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Section Report

By Stacy A. Bjordahl, ELUL Section Chair

By the time you receive this issue of the ELUL Newsletter, we will have held our Midyear Meeting and Seminar at the Ocean Shores Conference Center in Ocean Shores. Many thanks are due to Nathan Smith and Laura Kisielius for serving as our 2010 Midyear co-chairs and organizing a terrific program. We also want to thank Chair-Elect Jill Guernsey and the Bar Association staff for assisting in the coordination of the Midyear. The Midyear would not have been possible without the presenters, and we are deeply grateful for their time and effort to prepare engaging and thoughtful presentations for the Midyear participants.

In past years, the Section has provided Midyear scholarships to eligible law students and public-sector and non-governmental organization members. We are pleased to report that we were able to award Midyear scholarships to six Section members. Our 2010 scholarship program was made possible by generous donations from Bill Clarke, Attorney at Law; Cascadia Law Group; Chuck Wolfe, Attorney at Law; Foster Pepper LLP; GordonDerr LLP; Hillis Clark Martin & Peterson, PS; Marten Law; McCullough Hill PS; and Stoel Rives LLP.

The ELUL Section continues its partnership with Washington's three law schools and has once again awarded a

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Editor's Message

By Michael P. O'Connell, Newsletter Editor

In this issue, we have several articles and case law updates. The first article, by Andrea McNamara Doyle, provides a review of two bills enacted by the Legislature executing major components of the Natural Resources Reform initiative launched last year by the Governor, Commissioner of Public Lands Peter Goldmark, and the Legislature. In a sidebar, Andrea reports on legislation consolidating the Growth Management Hearings Boards. Eric Laschever's article summarizes developments in the evaluation of greenhouse gas emissions under NEPA and state statutes. A third article, by Chad Marriott and Cherise Oram, discusses recent developments and future initiatives relating to coastal and marine spatial planning for offshore renewable energy development on the West Coast. An article by Meline MacCurdy and Russell Prugh reports on EPA's Construction Stormwater Rule.

In addition, this issue includes an update on a wide range of recent federal environmental law cases prepared by Tisha Pagalilauan, Ashley Peck and Marie Quasius. Richard Settle prepared an update on significant judicial decisions on land use law. Also included are updates on decisions from the Environmental Hearings Board by Andrea McNamara Doyle and Growth Management Hearings

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series of grants to the environmental law societies at Seattle University and the University of Washington (Gonzaga University did not submit a request this year). Seattle University's Environmental Law Society received a grant to help fund its annual Matthew Henson Environmental Law Fellowship, which offers an opportunity for law students to engage in unpaid summer fellowship in the area of land use and environmental law. The University of Washington's GreenLaw Environmental Law Society received a grant to help fund their speaker series, law clinic and Environmental Law and Policy Journal.

The Section has also forged a new relationship with the Washington Young Lawyers Division (WYLD), and Mark Rabano is the Section's WYLD liason. The Section has also been appointed a new Board of Governor's liason, Lee Kerr.

Please mark your calendars for Thursday, September 16, 2010, which will be our next one-hour CLE which is *free* to our Section members and one of the many benefits your Section provides.

Enjoy your summer!

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Boards by Edward McGuire. Karen Terwilliger prepared an update on bills enacted by the Legislature on environmental matters. Finally, this issue includes reports from environmental groups in Washington's law schools.

Thanks to all the authors and to the Editorial Board, who are responsible for the content of this Newsletter issue. Anyone who would like the opportunity to contribute to future issues of the Newsletter or who has questions, comments, or suggestions regarding the Newsletter or its content, or the Editorial Board is encouraged to contact any member of the Editorial Board. Our contact information is on the last page of this Newsletter. Thank you for your continuing interest in the Newsletter!

Update on Natural Resources Reform Efforts

*By Andrea McNamara Doyle, Chair, Pollution Control Hearings Board**

In late March 2010, Governor Gregoire signed into law two bills executing major components of the Natural Resources Reform initiative launched last year by the Governor, Commissioner of Public Lands Peter Goldmark, and the Legislature. Together, SHB 2935 and SSB 6214 make some significant changes to the administrative appeals processes that environmental and land use practitioners will want to familiarize themselves with.

Based on recommendations developed by her Natural Resources Subcabinet, the Governor proposed legislation (HB 2935) to create a single environmental and land use adjudicatory agency that would house the Growth Management Hearings Board (GMHB) and consolidate a number of other boards under the Environmental Hearings Office (EHO) umbrella. It also proposed to streamline other administrative appeal timelines and processes. At the same time, the GMHBs proposed a bill to reduce the number of GMHBs from three to one. See sidebar re: *Consolidation of the Growth Management Hearings Boards (SSB 6214*).

Under the current system, the EHO consists of five separate quasi-judicial boards that hear appeals of state and local government regulatory actions. These are the Pollution Control Hearings Board (PCHB), Shorelines Hearings Board (SHB), Forest Practices Appeals Board (FPAB), Hydraulics Appeals Board (HAB), and Environmental and Land Use Hearings Board (ELUHB). Some environmental-related appeals, similar to appeals heard by the boards within the EHO, are heard by the Office of Administrative Hearings (OAH), which often lacks the expertise to handle such matters (*e.g.*, surface mining reclamation permit and derelict vessel appeals). The separate, regional GMHBs hear petitions for review of local land-use planning decisions.

The EHO and three GMHBs have always functioned as separate state agencies. The workload among the boards within the EHO, and among the three GMHBs, varies considerably. While the boards have very different review functions (EHO boards conduct trial-like *de novo* review on project-specific actions; GMHBs conduct record review of local planning decisions), there are many areas of substantive overlap (*e.g.*, shoreline critical areas, water quality, and SEPA issues), and areas of common interest or concern (*e.g.*, effective judicial writing skills and case management best practices). One goal of the legislation was to create a platform for the boards to create greater efficiencies over time, and better understand and act on cross-cutting issues of common concern.

In addition to the multiple boards hearing appeals of environmental and land use decisions, the various appeal processes are complex, partly as a result of being shaped by many laws and reforms over many decades. Appeal times and avenues for review differ across a broad range of environmental statutes. Appeal deadlines to the boards can vary from as few as 15 days to as long as 60 days, depending on the type of matter and statutory provisions. Different and confusing laws tell parties when the clock starts to run on an appeal period (*e.g.*, from "date of issuance," "date of mailing," "date of receipt"). Some agencies (the Departments of Ecology (Ecology), Natural Resources, and Fish & Wildlife (WDFW), and local air agencies) provide for mitigation or reconsideration of the agency decision through an informal appeal avenue prior to an appeal before the quasi-judicial boards within the EHO. Some of these internal appeal options have proven effective at avoiding litigation, while others have not provided the intended benefits. Often parties seek both an informal and formal appeal at the same time, caused by and resulting in confusion.

The legislation, SHB 2935, signed March 25, 2010, will eliminate three of the five boards within the EHO, leaving the PCHB and SHB intact. The workload of the FPAB and HAB will shift to the PCHB beginning with new appeals filed after July 1, 2010. The ELUHB is repealed effective June 30, 2011. Note, HB 2617, signed by the Governor after SHB 2935, also repealed ELUHB – effective June 30, 2010. Do not confuse this "Board," which had limited jurisdiction and only two appeals during its lifetime, with the new "Office" created by SHB 2935. Discrete types of cases previously heard by OAH are also shifted to the PCHB, and the PCHB is given authority to use one-member "short" boards for certain new cases. Several appeal requirements are more clearly stated and standardized.

On July 1, 2011, the EHO is renamed the Environmental and Land Use Hearings Office (ELUHO). Also on that date, a streamlined GMHB is administratively consolidated into the ELUHO, with its powers, duties, and functions transferred to that agency. A chart illustrating the consolidation of the boards is available at:

http://governor.wa.gov/priorities/reform/natural_resources/nr_admin_appeals.pdf

After July 1, 2012, the Governor has authority to further reduce the GMHB from seven board members to six if warranted by declining caseloads. The legislation also gives the Governor authority to designate one board member, from either the GMHB or PCHB, as the Director of the new, consolidated office. A new section spells out authority and procedures for mediation of cases before the environmental boards.

Informal appeal processes are either clarified (WDFW), or eliminated altogether (Ecology). Local air agencies will retain their current internal "application for relief" process, which is widely used to resolve smaller air penalty cases.

Consolidation of the Growth Management Hearings Boards (SSB 6214)

During the 2009 legislative session, the three Growth Management Hearings Boards (GMHBs) sought legislation to allow members of one Board to sit with another Board when a member was unavailable due to recusal, illness or to maintain workload balances. That proposal did not pass.

Following the 2009 session, and due to the State's budget shortfall, the Boards closed the Yakima and Seattle offices and consolidated the administrative function to the office in Olympia, reducing staff and obtaining some monetary savings. Additionally, the GMHBs commenced an "Efficiency Study and Restructuring Analysis" in preparation of the 2010 legislative session.

The proposal arising out of the study led to the introduction of SB 6412 in January 2010, which was passed and recently signed by Governor Gregoire. SSB 6412 abolishes the three existing Growth Management Hearings Boards composed of nine members and creates a single, seven-member Board with its principle office located in Olympia. The effective date of the consolidation is July 1, 2010.

All seven members must be experienced with the practical application of land use law or planning. The regional geographic differences are maintained, since each of the prior three regions must be represented by two members – an attorney and former city or county elected official. The seventh member may be from any of the regions. The reduction from nine members to seven is to occur through attrition, voluntary resignation or retirement. After the terms of the sitting members expire, no more than four of the seven Board members may be from the same political party.

Cases will be heard by three-member regional panels – Central Puget Sound, Eastern, and Western Washington – encompassing the same counties and cities as the prior Boards. The presiding officer must be a member from the region containing the local government whose action is being appealed, as well as another member, so that a majority of the panel comes from the region where the petition originates. The third panelist may be from either of the other two regions. Two members must agree to render a decision.

The composition of the panels may be varied to adjust workload imbalances or unavailability of a member. Panel assignments are to be made by the Administrative Officer who is elected from among the Board members on an annual basis.

The Board is presently revising its Rules of Practice and Procedure to establish procedures for panel selection and making adjustments to the new consolidated single-Board structure.

Several appeal timelines are standardized to 30 days. The bill clarifies and standardizes the point from which the appeal time runs across a variety of statutes, changing or clarifying that it is from the "date of receipt" of the agency order, permit, or penalty the party seeks to appeal. This is an area practitioners will want to review carefully because, although generally the new timeframes are slightly more generous than previously (*e.g.*, shifting from "date of issuance" to "date of receipt"), that is not universally true. For example, certain appeal provisions that previously stated *no* specific timeline for appeal will now have a 30-day statute of limitations.

The changes directed by the new legislation are not the only state-level changes underway that are of practical interest to WSBA Environmental and Land Use Section members. At the same time the Governor proposed her legislation, she also signed Executive Order 09-07 outlining several other Natural Resources Reform Initiatives. The executive order, with a companion agreement signed by leaders of independent agencies, alters how certain natural resource functions, decisions, and actions will be handled by the state in the following ways:

> **Creates "one front door"** to improve access to environmental permits, technical information, recreational opportunities and other services now scattered among multiple agencies and offices;
>
> **Directs agencies to establish a single set of regional boundaries** for natural resource agencies with local field operations;
>
> **Directs the sharing of scientific expertise,** so scientist doing fieldwork for one agency can simultaneously collect data for another agency;
>
> **Simplifies permitting** by expanding the use of multi-agency permit teams to cover all agencies' environmental permits for major projects in a geographic area and with a willing local government partner.

Updates on the progress state agencies are making toward these initiatives are being reported periodically at *http://www.governor.wa.gov/priorities/reform/naturalresources.asp*.

**Andrea acknowledges the contributions of Ed McGuire in preparing the sidebar re: Consolidation of the Growth Management Hearings Boards (SSB 6214), and Kathy Mix, PCHB member.*

Developments in the Evaluation of GHG Emissions Under NEPA and State Statutes

By Eric Laschever

Greenhouse gas (GHG) emissions are now recognized as an environmental impact under the National Environmental Policy Act (NEPA), and state analogs such as the Washington State Environmental Policy Act (SEPA), the California Environmental Quality Act (CEQA) and the Minnesota Environmental Policy Act (MEPA). Federal and state agencies and working groups have been developing guidance to help lead agencies and project proponents address these impacts during environmental review. This update examines recent administrative developments under NEPA, SEPA, CEQA, and MEPA. In each case, emerging guidance leaves open the question of what level of GHG emissions constitutes a "significant" impact requiring review in an Environmental Impact Statement (EIS). This approach provides considerable flexibility to lead agencies, but it will also leave the final determination of this central issue to the courts. Project proponents will need to evaluate their actions on a case-by-case basis and proactively develop a strategy to coordinate with the lead agency. The public comment period ends on May 24.

A. NEPA

On February 18, 2010, Nancy Sutley, Chair of the White House Council on Environmental Quality (CEQ), issued a memorandum (Draft Guidance) for heads of federal departments and agencies providing guidance on the consideration of the effects of climate change and GHG emissions under NEPA. The Draft Guidance is not effective until it is issued in final form. CEQ has requested public comment on all aspects of the Draft Guidance.

The Draft Guidance proposes to require federal agencies to consider the effects of climate change and GHG emissions when conducting NEPA analyses. While it has become the practice of many agencies to assess the effects of climate change when performing a NEPA analysis, the Draft Guidance more specifically recommends that an agency that proposes to take an action that directly emits GHGs in excess of 25,000 tons annually to consider the effects of those emissions on the environment in a qualitative and quantitative manner. The Draft Guidance makes clear that 25,000 tons do not constitute a significant impact requiring an EIS. Rather, the Draft Guidance states that "a quantitative and qualitative assessment" of emissions "may be meaningful to decision makers and the public" when a project exceeds that level. Such an assessment could occur in either an Environmental Assessment or an EIS.

In addition the Draft Guidance appears to suggest that the effects of climate change on the project be examined in the cumulative effects section of the NEPA document. Page 6 of the Draft Guidance indicates, for example, that "climate change can affect the integrity of a development or structure by exposing it to a greater risk of floods, storm surges or higher temperatures. Climate change can increase the vulnerability of a resource, ecosystem, or human community, causing a proposed action to result in consequences that are more damaging than prior experience might indicate." The Draft Guidance also suggests that the focus of this analysis should be on the aspects of the environment that are affected by the proposed action and the significance of climate change for those aspects of the affected environment. Importantly, it is careful to point out that agencies must employ "the rule of reason" to ensure that their discussions pertain to the issues that deserve study and deemphasize issues that are less useful to the decision regarding the proposal, its alternatives, and mitigation options. The Draft Guidance acknowledges that agencies may limit the scope of cumulative impact analyses on the basis of practical considerations, which in the case of climate change includes scientific uncertainty regarding anticipated environmental effects in a specific project area.

The Draft Guidance specifically suggests that climate change effects should be considered for projects that are designed for long-term utility and located in areas that are considered vulnerable to specific effects of climate change (such as increasing sea level or ecological change) within a project's timeframe. Finally, it emphasizes the value of adaptive management and the value of monitoring to ensure that environmental goals of a decision are realized.

The Draft Guidance also includes a short list of potentially satisfactory mitigation options, including energy efficiency and carbon sequestration.

In sum, the Draft Guidance provides ideas for considering GHGs in each stage of the NEPA process. However, it leaves open to question a fundamental issue in NEPA analyses—the level of emissions that would trigger an EIS. Thus, litigation will remain the principal mechanism for answering this question.

The Draft Guidance has generated intense reactions. For example, Sen. James Inhofe (R-Okla.), Ranking Member of the Senate Committee on Environment and Public Works, along with Sen. John Barrasso (R-Wyo.), Ranking Member on the Senate Subcommittee on Oversight and Investigations, and Sen. David Vitter (R-La.), Ranking Member of the Subcommittee on Clean Air and Nuclear Safety, have introduced S. 3230, the NEPA Certainty Act. The bill finds that using NEPA as a climate change mitigation tool would be costly, result in fewer jobs and would prove environmentally ineffective in addressing climate change. It declares that NEPA should not be used to document, predict, or mitigate the climate effects of specific federal actions.

B. Washington SEPA

In 2008, the Washington Climate Action Team convened a SEPA Implementation Working Group (IWG) in an effort to prescribe SEPA guidelines for evaluation of projects with GHG impacts. This effort did not yield a consensus on how to proceed. For a detailed discussion of the IWG report, see Environmental & Land Use Law Newsletter, Volume 36 Number 2 (August 2009). The IWG concluded:

> There are many issues that the SEPA IWG did not fully address or resolve because of the constraints of time, the complexity of the issues, and the many aspects of SEPA that are affected by considerations of climate change. For example, the SEPA IWG did not fully develop an approach for conducting SEPA threshold determinations and what the standard (or standards) of significance for projects and non-projects should be.

The IWG did, however, focus this and other discussions on key sets of questions and options that provide direction for future work. These recommendations include ideas for (1) revising the SEPA Checklist, (2) providing reference materials regarding emission sources, measurement tools, and mitigation options, (3) developing tools to measure GHG emissions to make impact assessment predictable and cost-effective, (4) providing qualitative methods of characterizing emissions pending development of quantitative measurement sources, (5) developing guidance on mitigation, (6) developing standards of significance for threshold determinations, (7) developing concepts for streamlining SEPA review for "climate-friendly" projects, (8) revising the Checklist to analyze a proposals impacts together with those anticipated to occur from climate change (e.g water availability, water temperature, forest health), (9) addressing varying lead agency capacities to conduct GHG review, (10) providing training and funding, and (11) using an advisory committee.

The Washington Department of Ecology is expected to issue draft guidance in late May; however, according to individuals working on the guidance, it will not establish numeric levels of emissions that constitute a significant impact.

C. CEQA

With respect to California, in 2007 the California legislature directed the state Office of Planning and Research (OPR) to develop regulations for the analysis and mitigation of GHGs under CEQA. This process was completed on December 30, 2009, as revisions to the CEQA Guidelines (title 14, section 15000, *et seq.* of the California Code of Regulations).

Instead of establishing a clear statewide standard, however, OPR left it to the individual agencies to set their own levels of significance. The regulations allow the agencies to perform either a quantitative or a qualitative analysis to determine if the impact from the GHG emissions from

a particular project is significant. This significance "threshold" is the key under CEQA not only to determine whether the project itself has a significant impact, which defines the extent of compliance required, but also to set the bar for other analysis including those involving mitigation and project alternatives.

A quantitative analysis involves a standard based upon a specific numeric threshold, which many industries find difficult to identify given the nature of GHGs. In contrast, a qualitative analysis determines significance based on a project's compliance with performance standards or its consistency with GHG reduction plans or regulations (Climate Action Plan (CAPS)).

To date, agencies that have issued regulations or guidance seem to use a combination of these two methods. The Bay Area Air Quality Management District (BAAQMD) has set quantitative standards that are based upon the difference between projected emissions and emissions that would be regulated under A.B. 32 (the California Global Warming Solutions Act). The BAAQMD also will allow CAPS under strict criteria. In turn, the San Joaquin Valley Air Pollution Control District (SJVAPCD) will allow compliance with Best Performance Standards (BPS) to reduce GHG emissions rather than emissions quantification and mitigation for individual projects. If the BPS cannot be met or there is none for that industry, a source may be able to escape significance by quantifying its emissions and reducing the GHG by 29%, which is the estimated reduction required under A.B. 32. The SJVAPCD is currently working with the public to set the BPS for specific industries. Finally, the South Coast Air Quality Control District is looking at a tiered approach, with current quantitative levels based upon a 90% capture rate for stationary sources. This approach would require the quantification of GHGs for a project as well as all mitigation measures included in the project or added during the CEQA process. The tiered approach may also allow the use of CAPS or other measures to determine significance levels.

At this juncture there is no clear path for projects with respect to GHGs and the CEQA process. Project proponents will need to comply with whatever process the relevant lead or responsible agency has developed to deal with GHGs and make sure that whatever analysis is incorporated into their CEQA documents is defensible under the new CEQA Guidelines, local regulation or guidance, and any case law that develops.

D. MEPA

In September 2009, the Minnesota Pollution Control Agency (MPCA) provided guidance on how to address GHGs in the state's environmental review process under MEPA. MPCA uses a different framework from the CEQ for determining when a proposal requires meaningful consideration of climate change in environmental review. Rather than identifying a reference point (*i.e.*, 25,000 metric tons per year), the MPCA requests quantitative analysis of GHGs from all proposers of projects that are also required to obtain air emissions permits. These proposers should develop carbon footprints that include reports of all GHG emissions from within the boundary of the proposed facility, and emissions from the generation of any purchased electricity.

Further, if the proposed project involves fuel combustion, the analysis should include a description of other fuel choices that were evaluated in the development of the project and their effect on GHG emissions. Also, if the proposed project is not the lowest GHG-emitting option, a description of why the project was still selected should be included.

Like the CEQ's Draft Guidance, MPCA's guidance makes recommendations on methodology for these calculations. But MPCA suggests using the protocol designed by the Climate Registry, a non-profit collaboration that sets GHG reporting standards, rather than using the various federally developed technical documents recommended by CEQ. Unlike the Draft Guidance, Minnesota's guidance does not recommend consideration of the effects of climate change on project proposals.

It appears that any project challenged on the basis of whether a sufficient GHG analysis was performed will be evaluated on a case-by-case basis. For example, in 2009 the Minnesota Court of Appeals decided a challenge to the scope of environmental review performed by the Department of Natural Resources (DNR) in issuing a permit for a proposed mining and steel mill. The steel company argued that MEPA did not extend to climate change issues. The DNR argued that its analysis, including a carbon footprint study (similar to the one in the MPCA guidance), was sufficient given the current state of climate science. The court held that MEPA does extend to GHG emissions and that the DNR review was sufficient under MEPA.

Eric Laschever *is a partner at Stoel Rives LLP and teaches a course in climate change law at Seattle University School of Law.* *He would like to acknowledge the substantial contributions of his colleagues at Stoel Rives to this article.*

Coastal and Marine Spatial Planning for Offshore Renewable Energy Development on the West Coast

By Chad T. Marriott and Cherise M. Oram, Stoel Rives LLP

As developers continue to build renewable energy projects on land under relatively well-defined siting and permitting schemes, the regulatory regime for offshore wind and hydrokinetic projects (i.e., wave, tidal, and ocean current)[1] is a work in progress as agencies strive to promote certainty for investors and developers. Recent memoranda of understanding signed between the Federal Energy Regulatory Commission and the Department of the Interior ("DOI"),[2] the State of Washington,[3] and the State of Oregon[4] demonstrate federal and state commitments to develop offshore renewable energy resources. Successfully navigating the offshore regulatory environment requires close attention to regulatory authorities governing uses of the ocean space and impacts one use may have others.

One reason special care is required is that the ocean and adjacent coastal areas generally are not zoned to allow (or restrict) particular uses in particular locations *to the exclusion of others*. Consider these interests and uses, for example: commercial and sport fishing, aquaculture, recreation, shipping, mining, oil and gas exploration and development, renewable energy development, undersea fiber optic cables, national defense, coastal private property, tribal treaty rights, cultural heritage sites, national parks, national marine sanctuaries, and protected and endangered species.

While individual sectors of the marine economy are subject to regulations such as limits on take, designated shipping lanes, and lease requirements, those regulations generally do not affect other uses. For example, the existence of a shipping lane in Puget Sound does not prevent a recreational sailor from crossing that lane. Likewise, a renewable energy lease on the Outer Continental Shelf (the "OCS") will not prevent commercial fishing or other uses in the lease area. Although this may not seem like a big deal (after all, the energy industry has been dealing with conflicting uses on the nation's public *lands* for a long time), the number of regulations and regulatory entities governing the use of *marine waters* that require consultation and cooperation between state and federal agencies is greater than that confronting most land-based renewable energy projects. As existing and new user groups seek to make use of the states' territorial seas[5] and the OCS,[6] some argue that a more comprehensive, integrated, ecosystem-based management framework is needed to deal with the statutory and regulatory complexity inherent in balancing so many interests.

The Interagency Ocean Policy Task Force

To address the potentially competing uses of the nation's oceans and coastal areas, President Obama established an Interagency Ocean Policy Task Force (the "Task Force") in June 2009 and directed it to develop "a recommended framework for effective coastal and marine spatial planning" ("CMSP").[7] Following the release of its Interim Report in September 2009,[8] the Task Force convened 14 expert roundtables focused on interests specifically affected by CMSP[9] and, on December 9, 2009, the Task Force released its Interim Framework for Effective Coastal and Marine Spatial Planning (the "Interim Framework").[10] The Interim Framework proposes nine regional planning areas (the West Coast Region includes Washington, Oregon, and California) and sets out a process to develop and implement CMSP in each region. According to the Interim Framework, each region is expected to develop its own CMS Plan within the next five years.[11] If implemented effectively, the CMS Plans contemplated by the Task Force can be a powerful tool for long-term ocean resource management and can play a key role in streamlining the regulatory process for offshore renewable energy developers.

This article focuses on the Interim Framework as it concerns offshore renewable energy development and posits that the CMS Plan for the West Coast Region (the "West Coast Plan") should endeavor to achieve three goals: (1) clarify the role that each state and federal agency will play in implementing the West Coast Plan in order to minimize duplicative efforts and speed up the siting and permitting phase; (2) streamline the state and federal authorization processes for offshore wind and hydrokinetic projects[12] to align the West Coast Plan with the President's goal of mitigating climate change through renewable energy development;[13] and (3) establish a mechanism for funding ongoing research and development aimed at designing and implementing baseline environmental studies and monitoring for offshore renewable energy technologies. If the West Coast Plan accomplishes these things, the industry will quickly reap the benefits.

What Is Coastal and Marine Spatial Planning?

The Interim Framework defines CMSP as "a comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal and Great Lakes areas. CMSP identifies areas most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives. In practical terms, CMSP provides a public policy process for society to better determine how the ocean, coasts, and Great Lakes are sustainably used and protected now and for future generations."[14]

The United Nations Educational, Scientific and Cultural Organization ("UNESCO") defines CMSP similarly,[15] with

two important qualifications: for UNESCO, CMSP is not an end in itself and it does not replace single-sector planning.[16] Thus, for UNESCO, CMSP functions as a national policy overlay that relies on existing statutory and regulatory schemes to achieve its purpose. In UNESCO's eyes, CMSP "is *not* ocean zoning."[17]

Importantly, the Interim Framework was vague on this point.[18] States in a particular region may choose to implement that region's CMS Plan by (1) carving out and regulating exclusive-use zones according to specific, uniform guidelines, (2) allowing state agencies to interpret general guidelines according to their existing statutory authority, or (3) something in between. For the West Coast Region, the choice for implementation will lie with a regional planning body consisting of federal, state, tribal, and local agencies, as well as representatives from the West Coast Governors Agreement on Ocean Health[19] (collectively, the "Western Regional Planning Body" or the "Planners").[20]

Identifying Roles for State and Federal Agencies

According to the Interim Framework, the National Ocean Council (the "NOC")—a new Cabinet-level committee proposed by the Task Force—will help create the Western Regional Planning Body. Co-chaired by the chair of the Council on Environmental Quality (the "CEQ") and the Director of the Office of Science Technology Policy,[21] the NOC will have "a stronger mandate and direction [than the former Committee on Ocean Policy], and renewed and sustained high-level engagement . . . . [that will provide] a framework for more successful policy coordination."[22] However, the NOC has not yet been formed. If President Obama takes the Task Force's recommendation, then he will likely form the NOC by executive order.[23]

While both the federal government and the western coastal states have been active in ocean resource management since the 1970s,[24] the number and variety of ocean uses continues to grow. Admittedly, without a unifying policy goal to guide the preservation and development of ocean resources, stakeholders risk a tragedy of the commons[25] that puts both individual interests and ocean health at risk. However, the courageous efforts of the states and federal agencies like the National Oceanic and Atmospheric Association ("NOAA") and the DOI have not yet provided a clear framework for developing renewable energy projects on the west coast. Washington's passage of Substitute Senate Bill 6350 on March 19, 2010 ("SSB 6350"), represents the most direct legislative action to implement CMSP and coordinate offshore renewable energy development.

SSB 6350, effective June 10, 2010, establishes a marine interagency team tasked with assessing and recommending a framework for conducting marine spatial planning and integrating the planning into existing state management plans. The assessment must be completed by December 15, 2010. However, until federal, private, or other non-state funding is secured specifically for these activities, the team may not (1) assist state agencies with the review and coordination of marine spatial data and marine spatial planning with existing plans and ongoing planning or (2) coordinate the development of a comprehensive marine management plan for the state's marine waters. Once funding has been secured and the interagency team sets itself to the task of designing a comprehensive marine management plan, it will have twenty-four months to do so. And once approved, the plan will be submitted to the appropriate federal agency for incorporation into the Washington's coastal zone management plan. The state's Department of Ecology is tasked with developing guidance to achieve a unified state position on the siting and operation of offshore renewable energy facilities in the state. However, that activity, too, is contingent on federal or other non-state funding.[26]

The West Coast Plan presents an opportunity not only to develop a unifying policy for the region, but to use that policy as a basis for cleaning out the cupboards—i.e., for revisiting the nexus between federal and state authorization processes in order to streamline environmental reviews. Because the Western Regional Planning Body will have responsibility for choosing how CMSP is implemented in Washington, Oregon, and California, developers in the region should consider carefully how each participating agency's existing regulatory responsibilities will be affected (e.g., will the West Coast Plan consolidate or expand existing consultations?), and determine how to proactively engage them in streamlining the system.

The degree to which the Western Regional Planning Body envisions CMSP as a method of ocean zoning will be critical to analyzing how agencies' roles may change. If, on one hand, CMSP is implemented by defining exclusive use zones on the West Coast, then stakeholders must agree on a method for proceeding with project development as those zones are negotiated. Such zones would undoubtedly be hotly contested and subject to protracted state and federal notice and comment processes (if not new statutory drafting). A similar method for proceeding in the meantime will be necessary if the Planners choose to designate preferred use areas where other uses are not excluded, but potentially competing uses are allowed according to a predetermined hierarchy of "best uses." On the other hand, if the West Coast Plan permits state and federal agencies to interpret a general set of guidelines, then the proponents of renewable energy projects may have to deal with inconsistencies between state processes and potentially more regulatory hurdles.

No matter how the scope of CMSP is defined, however, the West Coast Plan must address how state and federal agencies can work together to accelerate the responsible development of offshore renewable energy resources and avoid duplicative efforts during the siting and permitting phases.[27]

Implementing the West Coast Plan

The Interim Framework calls for each region to develop a CMS Plan within five years, based on a draft development agreement that will be provided by the NOC.[28] While other regions may find that goal difficult to meet, the West Coast Region should not. Not only do the western states benefit from an array of ocean resource management statutes and policies developed over the past 40 years,[29] the Interim Framework provides for the phased implementation of CMSP.[30] Phased implementation will allow the Western Regional Planning Body to focus early on those areas where the states have already accomplished the most and push less-developed or very contentious issues back for later consideration and negotiation. Thus, the Planners will not launch a comprehensive West Coast Plan *in* five years; rather, the West Coast Plan will be developed and implemented progressively *over the course of* five years.

Two areas deserve the Planners' early attention. First, dispute resolution procedures must be set out clearly and communicated to all stakeholders in the region. Distinct dispute resolution mechanisms must be established for (1) disputes that arise during the development of the West Coast Plan concerning the implementation of CMSP in the region generally and (2) disputes that arise after the West Coast Plan (or a portion thereof) has been implemented concerning the impacts a particular project could have on the environment, local culture, or local economy.

Neither the Interim Report nor the Interim Framework proposed a dispute resolution process to govern the development of regional CMS Plans. Rather, dispute resolution will be outlined by the NOC, in cooperation with the Governance Advisory Committee,[31] a committee consisting of 13 members from regional governance structures, tribes, and both coastal and inland states.[32] At a glance, the three levels of review set out in the Interim Report to resolve stakeholder disputes seem promising. If the regional planning body is unable to negotiate a solution, then the issue will be elevated to the NOC, and if the NOC members cannot resolve the conflict, it will be referred to the President for final decision.

However, a process that, in certain instances, could end only by executive order is not necessarily a streamlined one. Given the diversity of parties and the differing jurisdictional authorities and regimes between and among the state and federal agencies, devising a dispute resolution process that works for everyone will be challenging, but not impossible. Although implementing a process that is easy to facilitate and resolves conflicts quickly will require parties to compromise where they may not otherwise do so, the stakeholders involved in developing the West Coast Plan have a shared goal of responsible development.

Assuming the NOC establishes an efficient dispute resolution process for the regional planning bodies, the West Coast Plan itself should present a preferred method for resolving disputes that arise during individual project development. Ultimately, all stakeholders have an interest in avoiding litigation, and a development plan that includes a strategy for assessing impacts throughout a project's life will be far superior to one that does not.

Thus, the second area that deserves early attention is mitigation. The Interim Framework recommends that CMSP should be guided by "the precautionary approach as defined in Principle 15 of the Rio Declaration, 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'"[33] However, others have argued that pure adaptive management would be better for accelerating the offshore renewable energy industry.[34]

Ultimately, the West Coast Planning Body will determine what mitigation standard should predominate in the region, and it is possible that different mitigation strategies could be used to assess different technologies or sectors of the marine economy. After all, the West Coast Plan must address all ocean uses, not only renewable energy development. However, such a discussion is beyond the scope of this article.

Whichever method the Planners choose, the goal is clear. The West Coast Plan must give the industry a signal about the level of mitigation that developers will be required to undertake prior to placing their first device in the water. To be aligned with the President's goal of mitigating climate change through renewable energy development, projects must be able to move forward even though the environmental impacts (whether good or bad) are not completely understood at the outset. State and federal agencies must be able to define their specific roles in a comprehensive process for resolving disputes that arise in individual project development. Accelerating the industry, therefore, may be less about which mitigation philosophy should govern and more about how quickly the Planners can give the industry the signal it needs to assess the financial viability of proposed projects.

Using CMSP to Advance Offshore Renewable Energy

CMSP is to be "based on sound science."[35] However, relatively little is known about how offshore renewable energy projects will impact the ocean environment, and some of what is known is proprietary. Because the offshore renewable energy industry is still in its nascent stages of development, and because companies are not incentivized to share data gathered through their own R&D efforts, the West Coast Plan should establish a mechanism for funding ongoing R&D in the region.[36]

One idea is for the western states to fund research projects focused on regional issues through the Northwest National Marine Renewable Energy Center. Another possibility is for the West Coast Planning Body to work with legislators to propose R&D programs that can be carried out by other public universities and colleges. At the federal level, the Ocean Renewable Energy Coalition has negotiated Senate Bill 1462, a bill "that would establish an Adaptive

Management Fund which developers can use to underwrite environmental studies and ongoing post-deployment monitoring requested by state and federal resource agencies, including NOAA, for demonstration and early-stage commercial projects."[37] The concept articulated in Senate Bill 1462 is sound and the Planners can use it as a model for state legislation in the region.

Ultimately, increasing access to baseline data on the surface and subsurface environments will be critical to rapid growth in the industry. Better information will lead to more concise and efficient mitigation strategies, and better mitigation will lead to fewer disputes.

Conclusion

CMSP can be a powerful tool for ocean resource management on the West Coast. However, unless the West Coast Planning Body uses it to carefully streamline existing state and federal authorization processes, the West Coast Plan could slow offshore renewable energy development in the region. Once President Obama forms the NOC and the West Coast Planning Body convenes, the Planners should act quickly to leverage the states' existing statutes, policies, and memoranda of understanding to identify areas for early action. The Planners should also look beyond the four corners of the Interim Framework and devise a funding mechanism for research on the surface and subsurface environments that will help to inform decisions by developers, resource agencies, and legislators. Finally, to the extent that CMSP is designed to determine the best uses for the marine environment, interested parties should engage in the process early, not only to reinforce the President's goal of prioritizing renewable energy to mitigate climate change, but also to learn more about the competing uses and stakeholder groups.

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1 For an excellent summary and "roadmap" of relevant state and federal permits currently required for developing hydrokinetic projects in Washington's territorial waters, see the "Washington" chapter of "Siting Methodologies for Hydrokinetics: Navigating the Regulatory Framework," prepared by Pacific Energy Ventures, LLC on behalf of the U.S. Department of Energy and published in December 2009. A full-text PDF can be downloaded at http://www.advancedh2opower.com.

2 Memorandum of Understanding Between the U.S. Department of the Interior and Federal Energy Regulatory Commission (Apr. 9, 2009), *available at* http://www.ferc.gov/legal/maj-ord-reg/mou/mou-doi.pdf.

3 Memorandum of Understanding Between the Federal Energy Regulatory Commission and the State of Washington (June 4, 2009), *available at* http://www.ferc.gov/legal/maj-ord-reg/mou/mou-wa.pdf.

4 Memorandum of Understanding Between the Federal Energy Regulatory Commission and the State of Oregon (Mar. 26, 2008), *available at* http://www.ferc.gov/legal/maj-ord-reg/mou/mou-or-final.pdf.

5 For Washington, Oregon, and California, the states' territorial seas extend three nautical miles (3.452 statute miles) seaward of the baseline from which the territorial sea is measured (e.g., the mean lower low-water mark in Oregon). *See* U.S. Department of the Interior, Minerals Management Service, What is the Outer Continental Shelf? http://www.gomr.mms.gov/homepg/whoismms/whatsocs.html (last visited Apr. 12, 2010).

6 The OCS consists of "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in [43 U.S.C. § 1301(a)], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." Submerged Lands Act, 43 U.S.C. § 1331(a).

7 Memorandum from President Barack Obama to Heads of Executive Departments and Agencies, National Policy for the Oceans, Our Coasts, and the Great Lakes at 2 (June 12, 2009) ("Obama Memo"), available at http://www.whitehouse.gov/assets/documents/2009ocean_mem_rel.pdf. .

8 White House Council on Environmental Quality, Interim Report of the Interagency Ocean Policy Task Force (Sept. 10, 2009), *available at* http://www.whitehouse.gov/assets/documents/09_17_09_Interim_Report_of_Task_Force_FINAL2.pdf

9 White House Council on Environmental Quality, Interagency Ocean Policy Task Force: Expert Briefings, http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans/expertbriefings (last visited Apr. 12, 2010).

10 White House Council on Environmental Quality, Interim Framework for Effective Coastal and Marine Spatial Planning (Dec. 9, 2009), *available at* http://www.whitehouse.gov/sites/default/files/microsites/091209-Interim-CMSP-Framework-Task-Force.pdf.

11 *See* Interim Framework at 25-31.

12 *See id*. at 3 ("CMSP is intended to build upon and significantly improve existing Federal, State, tribal, local, and regional decision-making and planning processes.").

13 Obama Memo at 1.

14 Interim Framework at 1.

15 "Marine spatial planning is a public process of analyzing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that usually have been specified through a political process." UNESCO, Marine Spatial Planning, http://www.unesco-ioc-marinesp.be/marine_spatial_planning_msp (last visited Apr. 12, 2010).

16 *Id.* ("Marine spatial planning is *not* an end in itself, but a practical way to create and establish a more rational use of marine space and the interactions between its uses, to balance demands for development with the need to protect the environment, and to achieve social and economic objectives in an open and planned way." (emphasis added)).

17 *Id.* (emphasis added).

18

This framework for CMSP is to provide all agencies with agreed upon principles and goals to guide their actions under these authorities, and to develop mechanisms so that Federal, State, tribal, and local authorities, and regional governance structures can proactively and cooperatively work together to exercise their respective authorities.

An agency or department's capacity to internalize the elements of any particular CMS Plan would vary depending on the nature of the applicable statutes.

Interim Framework at 6.

19 *See* West Coast Governors Agreement on Ocean Health, http://westcoastoceans.gov/leads/ (last visited Apr. 12, 2010).

20 Interim Framework at 11-12.

21 Interim Report at 19.

22 Interim Report at 6.

23 The NOC will replace the former Committee on Ocean Policy within the CEQ. The Committee on Ocean Policy was formed by President George W. Bush in Executive Order 13366, 69 Fed. Reg. 76,591 (Dec. 17, 2004), *available at* http://edocket.access.gpo.gov/2004/pdf/04-28079.pdf.

24 For example, Congress enacted the Coastal Zone Management Act (16 U.S.C. §§ 1451-1464) and the Marine Mammal Protection Act (16 U.S.C. §§ 1361-1423) in 1972, the Endangered Species Act (7 U.S.C. § 136, 16 U.S.C. § 1531, et seq.) in 1973, and the Magnuson-Stevens Fisheries Conservation and Management Act (16 U.S.C. §§ 1801-1891) in 1976, and the State of Washington passed its Shoreline Management Act (RCW 90.58) in 1972.

25 Garrett Hardin, "The Tragedy of the Commons," *Science* (Dec. 13, 1968), at 1243-48.

26 Section 8 of SSB 6350 states explicitly that the statute will not affect "in any way any project, use, or activity in the state's marine waters existing prior to or during the development and review of the marine management plan."

27 The Ocean Renewable Energy Coalition ("OREC") expressed this sentiment in its comments to the Task Force: "Federal, state and local regulatory agencies should be encouraged to work together to ensure their approvals are consistent and to streamline their approval processes and timing." Comments of the Ocean Renewable Energy Coalition to the Interagency Ocean Policy Task Force at 2-3 (Sept. 10, 2009), available at http://www.whitehouse.gov/assets/formsubmissions/54/fa1fe587be3f4b75af4ccd11c21de4ff.pdf ("OREC Comments").

28 Interim Framework at 25-31.

29 Washington passed its Shoreline Management Act in 1972 (RCW 90.58) and then, amid increasing concern about offshore drilling, passed the Ocean Resources Management Act in 1989 (RCW 43.143). Oregon passed the Oregon Ocean Resources Management Act in 1991 (the "ORMA") (ORS 196.405-.515). The Oregon legislature also amended ORS chapter 163 in 1991 to create the Ocean Policy Advisory Council, tasking it with developing a Territorial Sea Plan by July 1, 1994. *See* Oregon Department of Land Conservation and Development, Oregon Coastal Management Program, Oregon Territorial Sea Plan, Part One, http://www.oregon.gov/LCD/OCMP/docs/Ocean/otsp_1-a.pdf (last visited Apr. 12, 2010). The ORMA is presented in Appendix E to the Territorial Sea Plan. Wave energy was brought to the forefront of the ocean-use conflict on March 26, 2008 when Governor Kulongoski signed Executive Order 08-07, directing state agencies to protect coastal communities when siting marine reserves and wave energy projects. Pursuant to the executive order, on November 5, 2009, Oregon's Land Conservation and Development Commission adopted an administrative rule for Part Five of the Oregon Territorial Sea Plan, "Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities." OAR 660-036-0005; Oregon Department of Land Conservation and Development, Oregon Coastal Management Program, Oregon Territorial Sea Plan, Part Five, http://www.oregon.gov/LCD/OCMP/docs/Ocean/otsp_5.pdf (last visited Apr. 12, 2010). California passed its Ocean Resources Management Act in 1990 (Public Resources Code § 36000, et seq.), and amended it in 1991 to transfer responsibility for all marine and coastal resource management to the Secretary for Resources. California Ocean Resources Management Program, http://www.resources.ca.gov/ocean/program_info.html (last visited Apr. 12, 2010). Finally, in 1999, California passed the Marine Life Protection Act. Cal Fish & Game Code § 2850, et seq. "This action required the state to undertake a marine spatial planning effort to evaluate and possibly redesign all existing state marine protected areas and to potentially create new protected areas that could, to the greatest degree possible, act as a networked system." U.S. Department of Commerce, NOAA, California Marine Life Protection Act Initiative, http://www.msp.noaa.gov/practice/california.html (last visited Apr. 12, 2010).

30 Interim Report at 26.

31 Interim Framework at 13.

32 Interim Report at 24.

33 Interim Framework at 8.

34 OREC Comments at 2 ("The Task Force should refrain from endorsing a precautionary principle that would discourage development in the face of uncertainty, and instead should endorse the testing and phased development of projects through robust monitoring and adaptive management.").

35 Interim Framework at 1.

36 *Cf.* OREC Comments at 2 ("Sound ocean management policy decisions and marine spatial planning must be based on adequate baseline data rather than speculation. Data collection is an integral part of any successful ocean management program and must receive adequate funding for comprehensive ocean planning to succeed.").

37 Testimony of Carolyn Elefant, Legislative and Regulatory Counsel, Ocean Renewable Energy Coalition, before the U.S. Senate Committee on Commerce, Science, & Transportation, Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard (Nov. 4, 2009), *available at* http://commerce.senate.gov/public/?a=Files.Serve&File_id=9aca122c-7617-40ff-a232-386c1d842edd.

EPA Issues Construction Stormwater Rule

By Meline MacCurdy and Russell Prugh

The Environmental Protection Agency (EPA) issued a long-awaited final stormwater rule in the Federal Register on December 1, 2009, that for the first time imposes an enforceable numeric limit on stormwater discharges from large construction sites and requires monitoring to ensure compliance with the numeric limit. The rule also requires nearly all construction sites disturbing one acre or more to implement a range of erosion and sediment controls and pollution prevention measures. While the non-numeric effluent limitations are applicable to every Clean Water Act[1] (CWA) construction stormwater permit for sites over one acre issued after the rule took effect on February 1, 2010, the numeric limit and associated monitoring requirements applicable to large sites will be phased in over four years.

According to EPA, the rule will impact approximately 82,000 firms within the construction and development (C&D) category, including residential and commercial construction and heavy and civil engineering firms,[2] and will cost the industry nearly $1 billion in new compliance costs.[3] While massive, the cost of the new requirements are less than were estimated under the proposed rule, as a result of changes made during the rulemaking process.

The Clean Water Act

The CWA prohibits discharges of pollutants by any person from point sources into waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit.[4] NPDES permits "place limits on the type and quantity of pollutants that can be released into the Nation's waters, and must set forth effluent limitations,"[5] which are specific restrictions on the quantities, rates, and concentrations of chemical, physical, biological or other constituents, such as sediment or turbidity, discharged into navigable waters from point sources.[6] EPA's effluent limitations are incorporated into NPDES permits when the permits are issued. NPDES permits are generally issued by state agencies, because most states have sought and received NPDES permitting authority from EPA.[7] EPA's national regulations set a floor for state as well as EPA NPDES permits, but states can include requirements in state NPDES permits that are more stringent than the national standards.

The specific effluent limitations incorporated into NPDES permits are established using more general effluent limitations guidelines (ELGs) and new source performance standards (NSPSs).[8] ELGs impose technology-based requirements for categories of point source dischargers. ELGs apply to existing sources of pollution and NSPSs only apply to "new sources." A "new source" is any source that was

constructed after publication of rules prescribing standards of performance under CWA section 306 applicable to the source, if the rule is subsequently adopted.[9]

Background to the Final Rule

Under EPA's NPDES regulations, dischargers engaged in construction activity are required to obtain an NPDES stormwater permit if the activity will result in the disturbance of a land area of one acre or greater.[10] While construction activity dischargers make up the largest category of NPDES permits, there were no federal guidelines establishing national performance standards or monitoring requirements for the C&D category of dischargers before February 1, 2010.[11]

EPA identified the C&D as a point source category for which it intended to promulgate rules regarding ELGs and NSPSs in 2000.[12] EPA issued a proposed rule in 2002 that contained several options for addressing stormwater discharges from construction sites, including ELGs and NSPSs.[13] However, in 2004, EPA opted not to promulgate ELGs for the construction industry, and instead relied on "the range of existing programs, regulations, and initiatives" at the federal, state, and local levels.[14] In response to EPA's rulemaking decision, environmental groups filed a complaint to force EPA to promulgate discharge standards and guidelines for the construction industry. In *Natural Resources Defense Council v. EPA*, the Ninth Circuit affirmed an injunction forcing EPA to propose ELGs and NSPSs for the construction industry by December 1, 2008,[15] and promulgate a final rule by December 1, 2009.[16]

Overview of the Final Rule

EPA's final rule establishes nationally applicable ELGs and NSPSs to NPDES permits covering stormwater discharges from construction sites, including best management practices (BMPs) and a numeric limit for turbidity. The non-numeric effluent limitations include a range of erosion and sediment controls and pollution prevention measures, apply to construction activities that will disturb one acre or greater, and must be incorporated into NPDES permits issued after the rule takes effect.[17] The final rule revises several elements of the non-numeric effluent limitations from the 2008 proposed rule, with the intent to make the requirements applicable to all construction activities. These changes include the elimination of specific requirements, such as the implementation of sediment basins on all large construction sites,[18] and generally responding to the variability of C&D sites with the inclusion of "unless infeasible" language in some requirements.[19]

The rule requires implementation of BMPs related to: (1) erosion and sedimentation controls,[20] (2) soil stabilization controls,[21] and (3) pollution prevention measures.[22] The rule also prohibits discharges from: (1) dewatering activities and concrete washout activities (unless managed by appropriate controls), (2) wastewater from the washout of stucco, paint, form release oils, curing compounds and other construction materials, (3) fuels, oils, or other pollutants used in vehicle and equipment operation and maintenance, and (4) soaps or solvents used in vehicle and equipment washing.[23] The rule also requires that discharges from basins or impoundments on a construction site must withdraw water from the surface, unless infeasible.[24]

In response to comments on the proposed rule, EPA changed the technology basis for BAT and NSPS from active or advanced treatment systems (ATS), which consist of poly-assisted clarification followed by filtration, to passive treatment systems (PTS), which, as used in the final rule, include practices that rely on settling and filtration to remove sediment, turbidity, and other pollutants.[25] EPA determined that PTS could "provide a high level of turbidity reduction at a significantly lower cost than" ATS.[26]

The rule sets a numeric effluent limitation for turbidity at 280 nephelometric turbidity units (NTUs) and requires monitoring to ensure that this limitation is met.[27] EPA explained its decision to regulate turbidity using numeric standards based on the fact that turbidity is an "indicator pollutant" that will help to control the discharge of other pollutants, such as metals and nutrients, from construction sites.[28] Turbidity can also be measured in the field, which EPA expects to reduce compliance costs.[29]

Unlike the rule's non-numeric requirements, the turbidity limitation only applies to large construction sites, *i.e.*, sites that will disturb ten acres or more at one time.[30] In addition, the numeric limitation will be implemented in two phases in NPDES permits for stormwater discharges associated with construction activities issued after February 1, 2010. First, construction sites that disturb twenty or more acres of land at one time are required to sample and comply with the turbidity limitation within eighteen months of the effective date of the final rule (by August 1, 2011).[31] Second, construction sites that disturb ten or more acres at one time are required to sample and comply with the turbidity limitation within four years of the effective date of the rule (by February 2, 2014).[32]

The 280 NTU turbidity limit is expressed as a maximum daily limitation, meaning that the averages of the samples taken over the course of a day may not exceed the maximum daily amount. This allows for temporary discharges of stormwater that exceed the turbidity requirement (such as discharges during an intense period of rainfall).[33] While the final rule leaves the specific monitoring requirements in the NPDES construction stormwater permits to the states, EPA has indicated that it expects at least three samples per day from the discharge point while discharges are occurring.[34] The rule also exempts discharges resulting from a storm event that is larger than the local two-year, twenty-four hour storm.[35]

Impacts on Existing State Programs, Reactions to the Final Rule

All NPDES permitting authorities will be required to incorporate the rule into their construction stormwater

permits as and when those permits are issued or reissued,[36] but the impact of the changes will depend on existing state and local requirements. In many cases, the rule is more restrictive than current stormwater permit requirements, which will impose significant burdens on permitting authorities and permittees. For example, EPA acknowledges that the monitoring requirements will generally "require an additional layer of management practices and/or treatment above what most state and local programs are currently requiring,"[37] although some states have been imposing monitoring requirements on construction operators in their permits for some time.[38] Additionally, although the rule does not require the use of a particular technology for meeting the numeric limitation, permitting authorities and permittees will need to develop and select appropriate management practices or technologies for meeting the numeric limitations.

Although EPA expects that the final rule will cost less than the proposed rule, the final rule comes at an economically difficult time for an already-strained construction industry, and has drawn criticism from industry and states. Industry petitioners have already filed lawsuits challenging the final rule, claiming that EPA failed to consider the economic and technical feasibility of meeting the rule's standards. Those lawsuits are currently pending in the Seventh Circuit Court of Appeals. In late April, the Small Business Administration (SBA) Office of Advocacy petitioned EPA to reconsider the final rule. The SBA argues that the numeric standard in the final rule is "costly, difficult to implement, and based on numerous factual errors."[39] SBA argues that the final rule would cost over ten times as much as EPA estimates, and offers several recommendations for revising the final rule to "reduce negative impacts on small businesses, the overall economy, and housing affordability."[40] At the time of this writing, EPA is considering SBA's petition and engaging in administrative review of industry petitions regarding the final rule.

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1 33 U.S.C. § 1251 *et. seq*.

2 *See* EPA, Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category; Final Rule 74 Fed. Reg. 62,996, 63,003-04, 63,031 (Dec. 1, 2009) ("Final Rule").

3 *See id.* at 62,997-98, 63,040.

4 *See* 33 U.S.C. § 1311(a); 33 U.S.C. § 1342.

5 *Natural Resources Defense Council v. U.S. EPA*, 542 F.3d 1235, 1238-39 (9th Cir. 2008) (citations omitted).

6 33 U.S.C. §1362(11).

7 EPA administers the NPDES permit program in only four states (Idaho, Massachusetts, New Hampshire, and New Mexico) and the District of Columbia. Final Rule at 63,000.

8 *See* 33 U.S.C. § 1314(b).

9 *See id.* § 1316(a)(2)).

10 40 C.F.R. § 122.26(b)(15), (c)(1). An NPDES permit is also required if the construction activity will disturb less than one acre of total land where the activity is part of a larger common plan of development or sale that will ultimately disturb one or more acres. *Id.*

11 Final Rule at 62,998.

12 *Id.* at 63,003.

13 67 Fed. Reg. 42,644 (June 24, 2002).

14 Final Rule at 63,003.

15 EPA issued the proposed rule on November 28, 2008. 73 Fed. Reg. 72562 (Nov. 28, 2008).

16 542 F.3d 1235, 1241, 1253 (9th Cir. 2008).

17 Final Rule at 62,997-99.

18 *See id.* at 63,009, 63,018.

19 *See id.* at 63,017-18.

20 *Id.* at 63,057 (to be codified at 40 C.F.R. § 450.21(a)).

21 *Id.* at 63,057 (to be codified at 40 C.F.R. § 450.21(b)).

22 *Id.* at 63,057 (to be codified at 40 C.F.R. § 450.21(d)).

23 *Id.* at 63,057 (to be codified at 40 C.F.R. § 450.21(c), (e)(1)-(4)).

24 *Id.* at 63,057 (to be codified at 40 C.F.R. § 450.21(f)).

25 *Id.* at 63,004-05; 63,012; 63,019.

26 *Id*. at 63,012.

27 *Id.* at 63,058 (to be codified at 40 C.F.R. § 450.22(a)(1)). EPA describes turbidity as "an expression of the optical property that causes light to be scattered and absorbed rather than transmitted with no change in direction of flux level through the sample caused by suspended and colloidal matter such as clay, silt, finely divided organic and inorganic matter and plankton and other microscopic organisms." *Id.* at 63,006. EPA considered and rejected making the turbidity limitation a "benchmark" instead of a requirement. The difference between a benchmark and a numeric limitation is that a violation of a benchmark is not, in itself, a violation of the NPDES permit. EPA concluded that numeric turbidity limitations were feasible and appropriate for larger construction sites. *Id.* at 63,025.

28 *Id.* at 63,006-07.

29 *Id*. at 63,020.

30 *Id.* at 63,047-48, 63,057-58 (to be codified at 40 C.F.R.§ 450.22(a)). "EPA emphasizes that the applicability of the turbidity limitation is tied to acres disturbed at one time, not to the ultimate amount of land disturbance on a site." *Id.* at 63,047-48.

31 Final Rule at 63,047-48, 63,057-58 (to be codified at 40 C.F.R.§ 450.22(a)). EPA's website notes that Federal Register notice (at 63,050 and 63,058) contains incorrect compliance dates associated with the turbidity limitation for sites disturbing 20 or more acres at one time. The website explains that the correct date for implementation is August 1, 2011. *See* EPA, Construction and Development – Final Effluent Guidelines, *available at* http://www.epa.gov/guide/construction/.

32 Final Rule at 63,047-48, 63,057-58 (to be codified at 40 C.F.R. § 450.22(a)).

33 *Id.* at 63,047-48, 63,057-58 (to be codified at 40 C.F.R. § 450.22(a)).

34 *Id.* at 63,048.

35 *Id.* at 63,058 (to be codified at 40 C.F.R. § 450.22(b)).

36 The Washington Department of Ecology (Ecology) will need to incorporate EPA's new rule into its next construction general permit (CGP). Ecology's current CGP expires on December 16, 2010.

37 Final Rule at 62,998.

38 *Id.* at 63,047.

39 Letter from S. Walthall, Acting Chief Counsel, Small Business Administration Office of Advocacy, to L. Jackson, Office of the Administrator, EPA (Apr. 20, 2010).

40 *Id*.

2010 Legislative Update

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

As in 2009, the defining issue during the 2010 legislative session was a significant general fund budget deficit. Budget cuts again hit state natural resource agencies and programs. Detailed budget information is available at: *http://leap.leg.wa.gov/leap/default.asp*. With budget restrictions, much legislative energy was focused on enhancing revenue for environmental programs. While none of these bills passed, several of these ideas may be reintroduced next session, including the following:

Hydraulic Permits (HB 3037/SB 6448): These bills required permit fees for issuance of hydraulic permit approvals and expanded authority to use programmatic and general permits.

Water Rights Processing (HB 2591): HB 2591 would have required applicants for a water right to pay for part or all of the cost of processing the application.

Forest Fire Protection (HB 3170/SB 6766): The bills would have required the Department of Natural Resources to impose an annual per parcel assessment of $4.95 on each taxable parcel of land within the state. DNR would also be required to impose a fire protection assessment on those lands it protects.

Hazardous Substances Tax (HB 3181/SB 6851): These bills proposed to increase the 0.7 percent Hazardous Substance Tax (HST) rate and allocate the money to water quality and stormwater programs.

Despite these challenges, the Legislature passed several significant bills during the 2010 session. Listed below are brief descriptions of many of the bills enacted into law related to land use, water, toxics and natural resources issues. The author wishes to acknowledge the significant contribution to this article from staff members of the House of Representatives and the Senate. Legislative staff members' bill reports and documents provided the baseline information and material in this update. Full reports, as well as other legislative information, can be found on the Legislature's website: *www.leg.wa.gov*. During the legislative session, electronic copies of documents used during House and Senate Committee meetings can be accessed through the electronic bill book at: *http://apps.leg.wa.gov/cmd/start.aspx*.

Land Use and Planning

EHB 1653 Integration of Shoreline and Growth Management Acts: On July 31, 2008, in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242; 189 P.3d 161, the Washington Supreme Court interpreted recent legislation and ruled that the Growth Management Act (GMA) controls procedures inside shorelines *until* new shoreline master programs are formulated and approved. EHB 1653 overturns that ruling by providing that development regulations adopted under the GMA to protect critical areas within shorelines of the state apply within shorelines of the state until the Department of Ecology (Ecology) approves one of the following: a comprehensive master program update; a segment of a master program relating to critical areas; or a new or amended master program, if the master program was approved by Ecology on or after March 1, 2002. The adoption or update of development regulations to protect critical areas under the GMA prior to Ecology approval of a master program update is not a comprehensive or segment update to a master program.

HB 2740 Definition of Land Use Decision: HB 2740 clarifies that when a motion for reconsideration of a local land use decision has been filed with the local decision-making authority, the date of the "land use decision" is the date of the entry of the decision on the reconsideration motion rather than the date of the original decision.

SHB 2935 Environmental and Land Use Hearings Boards: SHB 2935 consolidates the powers, duties, and functions of the Environmental Hearings Office (EHO) and the Growth Management Hearings Boards (GMHBs) into the Environmental and Land Use Hearing Office (ELUHO), a single quasi-judicial land use and adjudicatory agency. On July 1, 2010, the EHO consists of the Pollution Control Hearings Board (PCHB), the Shoreline Hearings Board (SHB) and the ELUHB. The Forest Practice Appeals Board and the Hydraulic Appeals Board functions are transferred to the PCHB. The PCHB has jurisdiction to hear and decide appeals from the Department of Natural Resources, the Department of Fish and Wildlife, and the Parks and Recreation Commission. Any person with standing may commence an appeal to the PCHB by filing a notice of appeal within 30 days from the date of receipt of the decision being appealed. Ecology's final decision on a proposed master program or master program amendment by a local government planning under the growth management act may be appealed to the GMHB by filing a petition within 60 days from the date of Ecology's final decisions to approve or reject a proposed master program or master program amendment.

SSB 6214 Restructuring Growth Management Boards: SSB 6214 consolidates three regional GMHBs into one board. The consolidated board consists of seven members, appointed by the Governor to six-year terms. The members will be appointed from three specified regions in the state, with two members each from the central Puget Sound area, eastern Washington, and western Washington. At least three members of the consolidated board, one from each region, must be admitted to practice law in the state; at least three members of the consolidated GMHB, one from each region, must have been a county or city elected official. After the expiration of the terms of the GMHB members who serve prior to the consolidation, no more than four members

of the consolidated GMHB may be members of the same major political party. No more than two members at the time of their appointment or during their term may reside in the same county. Petitions for review that are filed with the consolidated board must be heard and decided by a regional three-member panel, with membership for the regional panels selected from among full membership of the consolidated GMHB. With some exceptions, a majority of the regional panel members selected to hear and decide a case must reside within the region in which the case arose.

SSB 6350 Marine Spatial Planning: SSB 6350 creates a state inter-agency marine team to produce an analysis of existing planning efforts and make recommendations on a framework for integrating marine spatial planning into management planning efforts. The assessment must be completed by December 15, 2010. Subject to funding, all state agencies with marine waters planning and management responsibilities may include marine spatial data and planning elements in existing plans and ongoing planning. Also subject to funding, the team must coordinate development of a comprehensive management plan for the state's marine waters. Elements of the plan include: an ecosystem assessment that analyzes the health and status of marine waters; a series of maps providing information on the marine ecosystem, human uses of marine waters, and areas with high potential for renewable energy production and low potential for conflicts with existing uses and sensitive environments; recommendations to the federal government for use priorities and limitations within the Exclusive Economic Zone; and a fisheries management element. Following adoption of the marine management plan, each state agency and local government must make decisions in a manner that ensures conformance with applicable provisions of the plan to the greatest extent possible. SSB 6350 expressly does not create authority to affect any project, use, or activity existing prior to completion of the marine management plan or supersede current state agency or local authority.

SB 6481 Local Government Jurisdiction over Conversion-Related Forest Practices: Class IV forest practices generally consist of activities where conversion to non-forestry use is at issue or those practices that have the potential for substantial impact on the environment, including harvesting within an urban growth area. Class IV forest practices must be preapproved by either the Department of Natural Resources or an authorized local government. Currently, counties planning under the Growth Management Act and the cities within those counties must adopt regulations governing certain forest practices if more than 25 conversion-related Class IV forest practices were filed between January 1, 2003, and December 31, 2005. SB 6481 narrows the counties that are required to adopt forest practice regulations to counties with a population of 100,000 or more and the cities within those counties.

SSB 6520 Extending Time to Complete Recommendations Conducted by the Ruckelshaus Center: In 2007, the Legislature placed a moratorium on the ability for cities and counties to amend or adopt critical area ordinances affecting agricultural lands. During this moratorium, the William D. Ruckelshaus Center was assigned to conduct fact finding about agricultural practices in critical areas and facilitate discussions between stakeholders to identify policy and financial options to address such issues. SSB 6520 extends the moratorium by one year to July 1, 2011. A requirement that counties and cities are to review, and if necessary, revise critical area ordinances as they specifically apply to agricultural activities is also extended one year to December 1, 2012.

SSB 6611 Extending the Deadlines for the Review and Evaluation of Comprehensive Land Use Plan and Development Regulations: SSB 6611 extends the deadlines for updating comprehensive plans for three years. The bill also allows amendments to a comprehensive land use plan and development regulations to be considered more frequently than once a year for the development of an initial subarea plan for economic development located outside the of the 100-year floodplain in a county that has completed a state-funded pilot project that is based on watershed characterization and local habitat assessment. SSB 6611 also allows local governments to consider a comprehensive plan amendment for the initial adoption of a subarea plan more frequently than annually if the subarea plan clarifies, supplements, or implements jurisdiction-wide comprehensive plan policies. Such subarea plans may only be adopted if the cumulative impacts of the proposed plan are addressed by appropriate environmental review under the State Environmental Policy Act. The bill deletes a related requirement that the initial adoption of a subarea plan may not modify the comprehensive plan policies and designations applicable to the subarea.

Water, Toxics and Environmental Programs

E2SHB 2539 Source Separated Materials: E2SHB requires each jurisdiction's solid waste management plan to consider and plan for solid waste reduction, collection, handling, and management services. The bill allows solid waste collection companies collecting recyclable materials to retain up to fifty percent of the revenue paid to the companies for the recyclable material.

ESSB 5543 Mercury Light Recycling: ESSB 5543 establishes a producer-financed product stewardship program for the collection, recycling, and disposal of mercury-containing lights; producers of mercury-containing lights must participate in and implement a product stewardship program by January 1, 2013. ESSB 5543 also bans the sale of bulk mercury by June 30, 2012.

SSB 6248 Use of Bisphenol A: Bisphenol A (BPA) is a chemical used to harden plastic that is found in a wide variety of products, including baby bottles, reusable water bottles, tableware, and storage containers. BPA is also used

in the thin coating on the interior of food and beverage cans to prevent corrosion and food contamination from the metals. Potential health effects from exposure to BPA are reproductive effects and developmental effects, particularly in newborns and infants. Beginning July 1, 2011, SSB 6248 bans the manufacture, sale or distribution plastic containers made with BPA and designed to hold food or beverages primarily for children under three years old. The bill bans sports bottles made with BPA beginning July 1, 2012.

E2SSB 6267 Water Rights Processing: E2SSB 6267 modifies Ecology's water rights processing procedures. The bill modifies the current cost reimbursement system to allow applicants to use the process without paying costs of all other applicants in line ahead of them. The bill creates a new, coordinated cost-reimbursement process for multiple applicants. In the new process, the cost for each applicant is to be based on the proportionate quantity of water requested by the applicant, but may be adjusted if it appears that an application will require a disproportionately greater amount of time and effort to process due to its complexity. E2SSB 6267 also allows Ecology to expedite processing of applications within the same surface water or groundwater source when there is interest from a sufficient number of applicants or upon receipt of written requests from at least ten percent of the applicants within a water source. Ecology must notify everyone with a pending application that expedited processing is being initiated, provide the criteria under which the applications are examined and determined, provide the estimated cost, provide an estimate of how long the expedited process will take, and provide at least 60 days for applicants to respond to Ecology. If an applicant elects not to participate under an expedited or coordinated cost-reimbursement process, the application remains on file with Ecology, retains its priority date, and may be processed in the future. 2ESSB 6267 also creates a certified water rights examiner program. Certified water right examiners are eligible to perform final proof examinations of permitted water uses leading to the issuance of a water right certificate. Finally, the bill requires Ecology to review current water resource functions and fee structures, and report to the Legislature and the Governor by September 1, 2010, on improvements to make the water resources program more self-sustaining and efficient. Sections related to the placement of replacement wells under claim status were vetoed by the Governor.

SSB 6557 Copper Brake Friction Material: SSB 6557 bans the in-state sale of brake pads containing copper and other substances on a phased basis. Bans apply to sale by manufacturers, wholesalers, retailers, and distributors of brake pads and motor vehicles (vehicles). Beginning in 2014, the bill bans sale of pads containing more than trace amounts of asbestos, cadmium, chromium, lead, and mercury. Brake pads manufactured prior to 2015 are exempt to permit clearing of inventory until 2025. Brake pads manufactured as part of an original equipment service (OES) contract for vehicles manufactured prior to 2015 are also exempt. SSB 6557 establishes a process to determine whether safer alternatives for brake pads containing more than 0.5 percent copper are available. Pads used in certain vehicles are exempt from bans, including: vehicles not subject to vehicle licensing requirements, such as off-road vehicles; motorcycles; vehicles with brakes emitting no debris or fluid under normal circumstances; military combat vehicles; race cars, dual-sport vehicles, or track day vehicles; and vehicles over 30 years old. The bill creates an exemption process for manufacturers that can demonstrate that compliance with restrictions is not feasible, compromises safety standards, or causes significant hardship.

SSB 6634 Dairy Nutrient Management Record-keeping Requirements: SSB 6634 authorizes the Department of Agriculture to impose a civil penalty on a dairy producer up to $5,000 for failure to comply with dairy nutrient management record-keeping requirements. In determining the amount of the civil penalty, the Department must take into consideration the following: the gravity and magnitude of the violation; whether the violation is repeated or is continuous; whether the violation was an unavoidable accident, negligence, or intentional; the violator's efforts to correct the violation; and the immediacy and extent to which the violation threatens the public health or safety, or harms the environment.

Air and Climate

SB 6365 Motor Vehicle Emissions: In 2005, the Legislature adopted the California motor vehicle emission standards requiring model vehicles newer than 2009 to meet the California emission standards to be registered, leased, rented, licensed, or sold for use in Washington. SB 6365 exempts those motor vehicles obtained and used by a resident of Washington while serving as a member of the armed services in another state.

SSB 6373 Greenhouse Gas Reporting: SSB 6373 streamlines state greenhouse gas (GHG) emission reporting rules to conform more closely to federal rules. Beginning in 2011, a person who is required to report GHG emissions to Environmental Protection Agency (EPA) must concurrently submit the reported data to Ecology. To ensure consistency with federal requirements, Ecology must review and update the state GHG reporting rule whenever EPA adopts final amendments to its GHG reporting rule. SSB 6373 eliminates a requirement to report indirect emissions and relieves fleet operators from reporting emissions. By rule, Ecology may include other gases for reporting but only after the gas has been designated as a GHG by Congress or the EPA and Ecology notifies the Legislature. Such rule must not take effect before the end of the regular legislative session following its proposal.

SSB 6556 Fees for Agricultural Burning: SSB 6556 increases the current statutory maximum permit fee for agricultural field burning of $2.50 per acre to $3.75 per acre. The bill provides authority to charge a permit fee for pile burning which cannot exceed $1 per ton. Fees continue to be set by

rule adopted by Ecology at the level determined by the Agricultural Burning Practices and Research Task Force.

Natural Resources

HB 2460 Organic Products: HB 5460 allows Washington State Department of Agriculture to obtain federal accreditation as an organic products certifying agent under the federal Organic Food Production Act of 1990.

2SHB 2481 Forest Biomass: The bill authorizes the Department of Natural Resources (DNR) to enter into contracts for the removal of forest biomass and lease state lands for the sale and conversion of biomass into energy or biofuels. The bill also allows DNR to establish a five-year forest health and fuel reduction supply agreement demonstration project and DNR to evaluate how the forest biomass supply agreements could be used to sustain or create rural jobs and timber manufacturing.

ESHB 2541 Forest Industry Incentives: ESHB 2541 requires DNR to develop appropriate landowner conservation incentives that support forest landowners maintaining their land in forestry. These incentives may include incentives related to ecosystem service markets, tax incentives, easements, technical assistance, and recognition or certification. DNR must report to the Governor, Commissioner of Public lands, legislative committees and the Forest Practices Board by December 31, 2011.

HB 2659 Timber Purchase Reporting Requirements: Every harvester of timber is required to pay an excise tax of five percent of the stumpage value of any trees that are harvested. The excise tax applies to timber harvested from both private and public lands. The harvester is required to report certain information in a timber purchase report to the Department of Revenue, including the sale date, total sale price, total acreage involved in the sale, net volume of timber purchased, road construction that was required, data from the timber cruise, and any timber thinning information. HB 2659 extends the expiration date of this requirement from July 1, 2010, to July 1, 2014.

SSB 6211 Agriculture Scenic Corridor: SSB 6211 designates a portion of State Route 5 in Skagit and Snohomish counties, between Starbird Road and Bow Hill Road, as part of the Scenic and Recreational Highway System and as part of an agricultural scenic corridor. Agricultural scenic corridors are areas that showcase the state's historical agricultural areas, and promote the maintenance and enhancement of agricultural areas.

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Environmental Law Update

Federal Environmental Law Update

By Tisha Pagalilauan, Ashley Peck and Marie Quasius, K&L Gates LLP

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

Niagara Mohawk Power Corp. v. Chevron USA, Inc., ___F.3d___, 2010 U.S. App. LEXIS 3859, 2010 WL 626064 (2d Cir. 2010).

The Second Circuit held in part that a consent decree between a potentially responsible party (PRP) and a state does not require approval by the Environmental Protection Agency (EPA) for the private party to seek contribution from other PRPs. Pursuant to consent decrees with the State of New York, the Plaintiff had conducted Remedial Investigations and Feasibility Studies and remediated portions of the site that the state deemed necessary. The consent decree included contribution protection in exchange for the remedial activities performed. The Plaintiff filed suit against several other PRPs at the site and the district court dismissed its Section 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B), contribution claims on the grounds that the state had not been delegated express authority by EPA to approve a CERCLA settlement. The Second Circuit reinstated the claims, holding that the consent decree qualified as an administrative settlement under the plain text of Section 113(f)(3)(B). "The statute (CERCLA) does not require that the United States acquiesce in the administrative settlement... nor does Section 113(f)(3)(B) require that there be a federal delegation of settlement authority to a state."

The Second Circuit rejected the Plaintiffs' claim that it should alternatively be able to recover under Section 107(a), 42 U.S.C. § 9607. Citing *United States v. Atlantic Research Corporation*, 551 U.S. 12 (2007), the court stated that "Section 107(a) claims are brought by federal agencies or state agencies that have incurred response costs or PRPs who incur CERCLA cleanup costs without judicial or administrative intervention." The court held that Section 113(f)(3) was the proper procedure for the Plaintiff to seek reimbursement of cleanup costs where it had essentially financed the cleanup and resolved its CERCLA liability through an agency-approved settlement.

The court also reversed the district court's grant of summary judgment for the defendants on liability, following established case law holding that the issue of liability is separate from allocation of costs. The court held that summary judgment on liability requires only a determination as to whether a PRP contributed to the contamination, not an inquiry into the character and quantity of the contribution.

United States v. Albert Investment Company, 585 F.3d 1386 (10th Cir. 2009).

The Tenth Circuit joined the Second Circuit in allowing non-settling "PRPs to intervene as of right in the review of a consent decree under Section 113(i) of the CERCLA. Union Pacific Railroad was the current owner of the Double Eagle Superfund Site in Oklahoma City, and EPA sought to hold it jointly and severally liable for the entire cost of the cleanup in a separate action. EPA sued 44 other PRPs in this action and sought approval of a consent decree, pursuant to which the PRPs would pay $6.5 million toward the cost of cleanup and receive immunity from contribution actions by other PRPs, namely Union Pacific. Union Pacific sought intervention and the district court denied its motion to intervene as of right, concluding that it lacked a legally sufficient interest. The court also rejected its motion for permissive intervention on the grounds that intervention at the consent decree stage would delay the settlement and prejudice the rights of the parties.

The Tenth Circuit reversed the denial of Union Pacific's motion to intervene as of right under Section 113(i). It reasoned that (1) Union Pacific moved to intervene in a timely manner; (2) the elimination of Union Pacific's right to contribution under Section 113(f), and the associated threat of economic injury, constituted a legally sufficient interest; (3) approval of the consent decree would impair Union Pacific's interest by barring it from seeking contribution in the future; and (4) the government would not adequately represent Union Pacific's interests in the settlement. Such intervention would not give Union Pacific a right to veto the settlement—but only allow it to participate in the litigation by, *inter alia*, making arguments, presenting evidence, registering objections, and appealing adverse decisions, as permitted by the court.

Hinds Investments, L.P. v. Team Enterprises, Inc., 2010 U.S. Dist. LEXIS 23395, 2010 WL 922416 (E.D. Cal. Mar. 12, 2010).

The district court dismissed all CERCLA and Resource Conservation and Recovery Act (RCRA) claims brought by an owner of property on which drycleaners were operated against the manufacturer of the drycleaning machines, holding that the manufacturers were not liable as "arrangers" for the costs of cleaning up perchloroethylene (PCE) contamination. The plaintiff argued that the manufacturers should be liable because operating manuals for the machines directed users to dispose of PCE-laden wastewater

"in an open drain." Applying heightened federal pleading requirements from *Ashcroft v. Iqbal*, 556 U.S.___, 129 S. Ct. 1937 (2009), the court held the plaintiff had failed to present a plausible claim that the manufacturers were liable as arrangers. It concluded the plaintiff failed to sufficiently allege that the companies intended to arrange for improper disposal and had "offered nothing to negate the useful product defense."

Drawing on the Supreme Court's decision in *Burlington Northern and Santa Fe Railway Co. v. United States*, __ U.S. __, 129 S. Ct. 1870, 1879 (2009), the court first noted that the defendants' alleged "knowledge of likely disposal" was insufficient to show the requisite intent for arranger liability. Further, holding that the term "disposal" refers to the "affirmative act of discarding a substance as waste, and not to the productive use of the substance," the court noted the lack of any statements in the complaint that defendants installed the machines, connected them to floor drains, directed waste disposal, or inspected the machine and its waste disposal. Absent additional facts, the court found that the manufacturer's sale of a machine that was not itself hazardous waste and did not produce hazardous waste could not constitute an arrangement to dispose of hazardous substances.

The court also dismissed the plaintiff's request for declaratory judgment under Section 113(f), citing case law holding that potential contribution relief under Section 113(f) is necessarily tied to a viable Section 107, 42 U.S.C. § 9607, claim. The court also rejected plaintiff's RCRA claim that the defendants acted as a "generator," reasoning that allegations of passive conduct, such as manufacture of a machine operated by others, were insufficient without accompanying statements that defendants were actively involved in storage or handling of materials.

II. Resource Conservation and Recovery Act (RCRA)

Crandall v. City and County of Denver, 594 F.3d 1231 (10th Cir. 2010).

The Tenth Circuit held that when seeking relief under RCRA's citizen suit provision, a mere possibility of future activity that, absent protective measures, could injure human health does not constitute imminent and substantial endangerment to health or the environment under 42 U.S.C. § 6972. The Tenth Circuit affirmed the district court's denial of the plaintiffs' motion for an injunction preventing the Denver International Airport from conducting full-plane deicing at passenger gates and requiring it to employ other protective measures, holding that where the airport was not currently conducting the practices that had caused problems in the past and had implemented protective measures, the plaintiffs could not satisfy the statutory standard.

The deicing fluid produced hydrogen-sulfide gas during decomposition, which had entered the concourse in the past as a result of planes being deiced at the passenger gates. At that time, the airport had received complaints about foul smells and eye irritation. However, by the time of trial, the airport had already ceased full-plane deicing at the gates and implemented measures to prevent the gas from entering the concourse. The district court found that because evidence at trial failed to demonstrate that, under current conditions, hydrogen-sulfide gas was present at levels dangerous to human health or to show that there was a significant risk that the airport would resume full-plane deicing at the gates, the plaintiffs failed to demonstrate an imminent and substantial endangerment.

On appeal, the plaintiffs argued that the airport halted full-plane deicing only in response to their lawsuit and would resume the practice if no injunction was issued. The Tenth Circuit rejected this argument, holding that an endangerment must threaten to occur immediately, not merely be possible at some point in the future. It held the standard could be met even if the actual harm would not occur for a long time, but only "so long as the defendant's current or past actions create a present risk that the harm will eventually come to pass." The court held that because there was currently no hydrogen-sulfide gas present in the concourse, and there only could be if the airport resumed full-plane deicing at the gates and its protective measures proved to be ineffective, there was no imminent risk of harm.

III. Clean Water Act (CWA)

AES Sparrows Point LNG LLC v. Wilson, 589 F.3d 721 (4th Cir. 2009).

Upon a petition filed pursuant to the Natural Gas Act, 15 U.S.C. § 717f(d)(1), the Fourth Circuit upheld Maryland's denial of water quality certification under Section 401 of the CWA, 42 U.S.C. § 1341(a)(1), for a proposed liquefied natural gas terminal, finding (1) that the denial was not time barred, as the one-year limit in Section 401(a)(1) for the state to grant or deny the certification ran from the date the Army Corps of Engineers (Corps) issued its determination that a valid request for certification had been received; and (2) the flow of water into areas where dredged material would be removed constituted a "discharge" to navigable waters triggering the state's certification authority.

The case involved a proposal to construct a liquefied natural gas terminal in an area adjacent to Baltimore Harbor, requiring the dredging of approximately 3.7 million cubic yards of contaminated material to deepen the channel an additional 15 feet, and thus requiring permits from the Corps under Section 404 of the CWA, 33 U.S.C. § 1344, and Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403. After several follow-up requests for information since the project proponent's original application more than a year earlier, the Corps issued a public notice, pursuant to its regulations, determining that the state had received a valid request for certification and had one year from the date of that notice to make a decision or effectively waive the right to certify the project. Maryland ultimately denied

the request for certification, concluding that the project was not consistent with state water quality standards, one day prior to the one-year anniversary of the Corps' public notice.

The petitioner argued that the statutory time period instead ran from the date it first submitted its application for 401 certification, consistent with the policy of the Federal Energy Regulatory Commission (FERC), the authorizing agency for the terminal under the Natural Gas Act. The Fourth Circuit disagreed, holding that the Corps regulations were controlling because it held the permitting authority under the CWA and therefore Maryland did not waive its right to deny certification.

The petitioner also argued that Maryland exceeded its authority because the project would not result in a "discharge" requiring certification under Section 401(a)(1). Relying on the U.S. Supreme Court's decision in *S.D. Warren v. Maine*, 547 U.S. 37 (2006), the court held that the "discharge" trigger was met because the dredging would change the flow of water and allow for more water in those areas. The court further held that the state's denial of certification on the merits was not arbitrary and capricious.

United States v. Lexington-Fayette Urban County Gov't, 591 F.3d 484 (6th Cir. 2010).

Supporting statutory penalties under the CWA, the Sixth Circuit remanded this case to the district court to provide support for its rejection of a CWA consent decree. The Sixth Circuit noted that statutory penalties provide a deterrent effect and are in the public interest.

The EPA, later joined by Kentucky, brought a civil enforcement action against a county government for operation of a sanitary sewer system and a separate storm sewer system in violation of applicable permits and the CWA. The parties ultimately reached a settlement that required the county to bring its systems into compliance at an estimated cost of $250 to $300 million and also required the county to complete environmental projects costing a total of $2.73 million. Additionally, it ordered the county to pay the United States $425,000 in civil penalties.

The United States filed the consent decree in district court and solicited public comment. A handful of comments argued that the civil penalty was too high and that the money should instead be directed to bringing the systems into compliance. Agreeing with the comments, the district court denied the motion to enter the consent decree, finding that ratepayers should not be severely penalized for the defendant's failure to comply with the CWA and that the money would be better spent on remediation of the violations. Noting that civil penalties were expressly authorized in the CWA, the Sixth Circuit remanded the case to the district court. The court found that it was not obvious from the record that the civil penalty was unfair given the risk of significantly higher penalties if the plaintiffs were to prevail at trial, that the penalty was reasonable because it would have a deterrent effect, and that the penalty was consistent with the public interest sought to be protected in the CWA. The court also noted the presumption in favor of voluntary settlements, particularly where the settlement has been negotiated by a federal administrative agency.

IV. Clean Air Act (CAA)

MacClarence v. Environmental Protection Agency, ___F.3d___, 2010 U.S. App. LEXIS 4585, 2010 WL 725321 (9th Cir. 2010).

The Petitioner sought review of its request that the EPA object to a state air agency's issuance of a Title V permit (operating permit) under the CAA, 42 U.S.C. § 7661 *et seq.* The Ninth Circuit held that EPA's denial was not arbitrary and capricious because the petition failed to "demonstrate" that the Title V permit was "not in compliance with the requirements [of the CAA]," pursuant to 42 U.S.C. 7661d(b)(2).

The case involved an operating permit for pollutant-emitting activities at an oil and gas processing facility at the Prudhoe Bay Unit (PBU), a series of oil and gas facilities extending over 300 square miles on the North Slope in Alaska. The Petitioner argued that the facility should be aggregated with all other facilities owned by BP in the PBU as one "stationary source" for permitting purposes. Declining to address the merits of the substantive claim, the Ninth Circuit affirmed EPA's decision on procedural grounds, deferring to EPA's determination that the Petitioner failed to "demonstrate," pursuant to 42 U.S.C. 7661d(b)(2), that the final Title V permit for the facility did not comply with the CAA.

Joining several other circuits, the Ninth Circuit determined that the word "demonstrate" in the statute was ambiguous and thus substantial deference was due to EPA's interpretation of the term under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The court further noted that even under the "persuasiveness standard" in *Skidmore v. Swift*, 323 U.S. 134 (1944), it would defer to EPA's determination that the Petitioner failed to provide adequate information to support his claim and instead made only generalized assertions. Because EPA's duty to issue an objection is mandatory once a petitioner has met the burden to demonstrate that a permit does not comply, the Ninth Circuit held that EPA reasonably construed the word "demonstrate" to require a petitioner to provide sufficient references, legal analysis and evidence to support its claims.

American Road and Transportation Builders Assoc. v. Environmental Protection Agency, 588 F.3d 1109 (D.C. Cir. 2009).

The D.C. Circuit dismissed, for lack of subject matter jurisdiction, a petition filed by the American Road and Transportation Builders Association (ARTBA) challenging EPA's refusal to amend certain regulations. The court found that the petition was time-barred under CAA Section

307(b)(1), 42 U.S.C. § 7607(b)(1), because it should have been brought within 60 days from EPA's promulgation of the rules, not within 60 days from its refusal to amend them at ARTBA's request.

The case involved rules adopted by EPA under CAA Section 209(e), 42 U.S.C. § 7543, which prohibits states from imposing certain emissions-related regulations on several categories of engines and vehicles. The rules were originally promulgated in 1994 and readopted in 1997. ARTBA petitioned the EPA to amend the readopted rules in 2002, arguing that the language was not consistent with the statute and effectively allowed states to adopt the type of regulations the statute sought to prohibit. Following litigation regarding its failure to act, EPA formally opened ARBTA's petition for public comment in 2007 and ultimately rejected it with a lengthy analysis in 2008. ARTBA's petition to the D.C. Circuit followed.

The court held that although petitioners can generally obtain judicial review of alleged substantive defects in agency rules by petitioning the agency and appealing the agency's decision, this procedure is not available where Congress has specifically addressed the consequences of failure to bring a challenge within the statutory period running from the rule's original promulgation. Drawing on its decision in *National Mining Association v. U.S. Dept. of Interior*, 70 F.3d 1345 (D.C. Cir. 1995), the court held that Section 307(b)(1) includes a specific 60-day limitations period for judicial review which dates from either the original promulgation or subsequent substantive re-promulgation of the rules. Neither EPA's denial of the ARTBA petition, nor its rewriting of the rules in plain language without changing their meaning in 2007-2008, reopened the statutory period for judicial review. ARTBA's challenge must have been brought within 60 days of EPA's 1997 re-promulgation and its 2002 petition was therefore barred.

North Carolina v. Environmental Protection Agency, 587 F.3d 422 (D.C. Cir. 2009).

The D.C. Circuit dismissed a petition filed by the State of North Carolina challenging EPA's removal of northern Georgia from EPA's regulations under the national ambient air quality standard (NAAQS) for ozone measured during a one-hour period. The court held that North Carolina lacked Article III standing to challenge EPA's action because its alleged injury would not be redressed by vacating the removal.

In 1998, EPA required several states to revise their state implementation plans (SIPs) to attain the NAAQS for ozone by reducing nitrogen oxide (NOx) emissions. This regulatory action was referred to as the "NOx SIP Call." EPA promulgated a rule that included the Northern portion of Georgia in the NOx SIP Call based on findings that emissions from this area were significantly contributing to non-attainment of the ozone standard in Birmingham, Alabama, and Memphis, Tennessee. Responding to a petition by an industry association in light of more recent determinations that Birmingham and Memphis had attained the standard, EPA promulgated a rule removing the Northern portion of Georgia from the NOx SIP Call. North Carolina challenged the rule, arguing that the rule was contrary to EPA policy and case law, and gave disparate treatment to Georgia.

For Article III standing purposes, North Carolina alleged that it was harmed because NOx emissions from electric generators in northern Georgia were significantly contributing to North Carolina's inability to meet the eight-hour standard. It further argued that EPA's inclusion of Northern Georgia in the NOx SIP Call would redress that injury by helping North Carolina meet the ozone standards and improve its air quality. The D.C. Circuit rejected this argument, finding that North Carolina could not show redressability because submissions by Georgia showed that even if the NOx SIP Call were reinstated with respect to northern Georgia, the state could use emissions credits to meet the emissions cap rather than actually lowering its emissions. Thus, North Carolina could not show that re-including Georgia in the NOx SIP Call would redress North Carolina's difficulty in meeting the ozone standard.

V. National Environmental Policy Act (NEPA)

National Parks & Conservation Association v. Bureau of Land Management, 586 F.3d 735 (9th Cir. 2009).

Environmental groups challenged the Bureau of Land Management's (BLM's) approval of a land exchange that would permit Kaiser Eagle Mountain, Inc. to build the largest landfill in the United States on a former Kaiser mining site near Joshua Tree National Park. The NEPA issues before the court included (1) whether the agency's definition of purpose and need impermissibly restricted the range of alternatives; (2) whether the agency's Environmental Impact Statement (EIS) contained a reasonably thorough discussion of the environmental consequences for bighorn sheep; and (3) whether the EIS's form, content and preparation of its eutrophication analysis facilitated informed decision making and public participation.

Although the court reversed in the agency's favor on the bighorn sheep issue, it affirmed the district court findings that the BLM's unreasonably narrow purpose and need statement led the agency to consider an unreasonably narrow range of alternatives. The majority reasoned that of the four project purposes identified in the EIS, only one responded to a BLM goal. The other three, which served as primary disqualifiers for several reasonable alternatives, reflected only Kaiser's purposes and needs. With regard to the eutrophication issue, the majority reasoned that a map of references to eutrophication in numerous sections of the EIS did not suffice because readers had to sift through unrelated sections of the EIS and then put the pieces together.

The dissent noted first that the law requires the BLM to consider the applicant's objectives, which indicates that

the agency considered a reasonable range of alternatives, and second, with regard to eutrophication, that the EIS's presentation was sufficient because the judge himself, the California Court of Appeals, and the Interior Board of Land Appeals had no difficulty finding and analyzing the information on eutrophication.

South Fork Band Council of Western Shoshone v. U.S. Department of Interior, 588 F.3d 718 (9th Cir. 2009).

In a case involving the expansion of gold mining on and near Mt. Tenabo, a sacred mountain for the Western Shoshone, several tribes appealed the denial of a preliminary injunction related to the adequacy of BLM's EIS. The project involved an additional 7,000 acres of disturbed surface and potential impacts from the extraction and transportation of ore and the withdrawal of groundwater. The Ninth Circuit reversed, finding that the tribes established a likelihood of success on their NEPA claims, and remanded to require BLM to prepare an EIS that adequately considers the environmental impacts of the expansion and potential mitigating measures.

First, the court found that the BLM failed to analyze air quality impacts from transporting an additional five million tons of ore to a processing facility where mercury would be released. The agency argued that since the rate of transport will not change with the expansion and the processing facility already held a permit under the Clean Air Act, it need not discuss the environmental impacts in the EIS. The court held, however, that the agency did not take a "hard look" at environmental impacts because transporting the additional ore would extend the duration of transportation by ten years. Second, the court found that the BLM failed to assess the efficacy of the mitigation measures proposed to counteract the drying up of groundwater due to mine dewatering. Instead, the BLM merely noted that it could not predict which groundwater sources would dry up, thus the "feasibility and success of mitigation would depend on site-specific conditions and details of the mitigation plan." The court held that even if the discussion of the efficacy of mitigating measures would be tentative or contingent, NEPA nonetheless requires the agency to engage in that discussion.

Marilyn Morris et al. v. U.S. Nuclear Regulatory Commission, ___F.3d___, 2010 U.S. App. LEXIS 4802, 2010 WL 761075, (10th Cir. 2010).

Ranchers and members of the Navajo Nation challenged the Nuclear Regulatory Commission's (NRC's) decision to grant a license for in situ leach mining for uranium in New Mexico on land near the Navajo Reservation due to violations of NEPA. In their first NEPA challenge, plaintiffs asserted that the NRC failed to account for the cumulative effects of the new mine's airborne radiation emissions (which they acknowledged to be negligible) and the emissions from an existing conventional mine, which already emitted more airborne radiation than allowed by NRC's regulations. The Tenth Circuit, after finding that the agency did consider the cumulative effects of emissions from the two mines, refused to require the NRC to develop hard data on current emissions of airborne radiation or strategies for mitigation for existing emissions. In their second NEPA challenge, the plaintiffs contended that the agency failed to take a "hard look" at the environmental impacts on groundwater when it approved restoration plans based only on pilot projects. At the time, no in situ leach mining operation had ever successfully restored groundwater. Nevertheless, the court upheld the agency's licensing decision, reasoning that the agency analyzed in detail the pilot projects and tests conducted by the applicant and considered the effects of unsuccessful groundwater restoration.

Native Ecosystems Council v. Tidwell, 2010 U.S. App. LEXIS 4901, 2010 WL 843761 (9th Cir. 2010).

After the U.S. Forest Service (USFS) approved Allotment Management Plans (AMPs) for eleven grazing areas in the Beaverhead-Deerlodge National Forest (BDNF), plaintiffs challenged the adequacy of the USFS's review under NEPA. In preparing its Environmental Assessment (EA), the USFS, which monitors sage grouse populations as a proxy of species diversity under the National Forest Management Act (NFMA), relied on the presence of sage grouse-appropriate habitat as a proxy for the population of other species, despite the absence of sage grouse in the relevant area.

The Ninth Circuit reversed the district court's holding in favor of USFS, reasoning that because its "use of the nonexistent sage grouse as an [indicator species] to assess the project's impact on all sagebrush species' diversity was flawed," the EA was also deficient and did not constitute the "hard look" required by NEPA. Therefore, the court remanded to allow the USFS to develop a new or revised EA. The dissent, however, criticized the majority's conclusion and pointed out that violating NFMA's substantive requirements is not equivalent to a violation of the "more lenient NEPA requirement of a 'hard look' that doesn't 'rely on incorrect assumptions or data.'"

Plaintiffs also challenged the USFS's failure to supplement or revise the EA based on the results of a subsequently released private study that directly contradicted the USFS's conclusions regarding nesting habitat. Both studies applied the same research guidelines but the new study concluded that the area included 1900 acres of nesting habitat, while the EA concluded that the project area did not include any suitable nesting habitat and thus failed to analyze the effects of grazing on nesting habitat. Rejecting the USFS's argument that weather might prevent the birds from accessing the contested habitat despite evidence that such weather presented ideal conditions, the court found that the new information sufficiently impacted the project to require revision of the EA.

VI. Endangered Species Act ("ESA") /Marine Mammal Protection Act ("MMPA")

Greater Yellowstone Coalition v. Servheen, 2009 U.S. Dist. LEXIS 111139, 2009 WL 3775085 (D. Mont. Sept. 21, 2009).

Plaintiffs challenged the U.S. Fish and Wildlife Service's (FWS's) decision to designate a Distinct Population Segment (DPS) for the Greater Yellowstone grizzly bear and delist the DPS under the ESA. Plaintiffs argued in their motion for summary judgment that the FWS had violated the ESA on four grounds.

First, they argued existing regulatory mechanisms are inadequate to protect the delisted bear. The district court agreed, finding that the FWS erred in relying on the Grizzly Bear Conservation Strategy, existing federal and state laws, and management plans for the national forests and relevant state areas. It reasoned that all of the aforementioned regulatory mechanisms constituted "plans for future action" and "unenforceable efforts" previously prohibited under ESA case law.

Second, the plaintiffs argued the FWS did not adequately consider the impacts of global warming on whitebark pine nuts, a food source for grizzly bears. Although relying on studies that unequivocally indicated a strong relationship between decreased whitebark pine cone production and increased bear mortality, the FWS still concluded that bears are opportunistic omnivores and will adapt even if whitebark pine nut production decreases. The court found that the agency had not articulated a rational connection between the best available science and the FWS's conclusion and thus their conclusion was not entitled to deference. Based on its findings, the court granted the motion for summary judgment in part and enjoined the FWS from delisting the grizzly bear DPS.

The court denied the motion on the other two NEPA issues. First, plaintiffs argued that delisting was inappropriate because the population is extremely small and dependent on translocation of outside animals for genetic diversity. Although the FWS acknowledged the potential need to translocate bears to maintain genetic diversity in the future, the court held that this fact did not justify listing because the current population was not "likely to become an endangered species throughout all or a significant portion of its range." Second, plaintiffs alleged that the FWS did not properly consider whether the bears had recovered across a "significant portion of their range." The court deferred to the agency's interpretation of that ambiguous phrase because the FWS's interpretation conformed to ESA case law by including areas outside the bear's current range where they could expand in the future and providing reasons for excluding other areas.

American Welfare Institute v. Beech Ridge Energy, LLC, 2009 U.S. Dist. LEXIS 114267, 2009 WL 4884520 (D. Md. Dec. 8, 2009).

Plaintiffs challenged the construction and operation of a wind generation facility in West Virginia, alleging that it would violate Section 9 of the ESA, 16 U.S.C. § 1538, by "taking" Indiana bats, an endangered species. In an issue of first impression in the Fourth Circuit, the district court rejected the defendant's argument that the ESA bars citizen suits for "wholly future" violations where there is no past, current, or continuing take. It reasoned that not only does the ESA allow for injunctive relief to prevent future actions that would take endangered species, the text and legislative history suggested that "take" should have an expansive scope to serve the purposes of the Act. In another issue of first impression, the court next decided the requisite degree of certainty that a "take" will occur that must be proved in order to invoke the protections of the ESA. While rejecting the standards proposed by the parties, it adopted a Ninth Circuit standard that combined the two extremes and provided that "in an action brought under § 9 of the ESA, a plaintiff must establish, by a preponderance of the evidence, that the challenged activity is reasonably certain to imminently harm, kill, or wound the listed species."

Relying heavily on expert opinions to analyze the recorded bat calls and results of sampling, the court found first that Indiana bats are present at the site, based on the proximity of bat habitat, the attractiveness of the site's physical characteristics to bats, and the plaintiffs' experts' analysis of the acoustic data. Second, the court reasoned that, since it was uncontroverted that wind turbines kill bats in large numbers, "there is a virtual certainty that Indiana bats will be harmed, wounded, or killed imminently by the Beech Ridge Project." Defendants argued that any potential "take" could be remedied by the condition in the siting permit that required the company to engage in adaptive management strategies when the company deemed such strategies necessary. The court declined, noting the discretionary nature of the management plan, its lack of standards, and the defendant's prior refusal to cooperate with the FWS. Therefore, the court enjoined the construction of turbines beyond those already in progress and limited the future operation of existing turbines to the winter period of bat hibernation unless the defendant applies for and the FWS grants an incidental take permit.

Center for Biological Diversity v. Kempthorne, 588 F.3d 701 (9th Cir. 2009).

Plaintiff Center for Biological Diversity challenged the District Court's denial of summary judgment related to the FWS's promulgation of a five-year regulation that allowed the non-lethal "take" of polar bears and Pacific walrus by oil and gas activities in Alaska, pursuant to the issuance of a project-specific "Letter of Authorization" from the FWS. Plaintiff challenged the regulation under both the MMPA and the ESA.

First, the plaintiff challenged the government's characterization of "oil and gas exploration, development, and production activities" as a "specific activity" under the MMPA. The Ninth Circuit upheld the FWS's interpretation of "specific activity" as including those where the "anticipated effects on marine mammals will be substantially similar," reasoning that the plaintiff failed to show that one particular oil and gas activity had a substantially dissimilar impact to another particular oil and gas activity.

Second, under NEPA, the plaintiff challenged the FWS's Finding of No Significant Impact ("FONSI") and its failure to produce an EIS. The court upheld the agency's FONSI despite the well-documented negative effects of global warming on polar bears because the FWS properly accounted for only the effects of the regulation (non-lethal takes within a particular industry and during a particular time). The court also upheld the agency's decision not to produce an EIS. Although the plaintiff argued that climate change made polar bears more vulnerable and thus effects less certain than under substantially similar previous regulations, the court reasoned that that the FWS appropriately relied on the minimal negative effects observed under prior regulations.

VII. Water Rights

South Carolina v. North Carolina, 558 U.S. ____, 130 S. Ct 854 (2010).

In an original proceeding where South Carolina challenged permits issued by North Carolina for the diversion of water from the Catawba River, the Supreme Court allowed, for the first time, intervention by a party other than a state, the United States, or an Indian tribe. The Court rejected the Special Master's proposed rule for nonstate entity intervention, choosing instead to apply the test laid out in *New Jersey v. New York*, 345 U.S. 369, 373 (1953): "An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." Despite a vigorous, partial dissent by Chief Justice Roberts joined by Justices Ginsberg, Thomas and Sotomayor, the Court granted intervenor status to the Catawba River Water Supply Project (CRWSP) and Duke Energy, but sustained South Carolina's objection to intervention by the City of Charlotte, North Carolina.

With regard to the CRWSP, the Court reasoned that the entity was established as a joint venture by regulatory authorities in both states, provides roughly equivalent amounts of water to consumers in both states, relies on authority granted by both states, and, finally, that litigation over equitable apportionment of water between the two states would give neither state a sufficient interest in maintaining the delicate balance of the joint venture and protecting the entity's interests. As for Duke Energy, the Court argued that intervention would be appropriate because Duke operates eleven dams and reservoirs in both states and controls the flow of the Catawba River pursuant to its 50-year license from FERC, putting the company in a position where neither state represents its interests and at least one of the states seeks adverse changes to Duke Energy's FERC license. In contrast, the state of North Carolina indicated its intent to defend the City of Charlotte's right to withdraw water, contributing to the court's decision to reject its motion to intervene. The Court further observed that neither special characteristics nor interstate interests distinguished the City from other water users in the state whose interests are already adequately represented.

Chief Justice Roberts' partial dissent protested both the majority's departure from precedent and the propriety of the decision to act as a trial court. Further, he predicted that allowing intervention by CRWSP and Duke Energy opens the door to numerous other applications for intervention, leading to cases with "all those asserting interests . . . jostling for their share like animals at a water hole." Finally, Chief Justice Roberts pointed out that the Court could just as easily benefit from the intervenors' views by allowing them to participate as *amici curiae*.

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Land Use Law Update

Significant Recent Land Use Decisions

By Richard L. Settle, Foster Pepper PLLC

I. Growth Management Act (GMA)

A. No Bright Line Maximum Rural Density; Statutory LAMIRD Requirements: *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (December 17,2009).

In *Gold Star,* the Supreme Court reaffirmed several of its holdings in *Thurston County v. Western Washington Growth Management Hearings Board.* The requirement of RCW 36.70A.130 to review and revise comprehensive plans and development regulations every seven years does not reopen to challenge all preexisting provisions. The failure to revise such provisions may be challenged only if they are "directly affected by new or recently amended GMA provisions." Thus, most challenges of preexisting County provisions was precluded because they were not affected by intervening GMA amendments.

However, the Court held that the County's failure to revise its Comprehensive Plan provisions for Limited Areas of More Intensive Rural Development (LAMIRD) was subject to challenge because the County's LAMIRD provisions predated the GMA amendment authorizing LAMIRDs. RCW 36.70A.070(5)(d). Because the County's LAMIRD provisions did not use all of the same criteria as GMA's subsequently adopted LAMIRD amendment, the County was required to revise its LAMIRD provisions to be consistent with the statutory criteria and revisit its designated LAMIRDs to determine whether they were compliant with the revised LAMIRD provisions.

The Growth Management Hearings Board (Board) had ruled that some County rural density provisions were noncompliant with GMA requirements on the basis of the bright line rule that densities greater than one dwelling-unit per five acres were not rural in character and, thus, not permissible in rural areas. The Court reemphasized its holding in *Thurston County* that "in differentiating between urban and rural densities, the Board cannot employ bright line rules." Moreover, as in *Thurston County,* the Court held that the Board lacked authority to impose bright line rural and urban density rules even if the County conceded the bright line rule was correct.

B. Site-Specific Application of Comprehensive Plan Provisions and Development Regulations Is Not Within Jurisdiction of Growth Management Hearings Board and Satisfies LUPA Standards of Review: *Feil v. Eastern Washington Growth Management Hearings Board*, 153 Wn.App. 394, 220 P.3d 1248 (December 3, 2009).

The Washington State Parks and Recreation Commission (State Parks) applied to Douglas County for a permit to build a five-mile, non-motorized recreation trail along the Columbia River in the Baker Flats area of East Wenatchee. The proposed trail would connect to an existing trail system. All of the trail would be built on public property. Certain orchardists opposed the trail because they lease public land on which the trail would be located and the trail would displace nearly 24 acres of their mature fruit trees that would be removed.

The County granted a permit for the trail on the basis of Comprehensive Plan and Development Regulation provisions that were not and could not have been challenged in this litigation because of the passage of time. The orchardists challenged the permit by filing a petition for review with the Growth Management Hearings Board (Board) asserting that the trail permit through agricultural land violated GMA requirements. In addition, the orchardists filed a Land Use Petition Act (LUPA) petition in superior court claiming that the trail permit was inconsistent with applicable provisions of the County Comprehensive Plan and Development Regulations.

The Court of Appeals consolidated appeals of the Board's decision on the GMA petition for review and the superior court's decision on the LUPA petition. The Court upheld the Board's determination that it lacked jurisdiction over the GMA appeal because the challenged trail permit was a project-specific decision. The Court also rejected the LUPA challenge to the trail permit, holding, under LUPA's standards of review, that the permit was not violative of the County's Comprehensive Plan or Development Regulations.

The Court awarded attorney fees to the County and the State Parks Department under RCW 4.84.370.

II. Land Use Litigation

A. Mootness; Duration of Judicially Invalidated Permit: *Kelly v. County of Chelan*, 167 Wn.2d 867, 224 P.3d 769 (January 7, 2010).

Beginning in 1989, the developer submitted a succession of applications for an evolving project on the shore of Lake Chelan. The most recent application was filed in 2005. In reviewing that application the County hearing examiner concluded that the proposal was governed by regulations in effect in 1994 that were less stringent than the present regulations. On this basis, the examiner issued a conditional use permit in August 2005 that required the developer to obtain all necessary approvals to proceed within two years or the permit. Failure to do so would nullify the permit.

Kelly and other neighbors opposing the permit brought a timely LUPA petition challenging the permit. In May 2006, the superior court decided that the developer's application did not vest to the regulations in effect in 1994, ruled that the application was governed by regulations adopted in 2000, and invalidated the permit.

The developer filed a timely appeal to the Court of Appeals, but did not seek a stay of either the superior court decision or the running of the two-year durational limitation of the permit. In September 2007 while the appeal was pending, and over two years after the permit was granted in August 2005, the neighbors argued that the appeal should be dismissed for mootness. The Court of Appeals agreed and did so.

The Supreme Court reversed, holding that the superior court's invalidation of the permit tolled the running of the time limitation because the developer had no right to proceed on the invalidated permit. Therefore, the two-year time limitation had not expired, Since the case was not moot, the Court remanded to the Court of Appeals for a decision on the merits.

B. LUPA's Limitation Period Is Unaffected by Reconsideration: *Mellish v. Frog Mountain Pet Care*, 154 Wn. App. 395, 225 P.3d 439 (February 3, 2010). ALERT: Legislature Nullified the Effect of this Decision.

On June 20, 2007, the Jefferson County Deputy Hearing Examiner (Examiner) granted a conditional use permit and variance for Frog Mountain's proposed expansion of a dog and cat boarding facility. Mellish, a neighbor, who opposed the proposed expansion, filed a timely motion for reconsideration on June 28. The motion for reconsideration was denied on July 20. On August 10, Mellish filed a LUPA petition in superior court. The petition was filed within 21 days of the denial of motion for reconsideration, but 50 days after the Examiner's June 20 decision on the permit and variance. The superior court denied Frog Mountain's motion to dismiss the LUPA action as untimely, reasoning that LUPA's 21-day limitation period was tolled during the pendency of the motion for reconsideration.

The Court of Appeals disagreed, holding that the petition violated LUPA's strict timeliness requirement; thus, the LUPA limitation period ran from the date of the County's final decision on the permit and variance, and the limitation period was not tolled by the motion for reconsideration. The Court rejected the argument that because LUPA did not define "final determination" and "final decision," the Legislature implicitly delegated authority to each county to locally define finality. The Court noted that the Supreme Court had defined finality of decisions subject to LUPA; the purpose of LUPA was to establish a uniform and expeditious means of obtaining judicial review of land use decisions, and these purposes would be defeated by making finality a matter of local option. The Court also declined to apply the doctrine of equitable tolling under the facts of the case.

However, more important than the Court's decision was the Legislature's immediate response by enacting House Bill 2740, amending the Land Use Petition Act, RCW 36.70C.020(2), to provide:

> When a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

Ch. 59, 2010 Wash. Laws.

C. LUPA Review; Rezone Denial was Legally Erroneous: *Phoenix Development, Inc. v. City of Woodinville*, 152 Wash.App.1055, ___P.3d___, 2009 WL 3535431 (November 2, 2009), *publication ordered*, February , 2010.

Phoenix Development, Inc. (Phoenix), applied for rezones of two parcels of land in the City of Woodinville from R-1 to R-4 that would have increased allowed residential density from one to four dwelling units per acre. After the proposal was analyzed in an environmental impact statement, the City Hearing Examiner concluded that all rezone criteria were satisfied and recommended approval. However, the City Council denied the rezone after "finding" in its "legislative capacity" that the existing R-1 zoning was appropriate for the properties and deciding in its "quasi-judicial capacity" that the proposal was not consistent with the City's Comprehensive Plan and did not satisfy the City's rezone criteria. The superior court denied Phoenix's LUPA petition.

The Court of Appeals, in an initially unpublished decision that subsequently was published, held that, under all City Comprehensive Plan provisions and Development Regulations governing quasi-judicial rezone applications,

the City's denial of the rezone was not supported by substantial evidence. The Court directed the City to grant the rezone and process the pending applications for preliminary plat approvals.

The Court based its decision on specific City zoning code provisions governing such rezone applications. The most specific and compelling mandate of WMC 21.04.080(a) provided that "[d]evelopments with densities less that R-4 are allowed only if adequate services cannot be provided… ." The Court construed this provision to require the City to approve applications for rezones from R-1 to R-4 unless adequate public services cannot be provided.

The Court also held that the City Council unlawfully exercised its legislative authority in purporting to legislatively adopt a new policy, designated as a finding of fact, in the midst of a quasi-judicial proceeding. The Court explained that the Council's role in deciding the quasi-judicial site-specific rezone application was limited to interpreting existing policies and applying them to the facts. While the Court did not explicitly say so, the adoption and application of a new policy or standard purporting to govern a pending quasi-judicial rezone application would be contrary to the Washington's vested rights doctrine.

D. Timeliness; Exhaustion of Administrative Remedies: *Nickum v. City of Bainbridge Island*, 153 Wn.App. 366, 223 P.3d 1172 (November 2009).

Neighbors (Nickum) challenged a building permit issued by the City of Bainbridge Island for construction of a proposed wireless communication facility on neighboring property and a determination by the City that the proposal was exempt from SEPA's environmental review requirements.

The Court of Appeals held that the City's SEPA exemption determination was not subject to administrative appeal and that the Nickum's LUPA action was untimely for purposes of challenging the SEPA exemption because it was not filed within 21 days of the City's SEPA exemption decision or Nickum's actual notice of the City's decision. The building permit decision and SEPA exemption determination were made on September 14, 2007. There was no notice requirement for the building permit or SEPA exemption, and no notice of these actions was given. However, Nickum obtained actual notice of the City's issuance of the building permit on October 30, 2007. The LUPA action was filed on January 22, 2008.

The City's building permit decision was subject to administrative appeal to the City Hearing Examiner. The appeal was required to be filed within 14 days of the building permit decision. Nickum filed an administrative appeal on November 8, 2007, more than 50 days after the building permit decision, of which no notice was given, but only 9 days after Nickum had obtained actual notice of the decision. The Examiner dismissed the administrative appeal as untimely on January 14, 2008, and Nickum filed a LUPA action challenging the dismissal on January 22, 2008.

The Court of Appeals held that Nickum had failed to exhaust administrative remedies, a prerequisite to obtaining judicial review through a LUPA petition, by failing to file the administrative appeal within 14 days of the building permit decision. The Court characterized the 14-day limitation period as a statute of limitations and, therefore, subject to equitable tolling, rather than a jurisdictional prerequisite. However, the Court held that there was no sufficient basis for equitable tolling. In so deciding, the Court did not consider the fact that no notice of the building permit decision was given and Nickum had not obtained actual notice of the decision until 9 days before filing the administrative appeals.

Later in the opinion the Court acknowledged that the Supreme Court had "suggested" that a LUPA action filed within 21 days of actual notice of land use decisions, of which no notice was given, may be timely. *Habitat Watch,* 155 Wn.2d at 409 and n.7, 120 P.3d 56. The Court went on to observe that the LUPA action had not been filed within 21 days of actual notice. However, the Court did not address the fact that the administrative appeal had been filed within 14 days of actual notice of the decision even though the 14-day period was held to be nonjurisdictional and subject to equitable considerations.

If the Court of Appeals had held that the administrative appeal was timely, Nickum would have satisfied the exhaustion of remedies prerequisite to LUPA review and the Hearing Examiner would have erred by dismissing the appeal as untimely. Presumably, the remedy would have been to remand the case to the Examiner to hear the administrative appeal of the building permit. However, the Court held that the administrative appeal was not timely, the exhaustion of remedies prerequisite to LUPA review was not satisfied, and, therefore, the LUPA action was dismissed.

Although it was unnecessary to do so in regard to the building permit challenge (as opposed to the SEPA exemption challenge), given the Court's holding on Nickum's failure to exhaust administrative remedies, the Court also held that the LUPA action was untimely because it was not filed within 21 days of the building permit decision or Nickum's actual notice of the building permit decision. However, if the Court had decided that the administrative appeal of the building permit decision was timely because it was filed within 14 days of actual notice, the building permit decision would not have been final until the administrative appeal was decided, and the LUPA action would not have had to be filed until 21 days after that.

The Court awarded attorney fees to the applicant and the City under RCW 4.84.370.

E. Standing; Attorney Fees: *Knight v. City of Yelm*, Not Reported in P.3d, 2010 WL 1454096 (Wash. App. Div.2).

This unpublished opinion is reported here because the case attracted extensive attention by news media and the

land use bar. The issue of importance to the land use bar, initially raised by LUPA petitioner JZ Knight, was whether the requirement of appropriate provision for potable water supply for preliminary plat approval, in RCW 58.17.110, may be satisfied only by proof that the water purveyor presently holds sufficient quantity of water rights to serve all existing, approved, and proposed future development. However, the trial court did not rule in favor of JZ Knight on this issue, and she did not appeal the trial court's decision. Thus, before the Court of Appeals, the issues were narrow and mainly procedural.

The Court of Appeals held, in favor of the City of Yelm, that Knight lacked standing to challenge the City Hearing Examiner's decision that there was appropriate provision for potable water supply for the proposed plats because there was a reasonable expectancy that the City of Yelm would have adequate water supply to serve the developments when the water would be needed. The Court held that Knight had failed to sufficiently plead and prove that she would be "specifically and perceptibly harmed" by the proposed subdivisions and that a judgment in her favor would substantially eliminate or redress the alleged prejudice:

> …when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to herself. *Trepanier,* 64 Wn.App. at 383. If the injury is merely conjectural or hypothetical, there can be no standing. *Trepanier,* 64 Wn.App. at 383. Pleadings and proof are insufficient if they merely reveal imagined circumstances in which the plaintiff could be affected. *Snohomish County Prop. Rights Alliance v. Snohomish County,* 76 Wn.App. 44, 53, 882 P.2d 807 (1994).

The Court awarded attorney fees to the City and Tahoma Terra under RCW 4.84.370 because they had substantially prevailed before the City, trial court, and Court of Appeals.

III. Shoreline Management Act (SMA)

A. Shoreline Hearings Board Lacks Authority to Review Permit Conditions Derived from Critical Areas Ordinance: *Kailin v. Clallam County and Department of Ecology*, ___Wash. App.___, ___ P.3d___(November 9, 2009).

Dr. Kailin applied for a shoreline substantial development permit to build a house within the shoreline of Sequim Bay. Clallam County granted the permit subject to approval of a "reasonable use exception" to reduce the wetland buffer required by the County's critical areas ordinance and a zoning variance to decrease a road setback. The County granted the variance and reasonable use exception subject to conditions requiring that Dr. Kailin reduce the footprint of the house in order to limit its intrusion into the wetland buffer. Dr. Kailin appealed the County's substantial development permit decision to the Shoreline Hearings Board. The Board upheld the substantial development permit and conditions, ruling that it lacked subject matter jurisdiction to review the conditions to the reasonable use exception because they were based on the County's critical areas ordinance rather than the County's shoreline master program.

Dr. Kailin appealed the Shoreline Hearings Board decision to superior court but apparently had not filed a LUPA petition challenging the County's permit conditions based on the reasonable use exception of its critical areas ordinance. Dr. Kailin's appeal was based on her contention that under RCW 36.70A.480, as amended in 2003 by ESHB 1933, the County lacked authority to apply its critical areas ordinance to development within the territorial jurisdiction of the Shoreline Management Act. Thus, she argued, the Shoreline Hearings Board should have invalidated the County's conditions on the shoreline substantial development permit that were based on the County's critical areas ordinance requirements that had not been incorporated into the County's shoreline master program. Dr. Kailin relied on the Supreme Court's decision in *Futurewise v. Western Washington Growth Management Hearings Board,* 164 Wn.2d 242, 189 P.3d 161 (2008). The superior court agreed with her argument and remanded to the Shoreline Hearings Board to rectify the County's erroneous application of its critical areas ordinance to shoreline development.

The Court of Appeals reversed the superior court and affirmed the Shoreline Hearings Board, holding that the Board lacked subject matter jurisdiction to review the County's application of its critical areas ordinance. The Court extensively discussed the 2003 amendment of RCW 36.70A.480, the *Futurewise* case, and the subsequent *KAPO v Central Puget Sound Growth Management Hearings Board,* ___Wn.App.___. ___P.3d___(2009), concluding that none of these authorities addressed the jurisdiction of the Shoreline Hearings Board to review any local provisions beyond shoreline master programs.

Apparently, Dr. Kailin could have obtained judicial review of the County's application of its critical areas ordinance to her shoreline substantial development permit only if she had protectively appealed the County's permit decision separately to superior court in a LUPA petition.

B. Shoreline Hearings Board Denial of Dock Permit Overturned: *Robertson v. Shoreline Hearings Board,* 153 Wn. App. 57, 218 P.3d 244 (2009).

The Robertson and Qvinsland families, owners of adjoining Puget Sound waterfront property on Hale Passage in Pierce County (Robertson), applied for a shoreline substantial development permit for a recreational joint-use pier, ramp, and float that would extend 100 feet seaward from the ordinary high-water mark at the common property line of their respective parcels. The County Hearing Examiner granted the permit, and several neighbors appealed to the

Shoreline Hearings Board. The Hearings Board overturned the County's approval of the substantial development permit. Robertson appealed the Board's decision to superior court where the Board was reversed and the dock permit was reinstated. The neighbors appealed.

The Court of Appeals, on the basis of an extensive review of relevant provisions of the County's shoreline master program and the Board's findings and conclusions, affirmed the superior court's reversal of the Shoreline Hearings Board's decision and reinstated the County Hearing Examiner's approval of the substantial development permit to build the joint use dock.

IV. State Environmental Policy Act (SEPA)

A. Deferring SEPA Review of City's Proposed Redevelopment Project Until Future Permit Applications was Legally Erroneous: *Magnolia Neighborhood Planning Council v. City of Seattle*, ___Wash. App.___, ___P.3d___(2010).

Over thirty years ago, the City of Seattle acquired most of the former Fort Lawton, now Discovery Park in the Magnolia neighborhood. At that time, the federal government retained a small portion of the former Fort Lawton to be used as an Army Reserve Center (ARC). In 2006, the federal government decided the ARC was no longer needed and proceeded to dispose of the property under the Defense Base Closure and Realignment Act (BRAC). The City attempted to obtain the former ARC property through the BRAC process which required the City to propose a redevelopment plan. The City approved and submitted the Fort Lawton Redevelopment Plan (FLRP) to the federal government. The FLRP proposed to develop the property as a new mixed-use neighborhood with between 108 and 125 market-rate units, a 55-unit building for homeless seniors, 30 units for homeless families, and six self-help ownership units to be developed by Habitat for Humanity. The income source for the project was to be the sale of lots for single-family and duplex townhome lots to market-rate developers.Under the BRAC, if the City were awarded the property, it would be legally required to develop the land in accordance with the proposed FLRP.

The City finalized and then adopted the FLRP by resolution without any SEPA review. In foregoing SEPA review, the City explained that if it succeeded in obtaining the property, SEPA review would be conducted when applications for rezoning and development permits were submitted. The Magnolia Neighborhood Planning Council challenged the City's adoption of the FLRP in superior court, arguing that the City violated SEPA by failing to conduct environmental review before adopting the FLRP and by failing to determine the consistency of the FLRP with a previously adopted neighborhood land use plan. The trial court agreed with both arguments and overturned the City's adoption of the FLRP.

The Court of Appeals rejected the City's argument that the neighborhood group lacked standing and affirmed the trial court's determination that the City had violated SEPA. The Court rejected arguments that SEPA was preempted by NEPA, that the FLRP was not an "action" and, that if the FLRP was an action, it was categorically exempt. The Court held that the FLRP was a publicly proposed project action because if the City succeeded in obtaining the property, it would be legally obligated to proceed with the project in accordance with the FLRP, and the project action was not within any categorical exemption. However, the Court reversed the trial court's ruling that the City was obligated to determine the consistency of the FLRP with the neighborhood land use plan, holding that there was no legal basis for such a requirement.

B. Hearing Examiner Properly Overturned DNS and Ordered Issuance of DS and EIS Preparation to Analyze and Disclose a Proposed Subdivision's Significant Adverse Public Safety Impacts in Case of Wildfire: *Douglass v. City of Spokane Valley*, ___ Wash. App. ___, ___P.3d___, 2010 WL 448049 (2010).

This case involves a proposed subdivision in the Ponderosa area of Spokane County within the corporate limits of the City of Spokane Valley. The Ponderosa area is about three square miles of land on the east side of Browne's Mountain. The area is covered with grasses, shrubs, and scattered pine trees. The area has experienced numerous wildfires, including a firestorm in 1991 that destroyed 14 homes and threatened an additional 105 homes near the site of the proposed subdivision. The Ponderosa Neighborhood Association is opposed to further residential development in the area.

The City of Spokane Valley Hearing Examiner reversed the City SEPA Responsible Official's Mitigated Determination of Nonsignificance on a proposed subdivision of 17 acres into 81 lots and ordered the City to issue a determination of significance and prepare an environmental impact statement to analyze the significant public safety impacts of the probable inability to evacuate the subdivision in thirty minutes in the event of a wildfire.

At about the same time, the same developer had applied to Spokane County to subdivide 28 acres into 100 lots nearby in the Ponderosa area. In that case, the same Hearing Examiner, acting on behalf of Spokane County, heard an appeal by the Ponderosa Neighborhood Association of the County SEPA Responsible Official's determination of nonsignificance. Based on the evidentiary record in that case, the Hearing Examiner had upheld the determination of nonsignificance. The Ponderosa Neighborhood decision obtained judicial review, and the County's determination of nonsignificance ultimately was upheld in *Ponderosa Neighborhood Association v. Spokane County*, 141 Wn.App. 1031, 2007 WL 3349121.

In the subsequent City of Spokane Valley case, the Court of Appeals upheld the Hearing Examiner's reversal

of the City's Mitigated Determination of Nonsignificance. The Court held that the different evidentiary record in the later decision by the same Hearing Examiner provided substantial evidence in support of the Examiner's fact-findings and that the Hearing Examiner's application of SEPA law to the facts to conclude that the proposed subdivision would have probable significant adverse public safety impacts, requiring preparation of an environmental impact statement, was not clearly erroneous.

C. Appeal of SEPA Exemption Determination: *See, Nickum v. City of Bainbridge Island, supra.*

V. Historic Landmark Regulation

A. Denial of Development Permit by Landmarks Preservation Board (LPB) Was Not: an Unlawful Indirect Tax, Fee, or Charge; Constitutionally Void for Vagueness; a Regulatory Taking; or Violation of Due Process: *Conner v. City of Seattle*, 153 Wash. App. 573, 223 P.3d 1201 (2009).

Conner purchased a house on an acre of land with knowledge that it had been designated as a historic landmark by the City of Seattle at the request of a previous owner. Conner proposed to build three additional homes on the site, all of which were larger and higher than the historic house. The City Landmarks Preservation Board denied Conner's proposed development of the site because it did not preserve the protected historic features. The City Hearing Examiner and superior court upheld the Board's decision.

Conner appealed contending that only the house was designated as a historic landmark and, thus, development of additional homes on the land surrounding the house was not regulated by the City's Landmark Preservation Ordinance (LPO). The Court of Appeals disagreed, construing the historic designation as pertaining to the house and the lot.

Conner principally argued that the subjective standards of the LPO were unconstitutionally void for vagueness, that the burden imposed by the LPO resulted in an unconstitutional regulatory taking without compensation, that the application of the LPO violated constitutional due process, and that the LPO's regulatory requirements were an unlawful indirect tax, fee, or charge, in violation of RCW 82.02.020. The Court of Appeals rejected all of these arguments, upholding the City's denial of the proposal under the subjective standards of the LPO, as interpreted and applied by the Landmark Preservation Board.

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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

Smith v. Ecology, PCHB No. 08-060 Findings of Fact, Conclusions of Law, and Order (October 26, 2009)

Mr. Smith appealed a $232,000 civil penalty issued by Ecology for failing to stabilize soils at his property adjacent to I-5 and SR 505 near Winlock, Lewis County, as required by a Department of Ecology (Ecology) administrative order directing him to do so. Ecology had issued the order in response to Mr. Smith's unpermitted clearing and grading at the 175 +/- acre site, which borders Lacamas Creek, a tributary to the Cowlitz River and a significant fish stream that supports a number of threatened and depressed fish species including fall Chinook, Chum, and Coho salmon.

In a previous appeal to the Pollution Control Hearings Board (PCHB or Board), Mr. Smith had unsuccessfully challenged Ecology's determination that the clearing and grading required coverage under Ecology's Construction Stormwater General Permit because it was being done in furtherance of developing the property as a master planned resort (a Regional Equestrian Center) rather than as part of an agricultural activity. The only matter before the PCHB in this proceeding was the reasonableness of the penalty, which Ecology had imposed based upon a single violation (failing to implement a soil stabilization plan to protect adjacent aquatic resources) at $4,000 per day for 58 days.

After a contested hearing in which the parties presented evidence related to the three factors the Board considers in evaluating penalties (the nature of the violation, the prior history of the violator, and the remedial actions taken by the penalized party), the Board upheld the full amount of the penalty. The Board based its decision on several findings, including the fact that Mr. Smith had been penalized for substantially fewer violations than the agency had documented; the large scale of erosion and sediment control problems that caused ongoing damage to high-value, sensitive fish habitat; and the fact that the problems could have been largely avoided by complying with permit requirements.

As a property owner seeking to develop a large-scale commercial venture, the Board reasoned that Mr. Smith should have known about the need to comply with water quality requirements. Mr. Smith's lack of past violations was offset by the seriousness of the violations and the protracted delay in correcting the problems. The Board concluded that although Mr. Smith took some remedial actions, they were delayed and minor in relation to the scale and immediacy of the identified problems.

Mr. Smith did not appeal the Board's decision in the penalty matter, but has appealed to Superior Court the PCHB's earlier decision regarding the validity of the administrative order directing him to obtain coverage under the Construction Stormwater General Permit.

Bickford v. Ecology, PCHB No. 09-063 Order Granting Summary Judgment and Dismissal of Appeal (November 20, 2009)

This case involved an appeal of Ecology's decision reversing the Douglas County Water Conservancy Board's decision that had approved a change to a ground water certificate to allow for irrigation of additional acreage. The Conservancy Board calculated the amount of water available for change based on the "annual consumptive quantity" (ACQ). The ACQ, in turn, was calculated by averaging the highest two years of use during the five-year period before 2003, the point in time when the water right holder had removed an orchard and asserted an exemption to relinquishment based on a "determined future development."

Ecology's reversal of the Conservancy Board was based, in part, on its contention that the wrong five-year period had been used to calculate the ACQ. The parties stipulated to the material facts and presented to the Board on summary judgment the legal issue of which five-year period must be used. As part of their stipulation, they agreed that the water right had seen some continuous nominal use since the orchard was removed.

The PCHB held that the Conservancy Board used the wrong five-year period and therefore improperly calculated the annual consumptive quantity available for change. The PCHB's decision analyzes the statutory definition of "annual consumptive quantity" contained in RCW 90.03.380 and the Appellant's contention that it created an irreconcilable conflict with the relinquishment provision of the water code, which exempts from relinquishment those rights claimed for determined future development to take place within 15 years of the most recent beneficial use of the right.

The Board concluded that because the water right had been put to beneficial use, albeit nominal use, during the five-year period after the orchard was removed, that the more recent time period needed to be used to calculate the ACQ. Any perceived conflict between that provision and

the relinquishment provision of the water code, the Board reasoned, was more appropriately addressed as a policy matter by the legislature.

Based on the Board's decision, the Appellants requested withdrawal of the appeal, and the Board dismissed the case.

West v. Ecology, Weyerhaueser & Port of Olympia, PCHB No. 08-113 Order of Dismissal (January 5, 2010)

In this case, Arthur West appealed Ecology's approval of the Industrial Stormwater General Permit (ISGP), which was issued on October 15, 2008 and expired on April 30, 2009. The ISGP governs stormwater discharges associated with industrial activities throughout the state. The ISGP limits the discharge of pollutants into surface waters under the authority of federal law (Clean Water Act, 33 U.S.C. § 1251 et seq.) and limits the discharge of pollutants to both surface and ground water under the authority of the state's Water Pollution Control Act (RCW 90.48).

Mr. West named the Port of Olympia (Port) and Weyerhaeuser as responding parties to the appeal, along with Ecology. The Port and Weyerhaeuser promptly filed motions requesting their dismissal out of the appeal based on Mr. West's alleged failure to state a case upon which relief could be granted against them. The Board, after reviewing Mr. West's claims, and assuming for purposes of the motion that they were true, concluded that the claims did not support relief against Weyerhaeuser or the Port.

The alleged deficiencies in the ISGP were a result of Ecology's action or inaction, and neither Weyerhaeuser nor the Port had the authority to issue or modify a general permit. Further, the relief Mr. West was seeking involved issuance of an alternate permit with more stringent conditions. This relief was not available from Weyerhaeuser or the Port. On this basis, the Board dismissed Weyerhaeuser and the Port from the case.

Mr. West, who was appealing *pro se*, failed to appear at the pre-hearing conference. The conference was rescheduled, and prior to the new date, Mr. West filed the required list of exhibits and legal issues. He failed, however, to specify any witness by name. During the pre-hearing conference, the need to further identify the names of witnesses was discussed and Mr. West was given additional time to provide the additional information. Mr. West did not provide the additional information by the required date, but did so later, after Ecology had filed a motion for default. The Board denied the motion for default, noting that "[a]t this point, Mr. West has not fallen so far short of his required obligations as a litigant that the extreme sanction of dismissal for default is justified."

Subsequently, Mr. West again failed to appear in a mandatory conference, and the Presiding Officer issued an Order requiring Mr. West to Show Cause why the appeal should not be dismissed due to (1) his failure to participate in a mandatory conference and (2) the fact that the appeal was moot since the permit at issue had expired. Mr. West responded, making a minimally sufficient showing to withstand dismissal for default; however, the Board concluded the case was moot. The 2008 ISGP at issue in the case had expired, and was no longer regulating stormwater discharges from industrial sites. A new ISGP issued October 21, 2009, had replaced the 2008 permit, and Mr. West had already appealed the new permit. On that basis, the Board dismissed this appeal as moot.

An appeal of the Board's decision is pending in Thurston County Superior Court.

Bel-Lyn Farms LLC v. Ecology, PCHB No. 09-092 Order Granting Summary Judgment (February 19, 2009)

Bel-Lyn Farms, a medium-sized dairy and cattle operation in Whatcom County, had an accidental discharge of manure into the tributaries of the Nooksack River, which resulted in Ecology requiring the farm to apply for coverage under the Concentrated Animal Feeding Operations (CAFO) National Pollution Discharge Elimination System (NPDES) General Permit. The farm had not previously been covered by a discharge permit of any kind.

Bel-Lyn responded to the problem by instituting several measures to prevent additional discharges and appealed asserting that coverage under the CAFO General Permit was unnecessary. The Board found Ecology was entitled to summary judgment as a matter of law on the basis that state law requires people conducting commercial or industrial operations of any type to obtain a permit before discharging pollutants into state waters. Additionally, state regulations prohibit discharges into state waters from any point source without an individual or general permit. Because the CAFO General Permit, by its own terms, applies to medium-size CAFOs where there has been a discharge, the Board concluded that Ecology's order directing Bel-Lyn to apply for coverage was lawful. The Board noted, however, that the farm need not be covered forever since the permit provides for termination of coverage of medium-size CAFOs under certain conditions (*i.e.*, no discharges or other violations for a three-year period). The appeal was dismissed.

Methow Valley Irrigation District v. Ecology, PCHB No. 04-165 Order Granting Partial Summary Judgment (March 18, 2010)

The Methow Valley Irrigation District (MVID) and Ecology have been engaged in a long dispute over the amount of water MVID is diverting from the Methow and Twisp rivers to serve its irrigation customers. The inefficiencies of the system have been litigated in two prior cases before the PCHB, each concluding MVID needed to make significant improvements to reduce waste to the maximum extent practicable. Further appeal of one of the prior decisions is still pending in the court of appeals, after the Okanogan Superior Court affirmed the PCHB.

As a result of the earlier cases, Ecology issued an administrative order requiring MVID to measure water entering its canal from a ditch run by the Barkley Irriga-

tion Company so duplicate diversions could be avoided. When MVID failed to install a measuring device and submit reports by the required deadline, Ecology issued the District a $20,200 penalty. The penalty was appealed to the PCHB in this case.

Ecology moved for summary judgment on all issues. The Board granted summary judgment to Ecology on the issues related to whether MVID had violated the order, but reserved for hearing the issue regarding the proper amount of the penalty.

The Board concluded that MVID had violated the administrative order by failing to install measuring devices within the prescribed period and failing to submit required reports. In reaching this conclusion, the Board rejected arguments that the penalty order was insufficient in citing the violations and describing the facts.

MVID also alleged that Ecology could not penalize the District because written technical assistance had not been given regarding the violation. The Board found that the long history of technical assistance provided to MVID, the genesis of the violation in a Board directive, and the advice Ecology gave the District regarding alternatives, was adequate to comply with technical assistance requirements.

The Board refused to revisit the issue of whether the administrative order was valid because that issue was directly litigated in a prior case. Collateral estoppel prohibited relitigation of the same issue between the same parties.

The Board concluded that disputed factual issues prevented a summary judgment ruling on the proper amount of the penalty, and the penalty aspect of the case is scheduled for hearing during the spring of 2010.

II. Shorelines Hearings Board

Meyer v. Westport Fisheries & Grays Harbor County, SHB 09-011 Order on Summary Judgment (October 21, 2009)

Petitioner challenged a shoreline substantial development permit (SSDP) issued by Grays Harbor County to Westport Fisheries to develop a hagfish processing operation on a parcel along the Johns River, close to its entry into Grays Harbor. At issue on summary judgment was whether the development would be located on a shoreline of statewide significance and if so, whether the County complied with necessary review and notice requirements related to that designation.

On summary judgment, the Board concluded that while Ecology regulations did not identify the area in question as a shoreline of statewide significance, the Grays Harbor County Shorelines Master Program (SMP) more broadly defined such shorelines, and included within the definition the "Grays Harbor Estuary" and its associated wetlands. However, given the disputed record on summary judgment, the Board could not conclude where, exactly, the proposed development was located in relation to the SMP-defined estuary area, and left open the question of whether the County could by its own SMP and other planning documents define the area as a shoreline of statewide significance.

After denial of the summary judgment motion, the parties reached a settlement and the appeal of the SSDP was dismissed based on the parties' stipulation.

Walker, et. al. v. City of Tacoma and Ecology, SHB 09-013, 09-016 (Consolidated) Order on Summary Judgment (January 19, 2010) and Findings of Fact, Conclusions of Law, and Order (March 25, 2010)

A neighborhood group filed two appeals challenging the City of Tacoma's issuance of a SSDP and shoreline conditional use permit (CUP) for portions of a large, mixed-use development called the Point Ruston Project (Project). The Project is located on approximately 80 acres that was formerly the American Smelting and Refining Company's (ASARCO) Tacoma smelter operation. The site is unique in that it is an EPA superfund site that is still undergoing a long-term remediation.

Because the Project is partially within the shoreline areas of both the Town of Ruston and the City of Tacoma, both entities issued shoreline permits. The same individuals who appealed the City of Tacoma permits previously appealed the shoreline permits issued by the Town of Ruston. *See Leider et al. v. Point Ruston et al*., SHB No. 09-005 (2009) ("Leider"). The *Leider* appeal involved many of the same facts and issues raised in the current appeals.

The parties identified more than thirty broad-ranging issues for decision in this appeal, many of which the Board concluded on summary judgment were outside of its jurisdiction. The Board also ruled on summary judgment that the doctrine of collateral estoppel limited the evidence and arguments that the parties could make related to certain issues decided in *Leider*.

Most of Petitioners' issues were dismissed on summary judgment, but the Board held two remaining questions over for hearing: (1) whether the impacts to residential views caused by the buildings in the shoreline area exceeding 35 feet violated RCW 90.58.320; and (2) whether the proposed use of a docked ferry for a retail sales office met the criteria for conditional uses in WAC 173-27-160(1). The hearing included a Board site visit to four homes with views that could potentially be affected by the Project.

At the conclusion of Petitioner's case-in-chief, Ecology moved to dismiss the second issue on the basis that the Petitioners presented no evidence related to the proposed use of the docked ferry, and had failed to meet their burden of proof. The Board granted Respondent's motion.

In its decision regarding the view impacts, the Board concluded that the Petitioner Group had not presented credible evidence to meet its burden to prove that the proposed buildings in the shoreline exceeding 35 feet would create an obstruction of the view of a substantial number of residences in violation of RCW 90.58.320. The Board reasoned that due to the panoramic nature of the residential views involved, the loss of small portions of some of the

residential views was not substantial. Further, the Petitioner Group had not called out any particular scenic feature or specific view that would be obstructed.

The Board also noted the presence of a number of Project buildings proposed for outside the shoreline jurisdiction that would fall between the buildings on appeal and the residences, and found that these would play a major contributing factor to any view impact from the Project. Although many Petitioners testified as to concerns about view impacts from the Project as a whole, the Board concluded that it lacked jurisdiction to address the height of the buildings outside of the shoreline area.

Finally, the Board noted that prior to the demolition of the ASARCO buildings, and while the ASARCO operations were ongoing, ASARCO impacted some portion of all of the surrounding residents' water views. When the Project is complete, the site structures will once again impact some portion of the surrounding residences' water views, and the Board re-iterated its conclusion from *Leider* that the proper baseline for evaluating view impacts was the prior ASARCO operation (pre-demolition). Petitioner failed to meet its burden of proof to show that the impact from the Project, when compared to the prior ASARCO operation, would constitute view obstruction under RCW 90.58.320.

Based on this analysis, the Board dismissed the Petitioner Groups' appeals, and affirmed the shoreline substantial development permit and conditional use permit issued by the City of Tacoma.

III. Forest Practices Appeals Board

Perkins v. Department of Natural Resources, FPAB No. 09-002

The Department of Natural Resources (DNR) issued a $15,000 civil penalty to Lonnie Perkins for allegedly conducting forest practices without an approved forest practices application (FPA) and for cutting trees in a no-cut buffer on a non-fish perennial stream. Mr. Perkins appealed the penalty to the Forest Practices Appeals Board. The hearing was held in Anacortes, Washington. Following a site visit and three days of testimony, the Board issued a decision in which it affirmed $10,000 of the $15,000 penalty against Perkins.

Ten thousand dollars of the penalty, which DNR had assessed for conducting forest practices without an approved FPA, was affirmed on the basis that Mr. Perkins had participated in and profited from an un-permitted forest practices operation. Mr. Perkins, by his own admission, had hauled logs from the site without verifying that an approved FPA had been obtained.

The Board did not uphold the remaining portion of the penalty ($5,000), which DNR had issued for cutting in a no-cut buffer. Although the Board determined Mr. Perkins was aware of the presence of a wetland on the site, it concluded that DNR, the party with the burden of proof, did not offer sufficient evidence to prove that Mr. Perkins did the cutting.

Mr. Perkins has appealed the Board's decision to Skagit County Superior Court.

Recent Decisions from the Growth Management Hearings Boards

By Ed McGuire, Esq., E.G. McGuire & Associates

This update does not provide a complete summary of all decisions issued by the three [now one] Growth Management Hearings Boards (Boards). Instead, it summarizes decisions, or portions of decisions that may be of particular interest – interpretations of the Growth Management Act (GMA) or application of the Boards' practice and procedures. The decisions summarized below include selected decisions issued and published from October 6, 2009, through March 11, 2010. The complete listing of published Board decisions, with links, can be found at *www.gmhb.wa.gov*.

RCW 36.70A.320(3) requires the Boards to consider the GMA guidelines and criteria adopted by the Department of Commerce. These guidelines and criteria have recently been updated by the Department and can be found at *www.commerce.wa.gov/wacupdate*.

I. Affordable Housing

Larson Park Community LLC, v. City of Tumwater, WWGMHB Case No. 09-2-0010, Final Decision and Order, (Oct. 13, 2009).

The City enacted an ordinance creating a single use zone for certain manufactured housing parks, essentially requiring that several existing parks be maintained as such. Petitioners challenged the City's action alleging that freezing the zoning designation without incentives would result in higher rents since infrastructure improvements were needed and therefore affordable housing would be discouraged. The Board concluded the City's approach was an appropriate means of "encouraging affordable housing" and that the GMA does not require a jurisdiction to provide financial incentives to encourage affordable housing.

Campbell v. San Juan County, WWGMHB Case No. 09-2-0014, Final Decision and Order, (Jan. 27, 2010).

Petitioner challenged San Juan County's adoption of amendments to its Comprehensive Plan's housing element and related appendices. One of the arguments offered suggested that the County needed to provide affordable housing for individuals that commute to the County to work and would arguably relocate there if affordable housing

was provided. The Western Board rejected this argument because the GMA requires the County's housing needs analysis to be based upon the population projected by the Office of Financial Management (OFM), which the County did. The Board noted OFM projections consider not only birth and death rates, but also migration rates due to employment. Petitioner also contended the County's housing policies were inadequate to meet the problems identified in the housing needs assessment. The Board disagreed; and concluded the Comprehensive Plan's housing policies, in fact, supported the housing needs of the County.

Petitioner alleged the County's population and corresponding land use and housing provisions were inconsistent with those of the Town of Friday Harbor, claiming the Town was ignoring the need to provide affordable housing. The Board noted that 'mirror image' plans are not required by the GMA, and Petitioner's complaint was directed against the Town, not the County whose action was being challenged. The Board commented, "[Friday Harbor's] opportunity to update its comprehensive plan accordingly should be addressed in its next review." On another housing issue, the Board found, "The County is not obligated to add to the stock of low income housing but instead to set the framework in which the market can provide housing to all segments of the population." The Board concluded the County had provided sufficient land for housing and otherwise complied with the GMA's goals and requirements for housing.

II. Agricultural Resource Lands – Designation

Douglas County Coalition for Responsible Government v. Douglas County, EWGMHB Case No. 09-1-0011, Final Decision and Order, (Jan. 19, 2010).

Douglas County adopted amendments to its Comprehensive Plan changing the designation of certain lands from agricultural lands of long-term significance to rural. Petitioner challenged, alleging the de-designation violated the provisions of the GMA. Although the County de-designated several hundred acres of agricultural lands, Petitioner focused on approximately 148 acres.

Petitioner argued the lands in question continued to meet the GMA's criteria for designation and therefore, the County's de-designation failed to conserve agricultural resource land. The County contended the change was limited in scope and that the majority of the de-designated land was not in agricultural production, did not contain favorable soil types, had poor growing capacity, and was in close proximity to existing urban growth areas. The County urged to Eastern Board to defer to its decision and pointed the Board to materials in the record to support its action.

The Board reviewed: the parameters for agricultural land designation as established in the Supreme Court's *Lewis County* case, *Lewis County v. WWGMHB*, 157 Wn.2d 488 (2006); the County's designation/de-designation criteria within its Comprehensive Plan; and the criteria of WAC 365-190-050 (the WAC factors). It then reviewed the staff report and other materials in the record and found the staff report did not follow the process or criteria for de-designation and that some of the lands in question continued to meet some of the designation criteria. The Board concluded the record did not support the de-designation of the land in question. A noncompliance order was issued and the matter was remanded.

III. Critical Areas

Concerned Friends of Ferry County v. Ferry County, EWGMHB Case No. 06-1-0003, Third Order on Compliance, (March 3, 2010).

The outstanding compliance issues in this 2006 case were the County's failure to protect the functions and values of critical areas, the lack of "best available science" (**BAS**) to support including agriculture in its "Low Intensity Land Use" definition, and the inadequacy of the County's process for designating habitats and species of local importance.

The Eastern Board reiterated many of the findings and conclusions from its prior Orders finding noncompliance. The Board determined the County's failure to remove agriculture from Low Intensity Land Uses did not protect the functions and values of critical areas since no scientific evidence in the record supported the County's decision. The Board emphasized what the GMA requires and allows: (1) protection of all functions and values; (2) inclusion of BAS to prevent speculation and surmise in an area that is scientific in nature; (3) deviation from BAS is permitted upon a showing of reasoned justification which stems from balancing GMA goals and is based upon unique local circumstances; and (4) deviation from BAS does not amount to a relinquishment of the duty to protect.

In finding noncompliance on the issue of designating habitats and species of local importance, the Board concluded designation was a County duty that could not be delegated to individuals or agencies. The Board noted the County cannot transfer its duty to a nomination process to take place at a later time when BAS in the record presently supported designation. The Board remanded and established a new compliance schedule.

IV. Essential Public Facilities

Skagit Hill Recycling v. Skagit County, WWGMHB Case No. 09-2-0011, Order on Motions, (Sep. 22, 2009).

Petitioner owned and operated an existing solid waste handling facility [an essential public facility (EPF)] in Skagit County. However, the facility was operating without the appropriate permit authorization from the County. Petitioner sought to obtain the appropriate permit for the existing facility and pursue upgrades and expansion. Upon reviewing its development regulations governing solid waste-handling facilities, the County discovered a conflict

in its regulations. Solid waste-handling facilities could be sited and permitted with either a special use permit or an unclassified use permit. While it clarified its regulations, the County imposed a temporary moratorium on accepting special use permits for solid waste-handling facilities. Petitioner appealed to the Western Board alleging that the moratorium precluded the siting of an EPF in violation of the GMA. The County moved to dismiss asserting that the moratorium was not preclusive.

The Western Board acknowledged that moratoria can have a preclusive effect on EPFs, but in this case the moratorium only prohibited accepting special use permit applications for solid waste-handling facilities. The moratorium did not prohibit the filing of an unclassified use permit application for a solid waste-handling facility. Therefore, the Board found that EPFs were not precluded by the moratorium and granted the County's motion to dismiss the matter. Petitioners requested reconsideration, but the Board denied the request. *See* ***Skagit Hill Recycling & Scott Waldal v. Skagit County***, WWGMHB Case No. 09-2-0011, Order on Reconsideration, (Oct. 27, 2009).

Skagit Hill Recycling v. Skagit County, WWGMHB Case No. 09-2-0022, Order on Respondent's Dispositive Motions, (Jan. 8, 2010).

Following dismissal of Petitioners' challenge to the Skagit County moratorium, Petitioners filed a challenge to the Skagit County new ordinance refining its permitting process and modifying several definitions including the definition of "utility developments" that allegedly affected Petitioners' recycling facility. The County moved to dismiss, arguing that recycling facilities are solid waste-handling facilities (*i.e.*, major regional facilities permitted as unclassified uses) and that the relevant definitions are not amended by the ordinance. Petitioners claimed the new definition would require them to pursue an unclassified use permit for their recycling facility, whereas the prior definition could have been processed as a special use permit.

The Western Board concluded that the phrase in dispute – "utility development" – included solid waste-handling facilities, which encompasses recycling facilities, and that rather than having two categories of utility development there were now three. However, only major regional utility developments require an unclassified use permit. The threshold question for the first seven issues was whether all recycling facilities are major regional utility developments requiring an unclassified use permit. The Board concluded they were not, and dismissed the seven related issues, as well as other issues in the case.

V. Equitable Doctrines – *Res Judicata* and *Collateral Estoppel*

Irondale Community Action Neighbors v. Jefferson County, WWGMHB Case No. 09-2-0012, Order on Motion to Strike, (Nov. 5, 2009).

In a 2003 Western Board decision, Jefferson County's inclusion of the Port Hadlock/Irondale area within an unincorporated urban growth area (UGA) was found noncompliant by the Board. The County undertook numerous compliance efforts, most of which were challenged by the same Petitioners. The Board coordinated many of these proceedings and ultimately consolidated various cases into a 2007 case – WWGMHB Case No. 07-2-0012c. The Board's Compliance Order, issued on August 12, 2009, for the consolidated matter, found the County in compliance on all outstanding matters but for one – the County needed to clarify which rural development standards applied within the Port Hadlock/Irondale UGA prior to sewers being available.

The same Petitioners sought reconsideration of that decision, which was denied. The County then adopted an Ordinance to achieve compliance with the GMA as interpreted in the August 2009 Order. The Petitioners then filed the present petition for review alleging issues that were argued and decided during the Board's prior decisions on this particular UGA. The County moved to dismiss the challenge alleging that *res judicata* and *collateral estoppel* barred Petitioners from re-litigating matters previously determined by the Board. In response, Petitioners argued the Boards have never applied such equitable doctrines and the Boards do not have authority to grant equitable jurisdiction under the GMA or Administrative Procedures Act (APA). The County countered that the courts have held that quasi-judicial bodies can apply equitable doctrines in certain circumstances.

The Western Board discussed the doctrines of *res judicata* (claim preclusion) and *collateral estoppel* (issue preclusion) and the requirements for each. It then reviewed court decisions regarding whether these principles apply to administrative determinations, and concluded the authority to apply them was implied and in certain situations they could be applied. The Board then reviewed prior Growth Board decisions on the application of equitable doctrines, concluding that there have been inconsistent decisions on authority, and inconsistent application of the principles in numerous Growth Board decisions. The Western Board then determined that neither doctrine conflicts with any provision of the GMA or APA and in fact supplement the Boards' clear authority to determine compliance with the GMA.

Having determined the Board has implied authority in regards to these equitable doctrines, the Board went on examine whether the facts of the case warranted application of the doctrines. It concluded that all of the issues posed by Petitioners in the present proceeding had been

addressed by the Board, could have been raised, or are currently being addressed by the County. The Board found the facts compelling, and concluded, "In the context of the GMA, local governments should be protected from the 'expense and vexation' of multiple claims. Application of the doctrine of *res judicata* is warranted in this case." The Board dismissed the case, but noted one issue remained for the compliance proceeding in WWGMHB Case No. 07-2-0012. The Board ultimately found compliance on the one outstanding issue and denied a request for reconsideration. *See* ***Irondale Community Action Neighbors v. Jefferson County***, WWGMHB Case No. 07-2-0012c, Compliance Order, (Jan. 27, 2010); and Order on Petitioner's Motion for Reconsideration, (Mar. 1, 2010).

Hadaller v. Lewis County, WWGMHB Case No. 09-2-0017, Order on County's Motion to Dismiss, (Jan. 27, 2009).

Lewis County designated Petitioner's property as agricultural resource land in 2007 and that designation was upheld by the Western Board in 2008. However, the Board found the County noncompliant in other regards. In the compliance phase of the 2008 Lewis County case the County enacted revisions to its Comprehensive Plan to achieve compliance, but the County did not alter the compliant designation of Petitioner's land. Nonetheless, Petitioner filed a new petition for review. The County moved to dismiss the petition in its entirety asserting that either *res judicata* or *collateral estoppel* barred Petitioner's claims since the Board had disposed of them in prior proceedings.

Rather than turning to equitable doctrines, the Board dismissed the matter as untimely. The Board reasoned that the County's 2009 action did not alter the designation of Petitioner's property and Petitioner was attempting to challenge the action taken in 2007. Thus, the present appeal was untimely. The Board noted the County was not obligated to revisit compliant provisions of its plan.

VI. Failure to Act

Heikkila v. City of Winlock, WWGMHB Case No. 09-2-0009c, Final Decision and Order, (Oct. 8, 2009).

In 2006, the City of Winlock adopted revisions to its Comprehensive Plan to reflect a previously adopted UGA expansion. In 2008, the City undertook a comprehensive review and revision of its development regulations and zoning map, which it adopted in early 2009. Among other things, Petitioner Heikkila claimed the City had failed to update its Plan and regulations by the statutory deadline of December 1, 2008 – alleging Winlock had failed to act. The City conceded it had not taken any action to update its Plan since the revision in 2006, but the City claimed no additional updating was needed.

The Board stated, "While it adopted a revised Comprehensive Plan in early 2006, there has been no action taken by the City to address concerns raised in the previous matter before the Board [***Harader v. Winlock***, WWGMHB Case No. 06-2-0007, Final Decision and Order, (Aug. 30, 2006)]; concerns which appear to remain. . .there is no evidence in the record reflecting that there was public notice that the .130 mandated review and revision was under consideration nor was there any finding in any ordinance (1) of the review that had taken place or (2) that revisions were or were not undertaken as a result." The Board concluded the City had failed to review and update its Plan in accordance with the statutory deadline, and remanded.

VII. Procedural Issues – Extending Compliance Time and Stays

Larson Beach Neighbors v. Stevens County, EWGMHB Case No. 07-1-0013, Second Order on Compliance, (Oct. 6, 2009).

The Eastern Board found Stevens County out of compliance with the GMA for failing to protect the functions and values of its critical areas. The Board remanded the matter and set a compliance schedule. The County adopted an Ordinance to address noncompliance, but the Board determined the County's efforts were inadequate and issued an Order on Continuing Noncompliance with a new compliance schedule.

Stevens County did not act upon the Board's Order; it did not provide a remand index or attend the second compliance hearing. However, the County did appeal the Board's decision to Superior Court. In its Second Order on Compliance, the Board noted that although the County had appealed to Superior Court, the Board had not received a written or signed Order indicating the matter had been stayed by the Court. Regarding the County's lack of responsiveness to its Order the Board stated, "Such a patent disregard for the Board, GMA, and the Board's Rules of Procedure will not be tolerated in the future and the County is duly warned." Nonetheless, the Board set an additional compliance hearing for February of 2010.

Subsequent to a stay order issued by the superior court, the Board stayed further proceedings. *See* ***Larson Beach Neighbors & Jeanie Wagenman v. Stevens County***, EWGMHB Case No. 07-1-0013, Order Re: Stay of Proceedings, (Jan. 7, 2010).

VIII. Property Rights

Laurel Park Community LLC v. City of Tumwater, WWGMHB Case No. 09-2-0010, Final Decision and Order, (Oct. 13, 2009).

In reviewing the ordinances that created a single use manufactured home park zone for compliance with Goal 6, the Western Board reiterated that it does not have authority to determine whether an unconstitutional taking has occurred. However, the Board noted that Goal 6 has two provisions: (1) pertaining to takings; and (2) protection from arbitrary and discriminatory actions.

Regarding the first provision on takings, the Board indicated it would review actions to see whether the local decision makers had adequately considered any takings questions. In this case, the Board found that the record contained evidence (meeting minutes) showing that the planning commission, staff, and City Council gave consideration to whether the pending action constituted a taking. Thus, the Board found compliance with the first prong of Goal 6.

As to the second prong of Goal 6, Petitioners claimed the City's desire to preserve low income housing amounted to discrimination against the Petitioners since they alone were forced to bear the burden of providing such housing. The Board first asked what property right was at risk. The Board noted that Washington courts have recognized the rights to own, possess, use, enjoy, and dispose of property. However, the Board noted there is no right prohibiting a change in zoning (*citing Achen v. Clark County*, WWGMHB Case No. 95-2-0067c, Final Decision and Order, (Sep. 20, 1995)). The Board concluded that "Because there is no right to a continuation of existing zoning, there is no dispossession of a property right by the City action that changes the zoning [even if the change limits use to exclusively manufactured home parks]." Since the City's action did not affect a defined property right, the Board did not reach the question of whether the City's action was arbitrary and discriminatory.

Although the Board had concluded that evidence in the record indicated that consideration had been given to whether the action constituted an unconstitutional taking for purposes of Goal 6, the Board determined that compliance with RCW 36.70A.370 required more. The Attorney General's (**AG's**) guidance memo on avoiding unconstitutional takings includes a five-part process: (1) review of the AG memo, (2) use suggested warning signals to evaluate proposals, (3) develop an internal process to assess constitutional issues, (4) incorporate the constitutional assessments into the review process, and (5) develop an internal process for responding to constitutional issues identified in review. This process must be used. On this question the Board found no evidence suggesting the City used the AG review process. The Board found noncompliance and the matter was remanded for application of the AG review process.

Both Petitioners and Respondent filed motions for reconsideration. Petitioners argued the Board had converted Goal 6 into a mere procedural requirement, noting that while the Board had found compliance with the takings prong of Goal 6 it had found noncompliance with .370. Petitioners viewed this as finding compliance without following .370. The City argued it had complied with .370. In response, the Board modified its Order to indicate that it would use the .370 requirement to determine whether consideration of takings had occurred [Goal 6], which it had not, since the .370 process was not followed. The Board emphasized that this would not necessarily mean a taking had occurred, and that it did not have jurisdiction to make such a determination. Along with its motion for reconsideration the City provided a declaration of the City Attorney as evidence that the City had conducted the .370 analysis. However, since the motion was based upon new evidence the Board declined to consider it. But for the modification to its analysis of Goal 6, the Board denied the motions to reconsider. *See* ***Laurel Park Community LLC v. City of Tumwater,*** WWGMHB Case No. 09-2-0010, Order on Petitioners' and City's Motions for Reconsideration, (Nov. 12, 2009).

Petitioners subsequently filed with the Thurston County Superior Court and asked the Board to certify the matter to be heard by the Court of Appeals. The Board declined to issue a certificate of appealability. See ***Laurel Park Community LLC v. City of Tumwater,*** WWGMHB Case No. 09-2-0010, Order on Application for Certificate of Appealability (Thurston County Superior Court Case Nos. 09-2-02931-5 and 09-2-02687-1) (Feb. 8, 2010).

IX. Public Participation

Skagit Hill Recycling v. Skagit County, WWGMHB Case No. 09-2-0022, Order on Respondent's Dispositive Motions, (Jan. 8, 2010).

In adopting revisions to its regulatory permitting process for solid waste handling facilities, the Skagit County Planning Commission was presented with a confidential legal opinion from the County Attorney. Petitioners objected to this evidence and contended that only staff reports could be considered. The Western Board disposed of the question noting that the framed issue alleged a violation of RCW 36.70A.140, which requires adoption of a public participation program and Petitioners had not alleged that the County had violated its adopted program. Consequently, the public participation issue was dismissed.

X. Service

Laurel Park Community LLC v. City of Tumwater, WWGMHB Case No. 09-2-0010, Final Decision and Order, (Oct. 13, 2009).

The City challenged the legitimacy of the petition for review since it was not personally served on the City. The City relied on RCW 4.28.080 to support its position. The Board's rules allow service of a petition for review by mail (which occurred) or by personal service. The Board's rules are supplemented by the APA,[chapter 34.05 RCW, which also permits service by mail or personal service. Neither the APA nor the Board's rules reference RCW 4.28.080 which governs civil actions filed in the courts. The Board concluded that mailing the petition for review to the City was appropriate service and the Board retained jurisdiction to hear the matter.

XI. Shoreline Management Act

The GMA grants the Boards jurisdiction to review the adoption or amendment of shoreline master programs (SMPs) for compliance with the provisions of the Shoreline Management Act (SMA) – chapter 90.58 RCW. RCW 36.70A.280(1)(a). The Board's review for compliance with the SMA is further defined by RCW 36.70A.480, which specifies that the SMA is the sole basis for determining compliance of a shoreline master program.

Seattle Shellfish, LLC v. Pierce County, CPSGMHB Case No. 09-3-0010, Final Decision and Order, (Jan. 19, 2010).

Pierce County adopted a "limited amendment" to its shoreline master program (SMP) which was subsequently approved by the Department of Ecology (Ecology). The limited amendment primarily changed the County's regulations pertaining to aquacultural practices. The County intended these changes to be interim measures that would sunset on adoption of its comprehensive update to the SMP. The amendments limited the hours and days of operation for geoduck aquaculture and prohibited it in the Natural shoreline environment. Petitioners challenged the County's action and Ecology's approval of the limited amendment.

The fundamental question in this matter was whether the SMP amendment was erroneously classified as a limited amendment to the SMP. Petitioners argued the changes did not meet the criteria for a limited amendment; the County and Ecology asserted they did. Ecology initially questioned some of the changes as qualifying as a limited amendment and the County modified its ordinance. Ecology ultimately approved the changes. The County largely deferred to Ecology's arguments on this question.

The Board reviewed the record and history of the County's proceedings in the context of WAC 173-26-201 which provides criteria for amending an SMP without needing to complete a full comprehensive review. The Board's review was inconclusive as to the justification for proceeding as a limited amendment. Board member Earling sought to uphold the action and adopted the reasoning that the Board should defer to Ecology's interpretation of its own rules since the interpretation was plausible – *i.e.* continuing the prohibition of geoduck operations in the Natural environment was a clarification of existing regulations. However, Board member Pageler disagreed, reasoning that the County initially intended to prohibit geoduck operations in the Urban, Rural Residential and Natural environments. But Ecology would not permit the prohibition of geoduck operations in the Urban and Rural Residential environments, where they were previously permitted, without an inventory and analysis of the impact of such operations. The County then removed the prohibition in these environments. Yet, she noted, an inventory and analysis was not required for the continued prohibition of geoduck operations in the Natural environment. The County retained this prohibition. Board member Pageler found Ecology's inconsistent position on the need for inventory and analysis in err, and concluded that deference was not due to Ecology since it erred in applying one of the criteria for a limited amendment – *i.e.*, the changes would affect a substantial portion of the County's shorelines (approximately 20%) and therefore it should not be allowed as a limited amendment. The net result of the inability of the two-member Board to agree was that the County's action was sustained.

Interestingly, Pierce County attempted to incorporate its 2004 critical areas regulation update as part of this SMP limited amendment. When Ecology indicated it would be beyond the criteria for a limited amendment, the County withdrew it from its ordinance.

XII. State Environmental Policy Act (SEPA)

Davidson Serles & Associates v. City of Kirkland , CPSGMHB Case No. 09-3-0007c, Order on Motion for Reconsideration, (Nov. 3, 2009).

In its Final Decision and Order, after finding Petitioners had SEPA standing, the Board concluded that the City of Kirkland had not adequately considered off-site and alternative locations for the proposed commercial project in its environmental impact statement (EIS); thus the matter was remanded. The City and Intervenor filed a request for reconsideration, arguing that alternatives were considered in the various EIS documents done by the City. The Board commented that its disagreement with a party's legal analysis is not a basis for reconsideration and reconsideration is not an opportunity to reargue a case. Reconsideration was denied.

Kathleen Heikkila v. City of Winlock, WWGMHB Case No. 09-2-0009c, Final Decision and Order, (Oct. 8, 2009).

Petitioners alleged the City of Winlock failed to conduct adequate environmental review when it revised and adopted new development regulations and a new zoning map. The City completed an environmental checklist and issued a determination of nonsignificance (DNS), indicating there were no significant adverse environmental impacts associated with the new regulations. Petitioners challenged the timing of the SEPA review, asserted the DNS should have been withdrawn, and questioned whether the checklist disclosed adverse environmental impacts.

Petitioners claimed that environmental review commenced too late in the process to affect the outcome of the proposed development regulations. The City claimed it started environmental review as soon as the final draft regulations were adopted by the Planning Commission. In upholding the City, the Board noted that SEPA requires the review process to begin when environmental impacts can be reasonably identified and meaningfully evaluated. In this case, that time was after the Planning Commission adopted the draft regulations. The Board also found that commenting on a DNS does not necessitate withdrawal of

the DNS, noting other factors govern withdrawal, which were not apparent in this matter.

As to the adequacy of the checklist, the City asserted it had done exhaustive environmental review (an EIS) in conjunction with its Comprehensive Plan revision in 2006 and Petitioners' concerns were addressed in those environmental documents. The Board acknowledged that SEPA permits the use of previously prepared documents to satisfy environmental review requirements. However, the City did not incorporate or reference any prior environmental review; it just relied upon the environmental checklist. Without more, the Board concluded the City did not perform a complete environmental review for its development regulations. The Board remanded.

XIII. Remands to the Boards from the Courts

Karpinski v. Clark County, WWGMHB Case No. 07-2-0018c, Compliance Order, (Oct. 28, 2009).

The genesis of this Western Board case was Clark County's de-designation of numerous agricultural lands of long-term commercial significance and the inclusion of these lands in various urban growth areas. The Board found noncompliance and invalidity, but the matter was appealed to superior court and the appellate court where portions of the decision were upheld and portions reversed and remanded, with some portions still pending. Some of the previously designated agricultural lands that wound up in urban growth areas were subsequently annexed. The interesting part of this decision is the Board's sorting of lands that were not annexed and still under the County's jurisdiction and the Board's jurisdiction. The Board identified several areas where the area had not been annexed and was still subject to the County's and Board's jurisdiction. However, the County had taken no action to comply with the GMA pursuant to the Board's Order. A finding of continuing noncompliance was entered and a new compliance schedule established.

XIV. Rural Areas – Rural Densities

Brodeur/Futurewis v. Benton County, EWGMHB Case No. 09-1-0010c, Final Decision and Order [Resolution 09-162 – Rural Lands], (Nov. 24, 2009).

Benton County revised its land use element to change the rural density designation on 1,120 acres in the West Richland Planning Area from 1 dwelling unit (du) per 5 acres to 1 du per acre. Several petitions were filed with the Eastern Board challenging this new designation. The petitions were consolidated into a single case. The crux of Petitioners' case was that the County's action allowed urban growth outside the UGA and that such growth was inconsistent with the rural character of the area, thereby violating numerous provisions of the GMA.

Petitioners argued the average size of a small farm in Benton County was 4.9 acres, therefore a 1 acre lot was not compatible with food production, and therefore such lot sizes constituted urban growth as defined by the GMA. Petitioners also claimed the density change was inconsistent with rural character as defined both by the GMA and the County's Comprehensive Plan, since the existing lot sizes in the area ranged from 2.5 to 5 acres. The new pattern was alleged to be rural sprawl. Additionally, Petitioners asserted there was nothing in the record to demonstrate local circumstances to support the change. A lack of analysis of the services needed to support the new density was also argued. The County countered that Petitioners had not met their burden of proof and presented no evidence to indicate that the change constituted sprawl or was inconsistent with local character. Intervenors argued the change constituted infill and that such lot sizes were not urban since no city in Benton County allowed densities of 1 du/acre. The Board was persuaded by Petitioners' arguments.

The Eastern Board noted the County's plan set 2.5 acres as a minimum lot size in rural areas and helped define rural character. The Board then compared and contrasted the Commissioners' "cursory" findings supporting the action with the "specific" findings of the Planning Commission which recommended against the change – the Board found the specific findings of the Planning Commission more persuasive. The Board commented that photographs provided by the applicant, intended to support the need for the amendment, instead suggested the change would transform the rural open space character of the area into an urban-like community. The Board noted that the County had not provided any evidence in the record to indicate local circumstances influenced their decision to adopt the change in density. The Board found noncompliance, remanded and invalidated the County's action. One Board member dissented on the decision to invalidate the County's action.

Dry Creek Coalition v. Clallam County, WWGMHB Case No. 07-2-0018c, Compliance Order, (Nov. 3, 2009).

The Western Board's Final Decision and Order found several of the County's rural density designations noncompliant and invalid. The Board concluded the rural character of Clallam County demonstrated a general rural density of 1 du/5 acres and densities of 1 du/2.4 acres allowed development that was urban in nature contrary to the GMA. On remand, the County adopted a base rural density of 1 du/5 acres outside limited areas of more intensive rural development and UGAs; but allowed higher densities and clustering in limited instances and areas to preserve existing rural neighborhood character. Petitioners contended that these exceptions still allowed urban level development. The Board disagreed.

The Board noted that whether a particular density is rural in nature is a question of fact based on the circumstances of each case, and as such, the Board cannot dismiss a density of 1 du/2.4 acres out-of-hand, but must look to see if the density is consistent with existing rural develop-

ment and limited in its application. Here the County had limited the higher density options to areas where 70% of the surrounding area within 500 feet of the property had existing development denser than 1 du/5 acres. Clustering, the Board noted, also preserved open space and the rural character. In any case, the general base density of 1 du/5 acres was maintained. The Board stated, "While this Board has found the rural character of Clallam County is a rural density of 1 du/5 acres, the Board has not held that no variation of that density is allowed under any circumstances. In fact, the clear language of the GMA, which requires a 'variety of rural densities,' would not permit such a holding." The Board indicated that the County's action maintained traditional rural lifestyles of Clallam County and issued a finding of compliance.

XV. Urban Growth Areas - Sizing

Brodeur/Futurewise v. Benton County, WWGMHB Case No. 09-1-0010c, Final Decision and Order [Resolution 09-143: West Richland Urban Growth Area], (Dec. 12, 2009).

At the request of the City of West Richland, Benton County expanded the City's UGA by approximately 747 acres to accommodate commercial and industrial development near a potential interchange project along I-82. Petitioners challenged this UGA expansion claiming the expansion was oversized and unneeded to accommodate the urban growth projected by OFM. Petitioners also asserted there was no analysis of, or need for, additional non-residential land in the UGA. The County deferred to the City of West Richland, which argued the Board must defer to decisions of the local government, and that UGAs are to accommodate commercial and industrial uses, not just residential development. The City also claimed the UGA expansion was necessary to foster and support tourism and the developing wine industry in the region – an economic development focus reflecting local circumstances and opportunities. The City pledged to restrict development in the expansion area to non-residential uses.

There seemed to be no dispute that a UGA expansion for residential purposes was not needed, and the Board acknowledged that UGAs must accommodate non-residential development as well as development of homes. The Board also recognized economic development as a legitimate basis for a UGA expansion, and noted general supporting evidence in the record to expand the UGA. However, the Board questioned the sizing of the UGA expansion area at 747 acres. After reviewing the record, the Board concluded, "there is no substantial evidence supporting this specific amount of acreage." Citing *Thurston County v. WWGMHB*, 164 Wn.2d 329 (2008), the Board stated, "Once a petitioner challenges a county's UGA designation, the county must "show its work" to analyze and compute the appropriate amount of the UGA acreage." To support its decision the Board referred to the City's Buildable Lands Summary which included a land capacity analysis for residential lands, but an incomplete analysis for commercial and industrial lands. The Board could find no analysis in the record to support a UGA expansion for non-residential purposes of 747 acres. The Board determined the sizing of the UGA expansion of 747 acres did not comply with the GMA's UGA provisions and remanded. Although all three Board members concurred in the decision, one member would have gone farther and invalidated the County's action.

Douglas County Coalition for Responsible Government v. Douglas County, EWGMHB Case No. 09-1-0011, Final Decision and Order, (Jan. 19, 2010).

Douglas County expanded the East Wenatchee urban growth area by approximately 60 acres. Petitioners challenged the action, asserting there was no evidence in the record to support the UGA expansion, nor was the expansion necessary to accommodate projected urban growth. The County claimed the expansion area was within the UGA between 1996 and 2003, but it was removed at that time. The County argued the return of the acreage to the UGA was a matter of "equity" to the property owners. In reply, the Petitioner's asserted the UGA designation cannot exceed the amount of land necessary to accommodate the urban growth projected by the OFM plus a reasonable market supply factor. Petitioner suggested that since there was no need for the addition of land to the UGA, if the County wished to restore land for reasons of equity, it must remove other land already in the UGA.

The Eastern Board framed the issue as determining whether the UGA was oversized and found there was no detail or analysis in the record or the Commissioner's findings examining or supporting the need to expand the UGA. The Board then looked to the Greater Wenatchee Area Comprehensive Plan, a joint planning document which applied to the unincorporated UGA in question, and concluded the existing UGA was sufficient to meet urban growth needs through 2022. The Board noted that there might be justification for adding commercial land to the UGA, but the record did not reflect such a need. The lack of an evaluation process and the deficient record caused the Board to find noncompliance and remand.

Ed McGuire *is a land use attorney/planner (AICP) who served on the Central Puget Sound Growth Management Hearings Board from 1996 through April of 2009 when he retired from state service. Prior to joining the Board he was the attorney for the Pierce County Council, a legislative liaison for the former State Energy Office and a staff attorney for several committees of the Washington State House of Representatives. In retirement he now provides GMA/SMA consulting, mediation and hearing examiner services. egmcguire@harbornet.com.*

Law School Reports

Gonzaga University School of Law

This spring, the Gonzaga Environmental Law Caucus has teamed up with the Spokane Riverkeeper to promote a speaking engagement of Robert F. Kennedy, Jr., a leading voice of the international Waterkeeper movement. Hearalded as one of the "Heroes of the Planet" by *Time Magazine* for his part in the legal fight to clean up the Hudson River, Kennedy chairs the international Waterkeeper Alliance. He is coming to Spokane and Sandpoint May 20th and 21st, respectively, to support the work of the Spokane Riverkeeper and Lake Pend Orielle Waterkeeper. The Spokane Riverkeeper is one of our generation's living signatures for water stewardship in the inland northwest, and the Gonzaga Environmental Law Caucus has been excited to be a part of its water pollution watchdog efforts.

Besides ramping up for Robert F. Kennedy, Jr.'s visit in May, the Gonzaga Environmental Law Caucus was excited to team up with the Spokane Riverkeeper and the Gonzaga Environmental Law Clinic at Earth Day Spokane, held on April 17. At the citywide event, the group discussed Spokane river issues with community members. Earth Day Spokane hosted a number of community booths, vendors, music and performers Celebrating Earth for the 40th Anniversary of Earth Day. Dozens of free earth-friendly activities were made available for children of all ages including: planting veggies, building birdfeeders, recycled art projects, sidewalk chalk art, face painting and more.

As for on-campus Earth Day Festivities, the Gonzaga Environmental Law Caucus celebrated the 40th Annual Earth Day with an Earth Day barbeque and a free showing of "No Impact Man." "No Impact Man" details the exploits of one man's quest to "practice what he preaches for one year…all while taking his baby daughter and caffeine-loving, retail-obsessed, television-addicted wife along with him." At their Earth Day festivities, the Gonzaga Environmental Law Caucus also provided cell phone recycling opportunities, as well as information regarding Spokane River water quality.

With the year coming to a close and the new Board taking over, the Gonzaga Environmental Law Caucus looks forward to continuing to strive toward educating not only the school community, but the greater Spokane community leaving our corner of the world better than the way we found it.

Seattle University School of Law

In February, the Seattle University Environmental Law Society (ELS) sent a contingent of students to the 28th annual Public Interest Environmental Law Conference hosted by the University of Oregon School of Law. Students had their choice of several interesting panels, including: legal tools to reduce stormwater runoff, proposed revisions to National Ambient Air Quality Standards, and forest practices and wildlife protection under the Obama Administration.

In March, ELS was happy to award the Mathew Henson Environmental Fellowships to two students. The Matthew Henson Fellowship is a monetary grant given to Seattle University Law students who secure a summer internship working on environmental law and/or land use issues. The fellowship is graciously supported by ELUL members and members of the Seattle University School of Law faculty. This year's recipients are Daniel Kenny, who will be working this summer at the United States Department of Justice: Environmental and Natural Resources Division, in Sacramento, California, and Sean Waite, who will be working at the Kootenai Environmental Alliance in Idaho.

This April, students will be publishing a student-run, and newly renamed, *Seattle Environmental Law Journal* (formerly *Bellwether: The Seattle Journal for Environmental Law and Policy*), which features articles on the Obama Administration, nuclear power, and environmental justice, as well as winning submissions from a new Seattle University student writing competition.

Other noteworthy accomplishments of the past year include organizing a panel on Climate Change: Unjust Impacts & Just Solutions for Seattle University Social Justice week in October. The panel consisted of attorneys from private practice and the non-profit sector and policy analysts from non-profit think tanks. A group of students also participated in a restoration service project for the Duwamish Watershed, part of what is becoming an annual tradition for celebrating Earth Day.

ELS is also proud to announce its new board: Alec Osenbach, President; Sean Waite, Vice President,\; and Andrew Tingkang, Treasurer. The board is very excited for 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)*.

University of Washington School of Law

Advocacy Project

This year's advocacy project is in partnership with Smith and Lowney, PLLC and focuses on improving the National Pollutant Discharge Elimination System (NPDES) in Washington State. GreenLaw students are working to create a petition documenting the legal flaws in the permitting system and petition the U.S. EPA for changes. There are 20 first year students actively contributing to this effort. Please contact Advocacy Director Neil Diemer, npdiemer@u.washington.edu for additional information.

Moot Court Participation

GreenLaw sent University of Washington School of Law (UWLS) students Amy Alexandar, Wyatt Golding, and Sara Leverette to the Pace National Environmental Law Moot Court Competition. Ms. Alexander and Ms. Leverette received best oralist awards in preliminary rounds. The team reached the quarterfinal round, representing UWLS as one of the top 27 of 85 teams from across the country. Special thanks to our coaches, Michael Zevenbergen and Keith Cohon.

Jason DeRosa, Kate Warner, and Paul Vercruyssen represented UWLS at the International Environmental Moot Court Competition. The team tackled a novel problem of trans-boundary acoustic marine pollution and would like to thank coach Keith Scully of Gendler & Mann.

Recent Events

Nuclear Waste Cleanup at Hanford under the Hanford Federal Facility Agreement and Consent Order. In February, GreenLaw brought Chief Counsel for the U.S. Department of Energy, Robert Carosino to UWLS to discuss the history and progress of the Nuclear Waste environmental cleanup at the Hanford Nuclear Reservation and the legal issues and litigation that has resulted from this ongoing program.

Career Panel. GreenLaw also would like to thank the following firms and lawyers for participating in our private sector career panel in March: Keith Scully, Gendler & Mann, LLP; Ray Liaw, GordonDerr, LLP; Lara Fowler, Gordon Thomas Honeywell; Christopher Baird, Perkins Coie; Ryan Steen, Stoel Rives, LLP.

Upcoming Launch of a UWLS Environmental Law Journal: In recent months, GreenLaw led efforts to establish a regional environmental law journal. We are pleased to report full support from the UWLS's administration and expect our flagship issue to be released during the 2010-11 school year. Please send questions to Jason DeRosa, *derosa.jason@gmail.com.*

Other Events

Turning Scientific Research into Environmental Policy. GreenLaw celebrated Earth Day 2010 with a panel discussion about how environmental research being done in our state is being turned into environmental policy and law. The panel included: Dr. Amy Snover, Research Scientist with the Climate Impacts Group and Assistant Director of the Center for Science in the Earth System; Spencer Reeder, Lead Policy Strategist for Climate Change at the Washington State Department of Ecology; Dr. Clare Ryan, Adjunct Professor in the School of Marine Affairs and Evans School of Public Affairs, and Associate Professor in the College of Forest Resources at UW; and Dr. Martha Groom, Associate Professor in Conservation Ecology at UW.

2010 Northwest Water Law Symposium. GreenLaw is partnering with students from Lewis & Clark, University of Oregon to put on the annual Northwest Water Law Symposium. The event will take place October 9, 2010 in Portland. Please contact Stephanie Erickson, *sne2@u.washington.edu,* for more information.