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Message from the Editors

By Diane Meyers, Miller Nash Graham & Dunn, LLP, and Valerie Fairwell, Cascadia Law Group PLLC

This issue of the Environmental and Land Use Law newsletter features federal and land use case law updates. The federal case law update, authored by Carly Summers, Tyson Kade, and Matt Love from Van Ness Feldman, summarizes recent judicial developments related to the National Environmental Policy Act, the Endangered Species Act, tribal fishing and water rights, the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Clean Air Act. Dick Settle and Jeremy Eckert of Foster Pepper, in their recurring land use case law update, distill the latest developments in land use case law from the Washington Supreme Court and Washington's Courts of Appeal. Keep an eye out for the next edition of the ELUL newsletter, which will feature articles from the 2017 ELUL Midyear meeting in Alderbrook.

Are you interested in contributing to a future edition of the ELUL newsletter? We are currently accepting proposals for articles that will be ready for publication in August or November of this year. Please contact Diane or Valerie for more information!

Land Use Case Law Update

By Richard L. Settle and Jeremy Eckert

I. Washington Supreme Court Decisions

Ocean Resources Management Act Imposes Regulatory Requirements on Upland Projects With Impact on Coastal Uses: *Quinault Indian Nation v. Imperium Terminal Services, LLC*.[1]

This is the first reported decision to breathe potency into the Ocean Resources Management Act (ORMA).[2] ORMA, enacted in 1989 in response to the Nestucca and Exxon Valdez oil spills, explicitly recognized the dangers oil spills posed to the state's marine environment. An amendment to the Shoreline Management Act (SMA) also incorporates by reference ORMA's requirements into the SMA's regulatory framework.[3] The stated purpose of ORMA is "to articulate policies and establish guidelines for the exercise of state and local management authority over Washington's coastal waters, seabed, and shorelines."[4]

The issue before the Supreme Court in this case was to decide whether ORMA imposed regulatory requirements on two proposed developments in the City of Hoquiam and Port of Grays Harbor. The developments would expand existing facilities that included large storage tanks for methanol, biodiesel, and other products, as well as rail spurs and yards by which fuel products would be delivered by unit trains to the storage tanks and subsequently transferred to Port terminals for shipment by vessels or barges.

The Shorelines Hearings Board and Court of Appeals had held that ORMA did not apply to the proposed developments because, under ORMA's statutory definitions, the "policies in RCW 43.143.010 shall guide the decision-making process" only for state and local development of "plans for the management, conservation, use or development of natural resources in Washington's coastal waters." The Board and Court of Appeals reasoned that the proposed developments challenged in this case were not government "plans for the management, conservation, use, or development of natural resources" and were not "in" the coastal waters.

The Supreme Court disagreed, holding that the language of ORMA must be interpreted liberally to serve its protective

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purposes. The Court also relied on Department of Ecology implementing regulations in interpreting ORMA, holding that the proposed developments constituted "ocean uses," "transportation," and "coastal uses" within ORMA's jurisdiction under Ecology's regulations. As a result, the lower decisions were reversed and the matter was remanded for application of ORMA's requirements.

Regulatory Requirements Imposed by Local Governments to Comply With Ecology Stormwater Permit Are Not Subject to Vesting Statutes: *Snohomish County v. Pollution Control Hearings Board.*[5]

On December 29, 2016, the Washington Supreme Court issued a vesting decision that may have immediate impact on development projects across the state. The unanimous decision in *Snohomish County v. Pollution Control Hearings Board* held that stormwater regulations adopted pursuant to the Washington State National Pollutant Discharge Elimination System ("NPDES") Municipal Stormwater Permit are not "land use control ordinances" that are subject to the state's statutory vested rights doctrine. The state's Municipal Stormwater Permit is issued under the federal and state Clean Water Acts. In short, the court held that Municipal Stormwater Permit requirements may be retroactively applied to previously vested projects.

The specific permit condition, which challengers claimed would require local governments to violate the state vested rights doctrine, stated, in part, that "the [updated] stormwater regulations] … shall apply to projects approved prior [to] July 1, 2015 which have not started construction by June 30, 2020." Thus, new local stormwater regulations would apply to projects, for which applications for permits and even approval of permits had previously occurred, if construction had not started by June 30, 2020. In short, otherwise vested projects would be divested if construction had not begun by the specified future date.

Generally, the decision requires otherwise vested projects to comply with updated stormwater regulations, which may require costly and time-consuming project revisions. Moreover, the required revisions may be inconsistent with the project's underlying land use entitlements, potentially necessitating new project entitlements or revisions of existing entitlements.

Washington's statutory vested rights doctrine employs a "date certain" standard for determining when the regulations governing a proposed development are ascertained. The date certain is when an application for building permit or subdivision approval is submitted.[6] For example, the date certain normally is the date a developer submits a complete application for a building permit, although some municipalities exercise their local option to allow a project to vest when an applicant submits a complete application for the underlying land use permit for the project or obtains the land use permit. Vesting is intended to provide development applicants with certainty that they will not be subject to any changes in regulations that occur as the proposed project proceeds through the often lengthy entitlement process.

Under Washington's vesting statutes, upon application, proposed projects vest into, among others, "land use control ordinances." This case presented the issue of whether local regulations adopted to comply with a state NPDES stormwater permit were "land use control ordinances" under the vesting statutes. Previous case law had defined a "land use control ordinance" as having a restraining or directing influence over the land.[7] Stormwater regulations certainly meet this definition. However, the court declined to apply the existing case law definition, holding instead that any vested rights analysis must begin with identifying the *source of authority* for the regulation in question because the vesting statutes intended to protect development applicants against the abuses of *local government* discretion, not state or federal regulations.

As a basis for its holding, the court stated that the vested rights doctrine does not apply to SEPA, which is a state law even though it is implemented and applied at the local level. The holding is also based on the court's deference to the Department of Ecology's determination that vested rights do not apply to laws that originate at the state or federal level. However, the court's analysis did not include WAC 197-11-660(1)(a), a state-adopted SEPA vesting rule that applies to state and local agency SEPA substantive policies governing the exercise of substantive SEPA authority. And it is puzzling that the court "disapproved" *Adams v. Thurston County*[8] and *Victoria Tower Partnership v. City of Seattle*,[9] although neither of these cases involved state or state-mandated regulations. The decision raises many questions regarding Washington's vested rights doctrine.

By focusing its vesting analysis on the *source of authority*, the court's decision may create further uncertainty regarding the scope of vested rights. For example:

- Does a proposed project vest to local Shoreline Master Program regulations that are required by state law and must be approved by the Department of Ecology?
- Does a proposed project vest to local critical area regulations that are required by the state Growth Management Act?
- Does a project vest to commonplace zoning regulations adopted under the authority of state law (e.g., the Planning Enabling Act or the Growth Management Act)?

Parties have filed a motion for reconsideration and a motion for clarification.

In the near term, otherwise vested projects are now subject to the retroactive application of new

or revised local stormwater regulations adopted to comply with the state permit. The decision affects every jurisdiction that is subject to Washington Municipal Stormwater Permit.[10] The Municipal Stormwater Permits provide some flexibility in implementation of the stormwater requirements, such as adjustments, exceptions and variances. These provisions are contained in Appendix I of the Permits. If local governments have incorporated these provisions into their stormwater ordinances, they may have opportunities to employ alternative approaches to stormwater management.

GMA Construed to Impose New Water Resource Availability and Water Quality Requirements on GMA Counties: *Whatcom County v. Hirst.*[11]

In a lengthy decision, a five-vote majority of the Washington Supreme Court held that the Growth Management Act ("GMA") requires GMA planning counties to ensure water availability in their Comprehensive Plans, and the GMA places an independent responsibility on GMA counties to provide for the protection of water availability when issuing building permits or subdivision approvals that rely upon permit-exempt wells for water service. The Court also held that the GMA places an obligation on GMA counties to protect water quality, which, in this case, required Whatcom County to require professional inspections of all septic systems in rural Whatcom County.

As background, the Department of Ecology has adopted minimum instream flows for Watershed Resource Inventory Area 1 ("WRIA 1"), covering most of Whatcom County. A large portion of the county is in a year-round or seasonally closed watershed and most of the water in the Nooksack watershed is already appropriated. The record showed that the Nooksack River failed to meet minimum instream flows an average of 100 days a year. The record also showed that 1,652 permit-exempt wells, authorizing up to 5,000 gallons per day in water withdrawals, were drilled in otherwise closed basins since 1997, and 637 permit-exempt well applications were pending in March 2011.

The GMA requires counties to plan for a rural element that "include[s] measures that … protect … surface water and groundwater resources."[12] To address this provision, Whatcom County's Comprehensive Plan adopted Ecology's regulations that allow a subdivision or building permit applicant to rely on a permit-exempt well only when the well site "proposed by the applicant does not fall within the boundaries of an area where [Ecology] has determined by the rule that water for development does not exist."

Before the Growth Management Hearing Board ("Board"), Futurewise and other appellants challenged the validity of Whatcom County's Comprehensive Plan, arguing that it failed to protect surface water and groundwater resources. Futurewise argued that the Comprehensive Plan and its implementing ordinances allow for a permit-exempt appropriation without any individualized analysis of each withdrawal's impact on instream flows. Thus, argued Futurewise, the permit-exempt wells result in water withdrawals from closed basins and impair senior instream flows. Futurewise also argued that the Comprehensive Plan failed to protect water quality because the county's Stormwater Manual allows private homeowners in rural areas to inspect their own septic systems rather than requiring professional inspections.

The Washington Supreme Court largely affirmed the Board's determination that Whatcom County's Comprehensive Plan was noncompliant with the GMA because it failed to adequately protect surface water and groundwater resources. In addition to finding the Comprehensive Plan noncompliant, the Washington Supreme Court's decision imposes the following new project-related requirements on applicants and GMA-planning counties:

- The applicant for a building permit or subdivision that relies upon a permit-exempt well must present the local government with "evidence of water availability."
- Based upon this local information, the county's building department must complete a "fact specific determination that water is available." The county's finding of water availability now mandates a technical inquiry into how the proposed point of withdrawal may affect regulated water resources and whether the applicant must provide mitigation where such an impact might occur.
- The county has an independent responsibility to ensure water availability. Ecology-issued guidance or regulations do not create a "bright line" safe haven for the county's now-mandated project-specific water availability determinations.
- It appears that counties also must require rural landowners to have their septic systems inspected by a professional to protect water quality.

Justice Madsen's concurrence acknowledges that applicants generally do not have the technical expertise to analyze hydrologic connectivity between a permit-exempt well and a regulated water body. Madsen's concurrence encourages state and local governments to cooperate to determine water availability, rather than to shift the burden onto permit applicants, but this one-justice opinion will do little to address these new technical requirements for applicants or for local building department officials who are not trained in water resources or hydrology.

Justice Stephens' dissent identifies the likely implications of the decision: "The effect of the major-

ity's holding is to require individual building permit applicants to commission a hydrological study to show that their very small withdrawal does not impair senior water rights, and then have the local building department evaluate the adequacy of that scientific data. The practical result of this holding is to stop counties from granting building permits that rely on permit-exempt wells."

The court remanded the matter to the Western Washington Growth Management Hearings Board for further proceedings.

II. Washington Court of Appeals

Timeliness of LUPA Action Challenging Enforcement: *Chumbley v. Snohomish County.*[13]

Begis proposed to develop a single-family residence in unincorporated Snohomish County near Edmonds on a lot at the top of a steep bluff. He applied for a building permit from Snohomish County and an onsite sewage disposal permit from a separate governmental entity, Snohomish Health District. Begis proposed to locate the septic system drainfield on two separate lots on the steep slope below the lot where the proposed residence was to be built. The lots where the drainfield was to be located were designated as critical areas because of historical and continuing risk of landslides.

The Health District initially denied the sewage disposal permit because the drainfield was to be located in a landslide hazard area. After extensive geotechnical and hydrology studies required by the Health District, the sewage disposal permit was granted. Grading and excavation on the steep slope to install the septic drainfield were conducted without obtaining a land disturbance permit generally required for such activities. There seemed to be uncertainty between the county and the Health District regarding whether the grading and excavation for the drainfield was implicitly authorized by the sewage disposal permit or whether a separate county land disturbance permit was required. The grading and excavating activities on the steep slope apparently caused an underground spring to release water onto a number of adjacent properties and railroad facilities at the base of the bluff. As a result, the county issued a stop-work order. After the water flow was sufficiently managed and controlled, the stop-work order was lifted and construction of the drainfield and the residence on the lot at the top of the slope proceeded.

On September 22, 2015, the county made a final inspection of the work done under the building permit for the lot on the top of the slope. The final inspection approval constituted a certificate of occupancy for the residential structure. Begis sold the residence soon after.

On September 30, 2015, the railroad and several neighboring property owners brought a LUPA action against the county, the Health District, Begis, and the new homeowners, contending, among other things, that Begis violated county regulatory requirements by failing to obtain a land disturbance permit and failing to comply with county land disturbance and critical area regulations. The county and others moved to dismiss the LUPA petition as untimely because it was not filed within 21 days of the county's issuance of the building permit months earlier. The superior court dismissed, and the railroad and neighbors appealed.

The Court of Appeals held that the County's resolution of its enforcement actions by closing the enforcement file on September 9, 2015, and certification of the residence for occupancy on September 22, 2015, were the county's final land use decisions and were subject to LUPA review. The petition challenging those actions was timely because it was filed within 21 days of both of these decisions on September 30, 2015. The court decided only that the LUPA action was timely. Whether the county code was violated by failure to obtain a land disturbance permit and failure to comply with critical area regulatory requirements will be decided on remand.

Denial of Shoreline Permit for Proposed Pierce County Geoduck Farm: *De Tienne v. Shoreline Hearings Board.*[14]

Darrell de Tienne owns a 10.74-acre intertidal and subtidal parcel of property on the north shore of Henderson Bay on Puget Sound near Purdy in Pierce County. The property is designated as a shoreline of statewide significance. In 2005, de Tienne and Chelsea Farms LLC (de Tienne) applied for a shoreline substantial development permit to operate a commercial geoduck farm on 5 acres of the property. An extensive eelgrass bed separates the intertidal and subtidal portions of the proposed geoduck farm. Eelgrass beds are fragile aquatic habitat protected by the SMA and Pierce County Shoreline Master Program (SMP).

The Pierce County Hearings Examiner approved the permit subject to a number of conditions. Several parties appealed, and the Shorelines Hearings Board (SHB) reversed the Hearings Examiner's decision, concluding that the permit conditions approved by the Examiner did not adequately protect eelgrass and, therefore, were not consistent with the SMA and SMP. De Tienne appealed the SHB's denial of the Shoreline Substantial Development Permit, contending the SHB's decision was untimely under the statutory time limit, substantial evidence did not support the SHB's finding of potential adverse environmental impacts, the SHB erred in rejecting expert testimony, the Coalition to Protect Puget Sound Habitat (Coalition) did not meet its burden of proving the permit conditions were inadequate to protect the eelgrass, the SHB erroneously interpreted the Pierce County Code, and the SHB erred in requiring a cumulative impacts analysis. The Court of Appeals rejected de Tienne's arguments and affirmed the SHB.

The court considered the issue of first impression that the SHB failed to issue its decision within the 210-day (180-day plus uncontested 30-day extension) time-limit. The court disagreed with de Tienne's calculations and concluded that the decision was issued within the time limit. The court noted that it did not address the issue of whether the statutory time-limit was "directory or mandatory."

The court discussed at length the evidence that the buffers between the eelgrass and aquaculture operations, specified in the permit conditions, did not adequately protect eelgrass under the SMA and SMP, concluding that substantial evidence supported the SHB's decision that the buffers were insufficiently protective. In so deciding, the court held that the SHB properly accorded more credibility to the testimony of some experts than others.

The court upheld the SHB's reliance on a County zoning provision in concluding that the permit's buffer conditions did not adequately protect eelgrass from adverse impacts.

While noting that the SHB did not reverse the permit because the county failed to perform a cumulative impacts analysis, the court upheld the propriety of the SHB's consideration of cumulative impacts in reaching its decision.

The Coalition requested and was awarded attorney fees and costs on appeal under RCW 4.84.370(1) because the Coalition, the prevailing party on appeal, was also the substantially prevailing party before the SHB and the superior court.

WSDOT Plans, Publicity, and Condemnation of Adjacent Properties for Major Freeway Project Did Not Constitute Inverse Condemnation of Subject Property Absent Physical Invasion or Regulatory Taking: *Tapio Investment Company v Department of Transportation.*[15]

Tapio Investments Company I and others (Tapio) filed an inverse condemnation action against the Washington State Department of Transportation (WSDOT) for an alleged taking of a Tapio's office park as a result of longstanding and continuing planning, publicity, construction, and acquisition of neighboring properties for a major freeway project in Spokane. The approved location of the freeway project includes a portion of the office park situated within planned interchange. Construction of the interchange will be one of the last steps in the decades-long planning and construction process.

The partially completed 10.5 mile long, limited access freeway project, commonly referred to as the North-South Freeway, will link U.S. Highways 2 and 395 with Interstate 90 in the City of Spokane. The approved route traverses a developed area, requiring the acquisition of around 940 parcels.

Tapio Center is a three-acre office park located near the Thor-Freya interchange on Interstate 90. The Center includes nine office buildings and one restaurant.

WSDOT already had acquired hundreds of properties, including many in the vicinity of Tapio's property. However, in response to Tapio's repeated requests that its property be acquired by the state, WSDOT responded that it did not expect to acquire Tapio's property for at least a decade, prioritizing other properties for internal WSDOT policy reasons. In the 2014 trial, Tapio argued that WSDOT's planning and publicity activities and acquisition of nearby properties had greatly reduced Tapio's leasing activity and income and by 2006 already had effected a constitutional taking. Tapio presented expert testimony that as of 2006, the value of Tapio's property had been diminished by 80 to 90 percent, amounting to $8,510,000.

At trial, Tapio also asserted the legal theory, recognized in some other states but not previously in Washington, that its property was taken by WSDOT's "oppressive precondemnation activity." This alternative theory was abandoned on appeal.

At the close of Tapio's case before a jury, the trial court granted WSDOT's CR 50 motion, ruling that Tapio's evidence was insufficient as a matter of law to support its inverse condemnation claims.

The Court of Appeals affirmed, holding that WSDOT actions, as a matter of law, could not constitute a taking of Tapio's property because they did not physically invade or regulate the use of Tapio's property; government activities that only diminished the value of property, without physical invasion or regulation, no matter how great the diminution in value, could not constitute a constitutional taking requiring compensation.

The court declined to consider whether Tapio's claim was viable under the "taken or damaged" language of Article I, section 16 of the state constitution where Tapio had not briefed the "*Gunwall* factors" that are judicially regarded as a prerequisite to applying Washington constitutional provisions differing from parallel federal constitutional provisions.

Where to Seek Review of Agency Decisions is a Fatal Trap for the Unwary in Land Use Litigation: *Schnitzer West, LLC v. City of Puyallup.*[16]

Schnitzer West, LLC (Schnitzer) owned property outside the City of Puyallup that was envisioned by the city as a symbolic "gateway." The property subsequently was annexed to the city and zoned first for commercial and later, at the request of Schnitzer, industrial use. On its own initiative, the city had proposed zoning amendments to establish "overlay" regulations that did not change the allowed uses but established additional regulations designed to enhance the aesthetic appeal and quality of urban design in the "gateway" area. After the gateway overlay regulations already had been imposed on a number of parcels that were annexed before the Schnitzer property, the city considered and ultimately adopted a zoning amendment to

apply gateway overlay regulations to the Schnitzer property. However, these overlay regulations apparently did not merely enhance aesthetics and urban design but greatly reduced the amount of industrial development allowed on the Schnitzer property.

Schnitzer filed a Land Use Petition Act (LUPA) action in superior court challenging the zoning amendment. The city moved to dismiss because the zoning amendment imposing the overlay regulations on the Schnitzer property was not a "land use decision" subject to review under LUPA.

Schnitzer argued that the zoning amendment was a "land use decision" under LUPA because it was site-specific and the existing comprehensive plan allowed the zoning amendment without any corresponding plan amendment. The city argued that the zoning amendment was not a "land use decision" because it was initiated by the city, not by an "application" of Schnitzer or any other specific party.

The Court of Appeals, in a 2-1 decision, agreed with the city, holding that the zoning amendment was not a land use decision under LUPA, because a "land use decision" is defined as an "application for a project permit or other governmental approval," and there had not been any "application" for the zoning amendment.[17] The majority reasoned that the city could not "apply" for a zoning amendment from itself under the plain language of LUPA. The dissent disagreed, arguing that the definition was satisfied because the zoning amendment was site-specific, applying only to the Schnitzer property, and did not require a corresponding comprehensive plan amendment.

The superior court decision invalidating the zoning amendment was reversed, and the LUPA petition was dismissed.

The Lesson: A mistake in choosing the means of obtaining local administrative, judicial, and/or Growth Management Hearings Board review of local land use actions can be fatal. This risk may be avoided by seeking review through multiple pathways if there is any doubt as to which is legally available. Or, preferably, interest groups will come together to promote legislative reform to eliminate or reduce the frequent confusion about valid means of obtaining judicial review of land use regulatory actions.

WSDOT Properly Determined that "Predominantly Commercial" Exception to Scenic Vistas Act Prohibition of Billboards Did Not Apply: *Sun Outdoor Advertising, LLC v. Department of Transportation.*[18]

Sun Outdoor Advertising sought approval from the Washington State Department of Transportation (WSDOT) to erect a billboard along State Route 97 in Okanogan County**.** It was undisputed that the location of the proposed billboard was in a designated "scenic system" under the Scenic Vistas Act.[19] The Act generally prohibits the erection of billboards in such locations subject to an exception for "areas zoned by the governing county for predominantly commercial and industrial uses...." WSDOT determined that the exception was not applicable.

The Court of Appeals, reviewing WSDOT's determination under the Administrative Procedures Act, on the basis of the plain meaning of the statutory term, "predominantly," upheld WSDOT's determination that the proposed location was not "predominantly commercial."

Okanogan County SEPA Checklist Fails to Include Sufficient Information on Potential Impacts: *Conservation Northwest v. Okanogan County.*[20]

Conservation Northwest and Methow Valley Citizens Council (CNW) challenged SEPA compliance for a county ordinance authorizing all-terrain vehicle use of county roads with speed limits of 35 mph or less. Division 3 of the Court of Appeals issued what may be the longest appellate opinion ever written in a SEPA case. Judge Fearing, who authored the majority opinion, characterized it as "painfully long…necessitated by extended facts, a lengthy procedural background, and numerous legal issues." The SEPA issue was whether an environmental checklist adequately assessed the impacts of a proposed county ordinance permitting all-terrain vehicles (ATV) to travel on county road segments with speed limits of 35 mph or less. The court, after emphasizing that it was not taking sides between environmental protection groups and ATV enthusiasts, held that the county's environmental checklist failed to include sufficiently thorough information on the potential impacts of the ordinance.

Preliminarily, the court extensively addressed the proper means of obtaining judicial review of the SEPA issue and whether the citizen groups had standing. The majority of the court concluded that judicial review was authorized by SEPA,[21] and that the citizen groups had standing because of sufficient evidence that group members would suffer injury-in-fact within the zone of interests protected by SEPA as a result of the challenged ordinance, relying on both state and federal case law.

CNW had sought judicial review under four different statutes: (1) the superior courts' broad original jurisdiction,[22] (2) jurisdiction granted under the declaratory relief act,[23] (3) jurisdiction to issue injunctions,[24] and (4) the right to judicial review of SEPA compliance granted by SEPA.[25] The court held that SEPA directly conferred jurisdiction and found it unnecessary to decide whether judicial review of SEPA compliance for adoption of the ordinance was available under the other three legal theories. In so holding, the court rejected the argument that labeling the appeal as a "declaratory judgment" action precluded reliance on SEPA as the source of jurisdiction.

The court held that SEPA's linkage requirement was satisfied because CNW sought review of both the County Ordinance 2014-7 and the adequacy

of the SEPA environmental checklist. In effect, the court held that SEPA's judicial review provision confers subject matter jurisdiction over both the underlying action, legislative adoption of the ordinance, and SEPA compliance for the legislative action, the adequacy of the environmental checklist. While in this case, judicial review also was sought under other statutes, the court indicated that doing so was unnecessary.

Most of the voluminous opinion then addressed the adequacy of the information on potential environmental impacts in the environmental checklist. Holding the checklist inadequate, the majority of the court concluded that much additional information was required, including assessment of the adverse environmental impacts of potential *illegal* operation of ATVs *off* the roads even though the ordinance allowed ATV use only *on* specified roads, and even though under existing law the ATVs could have been transported on trailers or truck beds along any and all roads; and doing so within existing law would present the same risk of illegal off-road use as would be posed by the challenged ordinance allowing ATVs to be operated on specified roads. Notably, the majority rejected the challengers' argument that the checklist was inadequate for failing to address public safety impacts to the riders of ATVs and others using the roads, concluding that public safety impacts are not environmental impacts under SEPA.

Throughout the opinion the court relied extensively on NEPA case law under the established principle that, given the similarity of NEPA and SEPA, NEPA case law may be persuasive authority on the interpretation of parallel SEPA provisions.

The dissenting opinion was highly critical of the majority's assumption that the ordinance would *cause* the impacts that were not addressed in the checklist. Focusing on the impacts that would be *caused* by the ordinance, the deference owed to the SEPA-responsible official of the County, and the clearly erroneous standard of review, the dissent argued the checklist was legally sufficient.

While this decision is unpublished with "no precedential value"[26] it is the longest SEPA opinion ever written on a highly controversial subject, addresses important SEPA issues, may be cited as nonbinding persuasive authority under amended GR 14.3(a), and potentially may be published in the future if a motion to publish were to be granted.

***Richard L. Settle**, Professor of Law at Seattle University (formerly University of Puget Sound) School of Law from 1972 to 2002, now is Professor of Law Emeritus at the Law School, teaching and lecturing in land use, environmental, administrative, and property law on an occasional basis. He has been of counsel with Foster Pepper PLLC since 1985 and continues to actively practice land use, environmental, administrative, and municipal law, representing a wide variety of clients, consulting with public and private law offices, serving as expert witness, and mediating disputes. He has written numerous articles and papers on land use and environmental law, including Washington's Growth Management Revolution Goes to Court, 23 Seattle U. L. Rev. 5 (1999); The Growth Management Revolution in Washington: Past, Present, and Future, 16 U. of Puget Sound L. Rev. 867 (1993); Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't, 12 U. Puget Sound L. Rev. 339 (1989). He is the author of two treatises: Washington Land Use and Environmental Law and Practice (Butterworth Legal Publishers, 1983); and The Washington State Environmental Policy Act, A Legal And Policy Analysis (1987, 1990-2012 annual revised editions). He has been an active member of the Environmental and Land Use Law Section of the WSBA, having served on the Executive Board (1979-1985) and as Chairperson-elect, Chairperson, and Past-Chairperson (1982-1985); and Co-editor of the Environmental and Land Use Law Newsletter (1978-1984). Recently, he was Co-Lead of the Washington State Climate Action Team SEPA Implementation Working Group and also served on the Advisory Committee on SEPA and Climate Change Impacts to the Washington State Department of Ecology. Most recently, he served as a member of the Department of Ecology SEPA Rule-Making Advisory Committee established by the 2012 Legislature in 2ESSB 6406.*

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1 187 Wn.2d 460, 387 P.3d 670, 2017 WL 121545 (Jan. 12, 2017).

2 Ch. 43.143, RCW.

3 RCW 90.58.195(2) (counties, cities, and towns with coastal waters must ensure that their shoreline master programs "conform with RCW 43.143.010 and 43.143.030 and with the department of ecology's ocean use guidelines").

4 RCW 43.143.010(1).

5 187 Wn.2d 346, 386 P.3d 1064, 2016 WL 7495874 (Dec. 29, 2016).

6 RCW 19.27.095 (building permits); RCW 58,17,033 (subdivisions).

7 *E.g.*, New Castle Investments v. City of LaCenter, 98 Wn. App. 224, 228, 989 P.2d 569 (1999).

8 70 Wn. App.471, 855 P.2d 284 (1993).

9 49 Wn. App.755, 745 P.2d 1328 (1987).

10 **WESTERN WASHINGTON**: Phase I Cities and Counties: Seattle, Tacoma, Snohomish County, King County, Pierce County, Clark County. Phase II Cities: Aberdeen, Algona, Anacortes, Arlington, Auburn, Bainbridge Island, Battle Ground, Bellevue, Bellingham, Black Diamond, Bonney Lake, Bothell, Bremerton, Brier, Buckley, Burien, Burlington, Camas, Centralia, Clyde Hill, Covington, Des Moines, DuPont, Duvall, Edgewood, Edmonds, Enumclaw, Everett, Federal Way, Ferndale, Fife, Fircrest, Gig Harbor, Granite Falls, Issaquah, Kelso, Kenmore, Kent, Kirkland, Lacey, Lake Forest Park, Lake Stevens, Lakewood, Longview, Lynden, Lynnwood, Maple Valley, Marysville, Medina,

Mercer Island, Mill Creek, Milton, Monroe, Mountlake Terrace, Mount Vernon, Mukilteo, Newcastle, Normandy Park, Oak Harbor, Olympia, Orting, Pacific, Port Angeles, Port Orchard, Poulsbo, Puyallup, Redmond, Renton, Sammamish, SeaTac, Sedro-Woolley, Shoreline, Snohomish, Snoqualmie, Steilacoom, Sumner, Tukwila, Tumwater, University Place, Vancouver, Washougal, Woodinville. Phase II Counties (Phase II county permits apply to urban areas around permitted cities): Cowlitz County, Kitsap County, Skagit County, Thurston County, Whatcom County **EASTERN WASHINGTON**: Phase II Cites: Asotin, Clarkston, East Wenatchee, Ellensburg, Kennewick, Moses Lake. Phase II Counties (Phase II county permits apply to urban areas around permitted cities): Asotin County, Chelan County, Douglas County, Spokane County, Walla Walla County, Yakima County.

11 Whatcom County v. Hirst, 186 Wn.2d 648, 381 P.3d 1 (2016).

12 RCW 36.70A.070(5)(c)(iv).

13 Chumbley v. Snohomish County, 197 Wn. App. 346, 386 P.3d 306, 2016 WL 7468215 (Dec.27, 2016).

14 De Tienne v. Shorelines Hearings Board, 197 Wn. App. 248, ___P.3d___, 2016 WL 8193537 (Nov. 14, 2016).

15 Tapio Investment Company v. State by and through the Department of Transportation, 196 Wn. App.528, 384 P.3d 600 (2016).

16 Schnitzer West, LLC v. City of Puyallup, 196 Wn. App. 434, 382 P.3d 744 (2016).

17 RCW 36.70C.010.

18 Sun Outdoor Advertising, LLC v. Washington State Department of Transportation, 195 Wn.App.666, 381 P.3d 169 (2016).

19 RCW 47.42.030.

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21 RCW 43.21C.075.

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23 RCW Ch. 7.24.

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26 Under a recent amendment to General Rule (GR)14.3(a), effective September 1, 2016, "Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Federal Case Law Update

By Carly Summers, Tyson Kade, and Matt Love

National Environmental Policy Act ("NEPA")

***Protect Our Communities Foundation v. Jewell*[1]**

The plaintiffs challenged the adequacy of the Bureau of Land Management's ("BLM")'s environmental impact statement ("EIS") under NEPA for the issuance of a right-of-way for construction and operation of a wind energy project, and alleged that the project would harm birds in violation of the Migratory Bird Treaty Act ("MBTA") and the Bald and Golden Eagle Protection Act ("Eagle Act"). The district court granted defendants' motions for summary judgment, and the Ninth Circuit affirmed.

Under NEPA, federal agencies must review the environmental effects of proposed federal action and prepare an EIS for "major Federal actions significantly affecting the quality of the human environment."[2] The EIS must contain a detailed discussion of "the environmental impact of the proposed action," "adverse environmental effects which cannot be avoided," "alternatives to the proposed action," and a statement of the purpose and need for the action.[3] Compliance with NEPA involves the application of a "rule of reason," which involves "a pragmatic judgment whether the EIS's form, content, and preparation foster both informed decision-making and informed public participation."[4] In turn, the MBTA and Eagle Act generally prohibit the taking of migratory birds and eagles absent a permit or other exemption.[5]

In upholding BLM's EIS, the Ninth Circuit concluded that the purpose and need statement was adequately broad because it reflected both the immediate objective of responding to the right-of-way request and the broader policy goals that the agency considered in deciding among alternative proposals.[6] The court concluded that BLM's range of considered alternatives was not impermissibly narrow, and that the agency acted within its discretion in rejecting a proposed alternative that presented significant feasibility issues and was speculative.[7] The court also held that the mitigation measures provided ample detail and adequate baseline data for the agency to evaluate the overall environmental impact of the project.[8] Finally, the court concluded that BLM took the requisite "hard look" at avian impacts, the environmental effects of inaudible noise, the health effects of electromagnetic fields

and stray voltage, and the impacts of the project on greenhouse gas emissions and global warming.[9]

Addressing what it characterized as a "novel argument," the Ninth Circuit concluded that BLM's granting of the right-of-way did not make the agency complicit in any future conduct that might result in violations of the MBTA or Eagle Act.[10] The court held that the statutes do not contemplate "attenuated secondary liability on agencies like the BLM that act in a purely regulatory capacity, and whose regulatory acts do not directly or proximately cause the 'take' of migratory birds."[11] In addition, the court held that the Administrative Procedure Act does not require BLM to condition its grant of the right-of-way on the applicant securing the necessary permits from the U.S. Fish and Wildlife Service.[12]

Sierra Club and Galveston Baykeeper v. FERC[13]

In two companion cases, petitioners alleged that the Federal Energy Regulatory Commission's ("Commission") approvals of permits for two LNG pipeline projects failed to properly consider indirect and cumulative effects under NEPA. The petitioners argued, relying on prior court cases concerning NEPA review of coal leases and infrastructure projects, that the Commission must consider the greenhouse gas emissions and climate impacts of permitting the facilities based on allegations that the projects would induce increased domestic gas production and greater domestic reliance on gas as a fuel source. The D.C. Circuit denied the petitions.

Under NEPA, federal agencies must review the environmental effects of proposed federal action and prepare an EIS for "major Federal actions significantly affecting the quality of the human environment."[14] The agency must consider three types of impacts: direct, indirect, and cumulative effects of the action.[15] NEPA defines indirect impacts as "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[16] Cumulative impacts are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions."[17] Previously, the Eighth Circuit found that an agency's NEPA analysis was inadequate when it failed to consider the indirect and cumulative effects of downstream greenhouse gas emissions from increased coal combustion that would follow the construction and upgrade of rail lines to serve coal mines.[18]

The D.C. Circuit stated that the Commission was required to consider the direct, indirect, and cumulative impacts that are proximately caused by the proposed action, including those with a reasonably close causal relationship between the environmental effect and the alleged cause.[19] Relying on the Supreme Court's decision in *Public Citizen*, the D.C. Circuit held that an increase in LNG exports need not be considered as an indirect impact of the projects, because any increase requires a separate license from the Department of Energy, which is an intervening requirement that breaks the causal chain.[20] Unlike in *Mid States*, where the agency conceded a causal connection between rail line expansion and increased coal usage, the D.C. Circuit concluded that it could not assume that the additional pipeline infrastructure would result in increased exports and there was no linear connection to the alleged increase use of coal.[21] The court also rejected petitioners' arguments that the Commission should have undertaken a nationwide analysis, concluding that the cumulative impact analysis need only consider the effects "in the same geographic area" as the project under review.[22]

In a subsequent decision, the D.C. Circuit applied these holdings and concluded that downstream effects of emissions from the transport and consumption of exported natural gas lack a sufficient causal relationship to the facility approval requiring their consideration in NEPA review of the project.[23]

Endangered Species Act ("ESA")

Union Neighbors United, Inc. v. Jewell[24]

The plaintiffs challenged an ESA incidental take permit ("ITP") allowing a wind farm to take endangered Indiana bats. The plaintiffs alleged that the U.S. Fish and Wildlife Service ("FWS") violated the ESA by incorrectly finding that the applicant minimized and mitigated the impacts of taking the species, and violated National Environmental Procedures Act ("NEPA") by failing to consider a reasonable range of alternatives to the permitted action. The district court concluded that FWS complied with its obligations under the ESA but failed to comply with NEPA, and the D.C. Circuit affirmed.

Under Section 10 of the ESA, FWS may issue an ITP authorizing the incidental take of a threatened or endangered species.[25] An applicant for an ITP must submit a habitat conservation plan that, in part, includes measures to minimize and mitigate the impacts of the incidental taking to the maximum extent practicable.[26] In addition, when preparing an environmental impact statement under NEPA, a federal agency must analyze the impacts of the proposed action and all reasonable alternatives to the proposed action.[27] Reasonable alternatives include those that are technically and economically practical or feasible and meet the purpose and need of the proposed action.[28]

The D.C. Circuit upheld FWS's conclusion under the ESA that the ITP "minimized and mitigated" the impacts of the taking on the species. First, the court concluded that the scope of impacts that must be minimized refers not to the discrete number of species taken, but to the effects on the populations or subpopulations of the species as a whole.[29] Second, the court explained that the "maximum

extent practicable" standard imposes a single duty, and does not operate independently or sequentially on "minimize" and "mitigate."[30] Finally, the court found that FWS properly concluded that a reduced impact alternative was impracticable based on its economic implications for the project.[31] However, the D.C. Circuit concluded that FWS failed to comply with NEPA by not considering operational alternatives that were in between the proposed action and the economically infeasible turbine shut-down alternative.[32] Given the goal of reducing bat mortality and the likelihood that reduced turbine speeds could accomplish that goal, the court held that FWS's alternatives analysis was inadequate because it failed to consider additional speeds and other operational controls.[33]

Alaska Oil and Gas Ass'n v. Pritzker[34]

Several plaintiffs, including Alaska Native organizations, the State of Alaska, and oil and gas interests, challenged the National Marine Fisheries Service's ("NMFS") listing of a distinct population segment of the bearded seal as threatened under the ESA based on projections of climate-related habitat changes through 2100. The district court vacated the listing because forecasting more than 50 years into the future is too speculative and remote and NMFS lacked data on the impact of future habitat changes on the species. The Ninth Circuit reversed.

Under Section 4 of the ESA, NMFS must determine whether a species is threatened or endangered based upon any of five factors, including "the present or threatened destruction, modification, or curtailment of its habitat or range."[35] To be listed as threatened, NMFS must determine that the species "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[36] An endangered species is one which is "in danger of extinction throughout all of a significant portion of its range."[37] NMFS must make its listing determinations "solely on the basis of the best scientific and commercial data available."[38]

In upholding NMFS' listing of the bearded seal DPS, the Ninth Circuit acknowledged that it must defer to the agency's interpretation of the scientific data so long as the agency provided a reasonable explanation for its approach.[39] While recognizing that 100-year climate projections are volatile and have some uncertainties, the court stated that the ESA does not require "ironclad evidence" and that NMFS reasonably concluded that there would be continued habitat loss that would threaten the species' survival.[40] In addition, the court concluded that NMFS is not required to "quantify population losses, the magnitude of risk, or a projected 'extinction date' or 'extinction threshold'" to determine whether a species is likely to become in danger of extinction in the foreseeable future.[41] The court found that "likely" means that "an event, fact, or outcome is probable" and does not require specific quantitative targets.[42]

Center for Biological Diversity v. EPA[43]

The plaintiffs alleged that the Environmental Protection Agency ("EPA") violated the ESA when it registered certain pesticide active ingredients and pesticide products under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") without consulting with the National Marine Fisheries Service and the United States Fish and Wildlife Service (collectively "the Services"). The district court dismissed the plaintiffs' claims, and the Ninth Circuit reversed in part, holding that the reregistration of specific pesticides triggered the ESA consultation requirement.

Under ESA Section 7, federal agencies are required to consult with the Services to ensure that any discretionary federal action does not jeopardize the continued existence of threatened and endangered species or destroy or adversely modify a species' critical habitat.[44] No pesticide may be sold or distributed unless it is registered under FIFRA, and the statute. FIFRA charges the EPA with the responsibility of registering and reregistering pesticide active ingredients and pesticide products.[45] The various types of registration allow for distribution, sale, and use of pesticide with various requirements and limits, based on scientific analysis of the pesticide's properties.[46] If the statute's specific requirements are met, the EPA must register a pesticide.[47]

In affirming the district court in part, the Ninth Circuit dismissed several claims as beyond the six-year statute of limitations, which was triggered by the issuance of the registration eligibility determination (RED).[48] The Ninth Circuit also held that EPA's continued discretionary control of a pesticide's previous registration is not an affirmative agency action triggering the consultation requirement, and that completion of a pesticide reregistration for specific ingredients did not trigger consultation because it merely documented the fact of reregistration.[49] Reversing the district court, the Ninth Circuit concluded that EPA's reregistration of the individual pesticide products were affirmative acts triggering their own consultation requirement and were not impermissible collateral attacks on any prior RED made for the pesticides.[50] The court found that the reregistration process incorporated new data beyond that available during the process for issuing a RED and involved a distinct determination.[51]

Alliance for the Wild Rockies v. U.S. Army Corps of Engineers[52]

The plaintiff alleged that several federal agencies violated their obligation under ESA Section 7(a)(2) to reinitiate and complete consultation with the U.S. Fish and Wildlife Service ("FWS") to ensure that the agencies' operation of 23 hydroelectric dams would not destroy or adversely modify subse-

quently designated critical habitat for endangered bull trout. The district court dismissed the claims as moot because the agencies reinitiated consultation.

Under Section 7(a)(2), federal agencies must consult with the FWS to ensure that the proposed agency action is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[53] Formal consultation is required if the FWS determines the action is likely to adversely affect a listed species or critical habitat.[54] Consultation must be reinitiated if new information reveals that the proposed action may affect listed species or critical habitat "in a manner or to an extent not previously considered."[55]

After plaintiff filed its complaint, the federal agencies initiated or reinitiated consultation with FWS on all of the challenged dams in bull trout critical habitat. The district court concluded that reinitiation of formal consultation alone is sufficient to satisfy the agencies' procedural duty under ESA Section 7(a)(2) and moots plaintiff's claims.[56] In rejecting the argument that consultation must be completed for mootness to apply, the court found that the plaintiff only raised procedural, and not substantive, violations of the ESA and that reinitiation of consultation satisfied the agencies' obligations and provided the precise relief requested.[57]

Tribal Fishing and Water Rights

Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District[58]

The Agua Caliente Band of Cahuilla Indians filed an action for declaratory and injunctive relief against local water agencies, requesting a declaration that the Tribe has a federally reserved right and an aboriginal right to the groundwater underlying its reservation. In Phase I of the litigation, the district court held that the reserved rights doctrine applies to groundwater and that the United States reserved appurtenant groundwater when it established the Tribe's reservation. The Ninth Circuit affirmed.

Under the *Winters* doctrine, when the United States "withdraws its lands from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."[59] The doctrine reserves water only to the extent necessary to accomplish the purpose of the reservation, and can only reserve water that is appurtenant to the withdrawn land.[60] The reserved rights vest on the date of the reservation, and are superior to any subsequent right in the water.[61]

The Ninth Circuit first concluded that the United States implicitly reserved water because the primary purpose of the Tribe's reservation envisioned water use.[62] The court found that the primary purpose of the reservation was to establish a home for the Tribe and support an agrarian society which would be entirely defeated without water. Second, the Ninth Circuit expressly held that the *Winters* doctrine also applies to groundwater. Recognizing that unappropriated water must be "appurtenant" to the reservation, the court stated that appurtenance limits the reserved right to those waters attached to the reservation and is not limited to only surface water.[63] Because surface water on the reservation is minimal or entirely lacking for most of the year, the court found that survival necessarily depends on access to groundwater.[64] Finally, in rejecting the water agencies' arguments regarding the scope of the reserved water rights, the Ninth Circuit concluded that state water rights are preempted by federal reserved rights, the Tribe's lack of historic access to groundwater did not destroy its right, and existing entitlements to water under state law do not affect the analysis of whether a federally reserved water right was envisioned at the time the reservation was created.[65]

United States v. Washington[66]

Western Washington Treaty Tribes alleged that the State of Washington violated their treaty-based fishing rights by building and maintaining culverts that diminished the number of fish traveling through, to or from the Tribes' "usual and accustomed" fishing grounds and stations, and sought injunctive relief which, in part, would require the state to repair or replace the culverts that impact salmon migrations. The district court upheld the Tribes' treaty-based claims, and subsequently issued a permanent injunction requiring state agencies to provide and maintain fish passage for salmon at barrier culverts and establishing timeframes by which the state must act. On appeal, the Ninth Circuit affirmed.

The Stevens Treaties, entered into by the Tribes and the United States in the 1860's, state:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with the citizens of the territory…together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands.

The language, in context with the purpose and intent of the treaties, has been interpreted to reserve to the Tribes the right to continue hunting, gathering, fishing, and engaging in other activities in their traditional places, including on lands beyond reservations.[67] In prior phases of the case, the Tribes established their right to take up to 50 percent of the harvestable fish in the state or a sufficient quantity to provide them a "moderate standard of living.[68]

The Ninth Circuit concluded that the state violated, and continues to violate, the Tribes' Treaty fishing rights by building and maintaining barrier culverts.[69] The court noted that the Tribes' purpose in entering the treaties and preserving fishing rights at their usual and accustomed places included ensuring that "there would be fish sufficient to sustain them."[70] Even if this was not explicitly promised to the Tribes, the court stated that it would infer that promise to "support the purpose" of the treaties.[71] The Ninth Circuit also affirmed the injunctive relief requiring the state to correct its high-priority barrier culverts within 17 years, and correct the remainder at the end of their natural life or in the course of independent road construction projects.[72] Following the state's petitions for rehearing, the Ninth Circuit amended its decision to reject arguments that the state should have been awarded a monetary recoupment or set-off from the United States, and that the presence of non-state-owned barrier culverts minimized the benefits of remediating state-owned culverts on the same streams.[73]

Clean Water Act ("CWA")

United States Army Corps of Engineers v. Hawkes Co.[74]

The plaintiffs alleged that the Army Corps of Engineers' ("Corps") issuance of an approved jurisdictional determination ("JD") under the CWA is a final agency action for purposes of judicial review. The Eighth Circuit reversed the district court's conclusion that a JD is not a final agency action, and the Supreme Court affirmed.

The CWA regulates the discharge of pollutants into the waters of the United States.[75] The Act imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit from the Corps.[76] The Corps can issue an approved JD to property stating the agency's definitive view on whether there are jurisdictional waters on a parcel of land.[77] The Administrative Procedure Act ("APA") allows for judicial review of final agency actions.[78] An agency action is final when: (1) it represents the consummation of the agency's decision-making process; and (2) it must determine rights or obligations, or result in legal consequences.[79]

The Supreme Court concluded that an approved JD is a final agency action based on the *Bennett* factors. First, an approved JD clearly marks the consummation of the Corps decision-making process on the issue of whether jurisdictional waters are located on a property.[80] Second, an approved JD gives rise to "direct and appreciable legal consequences" in part because it binds the Corps and the EPA to the determination.[81] EPA argued that the plaintiffs had adequate alternatives to APA review in court—they could proceed without a permit, or complete the permit process and then seek judicial review. In rejecting both options, the Court found that parties are not required to wait for an enforcement action against them before challenging an agency action that can result in serious criminal and civil penalties.[82] Likewise, the Court stated that it is not reasonable to require parties to undertake a costly and lengthy permitting process in order to make the JD suitable for judicial review.[83]

Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA[84]

Several plaintiffs challenged the Environmental Protection Agency's ("EPA") Water Transfers Rule, which exempts water transfers from the requirements of the CWA's National Pollutant Discharge Elimination System ("NPDES") permitting program. The district court vacated the Rule as an unreasonable interpretation of the CWA, and the Second Circuit reversed and reinstated the Rule.

The CWA prohibits the discharge of any pollutant into waters of the United States.[85] The statute defines the discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source."[86] In 2008, the EPA promulgated the Water Transfer Rule, formalizing its longstanding position that water transfers are not subject to regulation under the NPDES program.[87] The Rule defines water transfers as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use."[88] Under the "Unitary Waters" theory adopted in the Rule, all water bodies in the United States constitute a single, unitary entity, and even if a water transfer between navigable waters conveys water in which pollutants are present, it does not result in the addition of a pollutant to navigable waters.

While agreeing with the district court that the CWA is ambiguous as to whether Congress intended the NPDES program to apply to water transfers, the Second Circuit found that the Water Transfers Rule "represents a reasonable policy choice" and should be afforded deference under the second prong of the *Chevron* test.[89] The court noted that the CWA "does not require that water quality be improved whatever the cost or means, and the Rule preserves state authority over many aspects of water regulation, gives regulators flexibility to balance the need to improve water quality with the potentially high costs of compliance with an NPDES permitting program, and allows for several alternative means for regulating water transfers."[90] The dissent argued that the Water Transfers Rule should be vacated, and that exempting water transfers from the permitting requirements could frustrate the purpose of the CWA to protect our waters by allowing unmonitored transfers for polluted water from one water body to another.[91]

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

Pakootas v. Teck Cominco Metals, Ltd.[92]

In ongoing litigation over cleanup liability for contamination caused by Teck Cominco Metals' operations at their Canadian smelter, the plaintiffs amended their complaint to assert that Teck is liable under CERCLA for the emission of hazardous substances into air that were ultimately deposited in the United States. The district court denied Teck's motion to dismiss the claims, and the Ninth Circuit reversed.

Under CERCLA, 42 U.S.C. § 9607(b)(3), any person who arranges for disposal of a hazardous substance is liable for all removal and remediation costs. "Disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."[93] The Ninth Circuit has previously held that the term "deposit" requires that a party put down or place the material, excluding from the definition chemical or geologic processes, or passive migration.[94] Similarly, under RCRA, the Ninth Circuit has held that emission of diesel particulate matter into the air and its subsequent transport by wind and air onto land and water does not constitute "disposal."[95]

In line with its prior decisions, the Ninth Circuit found that the operator did not arrange for "disposal" of hazardous substances within the meaning of CERCLA by allowing smelter's airborne emissions to contaminate land and water downwind.[96] The court stated that liability under CERCLA for emissions of hazardous substances into air requires that the substances first be placed "into or on any land or water" and thereafter emitted into the air.[97] The court observed that Congress had clearly provided liability for the emission of hazardous substances in other portions of the statute—but did not in relation to the liability provision for disposal.[98] Teck therefore could not be held liable under CERCLA for cleanup costs and natural resource damages for the aerial deposition of hazardous materials.

Clean Air Act ("CAA")

Helping Hand Tools v. EPA[99]

Petitioners sought review of the Environmental Protection Agency's ("EPA") decision granting Sierra Pacific Industries, Inc. a prevention of significant deterioration ("PSD") permit under the CAA for construction of a new biomass-burning power plant at a lumber mill in California. Petitioners alleged that EPA was required to consider solar power and a greater natural gas mix as alternatives in its best available control technology ("BACT") analysis, and that EPA could not consider the burning of biomass fuel alone as a control option. The Ninth Circuit denied the petitions.

The Clean Air Act requires new and modified major emitting facilities, like Sierra Pacific's new boiler, to seek a PSD permit prior to construction.[100] In order to obtain a PSD permit, applicants must demonstrate that the proposed facility uses the best available control technology ("BACT") for every pollutant subject to regulation by the CAA.[101] BACT is defined as

> [a]n emission limitation based on the maximum degree of reduction of each pollutant subject to regulation … from any major emitting facility, which [EPA], on a case-by-case basis … determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative duel combustion techniques for control of each such pollutant.[102]

EPA does not have to consider control alternatives that would "redefine the source."[103]

The Ninth Circuit concluded that EPA took the requisite hard look at the proposed plant design, and the key purpose of burning its own biomass waste, and held that EPA reasonably concluded that the solar and natural gas alternatives urged by the petitioners would disrupt the project purpose and redefine the source.[104] The Ninth Circuit noted that the distinction between control technology and redefining the source is a technical determination to which a court should defer to ESA.[105] In rejecting the claim that EPA could not consider burning biomass alone as a control option, the Ninth Circuit concluded that EPA properly followed its Bioenergy BACT Guidance and rationally applied it to the greenhouse gas emissions from Sierra Pacific's new facility.[106]

United States v. DTE Energy Co.[107]

The Environmental Protection Agency ("EPA") filed an enforcement action against DTE Energy Co. for beginning construction on a coal power plant overhaul project without a new source review ("NSR") permit. DTE characterized the project as routine maintenance, repair, and replacement activities and stated that predictions of post-construction emissions were excluded as demand growth, both of which would exempt the project from NSR. After the district court granted summary judgment for DTE, the Sixth Circuit reversed and held that EPA was authorized to bring an enforcement action based on projected increases in emissions without first demonstrating that emissions actually had increased after the project. On remand, the district

court again entered summary judgment for DTE, and the Sixth Circuit reversed in a split decision.

The Clean Air Act requires a utility seeking to modify a source of air pollutants to "make a preconstruction projection of whether and to what extent emissions from the source will increase following construction."[108] The projection then "determines whether the project constitutes a 'major modification' and thus requires a permit" prior to construction, as part of the Act's New Source Review (NSR) program.[109] The NSR regulations require an operator to "consider all relevant information" when estimating its post-project actual emissions but allow for the exclusion of any emissions "that an existing unit could have accommodated during the [baseline period] . . . and that are also unrelated to the particular project, including any increased utilization due to product demand growth."[110] An operator must document and explain its decision to exclude emissions from its projection as resulting from future "demand growth" and provide such information to the EPA or to the designated state regulatory agency.[111]

The Sixth Circuit reiterated its prior holding that the applicability of NSR must be determined before construction commences and that liability can attach if an operator proceeds without complying with the preconstruction requirements in the regulations.[112] The court concluded that DTE failed to justify its application of the demand-growth exclusion with supporting documentation, did not establish that the increase in emissions could have been accommodated during the baseline period, and did not establish that the increase in emissions was unrelated to the construction process.[113] The court stated that "post-construction emissions data cannot prevent the EPA from challenging DTE's failure to comply with NSR's preconstruction requirements."[114] In concurring in the judgment, one judge noted that actual events had disproven EPA's hypothetical emission calculations and that DTE's emissions were in compliance with the regulations.[115] The dissent concluded that DTE complied with the basic requirements for making emission projections, and therefore the district court decision should be affirmed.[116]

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67 *See* United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) (the "*Boldt Decision*").
68 *Id.;* United States v. Washington, 506 F. Supp. 187, 191 (W.D. Wash. 1980) ("*Boldt II*").
69 827 F.3d at 853.
70 *Id.* at 852.
71 *Id.* at 853.
72 *Id.* at 865.
73 U.S. v. Washington, Order No. 13-35474 (March 2, 2017).
74 136 S. Ct. 1807 (2016).
75 33 U.S.C. §§1311(a), 1362(7), (12).
76 *See* 33 U. S. C. §§1311(a), 1319(c), (d), 1344(a).
77 33 C.F.R. § 331.2.
78 5 U. S. C. § 704.
79 Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154 (1997).
80 136 S.Ct. 1813-14.
81 *Id.* at 1814.
82 *Id.*
83 *Id.* at 1815-16.
84 846 F.3d 492 (2d Cir. 2017).
85 33 U.S.C. §1311(a).
86 33 U.S.C. § 1362(12)(A).
87 *See* 73 Fed. Reg. 33,697, 33,700-03 (June 13, 2008) (codified at 40 C.F.R. § 122).
88 40 C.F.R. § 122.3(i).
89 846 F.3d at 507-508.
90 *Id.* at 501.
91 *Id.* at 533-34.
92 830 F.3d 975 (9th Cir. 2016).
93 42 U.S.C. § 9601(29) (defining the term as under 42 U.S.C. § 6903).
94 Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 879 (9th Cir. 2001) (*en banc*).
95 Center for Community Action & Environmental Justice, 764 F.3d 1019 (9th Cir. 2014).
96 830 F.3d 975.
97 *Id.* at 984.
98 *Id.*
99 836 F.3d 999 (9th Cir. 2016), *petition for rehearing denied, opinion amended and superseded*, Helping Hand Tools v. EPA, 2016 WL 7470564 (9th Cir. 2016).
100 42 U.S.C. § 7475(a).
101 *Id.* § 7475(a)(4).
102 *Id.* § 7479(3).
103 *See* Sierra Club v. EPA, 499 F.3d 653, 657 (7th Cir. 2007).
104 836 F.3d at 1005.
105 *Id.* at 1010.
106 *Id.* at 1002-03.
107 845 F.3d 735 (6th Cir. 2017)
108 42 U.S.C. §§ 7475, 7503; 40 C.F.R. § 52.21.
109 *Id.*
110 40 C.F.R. § 52.21(b)(41)(ii)(a) and (c).
111 40 C.F.R. § 52.21(r)(6)(i)–(ii).
112 845 F.3d at 741.
113 *Id.* at 740.
114 *Id.* at 741.
115 *Id.*
116 *Id.* at 746.

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