the upper elevations. It includes the old growth stands that are habitat for the marbled murrelet. It also includes a significant majority of the recreational opportunities offered by the forest. The zone is to be "managed in a manner similar to a permanently protected [n]atural [r]esource [c]onservation [a]rea with emphasis on wildlife habitat, older forest conditions, vistas, and maintenance of forest ecosystem health; while allowing non-motorized, low impact recreation such as horseback riding, hiking, mountain biking, and hang gliding." The only foresting will be "ecological management," and timber revenue will be "a by-product, not an objective, of ecological management inside of the core." Where possible, ecological management will be conducted without roads; any necessary roads will be of minimum length, constructed with minimal impacts, and temporary.

The habitat conservation plan zone will be managed "consistent with the goals, objectives, and conditions of [DNR's 1997 Habitat Conservation Plan] regarding ecologically sensitive areas and protected species and habitat requirements."

In the high visual sensitivity zone, logging activities will be subject to visual impact mitigation pursuant to DNR's *Policy for Sustainable Forests* (Dec.2006).

The general management zone will be managed as it is presently, for revenue production. To support the harvest, DNR will develop a road system exclusively outside the core zone.

The Strategies call for a recreational overlay applicable to all management zones, for trails and other recreational uses. A working forest overlay also will be developed, emphasizing natural resource stewardship.

The Strategies provide for a five-year implementation phase, during which the legislature will be asked to appropriate funds to compensate for lost timber revenue. During this period, DNR will confine the timber harvest to areas outside the core zone. Until compensation is secured, the general management and the high visual sensitivity zones will be subject to intensified logging.

Finally, the Strategies will change no existing regulations, policies or plans. New projects will be subject to environmental review as before.

156 Wn.App 274 (footnotes omitted).

DNR reviewed the nonproject Strategies for potential adverse environmental impacts under SEPA, issuing a determination of nonsignificance (DNS). Several environmental groups challenged the DNS in King County Superior where the DNS was invalidated and DNR was ordered to prepare an environmental impact statement (EIS). DNR appealed.

The Court upheld DNR's DNS, reasoning that the Strategies would have no new significant adverse impacts over and above those resulting from the existing system of forest management and that the Strategies actually would reduce logging and, thus, reduce adverse impacts below present ongoing levels. The Court also observed that the agency properly relied on a previous nonproject EIS since the proposed new Strategies would not have any adverse impacts that were not analyzed in that EIS. The court did not specify whether DNR adopted or incorporated by reference the EIS.

Comment: Agencies sometimes unnecessarily prepare new SEPA threshold determinations for subsequent actions on the same proposal even though agencies are not required to do so unless there are substantial changes in the proposal or new information indicating significant adverse impacts. In addition, issuing repeated DNSs for actions on the same proposal seems to violate the literal mandate of WAC 197-11-600(4)(a). Similarly, agencies sometimes issue DNSs for

proposals even though they implicitly acknowledge the environmental significance of the proposal by adopting an EIS prepared for a previous proposal. In such cases, either a DNS and incorporation by reference of the EIS into the environmental checklist (if the responsible official concludes that the impacts of the new proposal would not be significant) or a DS and adoption of the previous EIS (if the responsible official concludes that the impacts would be significant) would be appropriate.

## VI. SUBDIVISION REGULATION

**A. City was not obligated to deny oddly configured lots in a short plat, apparently designed to meet literal provisions in City's development regulations, under the public interest provision of RCW 58.17.110: *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633, 234 P.3d 214 (Publication Ordered July 1, 2010).**

The four lots in a short plat met the City's minimum lot size requirement of 9,600 square feet only because the buildable area of the two front lots was connected by a long strip of land six inches wide from the buildable portion of each lot to unbuildable environmentally critical areas on a steep slope below the two interior lots. Opponents argued that the City should have denied the short plat because the oddly-shaped lots would not be in the public interest under RCW 58.17.110.

Division 1 of the Court of Appeals disagreed based on case law holding that a plat that meets applicable regulations may not be denied under the public interest provision. The Court also affirmed the trial court decision that the hearing examiner properly provided for drainage and correctly applied regulations governing access easements for interior lots and minimum lot size.

## VII. ZONING

**A. Rezone invalidated because of failure to comply with City comprehensive plan policies and code provisions governing such rezones: *Chinn v. City of Spokane*, 157 Wn. App.294, 236 P.3d 245 (August 3, 2010).**

West Central Development, LLC (West) applied to rezone a block, consisting of eight city lots (the Property) adjacent to the Spokane County Courthouse in the City of Spokane from "Office" to "Office Retail." Except for the County Courthouse, which borders the property, the land surrounding the Property is developed with small scale offices, many in former residences. The "Office" zone has a 35-foot height limit. The "Office Retail" zone has a 150-foot height limit. Brad Chinn and other owners of small-scale office and residential properties in the neighborhood opposed the rezone. The hearing examiner denied the proposed rezone on the basis of City comprehensive plan policies and code provisions governing such rezones. West appealed the examiner's decision to the City Council. The Council overturned the hearing examiner's decision and approved the rezone. Chinn filed a LUPA action challenging the rezone, and the Spokane County Superior Court reversed the Council's approval of the rezone and reinstated the hearing examiner's denial. West and the City appealed.

Division 2 of the Court of Appeals affirmed the lower court, reinstating the hearing examiner's denial of the rezone. The Court held that the Council's rezone decision was based on erroneous interpretation of the comprehensive plan and code provisions governing such rezones and a clearly erroneous application of the misinterpreted law to the facts.

The significance of the holding in the case is limited to the specific City comprehensive plan and code provisions that applied to the proposed rezone. However, the decision more generally serves as a reminder that when local governments adopt comprehensive plan or code provisions limiting their discretion to rezone property, the local legislative bodies are legally bound by those limitations in making quasi-judicial decisions on rezone applications.

## VIII. LAND USE LITIGATION

**A. County's final decision to refuse to docket a proposed rezone from commercial forest land to low density rural residential was appealable only through a timely LUPA action: *Stafne v. Snohomish County*, 156 Wn. App. 667, 234 P.3d 225 (Publication Ordered July 6, 2010).**

Property owner Stafne applied to the County for docketing of a proposed rezone from commercial forest land to low density rural residential. The County made a final decision denying the docketing request and, thereby, the proposed rezone. Stafne brought an admittedly untimely LUPA action challenging the County's denial of docketing of his rezone proposal, arguing that he was entitled to judicial review through a writ of mandamus or prohibition or declaratory judgment action. The Skagit County Superior Court dismissed the lawsuit, and Stafne appealed.

The County argued that the docketing refusal was reviewable by the Growth Board under the GMA and Stafne's failure to file a timely petition for review by the Growth Board precluded judicial review. Division 1 of the Court of Appeals disagreed, holding that the County's decision denying docketing of the rezone proposal was reviewable not by the Growth Board but exclusively through a LUPA petition. Since Stafne admitted that his LUPA petition was not timely, the Court affirmed dismissal of his lawsuit. In so deciding the Court also rejected Stafne's arguments that he was entitled to judicial review through a writ of mandamus or prohibition or a declaratory judgment action because Stafne would have had an adequate remedy at law through a timely LUPA action.

**B. Challenger lacked standing to bring a LUPA action because of failure to exhaust administrative remedies by filing a timely administrative appeal of the challenged permit; attorney fees and costs awarded for frivolous appeal: *West v. Stahley*, 155 Wn. App. 691, 229 P.3d 943 (As Amended August 5, 2010).**

Weyerhaeuser proposed to operate a log yard on property leased from the Port of Olympia and to construct new buildings and utility infrastructure to support the log yard. After the Port conducted threshold SEPA review, West's successful administrative appeal of a SEPA DNS, and the Port's subsequent issuance of a Mitigated DNS, the City of Olympia issued an engineering permit allowing the Port to construct utility infrastructure. The permit was issued on September 5, 2007, but was not entered into the public record until October 9, 2007. West had actual knowledge of the issuance of the permit by October 10, 2007. On October 18, 2007, West filed a lawsuit challenging the engineering permit on a number of grounds. On October 30, 2007, 20 days after receiving actual notice that the City had issued the permit, West filed an administrative appeal to the hearing examiner. The hearing examiner dismissed the appeal as untimely because West had not filed the appeal within the applicable 14-day limitation period.

The Thurston County Superior Court dismissed the lawsuit because the only means of obtaining judicial review was under LUPA but West, by failing to file a timely administrative appeal of the permit to the hearing examiner, lacked standing to bring a LUPA action. West appealed.

Division 2 of the Court of Appeals affirmed, holding that the permit could be legally challenged only through a LUPA petition, and West lacked standing to bring a LUPA action because he had failed to exhaust the available administrative remedies by filing a timely administrative appeal. The court rejected West's arguments that his failure to exhaust should be excused because the City's notice of permit issuance was defective and the application of equitable tolling was appropriate. The Court, following established case law, held that notice defects did not excuse the failure to exhaust because West had actual notice of permit issuance over 14 days before filing an administrative appeal. And equitable tolling, even if it were appropriate, could not have made a difference because that doctrine would have tolled the running of the limitation period only between issuance of the permit and West's actual notice of issuance.

Attorney fees and costs were assessed upon West and awarded to Weyerhaeuser and the Port under RAP 18.9, because the appeal was found to be frivolous.

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# Boards Update

## Recent Decisions from the Environmental Hearings Boards

*By Andrea McNamara Doyle, Environmental Hearings Office*

### I. Pollution Control Hearings Board Cases

***Five Corners Family Farmers v. Ecology and Easterday Ranches, Inc.,***
PCHB No. 09-106
Findings of Fact, Conclusions of Law and Order (November 3, 2010)

Five Corners Family Farmers (Five Corners) appealed the Notice of Construction (NOC) approval issued by the Washington Department of Ecology (Ecology) governing air emissions generated by operation of a 30,000 head cattle feedlot between Connell and Mesa, in Franklin County. The animals will generate substantial quantities of waste which releases ammonia and hydrogen sulfide into the air. Easterday Ranches, Inc. (Easterday) was required to undertake air dispersion modeling to determine whether the emissions would exceed acceptable source impact levels (ASILs) for the toxic air pollutants ammonia and hydrogen sulfide.

Well before Easterday filed its NOC application, Ecology had begun a rulemaking process to update its ASIL standards for a wide range of toxic pollutants, including ammonia and hydrogen sulfide. The purpose of the update was to incorporate the most recent and accurate scientific information in order to protect human health and the environment from individual and cumulative impacts from toxic air pollutant emissions.

After Ecology adopted the new ASIL standards, but four days before they took effect, Ecology deemed the Easterday NOC application "complete." Ecology granted Easterday's NOC approval, applying the new ASIL standards to the application based upon its practice of evaluating a proposal based on the standards in place at the time an application is deemed complete. Easterday's air dispersion modeling showed that projected ammonia emissions would meet the old ASIL standard, but would exceed the new standard.

The Pollution Control Hearings Board (Board) rejected Ecology's motion for summary judgment regarding which ASIL standards were applicable and reserved the issue for hearing. At hearing, Ecology urged the Board to give deference to its policy of applying the standards in place at the time an application is deemed complete. The Ecology "policy" in question was not a written policy and it had been applied in just one other instance approximately ten years before. Ecology's rationale for the policy was based on the need for certainty and predictability and to avoid applicants having to engage in complex re-engineering to meet changing standards.

The Board initially concluded that Ecology's policy was not entitled to significant deference. The deference given to guidance, or even an interpretive rule, is based on the merit of the analysis and the persuasive impact of the content.

In this case, the Board found unpersuasive Ecology's rationale for allowing standards in place at the time an application is complete. This was because there were no complex or expensive reengineering that would be required to comply with the more protective standards, and Easterday could achieve the newly adopted ammonia levels by reducing the size of the herd without need for further engineering or other changes in the facility or its operations.

The Board acknowledged that Ecology had regulatory flexibility when instituting new standards, but that such discretion should be exercised to protect the public health and safety and provide relief only as necessary to avoid true hardship to applicants for air quality approval. In this case, applying the new standards were not shown to create a significant hardship on Easterday, in contrast to exposing the public to ASIL exceedences for ammonia, in perpetuity.

Although Easterday's dispersion modeling projected an exceedence of the ASIL for ammonia, the Board determined it was premature to conclude that the project would harm human health and the environment. This was because the regulations contemplated further modeling and / or analysis when initial screening models projected an exceedance, and the Board concluded the additional information was necessary to make an informed decision on whether or how the project could achieve safe emission levels.

On this basis, the Board remanded the matter to Ecology for Easterday to conduct further modeling consistent with the Board's opinion, which also indicated that the assumptions used in the modeling to calculate the benefit of best management practices (BMPs) should be based on scientifically sound data, rather than assuming the highest reported emission reduction rates for new BMPs as Easterday's initial screening model had done.

The Board rejected other claims advanced by Five Corners challenging the adequacy of State Environmental Policy Act (SEPA) review and whether ambient air monitoring should have been a required condition of the NOC approval. As to SEPA, the Board first ruled that Five Corners

was not barred from raising a SEPA challenge in the case for failure to comment during the SEPA comment period, where a member of Five Corners had submitted a letter to the County (lead agency) raising environmental concerns and other objections to the project within the SEPA comment period. But the Board ultimately ruled against Five Corners on the substance of their SEPA claim challenging as improper Ecology's decision to rely on existing SEPA documents from the County rather than conduct supplemental analysis. The Board found that Ecology acted consistently with the governing regulations addressing use of existing documents and that Five Corners' arguments on cumulative impacts and windblown contaminants were unsupported by the evidence.

As to Five Corners' contention that Ecology should have required ambient air monitoring as a condition of the NOC approval, the Board concluded that Ecology properly exercised its discretion under the statute by requiring monitoring of source control BMPs rather than monitoring of the ambient air surrounding the site. The Board concurred with Ecology's evaluation that there was no feasible and effective protocol for requiring ambient air monitoring in the area of the feedlot.

***Bruce King and Legacy Creative Ventures, LLC v. Ecology,*** PCHB No. 09-064
Order Granting and Denying Partial Summary Judgment (September 1, 2010)

Mr. King challenged an administrative order directing him to stop working in or adjacent to wetlands until the wetland boundaries and buffers were clearly marked and field-verified by Ecology, and a mitigation / restoration plan was submitted to and approved by Ecology for all wetlands disturbed on the property. King contested Ecology's allegation that adding woodchips to wetlands constituted a discharge of pollution to state waters. He also maintained that because the U.S. Army Corps of Engineers (Corps) allows farming in wetlands, Ecology was precluded from regulating his farming activity.

The Board granted partial summary judgment to Ecology, holding that the addition of woodchips to wetlands could constitute pollution. The Board's decision was based upon the broad definition of pollution in the state Water Pollution Control Act (Ch. 90.48 RCW), which includes any fill material that alters the physical, chemical, or biological properties of wetlands. The Board found that the addition of woodchips could impair the wetlands' ability to perform critical ecological functions, such as holding excess water runoff and releasing water more slowly, removing excess nutrients, and serving as habitat for upland and aquatic species.

The Board declined to rule on summary judgment whether federal law precluded Ecology from regulating farming in wetlands, but recognized generally that states may impose more stringent standards to regulate water pollution than what is required by federal law. The Board has also previously held that Ecology has the authority under state law to regulate wetlands that the Corps has determined to be exempt from federal regulation. The parties subsequently reached a settlement, and the Board dismissed the appeal.

***Rosemere Neighborhood Assoc. et al. v. Ecology and Clark County,*** PCHB No. 10-013
Order Denying Summary Judgment (August 26, 2010)

Three environmental groups challenged an agreed order entered into by Ecology and Clark County related to bringing Clark County into compliance with the National Pollution Discharge Elimination System Phase I Municipal Stormwater General Permit (Phase I Permit). Ecology had initially issued a notice of violation to Clark County alleging the County had, in addition to being several months late in adopting its required ordinances, violated the permit by adopting a stormwater flow control policy that failed to meet the permit's minimum requirements.

Under the agreed order, Ecology approved an alternative flow control program whereby the County would allow developers to utilize the older, less stringent flow control standard and the County would make up the difference in flow control protection through a capital facilities mitigation program undertaken at County expense. The mitigation program would be applied to new or redevelopment projects with vesting dates on or after the effective date of the agreed order.

The Phase I Permit allows for the use of alternative flow control programs so long as they provide an equal or similar level of protection as the permit's default flow control requirements provide. Appellants' challenge was based on several different ways in which they believe the County's alternative program fails to provide equal or similar protection and also fails to meet the federal and state law requirements to reduce stormwater runoff to the maximum extent practicable (MEP) and apply all known, available and reasonable methods to control runoff and protect water quality (AKART).

The Board denied the parties' cross motions for summary judgment on the basis that it was premature to decide whether the agreed order provides equal or similar protection of receiving waters as the Phase I Permit when there were several areas the Board believed needed further development of the factual record. Specifically, the Board found the Phase I Permit ambiguous regarding the relationship between the permit's deadlines and state vesting laws, and determined that resolution of this ambiguity was needed before the Board could reach the equivalency question.

Although it denied summary judgment, the Board held that the vested rights doctrine does not, as a matter of law, preclude municipal permittees from applying the Phase I Permit's flow control standard to new or redevelopment projects that vested before they adopted their updated flow control ordinances. The Board also agreed

with Rosemere and Ecology that the state's vesting laws do not exempt municipal permittees from complying with MEP and AKART requirements and that the Phase I Permit requires them to exercise their discretionary authorities to the fullest extent under vesting laws.

Left open for hearing, then, were the factual questions regarding the baseline level of protection afforded by the Phase I Permit in light of the vesting limitations and the specific details regarding how Clark County's mitigation program compares to that baseline.

The hearing was held September 27 – October 1, 2010. The Board's decision is currently pending.

***West Sound Utility District and Hartstene Point Water-Sewer District v. Ecology,*** PCHB No. 09-152
Order on Summary Judgment (July 27, 2010)

Ecology modified a National Pollution Discharge Elimination System (NPDES) permit after Mason County transferred ownership and operation of a wastewater treatment plant to a newly formed water-sewer district, Harstene Pointe. Because the new water-sewer district had entered into an interlocal agreement with another public entity, West Sound Utility District (West Sound), for operation of the plant, Ecology listed both Hartstene Pointe and West Sound on the NPDES permit, as owner and operator.

West Sound objected to being listed as a co-permittee, asserting that through the interlocal agreement, Harststene Pointe had accepted all liability and responsibility for permit compliance. Both districts appealed Ecology's decision to the Board, and Ecology moved for summary judgment.

The Board granted summary judgment to Ecology, holding that the agency had broad authority under water pollution control laws to administer the NPDES permit program, and to decide which entities must be listed on water quality permits. Because the undisputed facts demonstrated that both the owner district (Hartstene Pointe) and the operator district (West Sound) had responsibilities related to discharges and permit compliance, Ecology had the authority to require both entities to be named as permittees on the NPDES permit.

The Board reiterated holdings from other decisions that a separate contract, such as the interlocal agreement in this case, may establish the rights and obligations as between the two parties who sign it, but it cannot overcome the strict liability scheme of state and federal water pollution laws or trump Ecology's obligations to identify responsible entities on the permit.

The Board also concluded that Ecology properly used the "minor modification" procedure allowed for by the general terms of the permit and federal regulations to make the change on the permit. The Board rejected arguments from West Sound and Hartstene Pointe that the publicly owned operator need not be listed on a permit issued to another public entity and that the roles and responsibilities of the two parties had to be defined in the permit.

***Methow Valley Irrigation District v. Ecology,***
PCHB No. 04-165
Findings of Fact, Conclusions of Law, and Order (July 14, 2010)

The Board sustained a penalty of $20,200 assessed by Ecology for Methow Valley Irrigation District's (MVID) failure to comply with measuring and reporting requirements contained in an administrative order. The District had been ordered to measure input to the MVID irrigation system from the Barkley Irrigation Company.

The Board ruled on summary judgment that MVID had failed to comply with Ecology's administrative order. After a hearing on the reasonable amount of a penalty, the Board concluded the $20,200 amount was reasonable under the facts and circumstances. The Board found that MVID had failed to make timely efforts to comply with the clear obligations enunciated in the Order.

***Christensen v. Ecology,*** PCHB No. 09-098
Findings of Fact, Conclusions of Law, and Order (June 18, 2010)

Ed Christensen and Aberdeen Landing, LLC appealed a $79,000 penalty assessed by Ecology for violations of the NPDES Construction Stormwater General Permit (Construction SWGP) and failure to comply with the terms of an administrative order requiring the owner to exercise storm water control during construction at the residential development site known as Lakeview Terrace.

Mr. Christensen cleared over six acres during the fall of 2007, a portion of which was comprised of steep slopes draining to gullies that connected to Wilson Creek, a fish-bearing stream. The clearing activity left a large area of disturbed soil that was not adequately protected from erosion. Subsequent rain and storm events created significant erosion problems on the site.

Ecology observed numerous violations of the Construction SWGP in site visits during 2007 and issued warning letters to Mr. Christensen identifying steps that would be necessary to come into compliance with the permit. Mr. Christensen attempted to provide storm water control, but as a result of a series of financial problems he attributes to the economic downturn, he did not have means to pursue the BMPs necessary to adequately control erosion sources on the site. The site remained largely uncontrolled for another two winters due to his financial inability to address the identified problems.

The Board found a substantial penalty was appropriate based on the serious and ongoing nature of the violation and Ecology's goal of deterring violations by others in the construction industry. The Board reduced the $79,000 penalty to $50,000 based upon Mr. Christensen's significant, although insufficient, efforts to control erosion on the site and the lack of evidence that sediment from the site actually entered a fish-bearing stream.

***KP McNamara v. Ecology,*** PCHB No. 09-001
Findings of Fact, Conclusions of Law, and Order (June 9, 2010)

This case involved an appeal of a $20,000 penalty for violations of dangerous waste regulations at a facility in Vancouver that cleans and refurbishes bulk containers (totes) for the chemical industry. The facility was fined for several violations related to the company's receipt and handling of totes from off-site generators that were not "empty" under regulatory definitions, and its shipping of rinse (waste) water for disposal in Oregon. The violations were observed during a series of compliance inspections conducted over a period of more than one year.

Prior to hearing, the Board issued a summary judgment order resolving several of the legal issues in the case including that Kerry McNamara, as owner of the KP McNamara facility, could be held liable for the company's violations. The Board also determined on summary judgment that once the facility elected to characterize its rinse water as dangerous waste, based on its process knowledge in lieu of batch testing, the company was required to manage it in accordance with the dangerous waste regulations and failed to do so.

The Board held over for hearing the issue of whether the facility was operating as an unpermitted treatment, storage, and disposal (TSD) facility, by virtue of repeatedly receiving and storing totes from off-site generators that contained more than a residual amount of unlabeled and potentially dangerous material. In doing so, the Board rejected KP McNamara's assertion that it had no duty to address improperly labeled or manifested containers coming to its facility from off-site sources. The reasonableness of the penalty amount was also reserved for hearing.

After an evidentiary hearing, the Board found that KP McNamara's receipt of non-empty totes from off-site generators was more than occasional or incidental and concluded that KP McNamara's repeated receipt of these types of totes required the facility to be permitted as a TSD facility or otherwise comply with the TSD regulations. After reviewing the nature of the violations, the company's prior history, and its remedial actions, the Board affirmed the $20,000 penalty in full. The Board determined that a history of similar violations at a sister facility in Ohio argued against a reduction in the penalty amount, and that the company's efforts at remedial actions were already factored into Ecology's original calculation of the penalty so that they did not justify a further reduction.

KP McNamara has appealed the Board's decision to Clark County Superior Court.

***Anderson Parker Investments, LLC v. Ecology,***
PCHB Nos. 09-114 and 09-115
Order Granting Partial Summary Judgment (May 20, 2010)

The Appellant challenged Ecology's reversal of the Chelan County Water Conservancy Board's (Conservancy Board) decision approving changes to and the transfer of its water right. The Appellant held an unadjudicated water right claim to divert water for seasonal irrigation from the Mad River. The Appellant sought a change from seasonal to year-round use, and a change in the purpose of use from irrigation to municipal, community domestic, and/or domestic use. The new proposed points of diversion were all located downstream from the existing point of diversion, some as far as 47 to 50 miles away.

The parties submitted several issues to the Board on summary judgment, including issues related to the use of priority dates of unadjudicated claims, the need for public interest analysis and agency consultation requirements, and potential conditions to avoid impairment.

The Mad River joins with the lower Entiat River, which in turn, has a confluence with the Columbia River. The Columbia River is subject to an instream flow rule, which was adopted in 1980. Numerous water right holders have water rights with priority dates established after the instream flow rule. Therefore, when minimum average weekly flows are not being met in the river, these junior water right holders may have their water use interrupted on a week-to-week basis. Approximately 100 junior water right holders who have water right certificates or permits are located between the existing and proposed points of diversion affected by this change application.

The Conservancy Board determined that the expansion from seasonal use to year-round use may impair instream flows for a few weeks in November or March, but that the proposed change would result in greater flows in the lower Entiat River and portions of the Columbia River during the entire irrigation season. The Conservancy Board found that the greater flows during the irrigation season were sufficient mitigation for the lower winter flows, because the impact on winter flows were smaller in scale and might only occur once every 20 years. The Conservancy Board required the Appellant to permanently transfer the portion of the water right claim that provided additional flows during the irrigation season into the state trust water rights program.

The Columbia River instream flow rule provides that future approvals of water use that would conflict with the minimum instream flows require an analysis of whether an overriding consideration of the public interest supports the approval of the water right application. It further provides that the Director of Ecology shall only authorize such approvals when it is clear that the overriding consideration of the public interest will be served, after consulting with the Directors of the Department of Fish and Wildlife, and

the Department of Agriculture, and the Commissioner of Public Lands.

The Board agreed with Ecology that Ecology's ability to use the priority date of an unadjudicated water right claim to regulate against holders of water right certificates was limited. The Board rejected Appellant's argument that Ecology had a duty to seek injunctive relief in Superior Court on behalf of water change applicants to establish the priority date for the water right claim as part of its responsibility to process water right change applications. Citing an earlier Board decision of *Strobel v. Ecology*, PCHB No. 96-52 (1997), the Board reaffirmed its prior holding that the water codes are designed to prevent conflicts rather than permitting all requested uses and then requiring Ecology to regulate them to prevent impairment.

The Board found nothing in the record indicating that an analysis of the overriding consideration of the public interest was ever conducted, or that the directors of the listed state agencies were consulted prior to the approval of the application, and concluded that the Conservancy Board erred in not requiring these steps before approving the application.

The Board rejected the Appellant's request for the Board to condition the change application in order to avoid potential impairment problems on the basis that the necessary restructuring was more appropriately accomplished with Ecology or the Conservancy Board. The Board did not reach the issue of whether the additional water put into the stream during the irrigation season could mitigate for impaired flows during the winter season.

After the summary judgment order issued, the parties reached a settlement and the Board dismissed the appeal.

***Greenbriar Construction Co. v. Ecology,***
PCHB No. 09-110
Order Granting Partial Summary Judgment (May 11, 2010)

Greenbriar Construction Corporation (Greenbriar) contested a $36,000 penalty issued by Ecology for water quality violations related to a residential development project in Bellingham known as Emerald Cottages. In its appeal, Greenbriar alleged that Ecology's press release announcing the penalty had disseminated inaccurate and damaging information about the company and asserted that the PCHB should reduce the penalty amount accordingly.

On summary judgment, the Board addressed the question of whether false or inaccurate information in an Ecology press release, if proven, is a relevant to the Board's consideration as a basis for reducing the amount of a civil penalty. The Board concluded that such an inquiry is both unnecessary and ill-advised.

The Board reasoned that to do so would significantly expand the nature of the Board's inquiry, and would necessarily require an evaluation of alleged harm to a company's reputation (i.e., a "non-financial penalty" imposed by Ecology) that may have been caused by inaccuracies in press release. To perform such an evaluation, the Board would need to conduct, in essence, a defamation trial within the scope of a penalty hearing. The Board would be required to take evidence and make findings and conclusions regarding the truth or falsity of statements in the press release, the appellant's reputation in the community, and the nature and extent of any harm or damage to that reputation caused by any false statements, all of which are more appropriately done in the context of a defamation action initiated in court. The Board noted, however, that to the extent the Board finds a penalty order (rather than a press release) to have been based on inaccurate information, or that Ecology otherwise lacks sufficient proof for its allegations or legal conclusions, the Board can and does exercise its authority to modify the amount of a penalty accordingly.

After the summary judgment order issued, the parties negotiated a settlement agreement in which the penalty was reduced to $24,000, half of which would be paid to Ecology and half to a salmon enhancement association in the area. At the joint request of the parties, and based on the settlement, the Board dismissed the appeal.

***Center for Environmental Law & Policy (CELP) and Five Corners Family Farmers v. Ecology and Easterday Ranches Inc.,*** PCHB No. 09-113
Order Granting Summary Judgment (May 3, 2010)

This appeal challenged Ecology's issuance of a reservoir permit for a reservoir that will serve as water storage for a 30,000 head cattle finishing feedlot located between Connell and Mesa, in Franklin County. Appellants contended that Easterday Ranches intended to store permit-exempt stockwater in the reservoir, in addition to water to be stored pursuant to a previously transferred water right. Appellants argued that the reservoir permit also authorized storage in the reservoir of the permit-exempt stockwater, raising questions about how Ecology processed the reservoir permit application, whether the storage of stockwater amounted to use of a new water right, and related questions.

The Board concluded on summary judgment that there were no materially disputed facts as to the scope and limitations of the reservoir permit. Although Appellants asserted that the permit-exempt stockwater would be directed to the reservoir, they did not support this assertion with anything other than speculation and circumstantial inference. Conversely, the Board had before it the terms of the Reservoir Record of Examination (ROE), which limited water storage to the transferred water right, and an Ecology staff declaration, stating that Ecology did not interpret the permit to authorize storage of permit-exempt stockwater in the reservoir.

The Board went on to conclude that if Easterday should attempt to store permit-exempt stockwater in the reservoir, or use water in excess of the metered limits set forth in the ROE, Ecology could take enforcement action. However, the Board's decision could not be based on fears or suppositions

that the terms of the permit would be violated at some future time. Having made these conclusions, the remainder of the Appellant's case failed, as each claim assumed storage of permit-exempt stockwater in the reservoir.

One Board Member dissented, concluding there were sufficiently disputed facts to merit hearing. Of final note, neither the Conditional Use Permit issued by Franklin County for the feedlot, nor the Ecology decision allowing transfer of the underlying water right, were appealed by any party.

***Sierra Club et. al, v. Southwest Clean Air Agency and Trans Alta Centralia Generation LLC,*** PCHB No. 09-106
Order Granting Summary Judgment (April 19, 2010)

Several conservation organizations challenged the renewal of an air operating permit to the Trans Alta coal-fired power plant in Centralia on the basis that the permit failed to include Reasonably Available Control Technology (RACT), and that specific limits for mercury and carbon dioxide emissions need to be set. They also argued for stricter limits for nitrogen oxide emissions because these emissions are allowed at levels that adversely impact the air quality at the region's national parks and wilderness areas.

The Board agreed with the Respondents that air operating permits are intended to collect existing substantive requirements into a single permit, but are not intended as a vehicle for creating new substantive requirements. Although the Board found that the general emissions standard (sometimes referred to as the nuisance standard) is an applicable requirement for purposes of the air operating permit, the Board rejected the Appellants' argument that the general emissions standard requires the setting of emission limits on specific pollutants in order to be enforceable. The Board also concluded that whether the specific standards and conditions contained numeric or narrative limits, they would be new substantive requirements that cannot be added when an agency issues or renews an air operating permit.

With respect to RACT, the Board noted that state law defines RACT as those standards and requirements contained in rules or regulatory orders "in effect at the time of operating permit issuance or renewal." Although Ecology and the local air authorities have authority to update RACT determinations, there is no enforcement mechanism requiring them to do so. As part of its discussion concerning RACT, the Board agreed with the Appellants that RCW 70.94.154(4) anticipates Ecology will develop a list of sources and source categories requiring RACT review, and that this will be reviewed every five years. The Board found, however, it lacked authority to order Ecology to undertake RACT reviews as outlined in statute.

Finally, the Board found that the Appellants were not required to exhaust administrative remedies by first requesting the local air authority or Ecology to exercise its authority to set emission limits before filing the appeal with the Board. Exhaustion of administrative remedies was not applicable in this case because there was no failure by the agency to perform a nondiscretionary duty. The Board's summary judgment order was appealed to Thurston County Superior Court. Appellants are seeking direct review from the Court of Appeals, without objection of Respondents, and the Board has issued a Certificate of Appealability.

***Devine v. Ecology,*** PCHB Nos. 09-075 and 09-082
Order Granting Summary Judgment (April 9, 2010)

Mr. Devine challenged Ecology's denial of his applications for water rights to divert surface water for two hydroelectric projects on tributaries of the Skagit River. Ecology's denials were based on Devine's failure to obtain the signatures of the landowner, the U.S. Forest Service, on the applications despite having many years to do so. Ecology sought summary judgment.

The U.S. Forest Service had indicated it would only sign the application if Devine obtained a Federal Energy Regulatory Commission (FERC) license or a Forest Service Special Use Permit for his proposed hydroelectric projects. Mr. Devine was unable to get FERC approval despite several years of effort. The Board rejected Mr. Devine's argument that he was caught in a catch-22, whereby he could not receive his FERC license without his water rights but could not receive his water rights without the Forest Service's signature which, in turn, required the FERC license.

This was because FERC had previously denied Mr. Devine's applications, not due to lack of a water right, but on the basis that they would unreasonably diminish the fishery value of the Skagit River in violation of the federal Wild and Scenic Rivers Act. FERC's denials were later upheld by the Ninth Circuit Court of Appeals. The Board observed that the U.S. Forest Service does not require a state water right permit to be issued before it will process a FERC license or a Forest Service Special Use Permit request. The Board found Mr. Devine had no active applications before FERC and that a reasonable time had passed for him to obtain the necessary signatures.

## II. Shorelines Hearing Board Cases

***Walker & Seidl v. San Juan County and Friends of the San Juans,*** SHB No. 09-012
Findings of Fact, Conclusions of Law, and Order (August 27, 2010)

In a split decision, the Shorelines Hearings Board (Board) overturned San Juan County's denial of a shoreline substantial development permit (SSDP) for a two-party joint use pier, ramp, and float on Shaw Island. The Walkers and Mr. Seidl were seeking year-round use of the proposed dock for loading, launching, recreation and moorage to replace one applicant's mooring buoy and the other applicant's crude log slide, both of which were historically used for water access on a seasonal basis. One of the applicants now resides full time on Shaw Island and the other intends to within in the next few years.

The County Hearing Examiner had denied the proposal on the basis that the applicants had failed to show existing facilities were not adequate or feasible, and that alternative moorage would not be available within a reasonable period. The examiner's denial was further based on the examiner's conclusion that the dock would adversely impact views and was inconsistent with habitat regulations protecting eelgrass beds.

After hearing the evidence, the Board concluded that existing facilities were not adequate for the reasonable uses proposed by the applicants, and that alternative moorage was not adequate or feasible. The Board also found the dock would further the County's policy favoring joint use facilities and would prevent additional dock development on 865 lineal feet of shoreline. The Board's decision was based on evidence from the owner of the island's only commercial marina that, given the shortage of slips and current waiting list, no moorage would be available there within a reasonable timeframe. The Board also found that winter conditions at the project site make the mooring buoy option dangerous and unworkable for the regular year-round uses anticipated. In evaluating the adequacy of existing facilities, the Board specifically rejected the appellants' argument that advancing age and infirmity should be a basis for finding the mooring buoy and/or log slide inadequate.

The Board further concluded the proposal was consistent with the County's provisions designed to protect the shoreline and aquatic environment. The Board was unconvinced by Intervenor Friends of the San Juans' argument that the County's regulation requiring structures to be designed to avoid impacts to eelgrass was intended to operate as an absolute prohibition on any structures that impacted eelgrass to any degree. The specific facts of this case showed that eelgrass would not be significantly impacted by the project.

The float was located in a long-standing eelgrass void with setbacks on all sides. The pier and ramp were elevated and fully grated. The project size was limited and the alignment was arranged to minimize any potential shading. The expert testimony indicated no significant impact to eelgrass would be expected. The limited impact to eelgrass that would occur from two pilings that would, by necessity, be placed within the eelgrass bed would be mitigated by removing a nearby mooring buoy anchor. The Board concluded the project had been designed to avoid impacts to the environment to the maximum extent possible and had fully mitigated any remaining impacts.

The project's impacts on views and aesthetics were evaluated, and the Board found that the structure had been designed to minimize visual impacts. The pier, ramp, and float would be visible in the natural landscape, but it would not be prominent and would not block views.

The Board also considered whether the project approval would create a threat of cumulative impacts to the shoreline environment. Based on the standards identified in prior cases analyzing when a cumulative impacts analysis is appropriate for SSDPs, the Board concluded that the triggering conditions for cumulative impact analysis (*e.g.*, harm to habitat, loss of community use, and significant degradation of views and aesthetic values) were not present.

Even if cumulative impacts were considered, the Board did not see a threat of similar applications or approvals because the conditions along the nearby shoreline and the unique presence of an eelgrass void set this case apart. Based upon the project's compliance with the governing regulations, the Board remanded the case to San Juan County for issuance of a SSDP.

A concurrence/dissent found that the appellants failed to show existing facilities (mooring buoy, log slide) were not adequate and would have denied the permit on that ground. The concurrence/dissent would have engaged in cumulative impacts analysis, but would have found no likelihood of cumulative impacts on the facts of this case.

***Seaview Dunewatch v. Pacific County, Craig Wong and Kathleen Kee,*** SHB No. 10-004
Amended Order Granting Summary Judgment (August 9, 2010)

Opponents appealed Pacific County's approval of a SSDP for the construction of a road and residential development near Seaview. The County's approval allowed the division of one previously developed, non-conforming, shoreline lot within the Urban Environment into three smaller lots, two within the Seaview Urban Growth Area (UGA) and one west (waterward) of the UGA.

On summary judgment, the Board determined that the proposed division of land violated the minimum lot width requirement for the urban environment contained within the County's Shoreline Master Program and vacated the SSDP. The Board ruled that the division constituted an improper expansion of a non-conforming use because it created more non-conforming lots, and increased the intensity of the non-conforming use within the shoreline.

The Board denied the respondents' motion for reconsideration but amended its summary judgment order to clarify certain distinctions between the situation in this appeal and an earlier Board decision in *Peterson v. Templin Foundation*, SHB 99-4 (1999), where the Board had upheld a proposed subdivision that reconfigured four lots into six lots in the Rural Environment by reducing the number of waterfront lots from four to two and creating four upland lots.

***Engdahl & Patterson v. City of Burien,*** SHB No. 10-007
Order on Summary Judgment (July 16, 2010)

The City of Burien approved a SSDP for a replacement bulkhead for applicant Mario Segale. David Engdahl and Diane Patterson, who own beachfront property approximately 200 feet southwest of the Segale property, appealed the City's approval. They raised concerns primarily about the potential for impacts to the beach, including the aesthetic impact, of the bulkhead replacement.

The primary legal question presented to the Board on summary judgment was which shoreline master program (SMP) should apply to the City's permitting decision. The City of Burien incorporated in 1993. Prior to its incorporation, the King County Shoreline Master Program (KCSMP) applied to the area. Upon incorporation, the City continued to utilize the King County Code (KCC) Chapter 25.16, as its SMP. The City considered KCC Chapter 25.16 to be its SMP then, and still does today.

Petitioners argued that the City did not have a legally adopted SMP and therefore the Segale SSDP must be evaluated under the Department of Ecology's guidelines and rules, and the City's draft SMP. The Board rejected this argument. Instead, the Board concluded the applicable shoreline master program was the KCSMP that was in place at the time of the City's incorporation, because the City had failed to adopt and obtain Ecology's approval on any other SMP. Applying the provisions of the KCSMP, the Board concluded that the bulkhead met permitting requirements and granted summary judgment to the applicant and the City.

After Petitioners were unsuccessful on a petition for reconsideration to the Board, they filed an appeal in King County.

***Gray v. San Juan County,*** SHB No. 10-001
Findings of Fact, Conclusions of Law, and Order (July 2, 2010)

Mr. Gray applied for a SSDP to install a dock on his property on Decatur Island in San Juan County. His application was denied by San Juan County on the basis that he failed to show existing facilities were inadequate. Decatur Island is not served by public ferry, and residents must use alternative transportation to access their properties.

Mr. Gray had informally used some floats extending out from his beach in the past, but was seeking approval to improve the system and have a walkway and pilings for the float system. The Board concluded that existing facilities were not adequate for access to the property. Reliable and workable alternative access was also unavailable.

While the Board found that the unique facts of this case and the lack of public transport to the island supported approval of the dock proposal, it specifically rejected the argument advanced by Mr. Gray that advancing age or infirmity could be the basis for finding existing facility inadequate. There was no evidence the proposal would harm the shoreline environment or impact eel grass in the area.

The Board remanded the case to San Juan County to issue the SSDP with a condition requiring Mr. Gray and his successors to allow joint use of the dock by a neighboring property on reasonable terms and conditions. The decision further directed the SSDP must be conditioned on the applicant complying with any requirements placed on the project by the Washington Department of Fish and Wildlife through the Hydraulic Project Approval (HPA) process.

***KS Tacoma Holdings LLC v. City of Tacoma, et al.***
SHB No. 10-002
Order of Dismissal (June 10, 2010)

KS Tacoma Holdings LLC (KS Tacoma), owner of a hotel in downtown Tacoma, filed a petition with the Board challenging a shoreline permit revision the City of Tacoma issued to Hollander Investments allowing modifications to a previously approved mixed use hotel project located along the Thea Foss Waterway.

The City of Tacoma and the project proponents moved for dismissal contending KS Tacoma lacked standing to bring the appeal. The revision involved a number of changes to a hotel development approved on a vacant lot adjacent to the public esplanade at the Thea Foss Waterway. The original design included a hotel in a single tower, spa, ground floor retail/restaurant facilities and several residential units.

A first revision increased the number of hotel rooms and decreased the number of residential units. KS Tacoma failed to appeal either the original approval or the first revision. The revision sought by Hollander Investments changed the configuration from one to two towers with a single story structure bridging the middle. Retail/restaurant facilities were still located on the ground floor. The maximum height in the revised project was almost identical to the original proposal and the massing effect was reduced by the two tower design.

KS Tacoma is the owner of Hotel Murano in Tacoma. The Board analyzed KS Tacoma's standing under the applicable standards: (1) petitioner suffers a specific injury in fact, (2) the interest petitioner seeks to protect falls within the zone of interests the statute is designed to protect, and (3) the Board has the power to redress the injury.

The Board concluded that KS Tacoma failed to demonstrate an injury in fact caused by the revision in question. The Board refused to expand the inquiry to impacts of the entire project, focusing instead on the revision before it. KS Tacoma alleged injury to recreational interests and aesthetic interests of its employees and customer. Standing law generally does not allow a party to base standing on the rights of third parties, such as the Hotel Murano customers and employees.

To the extent the company was expressing its own injury through diminished business due to view impacts or change in the up-scale character of the Thea Foss area, those interests were economic and not within the zone of interests protected by the Shoreline Management Act. Accordingly, the Board found insufficient grounds for standing and dismissed the petition.

The case is now on appeal in Thurston County Superior Court, where an application for direct review by the Court of Appeals is pending.

*Andrea McNamara Doyle was appointed by Governor Gregoire in 2006 as a Board Member on the Pollution Control Hearings Board and Shorelines Hearings Board and has served as director*

*of the Environmental Hearings Office since July 2009. Andrea was previously Of Counsel at Davis Wright Tremaine, LLP, and spent the first decade of her legal career with the Washington State Senate as a non-partisan staff attorney. Andrea would like to acknowledge the assistance of her fellow Board Members Kathy Mix and Bill Lynch, and Administrative Appeals Judges Phyllis McLeod and Kay Brown, in compiling the case summaries for this newsletter.*

## Recent Decisions from the Growth Management Hearings Boards

*By Laura C. Kisielius, Plauché & Stock, LLP, and Tadas Kisielius, GordonDerr LLP*

This update does not provide a comprehensive summary of all recent decisions issued by the Growth Management Hearings Board ("Board"). Rather, it describes those decisions, or portions decisions, that contain issues of particular interest or new interpretations of the Growth Management Act ("GMA") (chapter 36.70A RCW) or implementing regulations promulgated by the Department of Commerce ("Commerce"). A complete list of all decisions issued by the Board can be found at *http://www.gmhb.wa.gov*. This update covers decisions issued and published between March 12, 2010, and November 23, 2010. Effective July 1, 2010, the Eastern, Western and Central Boards were consolidated into a single statewide Board; however, cases are still heard by a three-member regional panel.

### I. Revisions to Urban Growth Area (UGA) Boundaries

***North Clover Creek/Collins Community Council v. Pierce County*, CPSGMHB No. 10-3-0003c, Final Decision and Order (Aug. 2, 2010).**

Among the various allegations in a wide-ranging petition for review, Petitioners challenged the County's amendments to boundaries of UGAs that were alleged to be oversized.

First, the Board explored two proposals to amend a UGA boundary to add residential land. In general, Petitioners argued that the UGA at issue was substantially oversized such that any proposal to change its boundaries required the County to reduce the overall size of the UGA. While the Board appeared to acknowledge that the UGA had substantial excess land capacity for its population and employment growth, the Board upheld one specific proposal to amend the UGA boundary because the proposal both added and removed land from the UGA such that the proposal did not change the size of the UGA or alter the population or employment capacity. The County's Comprehensive Plan expressly allowed this type of rural-urban land exchange as a method to add property to the UGA. The Board characterized the proposal as a "size-neutral and capacity-neutral boundary adjustment" that was consistent with the GMA despite the overall excess size of the UGA. By contrast, the Board determined that another proposal to expand the UGA boundary did not comply with the GMA because the proposal did not remove an equal amount of area from the UGA. While the applicant and County noted that the proposal's impact on residential capacity would be "negligible," the Board determined that there was no information supporting a UGA expansion, even if it was marginal. Accordingly, the Board determined that the proposal was not necessary to accommodate urban growth.

The Board also addressed the question of whether the County could expand an oversized UGA for commercial and economic development purposes. The proposal would add 80 acres to the Town of Eatonville's UGA for an employment center while simultaneously removing 29.49 acres from the UGA. The property to be added to the UGA was a gravel quarry that would soon be fully reclaimed. The County designated the area for future industrial purposes due to its proximity to local populations and rail corridors. Relying on the County's buildable lands report, the Board concluded that the Eatonville UGA was already oversized for residential development and had adequate industrial and commercial land to meet employment targets. The question posed by the Board was whether land that has "better characteristics for a desired economic purpose can be added to a UGA which is already oversized." Relying on decisions of the Eastern and Central Boards that wrestled with the same question, the Board concluded that the proposed UGA expansion did not comply with the GMA. According to the Board, the remedy, if more land was needed for employment growth, was to redesignate excess residential land for industrial or other uses.

***Kittitas County Conservation v. Kittitas County*, EWGMHB No. 07-1-0004c, Fourth Order on Compliance (May 26, 2010).**

In this latest chapter of a long-running dispute, the Board rejected the County's most recent efforts to justify expansions of the Kittitas UGA. The Board had determined in an earlier decision that the County failed to conduct a proper land capacity analysis to support these expansions. To remedy the finding of invalidity and bring the action into compliance, the County sought to reallocate population projections by increasing the City's projection by 666 people. The projections were derived from population that previously had been allocated to the County's non-compliant "urban growth nodes" (most of which had been converted to Limited Areas of More Intensive Rural Development ("LAMIRDs") as a result of earlier compliance orders). The Board noted that this population increase resulted in a 48 percent increase to the Kittitas UGA. The Board observed that the County appeared to be "attempting to tweak the numbers to achieve the desired result – retaining the

current, noncompliant UGA as it currently exists – as this additional allocation has no supporting rationale except in this regard." The Board noted the land capacity analysis still did not support the expansion.

The expansion was primarily for industrial and commercial lands. In general, the Board acknowledged that counties can expand UGAs to provide for economic growth projected in the population figures. However, the Board held that the County had not justified the expansion in this case. The information upon which the expansion was based consisted of economic figures related to the City's and the County's economic development needs and the comparison of economic growth of the City compared to other areas in the County. The Board concluded that the studies did not support the expansion of the UGA because there was already sufficient unused industrial and commercial acreage within the UGA to support the economic growth of the population projection. *See also Brodeur/Futurewise v. Benton County*, EWGMHB No. 09-1-0010c, Order Finding Continuing Non-Compliance (Sept. 24, 2010) (expansion of the West Richland UGA to accommodate commercial and industrial development to support the wine industry and wine tourism despite excess of commercial and industrial land within existing UGA violated UGA sizing requirements). Much like the Board in *North Clover Creek* described above, the Board determined that the GMA provisions prohibiting sprawl and limiting urban growth to UGAs trumped more general concerns regarding economic development.

***Wold v. City of Poulsbo*, CPSGMHB No. 10-3-0005c, Order on Dispositive Motions (May 11, 2010); Final Decision and Order (Aug. 9, 2010). [*See also* discussion in Section II, Public Services and Facilities.]**

Petitioners appealed the City of Poulsbo's 2009 Comprehensive Plan and specifically challenged the size of the Poulsbo UGA, densities allowed within the UGA, and the City's land capacity analysis. The Board's discussion of these issues explored the degree to which Petitioners can challenge City planning actions (as opposed to *County* planning actions) based on allegations of impacts on the overall size of the UGA.

On the City's motion, the Board dismissed issues related to the sizing of the UGA. The Board held that the establishment and revision of UGA boundaries were actions relegated to counties, though they must consult with cities. Because the City had no authority to change a UGA boundary, the City's action could not be challenged on those grounds.

At the hearing on the merits, Petitioners continued to assert challenges to the overall size of the UGA, albeit indirectly, through their remaining issues pertaining to allowed densities within City limits, the City's land capacity analysis, and consistency with the buildable lands review to be conducted by the County. Many of these claims were based on the interrelationship between the County's and City's planning actions. For example, Petitioners alleged that City densities would lead to a UGA that would "expand unnecessarily in the future." Petitioners argued that "if the city is permitted to use unrealistically low densities in its Comprehensive Plan, those densities will form the basis for UGA sizing by the County when it undertakes the next County Comp Plan update…." While the Board evaluated the challenged densities and land capacity analysis for consistency with the GMA, it did not meaningfully evaluate whether those actions would impact the County's future actions. The Board reiterated that the UGA boundary was not changed by the City's Comprehensive Plan and could not be challenged in the appeal. Instead, the Board reviewed the densities allowed within the City to determine whether they were urban densities. Similarly, the Board noted that the City's Comprehensive Plan was not a buildable lands review subject to the requirements of RCW 36.70A.215.

## II. Public Services and Facilities

***Fenske v. Spokane County*, EWGMHB No. 10-1-0010, Final Decision and Order (Sept. 3, 2010).**

Spokane County amended its Comprehensive Plan to change the future land use designation for approximately five acres of land within the unincorporated urban area from Low Density Residential to High Density Residential. Petitioners challenged the amendment on the basis that it was inconsistent with the County's Comprehensive Plan provisions relating to access, connectivity and traffic infrastructure. The County argued that traffic impacts would be reviewed and mitigated during the site-specific land use approval process and that traffic concurrency requirements would be met at that time.

The Board began its analysis by noting capital facilities planning must be done at the Comprehensive Plan approval stage as opposed to the project approval stage to effectively provide the necessary lead time and identification of funding sources and to inform decision makers of the public infrastructure impacts of proposed Comprehensive Plan amendments. The Board then looked at the specific development project that the future land use map amendment was designed to accommodate. The Board took note of the project's projected trip generation, its location on a dead end street, the absence of sidewalks on the street, and the fact that the street was used by children and a disabled resident in a wheelchair. The Board found that there was no evidence in the record that public facilities would be adequate at the time the proposed project was available for occupancy and use. It further found that delaying an evaluation of traffic impacts until the time of project level review did not comport with the GMA "because it delays capital facilities planning until the time of a site-specific development application – after the land use map has been amended to facilitate the proposed project – thereby depriving County decision makers from having important

information to inform their land use mapping decision." Finally, the Board noted that although the Spokane County Planning Commission voted unanimously to recommend denial of the amendment, the County Commissioners made no findings that overruled or rejected the specific inconsistency findings made by the planning commission. The Board held that the County's future land use map amendment created an internal inconsistency in violation of RCW 36.70A.070.

***Wold v. City of Poulsbo*, CPSGMHB No. 10-3-0005c, Final Decision and Order (Aug. 9, 2010). [*See also* discussion in Section I, Revisions to UGA Boundaries.]**

In their challenge of the City's Comprehensive Plan, Petitioners alleged that the City could not provide adequate water to support its 2025 population projection. The City's water system planning relied in significant part on service from Kitsap PUD, which had agreed to provide water to parts of the City pursuant to a memorandum of understanding (MOU). Petitioners argued the MOU had expired and was an insufficient commitment to support the City's planning efforts. The Board determined the MOU and other City planning was adequate. While recognizing the disagreement between Petitioners and the City over the long-term viability of service from the PUD, the Board noted that the City was required to reassess its land use element if its capital facilities planning fell short of meeting existing needs.

***Skagit D06, LLC v. City of Mount Vernon*, WWGMHB No. 10-2-0011, Final Decision and Order (Aug. 4, 2010).**

Petitioner challenged several ordinances adopted by the City of Mount Vernon that collectively adopted several new annexation policies and required territory to be annexed into the City before the City would extend sewer service to the territory. Although Petitioner advanced several legal theories, its primary arguments were that the City imposed a *de facto* moratorium in violation of RCW 36.70A.390, the City failed to be guided by a number of goals contained in RCW 36.70A.020, and the City's ordinances prevented it from complying with its urban growth obligations under RCW 36.70A.110. The Board concluded that Petitioner failed to demonstrate that adoption of the ordinances was clearly erroneous.

The Board repeated various themes throughout its decision. First, the Board found that property not annexed by the City could continue to develop consistent with its present zoning and that not allowing property owners within the unincorporated portion of the UGA to be annexed and developed on City supplied sewer based on their own timeframe, rather than when the City was prepared to extend service, was not a GMA violation or a *de facto* moratorium. Second, the Board found that although properties on the periphery of the City's UGA could not be developed more intensively until late in the City's 20-year planning horizon, that was not a violation of the GMA. Finally, the Board emphasized that the City had legitimate interests in phasing urban infrastructure and not allowing leap frog development, and that such interests were consistent with the GMA's goals and requirements.

## III. Resource Lands

***Hazen v. Yakima County*, EWGMHB No. 08-1-0008c, Final Decision and Order (April 5, 2010). [*See also* discussion in Section VI, Critical Areas.]**

This case involved numerous issues raised by multiple parties in a challenge to Yakima County's multi-year process to update its Comprehensive Plan and development regulations. Issues that remained to be decided by the Board prior to the hearing on the merits involved primarily critical areas and resource lands.

Petitioners challenged the County's system of designating agricultural and mineral resource lands. That system allowed the designation of agricultural lands as an underlying designation, as well as an overlapping designation of mineral lands as a mineral resource overlay. Petitioners contended the Supreme Court's decision in *Lewis County v. WWGMHB*, 157 Wn.2d 488, 139 P.3d 1096 (2006), prohibited non-farm uses, including mining, on agricultural lands. The Board's decision did not directly address *Lewis County*.

The Board stated that RCW 36.70A.170 did not establish a hierarchy of resource lands, and cited to WAC 365-190-040(7)(b), which was not yet effective when the County updated its designation system. WAC 365-190-040(7)(b) provides that jurisdictions must determine whether multiple designations are inconsistent. If they are, jurisdictions "should examine the criteria to determine which use has the greatest long-term commercial significance, and that resource use should be assigned to the lands being designated." The Board found that only the zoning of land would change to accommodate mining operations pursuant to the overlay; the underlying designation would remain agricultural resource land after mining operations ceased. Therefore, the County "struck a balance between two natural resource uses – selecting mineral extraction in the near term while retaining the very same land for agricultural production in the future as the land can be used after mining operations have ceased." The Board concluded that this balancing was within the broad discretion afforded the County and within the goals and requirements of the GMA.

Board Member Roskelley issued a substantial dissent on this issue, arguing in part that *Lewis County* controlled.

***Concerned Friends of Ferry County v. Ferry County*, EWGMHB No. 01-1-0019, Sixth Compliance Order (March 23, 2010).**

The issue addressed in this compliance order was whether Ferry County appropriately designated agricultural lands of long-term commercial significance ("ALOLTCS") under the applicable GMA provisions, Commerce regula-

tions and *Lewis County v. WWGMHB*, 157 Wn.2d 488 (2006). The Board found that it did not.

Ferry County developed a "very comprehensive and elaborate point system" to determine which lands qualified as ALOLTCS. Although the County indicated that it used WAC 365-190-050(1) as guidance, the Board found that its point system included numerous local factors outside the requirements of the GMA. Because these factors were used extensively in the County's determination, the County concluded there were no ALOLTCS within its borders. The Board stated this was not surprising, "given the Herculean, if not impossible, task the County's point system and additional 'local discretion' factors place on a piece of land to qualify as ALOLTCS." The Board held that the inclusion of these local factors in the designation process and the County's reliance on them expanded the agricultural land designation parameters beyond those established by the Legislature and was in direct conflict with the GMA.

## IV. Rural Lands

***Butler v. Lewis County*, WWGMHB Case No. 10-2-0010, Final Decision and Order (July 22, 2010).**

Petitioners challenged Lewis County's adoption of a resolution amending its Comprehensive Plan to allow "unique, regional commercial/industrial uses along major transportation corridors." The Board examined whether the allowed uses fit within the GMA's parameters for permissible rural development, including the assurance under RCW 36.70A.070(5)(b) that such uses not be characterized by urban growth or inconsistent with rural character.

Petitioners alleged that the contemplated uses constituted urban growth in that developed sites would no longer be capable of growing trees or crops. The Board found that rural development could consist of a variety of uses under RCW 36.70A.030(16), and that not all parcels in the rural area need be capable of producing food, fiber or mineral resources. Further, the Board found that the lack of size limitations on the contemplated uses would not in and of itself result in such uses being urban in nature.

Petitioners also alleged that each "unique, regional commercial/industrial use" must be sited and designed to maintain the rural character of the surrounding area. The Board found that rural character as envisioned by RCW 36.70A.030(15) referred to a pattern of land use and development on an area-wide basis, rather than a site-specific evaluation of a proposed development. Commercial and industrial uses could be allowed "in a pattern of development in which open space, the natural landscape and vegetation predominate, and the visual landscape could remain traditionally rural." The Board did acknowledge, however, that a pattern of permitting uses that threaten the preservation of the rural landscape might not be consistent with the GMA's definition of rural landscape. The Board concluded that the County's resolution complied with RCW 36.70A.070(5). The Board also held that the GMA definitions of "urban growth," "rural development," and "rural character" (RCW 36.70A.030) did not create duties upon which a GMA violation could be based.

## V. Limited Areas of More Intensive Rural Development (LAMIRDs)

***Community Addressing Urban Sprawl Excess (CAUSE) v. Spokane County*, EWGMHB No. 10-1-0003 (June 18, 2010).**

Spokane County designated as a LAMIRD a single parcel consisting of 3.6 acres. Petitioner challenged the designation as noncompliant with the GMA and inconsistent with the County's Comprehensive Plan and development regulations. The Board agreed with Petitioner.

The County designated the parcel as a Type 1 LAMIRD, the requirements of which are contained in RCW 36.70A.070(5)(d)(i). The Board stated that a LAMIRD must be based upon *existing* areas or uses of more intensive rural development. Here, although the existing area surrounding the parcel was primarily developed at urban levels, the parcel itself contained only one single-family home and a detached pole barn. The Board found that although nothing in the GMA precluded a county from designating a single parcel as a LAMIRD, it was the built environment of the proposed LAMIRD itself and not that of the surrounding community that could justify its designation. The Board found that in this case, designating the parcel as a LAMIRD would serve to exclude the surrounding areas that already had more intensive rural development in conflict with the GMA. The Board indicated that the County might consider whether the entire area within which the parcel was located should be designated as a LAMIRD.

The Board issued a determination of invalidity. Board Member Mulliken dissented on this issue, noting the small size of the parcel, that the proposed development consisted of only four new residential units, and that Petitioner submitted no compelling argument that the action would affect natural resource lands, the environment or public services.

## VI. Critical Areas

***Citizens for Good Governance v. Walla Walla County*, EWGMHB No. 09-1-0013, Final Decision and Order (May 3, 2010); Order Denying Respondent's Motion for Reconsideration (June 4, 2010).**

Petitioner and Intervenor challenged Walla Walla County's adoption of its critical areas ordinance for failure to adequately designate critical aquifer recharge areas ("CARAs"). The Board agreed.

The Petitioner and the Board focused on the gravel aquifer, a significant drinking water source in the County. The County acknowledged the gravel aquifer was vulnerable to contamination and "an area of concern that must

be monitored." The Board held that the County was not required to designate the entire aquifer, as the Petitioner and Intervenor argued. However, the Board determined that the County had not adequately identified specific aquifer recharge areas.

When designating CARAs, the County relied upon "wellhead protection areas" established by state and federal water quality laws designed to protect potable water sources of public water systems. Even though Department of Ecology ("Ecology") guidance referred to wellhead protection zones as useful information in designating CARAs, the Board indicated that the exclusive reliance on wellhead protection areas was not sufficient to satisfy the GMA requirement to designate and protect CARAs. Instead, the Board relied on guidance in Commerce's regulations indicating that jurisdictions could rely on existing studies or may use soil and surficial geologic information. The Board noted that the County did not rely on that information for the gravel aquifer. Nor did the County evaluate the threat from existing land use activities or designate aquifer specific recharge areas based on vulnerability to contamination.

From the Board's decision, it did not appear that Petitioner or Intervenor had presented any competing science that identified specific CARAs that should have been designated. Rather, the Board was persuaded by the absence of evidence in the record supporting the County's decision; according to the Board, the County had failed to adequately review the best available science ("BAS") in reaching its decision. In its request for reconsideration, the County argued that the Board had failed to defer sufficiently to the County's decision. The Board denied the motion, reiterating its conclusion that there was no evidence or analysis in the record that the County adequately considered a variety of key factors in designating CARAs.

***RE Sources v. City of Blaine*, WWGMHB No. 09-2-0015, Final Decision and Order (May 3, 2010); Order Denying Respondent's Motion for Reconsideration (June 4, 2010).**

Petitioner challenged various aspects of the City of Blaine's critical areas regulations, including provisions governing wetland buffers and stream relocation. In both instances, the City included a process that requires submission of a site-specific study that applies BAS to the specific proposal. The Board affirmed this approach of deferring BAS review to the time of project review.

With respect to wetland buffers, Petitioner argued that the City inappropriately relied on outdated BAS. Specifically, the City chose buffers based on Ecology's recommended buffer widths as summarized in Commerce's 2003 guidance document. Ecology had supplanted those earlier recommendations with a new two-volume wetland guidance document. In comparing the City's buffer widths to the new Ecology guidance, Petitioners argued that the buffer widths were outside the range recommended by Ecology. The Board agreed with Petitioners that these deficiencies were problematic. However, the Board ultimately determined that the regulations complied with the GMA because they included a requirement that applicants include a detailed study that reviews impacts and applies BAS for a site-specific evaluation of necessary buffers. The regulations specifically indicated that the City could change buffer widths based on the site-specific study. Accordingly, the Board concluded that the wetland buffers resulting from this process would apply BAS and satisfy GMA requirements, despite other deficiencies in the process.

Similarly, the City provisions allowed stream relocation provided certain requirements are satisfied, including submission of a detailed study applying BAS. The Board upheld the regulation because it established a process that would result in full review of the impacts and application of BAS.

More generally, Petitioner argued that this regulatory scheme deferred too much discretion to the community development director responsible for reviewing these site-specific studies and issuing approvals. The Board rejected Petitioner's concerns, noting that the regulations provided sufficient guidance to the director to reach the required decisions.

***Hazen v. Yakima County*, EWGMHB No. 08-1-0008c, Final Decision and Order (April 5, 2010). [*See also* discussion in Section III, Resource Lands.]**

As described in section III, this case involved numerous issues related to critical areas and resource lands. With regard to critical areas, the Board first addressed the designation and protection of CARAs. The County mapped CARAs based on the methodology outlined in Ecology's Publication 97-030: *Guidance Document for the Establishment of Critical Aquifer Recharge Area Ordinances*. The Board found that although the designation of CARAs by mapping was appropriate, the County's mapping was not based on BAS because it relied on a publication that had been superseded by a more recent Ecology guidance document. With regards to protecting CARAs, the Board found the County's generalized reference to "existing federal, state, local, or tribal laws" insufficient, as the laws on which the County was relying should have been adopted or incorporated by reference into the County code. Further, the Board found that the County was required to subject such non-County laws to the applicable critical areas analysis to ensure they were consistent with BAS.

Next, the Board evaluated 17 exemptions from the County's critical areas regulations. The Board stated that exemptions generally were not prohibited under the GMA, but that such exemptions must be based on BAS. Here, the Board found there was no evidence in the record to support the County's exemptions. The County argued that its administrative review process ensured that the functions and values of critical areas would be protected. However, the Board found that the County's regulations delegating

decision-making authority to administrative reviewers contained neither a requirement that the reviewer base decisions on BAS nor a requirement that conditions be placed on exempted activities. Thus, the regulations did not comply with RCW 36.70A.060(2) and 36.70A.172. *See also Hazen v. Yakima County*, EWGMHB No. 09-1-0014, Final Decision and Order (June 14, 2010).

On the issue of streams and wetlands, the Board first concluded that the County's failure to designate and protect Type 5 ephemeral streams as critical areas was contrary to BAS. It next concluded that the County's riparian buffer widths ranging from 25 to 100 feet were outside the range of BAS and failed to protect the entirety of the functions attributed to designated streams. As to wetland buffers, the Board noted that Volume 2 of Ecology's Wetlands in Washington State was not in and of itself BAS, although Ecology's recommended buffer widths reflected BAS. The County's BAS review indicated that its standard buffer widths were within the range of BAS. However, its buffer width adjustments, which allowed a reduction of between 40 and 90% of the standard buffer width, were not supported by BAS.

The Board then considered whether allowing mining in floodplains failed to protect hydrologically-related critical areas. Prior to the hearing on the merits, Ecology approved the County's updated Shoreline Master Program (SMP). Therefore, any critical areas within shoreline jurisdiction would be protected under the County's SMP and not its GMA critical areas regulations pursuant to RCW 36.70A.480 as recently amended by the Laws of 2010, ch. 107 § 2. The Board stated that despite the apparent impacts of floodplain mining as documented in the BAS, the record did not reflect whether any floodplains existed outside of shoreline jurisdiction. It therefore declined to determine whether the County included BAS in developing regulations to protect critical areas outside shoreline jurisdiction. Board Member Roskelley issued a lengthy dissent on this issue.

Finally, the Board reviewed whether the County gave "special consideration" to anadromous fisheries as required by RCW 36.70A.172(1). The Board found that under *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 166 P.3d 1198 (2007), the County was required only to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fish and their habitat, not adopt them. The Board concluded that the record supported that due consideration was given. In his dissent, Board Member Roskelley disagreed, stating that the "special consideration" provision "requires action if the evidence shows measures need to be taken to protect and enhance anadromous fisheries."

## VII. Essential Public Facilities (EPFs)

***Port of Shelton v. City of Shelton*, WWGMHB No. 10-2-0013, Final Decision and Order (Oct. 27, 2010). [*See also* discussion in Section IX, Evidentiary Issues.]**

The City of Shelton amended its Comprehensive Plan and future land use map, changing the designation of 160 acres from Commercial Industrial to Neighborhood Residential to facilitate the consideration of a proposal for a planned unit development. The 160 acres were located within the least restrictive zone of the City's Airport Overlay, which placed no restrictions on residential use. The Port of Shelton argued that allowing incompatible residential uses within close proximity of the airport it operated would result in complaints of nearby residents and preclude increased use or expansion of the airport, either in size or volume. The Board agreed.

The Board cited *Des Moines v. PSRC*, 108 Wn. App. 836, 988 P.3d 27 (1999), for the proposition that siting of an EPF, as used in RCW 36.70A.200(5), includes "expansion" or "improvement" of the EPF. The Board found that the record supported the potential conflict between residential uses and airport operations and the fact that the airport would continue to grow in the number of flights to and from the airport. The Board stated: "By their very nature, incompatible uses have the propensity to adversely impact an EPF by interfering with its continued operation or frustrating future expansion or improvement, resulting in a preclusive effect prohibited by RCW 36.70A.200(5)." It concluded that the City's Comprehensive Plan and future land use map amendment would preclude the siting of an EPF in violation of the GMA.

***Friends of the San Juans v. San Juan County*, WWGMHB No. 10-2-0012, Final Decision and Order (Oct. 12, 2010). [*See also* discussion in Section VIII, Invalidity.]**

San Juan County amended its development regulations regarding EPFs, in part on the basis that many of its EPFs were nonconforming and that their expansion would be difficult under existing County regulations. Petitioner challenged the regulations, claiming, among other things, that they were inconsistent with the County's Comprehensive Plan and failed to protect natural resource lands and critical areas. On the issue of inconsistency, the Board found the regulations clearly violated RCW 36.70A.040(3) because the regulations permitted the siting of EPFs in land use districts "where one or more uses which comprise the facility are prohibited." The Board found additional inconsistency in that the County's Comprehensive Plan stated EPFs "should not be located within frequently flooded or geologically hazardous areas unless no practicable alternative exists," and the regulations stated merely that EPFs were "disfavored" in specified critical areas.

The Board also found the County's regulations, which allowed the siting and expansion of EPFs in critical areas and natural resource lands, failed to meet the GMA's

mandate to protect such areas and lands. As to critical areas, the Board noted that the "Legislature first required critical areas to be protected, then it gave direction on how to address EPFs." The Board determined that the process for protecting critical areas was less flexible than that for siting EPFs. "Critical areas are the 'natural infrastructure' and the foundation of a landscape and cannot be overruled or 'trumped' by siting EPFs." The Board's analysis regarding the protection of natural resources similarly recognized that the Legislature gave clear direction that natural resource lands were a foundation "around which other land uses must be adjusted." It concluded that the County's regulations violated RCW 36.70A.020(8), .060(1) and .177(1) by putting natural resource lands at risk, as EPFs were only a disfavored use and the regulations did not set forth specific language to guide or limit their siting so as not to adversely impact the long term conservation of natural resource lands.

## VIII. Invalidity

***Friends of the San Juans v. San Juan County*, WWGMHB No. 10-2-0012, Final Decision and Order (Oct. 12, 2010). [*See also* discussion in Section VII, Essential Public Facilities.]**

The Board found San Juan County's ordinance amending its EPF regulations noncompliant with the GMA. Petitioner did not set forth in either its petition for review or amended issue statements an issue seeking a determination of invalidity. The Western Board's general practice was to require a petitioner to present invalidity as an issue for the Board's resolution. The Board noted that this practice was contrary to that of the former Central and Eastern Boards. In a change of position bringing all three former Boards in alignment, the Board concluded that invalidity is a remedy and does not need to be framed as an issue. However, although the Board will no longer require invalidity to be set forth as an issue within a petition for review, it will require that a petitioner "expressly request invalidity as a form of relief within the PFR and support that request within the briefing."

## IX. Evidentiary Issues

***Port of Shelton v. City of Shelton*, WWGMHB No. 10-2-0013, Final Decision and Order (Oct. 27, 2010). [*See also* discussion in Section VII, Essential Public Facilities.]**

As discussed in section VII, this case addressed challenges to the City of Shelton's amendments to its Comprehensive Plan and future land use map, changing the designation of 160 acres from Commercial Industrial to Neighborhood Residential. Petitioners challenged the City's amendments on several grounds, with the underlying basis that the amendment allowed residential land uses incompatible with airport operations in violation of the GMA.

In response to concerns raised about incompatibility, the City conducted a noise study using a threshold of compatibility associated with physical harm. Petitioners argued that the appropriate threshold should be one that measures aggravation, complaints and the resulting political pressure to constrain airport operations. The City argued that the threshold it used was set by the Federal Aviation Administration as establishing compatibility. Petitioners also alleged that the noise study was flawed in a number of regards.

The Board explained that its role was to determine whether substantial evidence supported the City's action. Its decision contains a hearty discussion of the substantial evidence standard. The Board stated that it would be inappropriate to "balance" the arguments presented by the Petitioner with those of the City. However, a criticism of the methodology employed in the noise study was "appropriate for consideration as that criticism relates to a determination of whether or not the City's noise analysis constitutes substantial evidence." After giving "substantial weight" to the opinions expressed by the Aviation Division of the Washington State Department of Transportation as the agency with specialized knowledge in the subject matter at issue, the Board found that the City's noise study was gravely flawed and could not be considered substantial evidence.

***North Clover Creek/Collins Community Council v. Pierce County*, CPSGMHB No. 10-3-0003c, Order on Motions (April 27, 2010). [*See also* discussion in Section X, Service Requirements.]**

Among the numerous issues Petitioners raised in their appeal of Pierce County's Comprehensive Plan amendments, one Petitioner challenged an amendment that would allow electronic message boards within a community planning area. The Petitioner sought to supplement the record with photographs of electronic message boards throughout the planning area. The photographs were not part of the record before the County Council. Nevertheless, the Board admitted the photographs over the County's objection because it found the photographs would be of substantial assistance. The Board noted that while the legislative record is primarily a "paper record," the County Council members bring a "visual record" to their deliberations based on their "day-to-day familiarity with all parts of the County." The Board surmised that the visuals depicted in the photographs "must be familiar to the County Council members." Accordingly, the Board allowed the evidence as "illustrative" material. The implication of the Board's decision was that the supplemental material would put the Board in a similar position to that of the County Council. The Board's decision in this instance stands in contrast to other Board decisions that allow the introduction of evidence outside the legislative record only in extremely limited situations and that reject other efforts to create a visual record, such as site visits, because they would

place the Board "in the awkward position of having more information to make our decision than the BOCC had to make theirs." *Henderson, et al., v. Spokane County*, EWGMHB 08-1-0002, Order Denying Respondent's Motion for View of Subject Site (July 31, 2008).

***Wold v. City of Poulsbo*, CPSGMHB No. 10-3-0005c, Order on Motions to Supplement the Record (May 11, 2010).**

In this appeal of the City of Poulsbo's adoption of its 2009 Comprehensive Plan, Petitioners sought to supplement the record with a variety of documents including newspaper clippings that were not in the City's legislative record. The Board denied a majority of the supplemental evidence. With respect to the newspaper reports, the Board expressed some skepticism about their "accuracy or probative value," but nevertheless admitted them. The Board relied on past decisions in which the Board allowed newspaper accounts to support determinations of invalidity, even though the evidence in this case did not appear to be offered in support of a request for a finding of invalidity. Also, the Board seemed to be persuaded by the fact that the City index included other newspaper accounts such that the City demonstrated an "awareness of ongoing news coverage" and would not be prejudiced by admitting the articles.

## X. Service Requirements

***Fenske v. Spokane County*, EWGMHB No. 10-1-0010, Order on Motion to Dismiss (May 27, 2010).**

Petitioners timely filed a petition for review and served it on the Spokane County Prosecuting Attorney and on the attorney for Intervenors. The County and Intervenors moved for dismissal of the petition on the basis that Petitioners failed to timely serve the Spokane County Auditor pursuant to WAC 242-02-270. The Board found that although its rules require service upon the County auditor, there is no similar requirement in the GMA. Therefore, the Board's service rule is not a jurisdictional requirement. Here, the County and Intervenors did not claim any prejudice, the record did not demonstrate prejudice, and attorneys for the County and Intervenor appeared at the prehearing conference. The Board concluded that Petitioners substantially complied with service requirements and denied the motion.

***Crowder v. Spokane County*, EWGMHB No. 10-1-0008, Order on County's Motion to Dismiss (May 12, 2010).**

Petitioners timely filed a petition for review and served it on the Spokane County Prosecuting Attorney's Office and the Spokane County Board of County Commissioners. Petitioners, who were *pro se*, filed a declaration of service with the Spokane County Auditor. They also researched service requirements in the Board's Handbook, *Practicing Before the Growth Management Hearings Boards of Washington State*, which did not mention serving county auditors in non-charter counties. Similar to the Board's discussion in *Fenske v. Spokane County* above, the Board found that its requirement to serve the County auditor was not jurisdictional and that Petitioners had substantially complied with service requirements. The Board further indicated, however, that city and county attorneys should treat *pro se* petitioners differently than petitioners represented by counsel, stating:

> A motion to dismiss a case by a county or city should be used sparingly and for the most part on those parties represented by legal counsel who have equivalent knowledge of the rules and regulations. To request a dismissal of a case defended by pro-se petitioners, who obviously substantially complied, is far too onerous in this particular circumstance.

***North Clover Creek/Collins Community Council v. Pierce County*, CPSGMHB No. 10-3-0003c, Order on Motions (April 27, 2010). [*See also* discussion in Section IX, Evidentiary Issues.]**

In this appeal of the County's Comprehensive Plan amendments, the Board denied Intervenors' motion to dismiss for failure to serve them with the petition for review. Intervenors were owners of property that was redesignated by the challenged amendments, and claimed they were necessary parties that should have been served. In rejecting Intervenors' motion, the Board noted the GMA imposes obligations on local governments, not property owners. Accordingly, while the petition must be served on the local government that adopted the challenged action, there is no requirement to serve the landowners affected by particular legislative actions because the Board has no direct authority over landowners or individual parcels. The Board acknowledged this result under GMA is different from other kinds of land use litigation proceedings where property owners are indispensible parties.

*Laura C. Kisielius is an attorney with Plauché & Stock, LLP. Laura represents private and public clients in environmental and land use matters involving strategic planning, project permitting, regulatory compliance, administrative proceedings and litigation. Prior to joining Plauché & Stock, LLP, Laura was a deputy prosecutor in the Land Use and Environmental Law Unit of the Snohomish County Prosecuting Attorney's Office.*

*Tadas Kisielius is an attorney at GordonDerr LLP, where he represents public and private clients on issues pertaining to land use and water resources law. He has worked with public clients in drafting, adopting and defending regulations required by the Growth Management Act (GMA) and the State Environmental Policy Act (SEPA) and has represented private clients in their efforts to secure land use approvals for development projects throughout the state.*

# Law School Reports

## Gonzaga Environmental Law Caucus

This fall, the Gonzaga Environmental Law Caucus continued to promote environmental awareness and engagement in our local community while also providing resources for students to pursue environmental and natural resources law. Situated beside the Spokane River, Gonzaga Law School presents students with the opportunity to see up close the multiple uses that that the River provides to the community. The caucus has focused on taking advantage of this opportunity, working to protect the River through legal action and on-the-ground cleanup. Caucus members who also participate in the Gonzaga Environmental Law Clinic have been able to gain real-world legal experience, holding polluters accountable under the Clean Water Act. Through this hands-on experience, students are actively engaged in the process of environmental protection of the Spokane River and other local water bodies.

In September, approximately 25 Caucus members took part in the 2010 Spokane River Clean Up, a city-wide undertaking to remove garbage from the Spokane River and its environs. Led by team leaders, Vice President Derek Leuzzi and President Lindsay Arnold, members registered volunteers and led a team in the field. The project managed to remove almost 4 tons of garbage, and 2 tons of waste were recycled. The Caucus looks forward to continuing our involvement with this effort next year.

In November, the Environmental Law Caucus co-sponsored viewing of a documentary film about the effects of climate change on the Kichwa, an indigenous group in the Ecuadorian Amazon. The film, "Life and Breath: Kichwa People Confront Climate Change in the Amazon," provided an opportunity for students to see how indigenous peoples are finding solutions to climate change that will create both sustainable economies and ecosystems. Next semester we hope to bring more films to campus to promote environmental awareness and to open a dialogue with students on the issue.

Members have also been actively engaged in promoting recycling on the school campus. The Caucus has brought larger recycling bins to campus and is working to find ways to encourage recycling and reduce consumption. As part of this effort, the Caucus has been receiving donations of reusable water bottles from local entities such as REI, the City of Spokane and Mt. Gear. These BPA-free water bottles will be distributed as part of our "New Year's Resolution Pledge" in January, where students will receive a free water bottle and an opportunity to sign a pledge stating their commitment to using refillable bottles rather than purchasing bottled water. The Caucus has exciting events coming up next semester as the Environmental Law Moot Court team will be representing Gonzaga at Pace University in February. We are also actively fundraising to send students to the annual environmental law conference in Eugene, Oregon.

As law students, we have the power to help shape the future of environmental policy, whether in the courtroom, state and local governments, or the development of collaborative solutions. We look forward to continuing our role in this process over the next semester and beyond.

*Lindsay Arnold, president, Gonzaga Environmental Law Caucus*

## Seattle University Environmental Law Society

The 2010-2011 school year is almost halfway done, and the Seattle University's Environmental Law Society (ELS) has had a very active Fall semester. In October, the ELS sent students to New Orleans as a part of a campus-wide group on a fact-finding investigation in response to the BP Oil Spill. The group had the opportunity to meet with agency staff, legislators, academics, and affected communities, as well as volunteering their time with local community groups. On returning to the Pacific Northwest, students organized a panel discussion event and a second event featuring a documentary presentation and a silent auction to raise funds to support efforts to raise awareness of the problems still facing Gulf residents and the environment. Also in October, the ELS organizing a panel on Climate Change and Human Rights, with a presentation from Three Degrees Warmer, a Climate Justice Project at the University of Washington.

In other exciting news, this summer the Seattle University School of Law Administration granted full authorization of the student-run environmental journal at the law school. The *Seattle Journal of Environmental Law* will publish online only, and will feature shorter pieces published on a rolling basis to promote a discussion of contemporary issues facing environmental law. The Journal will publish its first edition this January.

Lastly, the 2010 Matthew Henson Environmental Law Fellowship recipients, Sean Waite and Daniel Kenny, would like to extend their gratitude to the Washington State Bar Association Environmental and Land Use Law Section for its sponsorship. The Matthew Henson Fellowship, funded in part by the Washington State Bar Association Environmental and Land Use Law Section, is awarded to first- and second-year Seattle University law students who take part in an otherwise unpaid summer internship. Past recipients

have interned with a variety of environmental non-profits and public-sector entities participating in litigation, regulation, and policy analysis.

Sean Waite began his second year of law school this fall and spent the past summer interning with Kootenai Environmental Alliance, a non-profit environmental advocacy organization located in Idaho. By virtue of this position, he was able to contribute to the organization's mission of conserving, protecting, and restoring the environment, while gaining unparalleled legal experience for a first-year law student. Tasks included preparing written comments for hearings on Superfund proposals, drafting tutorials on CERCLA, and participating in collaborative negotiations on forest and wilderness management. Beyond the office he also found himself in the field, investigating sites of proposed timber cuts and government land swaps. These assignments provided a sense of how the law is implemented within the natural resources industry.

Daniel Kenny, now in his third year of law school, spent his summer in Sacramento, California, working at the Department of Justice – Environment and Natural Resources Division. Despite the Central Valley heat, the summer was a grand success. Daniel worked with a group of three lawyers primarily on water law cases in California, Nevada, Arizona, and Washington. He helped draft motions and provided research and analysis for many interesting cases. Additionally, Daniel was able to watch arguments in district court as well as in front of the California Water Resources Control Board.

This summer at the Department of Justice was a well-rounded learning experience that has provided a great boost to Daniel as he works through his last year of school. Without this fellowship and the support of the WSBA Environmental and Land Use Law Section, Daniel would not have been able to take advantage of this great opportunity.

Sean and Daniel greatly appreciate the Section's support of the Matthew Henson Environmental Law Fellowship. Both Sean and Daniel are confident that their summer experiences will serve as a solid foundation for their future legal careers, and wish to thank the membership of the section for making it possible.

The ELS Board is very excited for the rest of the 2010-2011 year and is always looking to develop new programming and welcome any ideas from ELUL members. Any questions or comments can be directed to Alec Osenbach *(osenbac1@seattleu.edu).*

*Marcus Lee and Alec Osenbach, 2010-2011 Board, Seattle University School of Law, Environmental Law Society.*

## University of Washington School of Law

For the 2010-2011 academic year, Greenlaw is engaged in an exciting array of projects and programming designed to bring leaders in environmental law to the University of Washington and involve law students in service, scholarship, and professional development.

In September, Greenlaw launched a pro bono project in partnership with the Trustees for Alaska. Fifteen 1L students are currently assisting the trustees with legal research and document review to support litigation regarding Alaska's administration of permitting programs under the Clean Water Act. The project provides a unique opportunity for first-year law students to participate in hands-on legal work while serving a public-interest organization that does not have the benefit of a local law school.

In addition to our pro bono efforts, Greenlaw is offering a speaker series addressing a range of environmental law topics. In October, we collaborated with the Native American Law Students Association to present a series of events regarding the environmental and social impacts of oil refinery operations on the Swinomish Tribal community in northwest Washington. We hosted a panel discussion featuring Swinomish Tribal Historian Larry Campbell and UW law professor Ron Whitener, as well as two screenings of the documentary "March Point," which portrays three Swinomish teens' response to the environmental degradation of reservation lands. On November 17th, in partnership with the Northwest office of Earthjustice, Greenlaw hosted Leo Saldahna and Bhargavi Rao, of the Environmental Support Group, to discuss their work on environmental protection and environmental justice issues in India. We are also planning a panel discussion on the BP Deepwater Horizon Oil Spill for January 2011, which will feature attorneys representing the United States and the State of Louisiana, as well as a fisheries expert from the UW School of Marine Affairs.

We continue to offer professional development opportunities for law students with environmental aspirations. This fall, we offered a brown-bag lunch to connect first-year law students with 2Ls and 3Ls who can share insights from their own environmental internship and summer job experiences. During winter quarter, we will host a series of panel events featuring local environmental practitioners from the non-profit, government, and private sectors to discuss opportunities in the environmental law field. We are very grateful for the generous participation of local environmental attorneys in these programs.

Greenlaw is proud to be fielding a team for the Pace University Environmental Moot Court Competition, a national moot court held in New York each February. This year's competition problem concerns state delegation under RCRA, and Greenlaw's team is hard at work preparing. The team is fortunate to have the guidance of coaches Keith Cohon, of EPA Region 10, and Mike Zevenberg, of the U.S. Department of Justice.

Finally, Greenlaw's curriculum committee continues to work with the Law School administration to advocate for new environmental law courses, additional faculty support, and the re-launch of our environmental law clinic.

Greenlaw appreciates the ongoing support of the local environmental bar in all of our efforts. We are indebted to the community of practitioners for serving as speakers, instructors, coaches, and professional mentors, and to the ELUL Section for its generous financial support.

*Katherine Kirklin & Aurora Janke, co-presidents, greenlaw@uw.edu.*

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