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In This Issue

Section Report

By ELUL Section Chair Thomas McDonald, Environmental and Land Use Hearings Office

The ELUL Section Executive Committee met for its annual retreat in November. It was a pleasure welcoming new board members Kelly Wood (Phillips Wesch Burgess PLLC, Olympia) and Jeff Weber (Seattle City Attorney's Office). We also were pleased to have our newly appointed Board of Governor's Liaison, James Andrus (K&L Gates LLP, Seattle), and our new WSBA Section Leader's Liaison, Kiley Thornton, join us. Several members of the Newsletter Editorial Board also joined us. We had a very good discussion regarding the role of the Editorial Board and the necessary strategy to ensure the Newsletter maintains the highest level of quality and relevance for Section members. I hope you have had an opportunity to read the September edition of the Newsletter. There are excellent articles and informative updates of land use and environmental case law and administrative decisions. We are continuing to seek a Newsletter Editor for 2014. If you or someone you know has an interest in serving as the sole editor or sharing the position with others, please contact me (*tom.mcdonald@eluho.wa.gov)* or Laura Kisielius *(laura.kisielius@snoco.org)*. I want to again thank Laura and the Editorial Board for their efforts in publishing excellent editions of the Newsletter this year after our previous editor was unexpectedly unable to continue in this position.

A large part of our retreat was spent working on the ELUL Section's upcoming events. First, we finalized the details of our annual ethics mini-Cle on December 5, 2013, free to all Section members. Perkins Coie attorneys Harry Schneider and Joe McMillan discussed issues of legal ethics presented through their representation of Salim Ahmed Hamdan, widely known as Osama bin Laden's personal driver. The presentation included a behind-the-scenes account of the federal court litigation filed in Seattle that eventually led to the United States Supreme Court 2006 landmark *Ham-*

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Save the Date!

ELUL Section Midyear Meeting and Seminar

May 1-3, 2014
Suncadia Resort
Cle Elum, WA

Interim Editor's Message

By Laura C. Kisielius, Snohomish County Prosecuting Attorney's Office

Welcome to the 2013 holiday edition of the ELUL Section Newsletter. Once again, members of the ELUL Section have graciously donated their time and talent to bring you in-depth articles on relevant legal issues and comprehensive updates on current case law and administrative decisions.

The first article, by Roger Wynne of the Seattle City Attorney's Office, provides a detailed and insightful account of the United States Supreme Court's recent takings decision, *Koontz v. St. Johns River Water Management District*. The second article, by Kelly Wood of Phillips Wesch Burgess PLLC, informs land use and environmental practitioners with clients breaking ground within the Tacoma Smelter Plume on issues related to legacy ASARCO plume contamination. And this edition, we are fortunate to have a third feature-length article by Lynne Cohee of Tupper Mack Wells PLLC. Lynne examines the lengthy history (and future) of *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc*.

These articles are followed by updates from the Newsletter's regular and spectacular contributors. Richard Settle provides an update on recent land use court decisions. Matthew Love, Chris Zentz and Tyson Kade examine recent federal environmental law decisions. Edward McGuire and Tadas Kisielius summarize decisions from the Growth Management Hearings Board from the past year. And Jason Callahan and Karen Terwilleger recap legislation enacted in 2013 pertaining to energy, land use, water, toxics and natural resources issues.

Finally, this edition contains updates from the environmental law groups at Washington State's three law schools.

As you may have discovered through the notice that brought you this edition of the Newsletter, the Newsletter is no longer password-protected. Several Section members commented that password protection served to make access

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dan v. Rumsfeld decision. It was an excellent event, and I am glad that many of you were able to attend.

We are also actively working with the law schools to schedule attorney and law school student social mixers in February for Seattle University and the University of Washington, and in March for the *March Madness* social mixer for Gonzaga University. Please try to attend these terrific events. I believe you will find that they are beneficial for both attorneys and students. It is a goal of the section to support law students and young lawyers interested in land use and environmental law by promoting their interaction with lawyers practicing in those fields. We also hope to coordinate with local bar associations to have mini-CLE programs as part of the socials.

In January or February you will receive information about a CLE presented by the Land Use & Environmental Mediation Committee (LUEMC). The LUEMC is a joint standing committee of the WSBA ADR and ELUL Sections. Please see *http://wsba-adr.org/group/land-use-environmental-mediation-committee* for more information.

Finally, we are planning the 2014 Mid-Year Meeting and Seminar at Suncadia Resort. We are returning to having the CLE over three days, starting around noon on Thursday, May 1, continuing for half-day the morning of May 2, and ending with presentations the morning of Saturday, May 3. Our co-chairs, Jennifer Stacy (King County Prosecutor's Office) and Greg Hixson (Short, Cressman & Burgess, PLLC, Seattle) have begun developing an excellent CLE program. Please look on the ELUL Section website for these and other upcoming events.

I want to thank you again for your support, and I want to thank the Executive Committee and the Editorial Board for a huge commitment of time and work.

Interim Editor's Message *from page 1*

to the Newsletter burdensome. The Executive Committee and Editorial Board agreed that there should be no barriers to accessing the Newsletter, which is a tremendous resource for Section members and the legal community in general.

As always, member feedback on Newsletter access, content and format is appreciated. Please contact me or any of the Editorial Board members with your suggestions.

Have a safe, happy and peaceful holiday season.

Koontz: What It Said, What It Didn't Say, and Some Lessons for Us in Washington

By Roger Wynne,
Seattle City Attorney's Office

In the swirl of higher-profile decisions issued by the U.S. Supreme Court at the end of its 2012-2013 term, most Court watchers took little note of *Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S. Ct. 2586 (2013). Government and land use lawyers paid attention, though, for good reason. *Koontz* altered part of the takings landscape many thought settled. This article outlines that seemingly settled territory, explains how *Koontz* changed it, identifies key questions *Koontz* left unanswered, and offers some post-*Koontz* lessons for attorneys in Washington.

A. The seemingly limited reach of the "nexus" and "rough proportionality" tests before *Koontz*

The "unconstitutional conditions doctrine" is a fancy label for a simple concept: government may not punish people for exercising a constitutional right, or pressure them into giving up that right. A decision cited frequently for the doctrine—even though the phrase does not appear in the text—involved a claim by a professor that a public college refused to extend his contract because he criticized the school publicly. The Supreme Court reasoned:

> [The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694 (1972) (citation omitted).

The Court applied this doctrine to takings a quarter century ago. Again, the concept is simple. If the government wants, for example, to run a public trail through your property, it generally may do so only if it pays for an easement because the U.S. and Washington Constitutions hold that private property may not be taken for public use without just compensation. U.S. Const. Amend. 5; Wash. Const. art. 1, § 16. But what if you apply for a develop-

ment permit and the government, as a condition of the permit, requires you to deed the trail easement without compensation? Or as some would put it, what if the government "exacts" your property from you through a permit condition?

Two milestone decisions imposed limits on this exaction power. In 1987, *Nollan v. California Coastal Commission* held a "nexus" must link a legitimate state interest and the condition exacted. 483 U.S. 825, 837, 107 S. Ct. 3141 (1987). Then in 1994, *Dolan v. City of Tigard* ruled a nexus is not enough; the government must also show the exaction is "roughly proportional" to the state interest. 512 U.S. 374, 391, 114 S. Ct. 2309. "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id*.

After introducing the nexus and proportionality tests, the Court showed little interest in extending them beyond two key facts of *Nollan* and *Dolan*. First, the Court seemed unlikely to apply nexus and proportionality where the government *denied* a permit. In 1999, the Court said *Dolan* "was not designed to address, and is not readily applicable to, the much different questions arising where... the landowner's challenge is based...on denial of development." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703, 119 S. Ct. 1624 (1999). The next year the Court declined to review a *Nollan/Dolan* challenge to a permit denial. *See Lambert v. City and County of San Francisco*, 529 U.S. 1045, 120 S. Ct. 1549 (2000) (Scalia, J., dissenting).

Second, the Court appeared to reject invoking *Nollan* and *Dolan* where a land use permit is conditioned on the payment of money, rather than the dedication of an interest in land. The Court noted "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey*, 526 U.S. at 702. More recently, in resolving a different issue, the Court characterized *Nollan* and *Dolan* as premised on—and seemingly limited to—a permit condition working a physical invasion of real property. *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 539, 546-47, 125 S. Ct. 2074 (2005).

Although the Court did not expressly limit *Nollan* and *Dolan* to dedications, lower courts generally—although not uniformly—shied away from extending the doctrine on their own. *See, e.g.*, *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) ("A monetary exaction differs from a land exaction—'[u]nlike real or personal property, money is fungible.'"); *Clajon Prod. Corp. v. Petera,* 70 F.3d 1566, 1578 (10th Cir. 1995) (the *Nollan/Dolan* tests "are limited to the context of development exactions where there is a physical taking or its equivalent"); *City of Olympia v. Drebick*, 156 Wn.2d 289, 302, 126 P.3d 802 (2006) ("neither the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees"). *But see, e.g., Town of Flower Mound v. Stafford Estates Ltd. Partnership,* 135 S.W.3d 620, 640 (Tex. 2004) ("we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved"); *Ehrlich v. City of Culver City,* 12 Cal. 4th 854, 911 P.2d 429, 444 (1996) ("we reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions").

Not that the Court was silent about the relevance of the Takings Clause to the taking of money. For example, government appropriation of property in the form of interest on a bank account or a lien might trigger the Clause's requirement to pay just compensation. *See, e.g., Phillips v. Washington Legal Foundation,* 524 U.S. 156, 163-72, 118 S. Ct. 1925 (1998); *Armstrong v. United States*, 364 U.S. 40, 48-49, 80 S. Ct. 1563 (1960). Still, when deciding when to apply the *Nollan/Dolan* tests, the Court had not wandered beyond the taking of an interest in real property.

B. What *Koontz* said... and declined to say

Koontz altered this legal landscape in two fundamental ways. It held that *Nollan* and *Dolan* review could be triggered by certain permit *denials* (not merely the issuance of a permit with a condition) or by the taking of *money* (not just a physical interest in land).

The factual and procedural saga preceding the Court's decision spanned almost two decades. *See Koontz*, 133 S. Ct. at 2591-93. Reduced to its relevant essence, the case stemmed from an application to develop a roughly 15-acre parcel that included wetlands. The applicant proposed to develop four acres and, to comply with a statute requiring the mitigation of wetland loss, deed the government a conservation easement over the remaining 11 acres. According to the Court, the government said it would approve a permit under one of two alternatives: (1) the applicant develop only one acre and deed a conservation easement over the remaining 14; or (2) the applicant adhere to his original proposal of developing four acres and deeding 11, plus hire contractors to improve government wetlands elsewhere. When the government reportedly denied the permit because the applicant refused the alternatives, the applicant sued under a state law. *Id*. at 2593.

1. Permit denial: not a taking, but perhaps an "unconstitutional conditions claim predicated on the Takings Clause"

The government defended itself by stressing it denied the permit. Because it never exacted a condition from the applicant, the government reasoned, the denial could not have implicated the Takings

Clause. The government prevailed on this argument. The Court conceded a permit denial thwarts any actual takings claim: "Where the permit is denied and the condition is never imposed, nothing has been taken…. [T]he Fifth Amendment mandates a particular remedy—just compensation—only for takings." *Id*. at 2597 (emphasis removed). Learning it had not directly violated the Takings Clause was the extent of the good news for the government defendant.

The Court went further. It articulated a new "unconstitutional conditions claim predicated on the Takings Clause." *Id*. According to Justice Alito's majority opinion, this claim is available where the "denial of a permit is based on an unconstitutionally extortionate demand"—one that would have failed the nexus and proportionality tests of *Nollan* and *Dolan* had it been imposed as a permit condition. Because "the unconstitutional conditions doctrine recognizes that [such a denial] burdens a constitutional right," it must give rise to some claim. *Id.* (emphasis removed). The Court seems unanimous on this point. Although the four-member dissent joined no part of the majority opinion, Justice Kagan's dissenting opinion agreed a claim could be available for a denial. *Id*. at 2603.

The Court provided no assurance such a claim could yield monetary relief. "In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies." *Id*. at 2597. Because the case was brought under a state statute, the Court remanded the matter to the state court to determine whether that law covers the newly-articulated "unconstitutional conditions claim predicated on the Takings Clause." "[T]he Court has no occasion to discuss what remedies might be available for a *Nollan*/*Dolan* unconstitutional conditions violation either here or in other cases." *Id*.

We are left to speculate about the availability of remedies for this new claim. Will landowners always be able to assert a claim under 42 U.S.C. § 1983, which provides a remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," even though "an unconstitutional conditions claim predicated on the Takings Clause" involves no actual deprivation of the right to be compensated for a taking? The Court seems to suggest that a § 1983 remedy is available, given that other "unconstitutional conditions" cases were brought pursuant to that statute and "[a]s in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Id*. at 2596. But even if those dots seem easy to connect, *Koontz* declined to connect them.

Here in Washington, will this new claim find redress through Chapter 64.40 RCW, which provides a cause of action "to obtain relief from acts of an agency which are…unlawful, or exceed lawful authority"? RCW 64.40.020(1). Where "act" is defined as a decision "which *places* requirements, limitations, or conditions upon the use of real property," can a landowner seek redress for a decision that places no express requirement or condition on the use of property? *See* RCW 64.40.010(6) (emphasis added). Does a denial itself "place limitations" on the use of property within the meaning of this provision? Further litigation will resolve these questions.

The Court also provided no guidance on the key evidentiary question: what constitutes a pre-permit-denial demand sufficient to trigger an "unconstitutional conditions claim predicated on the Takings Clause"? "This Court...has no occasion to consider how concrete and specific a demand must be to give rise to liability" for this claim. The Court remanded this issue too.

Assuming a landowner finds a relevant cause of action and clears the still-murky evidentiary hurdle to prove the government denied a permit because the landowner refused to accede to the government's demand, the central issue for this new claim will be whether the government demanded more than what would have passed muster as a permit condition under *Nollan* and *Dolan*. The Court assured governments they "need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards…." *Id*. at 2599. A government can therefore presumably make as many additional, "extortionate" demands it wants because, "so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition." *Id*. at 2598.

2. "Monetary exactions" are not immune from *Nollan/Dolan* review

The government defendant in *Koontz* also sought shelter by arguing the subject demand was for the payment of money, not a physical interest in real property, and that *Nollan* and *Dolan* do not apply to an alleged "monetary exaction." *Id*. at 2598-99. The Court rejected that argument, holding 5-4 that "monetary exactions" must also satisfy the *Nollan/Dolan* tests.

The majority reasoned that the government's position would facilitate an end-run around *Nollan* and *Dolan*:

> Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an

> easement or making a payment equal to the easement's value. Such so-called "in lieu of" fees are utterly commonplace…, and they are functionally equivalent to other types of land use exactions.

Id. at 2599. For the majority, a government command to relinquish funds linked to a specific parcel of real property triggers a *per se* takings analysis, functionally equivalent to a command for an easement. *Id*. Given the facts of *Koontz*, we can infer there is no difference between a "monetary exaction" in the form of a direct payment of money to the government or, as the demand in *Koontz*, of expending funds to improve government property.

The majority responded to the dissent's concerns with an assurance its holding "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Id*. at 2601. The majority was unconcerned about distinguishing these exempt financial burdens from the "monetary exactions" subject to *Nollan* and *Dolan* review. Echoing Justice Stewart's famous "I know it when I see it" approach to pornography,[1] the majority admonished fretful critics "that teasing out the difference between taxes and takings is more difficult in theory than in practice" and "we have had little trouble distinguishing between the two." *Id*. at 2601, 2602.

The majority's refusal to say more about the definition of "monetary exactions" leaves us looking down a potentially slippery slope, at the bottom of which is a world where most development regulations are subject to review under *Nollan* and *Dolan*. Consider these questions:

- Do "monetary exactions" include payments/expenditures to the government *only if* made in lieu of a demand for an easement? If there is no express or implied demand for an easement, are *Nollan* and *Dolan* relevant? Limiting *Nollan* and *Dolan* to "in-lieu fees" would be consistent with the facts of *Koontz* and the majority's professed motivation to prevent an end-run around *Nollan* and *Dolan*, but not necessarily with some of the majority's broader sweep of situations where "the government commands the relinquishment of funds linked to a specific, identifiable property interest." *Id*. at 2600. Must that interest be a physical interest in land?
- Do "monetary exactions" result only from applicant-specific permit decisions, but not from applying area-wide, legislative determinations? Such a limitation on the meaning of "monetary exactions" would build upon the reasoning of some federal and state courts when describing the limits of *Nollan* and *Dolan*. *See, e.g.*, *McClung*, 548 F.3d at 1227; *Ehrlich,* 911 P.2d at 443-44; *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale,* 187 Ariz. 479, 930 P.2d 993, 1000 (Ariz. 1997). As the *Koontz* dissent observed, we have no answer to that question: "Maybe [the *Koontz*] majority accepts that distinction; or then again, maybe not." *Koontz*, 133 S. Ct. at 2608 (Kagan, J. dissenting).
- Do "monetary exactions" mean all payments/expenditures to the government that are not "property taxes, user fees, and similar laws and regulations"? Is the majority's apparent safe harbor for these payments the extent of smooth sailing for local government?
- What about expenditures not made to the government or to benefit public property? If a landowner must expend funds to construct a storm water retention facility or fire escapes, the title to which the landowner retains, has the government "exacted" anything from the landowner within the meaning of *Nollan* and *Dolan*? At some points, the majority speaks in more limited terms, suggesting there must be a transfer "from the landowner to the government." *Id*. at 2600. But elsewhere, the majority seems to embrace any situation where the government uses "land-use permitting to pursue governmental ends," *id*., even if those ends involve no actual transfer to the government.
- If nothing need be transferred to the government to trigger *Nollan/Dolan* review, what about "expenditures" in the form of a lost opportunity cost? If a permit condition requires a property owner not to develop certain wetlands, but does not demand the expenditure of any money or the conveyance of an easement or any other real property interest to the government, has the government "exacted" anything? What about a five-foot setback? A height limit? After all, some of the majority's reasoning speaks of the apparent evil of "diminishing without justification the value of the property." *Id*.

Finding a principled handhold somewhere along this slippery slope will require additional litigation.

C. So what? Some lessons for us in Washington

Although *Koontz* foreshadows a cloud of more litigation, the silver lining is the opportunity to provide reasonable answers to the questions *Koontz* left open. As we await those opportunities and answers, government and property-rights attorneys should keep at least four points in mind.

First, *Koontz* is not a radical departure for attorneys in Washington, where we have been living with RCW 82.02.020 for decades. Like the nexus and proportionality requirements *Koontz* extended to certain "monetary exactions," Washington

has long required payments in lieu of dedications or for mitigation to be "reasonably necessary as a direct result" of the proposed development. RCW 82.02.020. As *Koontz* shields taxes from *Nollan/Dolan* review, so Washington also exempts Growth Management Act impact fees (which need only be "reasonably *related*" in type and degree to new development, and may be modified "based on principles of fairness") from the "reasonably *necessary* as a *direct* result" requirement. *Compare* RCW 82.02.020 *with* RCW 82.02.050(3), .070(5). Property owners will likely argue that GMA impact fees are subject to *Nollan/Dolan* review because they are imposed as a condition on development and so fall outside *Koontz*'s apparent safe harbor for "property taxes, user fees, and similar laws and regulations." Governments will likely counter that the fees are shielded because they are authorized by an excise tax statute and Washington courts have already ruled the fees are not subject to the vested rights doctrine because they are not land use controls; they are just another source of revenue to augment tax dollars. *See, e.g.*, *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 233-36, 989 P.2d 569 (1999).

Second, subjecting a permit decision to *Nollan* and *Dolan* review does not mean the government will lose. It is only an invitation to debate whether the decision satisfies nexus and proportionality requirements.

Third, because of those requirements, the essential lesson for governments is not new: don't overreach. Especially if tailoring mitigation for a specific project, and where that mitigation might involve a dedication of land to the government, a payment in lieu of that dedication, or the expenditure of money to improve government property, be prepared to demonstrate the nexus between the condition and the public interest behind your regulation, and that the type and magnitude of the condition is roughly proportionate to the proposal's impact on that interest.

Finally, note the rhetoric of "extortion" peppering *Koontz*. Justice Scalia first introduced "extortion" to the mix in his majority opinion in *Nollan*. He used the word only once, quoting a New Hampshire Supreme Court decision to reject an argument that government could exact property whenever it had the authority to ban the proposed development: "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson,* 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). By contrast, *Koontz* used the word four times and not just to illustrate what could happen should the government overreach. Rather, *Koontz* started from the premise that government overreaches. *Koontz* extended *Nollan* and *Dolan* to "monetary exactions" expressly because the majority was "[m]indful of the special vulnerability of land use permit applicants to extortionate demands for money." *Koontz*, 133 S. Ct. at 2603. That mindfulness was not the product of the facts of *Koontz* (the Court remanded all factual issues) or any other case. As the dissent noted, "No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs." *Id*. at 2908 (Kagan, J., dissenting). Nevertheless, five members of the Court seem to know in their guts that landowners need protection from government extortion.

"Extortion" is an emotional word. In the wake of *Koontz*, property-rights lawyers will likely cast government decisions as "extortionate." Government lawyers will argue why the label doesn't stick. Part of their task will be to advocate for a principled, limited reach of the phrase "monetary exaction" by answering the key questions *Koontz* left open. But given that *Koontz* starts from the premise that governments extort property owners, another part of government lawyers' task will be to avoid feeding that perception through bad facts—which, the proverb holds, lead to bad law. The best way to do that is to counsel government clients to spot and avoid situations where they might be overreaching.

Roger Wynne is the Director of the Land Use Section of the Seattle City Attorney's Office and an adjunct professor at Seattle University School of Law. His most recent law review article is The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis, 86 Wash. L. Rev. 125 (2011). The views expressed here are his own, not necessarily the opinions or positions of the City of Seattle or its City Attorney.

1 Conceding his inability to define "hard-core pornography," Justice Stewart admitted: "[P]erhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964) (Stewart, J., concurring).

The ASARCO Smelter Plume: What You Don't Know *Can* Hurt You

By Kelly T. Wood, Phillips Wesch Burgess PLLC

Introduction

Nearly half a decade ago, the American Smelting and Refining Company, ASARCO, was nearing the end of its massive, multi-year bankruptcy proceeding. The once formidable bastion of American industrial development had finally been placed on the ropes from the enormous legacy of contamination left by its various operations. In what was to become the largest environmental bankruptcy settlement in history, Grupo México, the Mexican mining conglomerate and ASARCO parent company seeking to resurrect ASARCO post-bankruptcy, agreed to pay the federal government, several Indian tribes, and 19 states a total of $1.79 billion to pay for past and future remediation efforts.

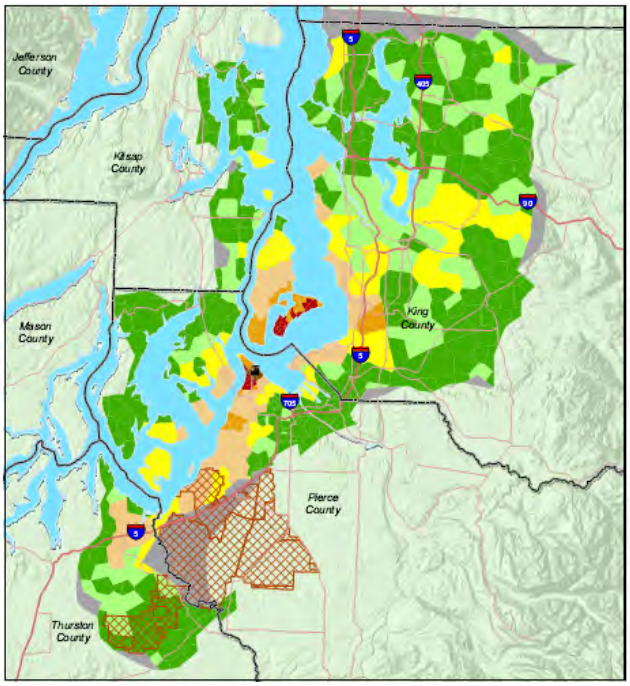
In all, Washington state received $188 million to pay for cleanup activities associated with the history of ASARCO operations throughout the state, including contamination from former smelters in Everett and Tacoma. Of that sum, approximately $98 million went towards cleaning up contamination within the enormous swath of land contaminated with lead and arsenic from the smelters' aerial deposits primarily associated with the Tacoma smelter ("Tacoma Smelter Plume" or "plume").

Despite the settlement, the amount of money directed at ASARCO plume cleanup is nowhere near the amount needed to fully remediate the millions of acres (over 1,000 square miles) where lead and arsenic from the smelter stacks were deposited in various concentrations. In fact, Washington State never intended the settlement to cover all remediation costs within the plume. The State's claim in the ASARCO bankruptcy proceeding was expressly limited to past and future remediation costs of areas deemed to be of "high risk" to children, namely, residential properties, parks, schools, and day care centers. Commercial and industrial areas were excluded from the State's claim. This exclusion allowed large commercial/industrial landowners (such as Burlington Northern Railroad) to proceed with their own claims for past and future remediation costs of properties within the plume. Unfortunately, only a small percentage of eligible commercial/industrial property owners took advantage of this opportunity.

The end result, as some developers throughout Pierce and Thurston Counties are discovering, is that the burden of cleaning up the plume outside the areas of heaviest contamination is falling upon public and private developers whose projects are located within the plume. This article is intended to educate land use and environmental practitioners with clients breaking ground (or hoping to) within the Tacoma Smelter Plume on issues related to legacy ASARCO plume contamination.

Beyond the Superfund Site

The ASARCO smelter site itself is part of the Commencement Bay/Nearshore Tideflats "Superfund" site, along with the most highly contaminated areas immediately adjacent to the smelter. Much of the smelter site itself was purchased by a private developer, who then assumed responsibility for finalizing remediation of the smelter site during redevelopment. However, over decades of smelter operations, the Northwest's near-constant westerly wind carried lead and arsenic from the smelter's 571-foot tall stack from the smelter to far-flung portions of King, Kitsap, Pierce, and Thurston Counties. The metals then deposited on any available surface and, in areas where the land use (or, more accurately, the land *non*-use) allowed deposited metals to remain undisturbed, accumulations of lead and arsenic in the upper soil layers of many areas reached levels exceeding state cleanup levels (20 ppm for As and 250 ppm for Pb).



ASARCO Plume Map. Green areas are areas with low or little ASARCO contamination. Red areas contain high concentrations.

For plume contamination, as opposed to the smelter site itself, the Washington State Department of Ecology ("Ecology") assumed primary authority for oversight and conducted several years of sampling and study to conclusively tie the lead and arsenic contamination back to the Tacoma smelter. In 2004, Ecology named ASARCO as the Potentially Liable Person (PLP) for the contamination, and, as noted, the bankruptcy settlement ultimately carved out almost $100 million for addressing soil contamination within the plume.

In the lack of participation from ASARCO, both before and after settlement, Ecology also moved forward with drafting an Interim Action Plan (IAP) in order to "manage risk and clean up a some areas within" the plume. Interim Action Plan, at 9. The IAP was done under the assumption that, due to the sheer size of the site, Ecology's primary focus should be on risk reduction strategies. *See id.* at 28. This document was finalized in June 2012 and contained many of the recommendations of the Area-Wide Soil Contamination Task Force.[1]

Who Is Liable?

Despite the fact that ASARCO was tagged as the source and the liable party, cleanup laws are not known for copious applications of equity. From early on, questions were raised regarding individual landowner liability under Washington's Model Toxics Control Act (MTCA) for smelter plume cleanup. Given the narrow construction of MTCA's liability defenses, especially with regard to soil contamination, these concerns were well-placed.

As early as 2001, Ecology (albeit informally) announced that it did not intend to require individual homeowners to conduct remediations of their yards; instead, Ecology focused on education as a primary risk management tool. *See Questions & Answers: Tacoma Smelter Plume Year End 2001*, p. 14 (available at: https://fortress.wa.gov/ecy/publications/publications/0109087.pdf). Once settlement funds were available and the IAP adopted, Ecology logically placed residential properties at a high priority for settlement-funded cleanup in areas where arsenic and lead levels are high. *See* IAP, at 49-55. In addition, some commercial properties that placed children at risk of coming in contact with contamination were also prioritized for settlement-funded cleanup within the IAP. *See id.*

With regard to commercial properties, non-individual residential development, and properties not situated within areas of "high" contamination, the question of smelter plume liability, and what Ecology would ultimately require of property owners, remained murky. While an argument certainly exists that the innocent landowner defense under MTCA (and CERCLA)[2] may apply to landowners who—through no fault of their own—had contamination literally rained down upon their land by a distant discharger, the extremely broad definition of "release" in both state and federal cleanup laws makes applicability of the defense problematic for landowners due to the ease with which virtually any on-site activity would impact shallow soil contamination.

On the other hand, the Tacoma Smelter plume certainly paints a unique and sympathetic fact pattern that has yet to be tested in Washington courts. If push eventually comes to shove, and given the right defendant, it is unclear whether Washington's courts would be eager to peg landowners with potentially hefty cleanup costs stemming from aerial deposition of widespread contamination which, in some cases, can include large-scale excavation, removal, and treatment of contaminated soils.

Interim Action Plan "Encourages" – Not Requires – Cleanup

Of course, there is a difference between what the law may allow and what a regulating agency, in the exercise of good judgment, will endeavor to undertake. To those ends, the degree to which otherwise blameless landowners would be burdened for ASARCO contamination cleanup appeared to fall in the "maybe not so hard" camp pursuant to the Interim Action Plan.

The 2012 IAP is divided into Phase 1 and Phase 2 actions. Phase 1 actions were established in the 2012 IAP and focus primarily on residential and other properties located in the areas of highest contamination. Phase 2 actions are merely outlined, but not finalized, in the 2012 IAP, and a second IAP will propose Phase 2 actions in 2014 for implementation in 2015 and beyond. IAP, at 59. In contrast with Phase 1's focus on higher contamination zones, Phase 2 actions will focus on properties likely to have "moderate" contamination (average arsenic from 20-100 ppm). *Id.*

When it comes to re-development and new development, neither the Phase 1 nor Phase 2 actions purport to absolutely require property owners to undertake cleanup actions within the plume. Rather, Phase 1 actions include "encouraging" land owners to do sampling and cleanup during development projects within high or moderate areas of plume contamination. IAP, at 46. The IAP envisions that this encouragement to sample and cleanup will come via the comment process under the State Environmental Policy Act ("SEPA") at the local government level, but in Thurston and Pierce Counties only.

For Phase 2, the IAP similarly does not universally envision requiring property owners to clean up ASARCO contamination during the development process. For residential-focus development within "high" zones of contamination (average arsenic > 100 ppm), Phase 2 anticipates that Ecology will "Encourage (or require) action through planning and permitting offices." *Id.* at 60. However, within the moderate zone, the IAP recognizes that even during Phase 2, "*requiring* action may not be realistic." *Id.* (emphasis added). As such, and similar to Phase 1, at this point the Phase 2 IAP will simply continue to "encourage" cleanup for residential and commercial projects in this area.

The Not-So-Voluntary Voluntary Cleanup Program

Despite the representations regarding "encouragement" set out in the IAP, the reality on the ground has been a different matter. Indeed, many developers within the plume in Pierce and Thurston Counties now find themselves required to

enter Ecology's Voluntary Cleanup Program (VCP) and receive a No Further Action letter as a condition of development.

This surprise comes at the local government permitting level. In 2012, Ecology began submitting comment letters associated with the SEPA process on local government subdivision or grading approvals for projects located within the plume in Pierce and Thurston Counties. The comments expressly state that the project proponent should be required to sample for ASARCO contamination and, if sample results indicate lead or arsenic above MTCA cleanup—*not action*—levels[3] (again, 20 ppm for arsenic and 250 ppm for lead), be required to enter VCP and obtain a No Further Action Letter *prior to* issuance of site development permits and/or the initiation of any grading activities at the site.

Almost universally, the approving local governments adopt Ecology's recommendations verbatim as conditions attached to the SEPA threshold determinations. Once firmly ensconced as a condition within the SEPA threshold determination for a project, the IAP's "encouragement" to test for and remediate ASARCO contamination is instantly transformed into requirement.

Although the goal of cleaning up ASARCO contamination is certainly a laudable one, especially with regard to residential developments that include the potential to expose children to ASARCO contamination, Ecology's strategy within the plume has proven problematic for developers on several levels.

First, and from a legal perspective, the way in which SEPA conditions operate proves an ill fit with the purposes and policies underlying the VCP. The VCP is not like the "Hotel California": it is expressly designed so that you can not only check in any time you like but also leave when you want.[4] After all, it's the *Voluntary* Cleanup Program. MTCA also recognizes the right of parties to conduct independent remedial actions so long as they are willing to assume a greater risk of further remedial actions being required at some point in the future. However, once included as a SEPA condition, the ability to leave VCP is turned into a one-option proposition for impacted developers: when it is a condition of site development permits, the only option for developers to leave VCP is to abandon the project. In other words, for smelter plume projects, the VCP is turned into something more akin to an agreed order scenario, but with only one party doing the agreeing.

The next issue with Ecology's use of the SEPA process is practical. ASARCO smelter plume contamination accumulated mainly on properties that remained undeveloped and/or undisturbed during the periods in which the smelter operated. Most of this land, obviously, falls within outlying areas. These areas, in turn, tend to contain lower levels of plume contamination due to increased distance from the source.

Anecdotal data from developers in such areas within northern Thurston County and southern Pierce County indicate that lead and arsenic levels are almost entirely below cleanup levels, much less action levels, with only some "hot spots" yielding higher (but still low) concentrations of contaminants. Furthermore, and as would be expected, the contamination is also almost entirely contained within the upper-most soil layers, or even just the "duff"[5] overlying the top layer of soil.

Because of the low concentrations in these areas, most of this contamination can be remediated to acceptable levels by mixing top soil layers with deeper, uncontaminated soils at the site. Indeed, the IAP's model remedies for ASARCO contamination expressly include using mixing as a cleanup method, where appropriate. *See* IAP, at 91. So long as appropriately undertaken, the level of mixing necessary to achieve cleanup levels would very likely occur during standard site redevelopment activities, including site clearing and grading. However, because Ecology's SEPA comments, and therefore the ultimate conditions, are written such that cleanup must happen *prior* to any grading activities occurring onsite, this potentially practicable and time-saving measure has largely been precluded.

The Takeaways

Apocalyptic visions of heavy metals raining down on Western Washington aside, what do you need to know about undertaking projects in the plume? Here are a few quick takeaways:

Takeaway 1: Know thy plume. The first step for determining whether you and your client should start worrying about smelter plume impacts is determining whether the property is in the plume to begin with. Although Ecology's sample datasets are somewhat limited, Ecology has put together a searchable map and database that roughly outlines the plume and its various concentration gradients. While on a macro scale, this tool is an important first step in the process of understanding whether the plume will impact you. The website is located at: *https://fortress.wa.gov/ecy/smeltersearch/*. If you do actual testing to confirm, bear in mind that any samples showing contaminants above cleanup levels must be reported to Ecology.

Takeaway 2: Thou shalt plan ahead. Developers do not like surprises. If your client's project is within the plume, the next step is to educate your client on the scenarios that might play out, and the various options available, during the planning process. It should go without saying, but initial cost estimates for potential compliance with SEPA conditions related to plume contamination remediation should be taken into account *up front*. For example, while many commercial properties may simply be paved over at an expense not much greater than usual development costs ("capping" is one of the model remedies), some sites will require excavation and removal (plus treatment) at considerable cost if

sampling and remediation conditions are imposed. Plume requirements have killed deals for the unwary or forced projects back onto shelves.

Takeaway 3: Know thy team. Ecology's smelter plume Model Remedies guidance is, unfortunately, a bit vague and confusing. As a result, even competent consultants have misconstrued various aspects of the guidance resulting in unnecessary costs to developers in the form of both time and money. Making sure your client's technical team is up to speed is also a must. If you have a client with a project in the plume, become familiar with the guidance yourself rather than relying solely on your consultants.

Takeaway 4: Know thy options. Be prepared to work with and appropriately push back on local governments during the SEPA process. Conditions are often written so broadly as to purport to require sampling and remediation in sensitive areas where land disturbance would (for lack of a better description) be nuts. For example, stripping geologically hazardous slopes of vegetation in the name of plume remediation is a bad idea in many, if not all, circumstances. However, some local governments have needed gentle and not-so-gentle prodding to exclude these areas from plume-related SEPA conditions. Be vigilant and ready to call these disconnects to the attention of your permitting jurisdiction.

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1 The Area-Wide Soil Contamination Task Force was convened in 2001 to study area-wide issues (surprise!) related to large-scale arsenic and lead contamination in soil, including the Tacoma Smelter plume.

2 Under MTCA, a property owner is shielded from liability for cleanup where the owner can show that the release of hazardous substances was caused solely by a third party and where both: (1) the owner lacked a direct or indirect contractual relationship with the third-party; and (2) the owner exercised "utmost care" with respect to the hazardous substance(s) and the foreseeable acts or consequences of the third-party's acts or omissions. *See* RCW 70.105D.040(3)(a)(iii).

3 For comparison, action levels for the yard and play area remediation program are 100 ppm for arsenic and 500 ppm for lead in residential yards. EPA's action levels for the Ruston/North Tacoma Study area are 230 ppm for arsenic and 500 ppm for lead.

4 Folks with experience in the VCP will also note a distinct lack of pink champagne on ice.

5 Duff: it's not just a fictional beer or a bass player. "Duff" is the layer of moderately to highly decomposed leaves, needles, and fine material gathered on top of the mineral soil.

To The Supreme Court and Back Again: The Los Angeles County Flood Control District Clean Water Act Municipal Stormwater Permit

By Lynne M. Cohee

***Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 133 S. Ct. 710 (2013), remanded to *Natural Resources Defense Council, Inc. v. City of Los Angeles*, 725 F.3d 1194 (9th Cir. 2013).**

In a 9-0 ruling on January 8, 2013, the United States Supreme Court reversed a Ninth Circuit Court of Appeals decision that had held the Los Angeles County Flood Control District ("Flood Control District" or "District") liable for violation of Clean Water Act water quality standards for stormwater discharges. In a case in which all parties agreed on the answer to the question on which the Supreme Court granted certiorari, the Court held that the flow of water from a concrete channel or improved portion of a river into an unimproved portion of the same river does not qualify as a "discharge of a pollutant" under the Clean Water Act. The Supreme Court refused to reach an alternative issue, raised by the environmental groups and rejected by both lower courts, of whether exceedances of water quality standards detected at downstream "mass emissions" monitoring stations are by themselves sufficient to establish Clean Water Act liability for upstream discharges.[1]

On August 8, 2013, the Ninth Circuit on remand took up and reversed its previous ruling on this alternative issue. The Court of Appeals focused on the language of the specific National Pollutant Discharge Elimination System (NPDES) permit at issue and held that uncontroverted evidence of pollution exceedances at the monitoring stations established the Flood Control District's liability for permit violations as a matter of law.[2]

1. Background

The Flood Control District is a regional governmental entity comprised of 84 cities and some unincorporated areas of Los Angeles County.[3] It operates a "municipal separate storm sewer system" or MS4, a vast publicly-owned collection of storm drains, pipes, outfalls, and other infrastructure that collects urban stormwater runoff from across Los Angeles County and discharges it into the region's rivers, including the Los Angeles and San Gabriel Rivers, and ultimately into the Pacific Ocean.[4] The Los Angeles County MS4 "is a complicated web, with thousands of miles of storm drains, hundreds

of miles of open channels, and hundreds of thousands of connections."[5]

Under the Clean Water Act, MS4 operators that serve a population of 100,000 people or more must obtain an NPDES permit before discharging stormwater into navigable waters.[6] Permits for discharges from an MS4 may be issued on a system or jurisdiction-wide basis when a number of entities operate an interconnected stormwater system.[7] Under such a permit, a co-permittee "is only responsible for permit conditions relating to the discharge for which it is operator."[8]

The Flood Control District's NPDES permit was first issued in 1990 and has been renewed several times.[9] The permit prohibits "discharges from the MS4 that cause or contribute to the violation of water quality standards or water quality objectives."[10] The permit requires that the District, as "Principal Permittee," monitor stormwater runoff flowing past downstream "mass emissions" stations and submit reports identifying possible sources of any exceedances of water quality standards.[11] The stated purpose of the monitoring stations is to (1) estimate the mass emissions from the MS4, (2) assess trends in the emissions over time, and (3) determine if the MS4 is contributing to exceedances of water quality standards.[12]

The mass emissions monitoring stations are located in the Los Angeles and San Gabriel Rivers, in portions of the rivers encased in concrete channels built for flood control.[13] Although the District is the predominant discharger, thousands of other co-permittees also discharge into the rivers at points upstream of the monitoring stations.[14] Data from the emissions stations indicate that water quality standards have repeatedly been exceeded for a number of pollutants.[15]

2. The Litigation

The District Court Rejects the Environmental Groups' CWA Citizen Suit

The Natural Resources Defense Council and Santa Monica Baykeeper filed a Clean Water Act citizen suit against the Flood Control District,[16] alleging that the undisputed exceedances of the NPDES permit's water quality standards at the monitoring stations established a violation of the permit as a matter of law.[17] On cross-motions for summary judgment, the U.S. District Court for the Central District of California rejected the environmental groups' argument and granted summary judgment in favor of the defendants.[18]

The District Court held that "although the mass emissions station data may be the appropriate way to determine whether the MS4 in its entirety is in compliance with the permit or not, that data is not sufficient to enable the court to determine that the District is responsible for 'discharges from the MS4 that cause or contribute to the violation of [water quality] standards,'" because under the permit and applicable regulations, a co-permittee is responsible only for a *discharge* for which it is the operator.[19] Pointing out that numerous entities other than the District discharge into the rivers upstream of the monitoring stations, the court concluded that the environmental groups had presented insufficient evidence to warrant a finding that the standards-exceeding pollutants detected by the monitoring stations had been discharged from the Flood Control District's own upstream outfalls.[20]

The Ninth Circuit Reverses the District Court and Holds the Flood Control District Liable for CWA Permit Violations

On appeal, the Ninth Circuit Court of Appeals reversed the District Court in relevant part and ruled in favor of the environmental groups with regard to whether there was a discharge of pollutants into the Los Angeles and San Gabriel rivers. The Ninth Circuit rejected what it labeled the environmental groups' "*ipso facto*" argument that exceedances of water quality standards alone establish a Clean Water Act violation, agreeing instead with the District Court that "while it may be undisputed that [water quality] exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant."[21]

However, the court went on to hold that the Flood Control District had violated the Clean Water Act because a "discharge" of pollutants from a point source occurred when stormwater containing pollutants flowed "out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways."[22] The court held that because the monitoring stations "are located in concrete portions of the MS4 controlled by the [Flood Control] District, it is beyond dispute that the District is discharging pollutants from the MS4" into the rivers in violation of the permit.[23]

The Supreme Court Reverses the Ninth Circuit and Clarifies the CWA Definition of Discharge

On petition for review by the Flood Control District, the United States Supreme Court granted certiorari solely on the question of whether a "discharge" occurs when polluted water flows out of a concrete channel into a lower portion of the same river.[24] In a five-page decision, a unanimous court reversed the Ninth Circuit, holding that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a discharge of pollutants under the Clean Water Act.[25]

The Court relied on its previous holding in *South Florida Water Management District v. Miccosukee Tribe of Indians* that the transfer of polluted water between "two parts of the same water body" is not a discharge of pollutants.[26] In *Miccosukee,* a Florida water management district pumped polluted water from a canal, through a pump station, and into a nearby reservoir.[27] The Court held that such a water

transfer would count as a discharge of a pollutant only if the canal and reservoir were "meaningfully distinct water bodies."[28]

As the Court explained in *Miccosukee* and reaffirmed in *L.A. County,* the Clean Water Act defines "discharge of pollutant" to mean "any addition of any pollutant," and no pollutants are "added" to a water body when water is merely transferred between different portions of the same water body.[29] In her opinion written on behalf of the Court,[30] Justice Ruth Bader Ginsburg noted that *all* parties to the appeal – including the United States[31] as *amicus curiae* – agreed that water flowing out of a concrete channel within a river does not constitute a "discharge of pollutant," and thus that the answer to the question upon which the Court had granted certiorari was "no."[32]

The environmental groups nevertheless urged the Court to uphold the Ninth Circuit ruling, arguing – as they had unsuccessfully before the District and Ninth Circuit courts – that exceedances of water quality standards detected at instream monitoring stations were in and of themselves sufficient to establish liability for permit violations.[33] Justice Ginsburg declined to consider the environmental groups' argument, noting that it had failed below, and was "not embraced within or even touched by the narrow question" on which the Court granted certiorari.[34]

The Supreme Court Sends the Case Back to the Ninth Circuit

Much of the parties' Supreme Court briefs and virtually all of the questioning at oral argument concerned whether the case, if reversed, should be remanded to the Ninth Circuit.[35] Although all parties agreed that the Ninth Circuit's reasoning was erroneous, the Flood Control District asserted that the Ninth Circuit had made an error of *law,* and thus that its decision should be reversed and judgment entered in favor of the Flood Control District. The United States and the environmental groups, however, took the position that the Court of Appeals more likely misunderstood the *facts*. They asserted that if the Court chose not to uphold the Ninth Circuit decision, it should vacate that decision and remand to the Ninth Circuit, suggesting that if the case were vacated and remanded with a "corrected understanding of the universe of law and facts" the Ninth Circuit might potentially rule in favor of the environmental groups.[36] Without explanation, the Supreme Court reversed and remanded the case to the Ninth Circuit.[37]

On Remand the Ninth Circuit Adopts the Argument it Previously Rejected and Once Again Finds the Flood Control District Liable

The second time around the Ninth Circuit, adopting the very argument that it previously had rejected, agreed with the environmental groups that the mass emissions monitoring data alone established the Flood Control District's liability for NPDES permit violations as a matter of law.[38] The court acknowledged that the environmental groups had returned from the Supreme Court with the same argument that they had "consistently advanced throughout this litigation," that the District and Ninth Circuit courts had previously rejected the argument, and that the Supreme Court had explicitly declined to address it.[39] The court nevertheless held that it was free to reconsider the merits of the environmental groups' argument because no mandate had issued, rejecting the Flood Control District's position that the court's prior decision was final and constituted the law of the case.[40]

The Ninth Circuit then focused on the specific language of "*this particular*" permit.[41] The Court pointed to permit provisions requiring the mass emissions stations monitoring and reporting program, noting that the permit states that one of the primary objectives of the program is to assess compliance with the permit. The court rejected the Flood Control District's assertion that the monitoring program was intended to assess the MS4 collection system as a whole rather than to measure an individual permittee's compliance with the permit.[42]

Although acknowledging that the permit also provides that "[e]ach permittee is responsible only for a discharge for which it is the operator," the court held that the only reasonable reading of the "putatively conflicting provisions" of the permit was that the provision limiting a permittee's responsibility to its own individual discharge "applies to the appropriate *remedy* for Permit violations, not to *liability* for those violations."[43] The court thus concluded that the Flood Control District was *liable* for permit violations as a matter of law, and reversed and remanded to the District Court to determine "the appropriate *remedy*" for the Flood Control District's violations.[44]

The Ninth Circuit's decision is notable for what it does not do. The decisions of the District Court, the Ninth Circuit on its initial review of the case, and the Supreme Court all turned on an analysis of the Clean Water Act's definitions of a "discharge" and "point source."[45] The remand decision, however, contains virtually no discussion of the appropriate definition of a "discharge" or "point source" under the CWA. To the contrary, the Ninth Circuit states that "[t]he question before us is not whether the Clean Water Act mandates any particular result."[46] Nor does the Ninth Circuit refer to the fact that the permit's provision that a co-permittee can be held responsible only for "a discharge for which it is the operator" has its origins in the EPA regulation defining a "co-permittee."[47]

3. The Saga Continues

Shortly before the Supreme Court oral argument a renewed permit was approved for the Flood Control District's MS4 requiring water quality monitor-

ing at individual upstream outfall points.[48] Counsel for the Flood Control District explained at oral argument that the new permit's upstream monitoring will allow the permitting agency to pinpoint the source of water quality-exceeding pollutants.[49] Thus, determining which co-permittees are responsible for discharging pollutants will not be an issue in the future, and on remand the District Court will only address remedies for past permit violations.[50]

As to those past violations, the case may be heading back to the Supreme Court. On September 26, 2013, the Ninth Circuit rejected the Flood Control District's petition for rehearing and/or rehearing en banc.[51] The District recently moved for a 90-day stay of the issuance of the mandate pending the filing of a petition for writ of certiorari.[52]

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1 *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, -- U.S. --, 133 S. Ct. 710 (2013).

2 *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles,* 725 F.3d 1194 (9th Cir. 2013).

3 *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles,* 673 F.3d 880, 884 (9th Cir. 2011).

4 133 S. Ct. at 712.

5 *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles,* No. 08 Civ. 1467 (AHM), 2010 WL 761287, at *2 (C.D.Cal. Mar. 2, 2010), *amended on other grounds,* 2011 WL 666875 (C.D.Cal. Jan. 27, 2011).

6 133 S. Ct. at 712. *See* 33 U.S.C. §§ 1311(a), 1342(p)(2)(C) and (D); 40 CFR §§ 122.26(a)(3), (b)(4), (b)(7).

7 33 U.S.C. § 1342(p)(3)(B)(i).

8 40 C.F.R. § 122.26(b)(1).

9 133 S. Ct. at 712; 673 F.2d at 886. The permit is issued by the California State Water Resources Control Board for the Los Angeles Region. *See* 673 F.2d at 886.

10 673 F.2d at 887.

11 *Id.* at 888-89. Applicants for MS4 permits are required to propose a monitoring program for representative data collection. 40 C.F.R. § 122.26(d)(2)(iii)(D).

12 *Id.* at 888.

13 133 S. Ct. at 712

14 673 F.3d at 889-90.

15 133 S. Ct. at 712.

16 The environmental groups brought suit against both the Flood Control District and Los Angeles County. Only the Flood Control District pursued review before the U.S. Supreme Court.

17 673 F.2d at 890.

18 2010 WL 761287, at *8.

19 *Id.* (emphasis in original); *See* 40 C.F.R. §122.26(b)(1) ("Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.").

20 2010 WL 761237, at *8; 133 S. Ct. at 712.

21 673 F.3d at 898 ("[T]he Clean Water Act does not prohibit "undisputed" exceedances; it prohibits "discharges" that are *not* in compliance with the Act, which means in compliance with the NPDES.").

22 *Id.* at 899-901.

23 *Id.* at 900-01.

24 133 S. Ct. at 712-13.

25 *Id.* at 713.

26 *South Fla. Water Management Dist. v. Miccosukee Tribe,* 541 U.S. 95, 124 S. Ct. 1537 (2004).

27 *Id.* at 100.

28 *Id.* at 112.

29 133 S. Ct. at 713; 541 U.S. at 109-112 (*quoting Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York,* 273 F.3d 481, 492 (C.A. 2 2001) ("[I]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.").

30 All justices joined in Justice Ginsburg's opinion with the exception of Justice Scalia, who concurred in the judgment but did not write a separate opinion.

31 Upon invitation by the Supreme Court, the Solicitor General filed a brief opposing the Flood Control District's petition for a writ of certiorari, on the grounds that the Ninth Circuit's ruling turned on the specific terms of the District's MS4 permit and the evidence of a potential violation of the permit put forth by the environmental groups. Br. for the U.S. as Amicus Curiae. Following the Supreme Court's acceptance of the appeal, the Solicitor General filed an amicus brief "supporting neither party," and was granted leave by the Court to participate in oral argument. *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc*, 132 S. Ct. 1133 (2012); *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc*, 133 S. Ct. 638 (2012).

32 133 S. Ct. at 712-13.

33 *Id.* at 713.

34 *Id.* at 713-14. The Court continued, "We therefore do not address, and indicate no opinion on, the issue the NRDC and Baykeeper seek to substitute for the question we took up for review." *Id.* The environmental groups had opposed the Flood Control District's petition for certiorari, and did not cross petition from the Ninth Circuit's decision rejecting the *ipso facto* argument.

35 The oral argument transcripts are available on the Supreme Court website at *http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-460.pdf*. The parties' Supreme Court briefs on the merits can be found at *http://www.americanbar.org/publications/preview_home/11-460.html*.

36 Justice Ginsburg chose not to resolve this dispute, instead noting that "[w]hatever the source of the Court of Appeals' error, all parties agree that the court's analysis was erroneous." 133 S. Ct. at 713 n.1.

37 133 S. Ct. at 714. The opinion did not contain the words "remanded for further proceedings" but simply stated: "the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded." *Id.*

38 *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles,* 725 F.3d 1194 (9th Cir. 2013).

39 *Id.* at 1202-03.

40 *Id.* at 1203-04.

41 *Id.* at 1204-05 (emphasis in original).

42 *Id.*

43 *Id.* at 1206 (emphasis in original). The Court also referenced language in an amicus brief filed in a related case by the Los Angeles Regional Water Quality Control Board, the entity issuing the permit. *Id.* at 1208. The Court characterized the Regional Board as disagreeing "with any construction of the permit that would require individualized proof of a permittees' [sic] discharges in order to establish liability." *Id.*

44 *Id.* at 1210 (emphasis in original). Permittees in violation of an NPDES permit are subject to mandatory civil penalties and may be subject to attorneys fees and potential injunctive relief. 33 U.S.C. §§ 1319(d), 1365(a); *NRDC v. Southwest Marine, Inc.,* 236 F.3d 985, 1001 (9th Cir. 2000).

45 *See, e.g.,* 2010 WL 761237, at *7-8; 673 F.3d at 898-901; 133 S. Ct. at 712-14.

46 725 F.3d at 1205 n.16. The approach taken by the Ninth Circuit on remand is exactly the same as that taken by the Solicitor General's office in its Supreme Court brief: "On remand, the court of appeals' liability determination will depend on the court's interpretation of the MS4 permit… [the] question is one of permit construction as to which the CWA does not mandate any particular result." Br. for the U.S. as Amicus Curiae Supporting Neither Party at 25-26.

47 *Id.* at 1206. *See* 40 C.F.R. §122.26(b)(1).

48 133 S. Ct. at 714 n.2.

49 *See* the oral argument transcripts at *http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-460.pdf*.

50 Although the Supreme Court considered the permit renewal important enough to make note of it in its opinion, the only mention of the renewed permit in the remand opinion is a one-sentence footnote stating that the Regional Board issued a new NPDES permit on November 8, 2012. 133 S. Ct. at 714 n.2; 725 F.3d at 1198 n.7. The Ninth Circuit decision contains no discussion about the terms of the renewed permit or the fact that it specifically addresses the problem of identifying which upstream entities are discharging polluted stormwater.

51 *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles,* No. 10-56017, Order dated September 27, 2013.

52 *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles,* No. 10-56017, Motion of Defendants-Appellees County of Los Angeles and Los Angeles County Flood Control District for Stay of Issuance of Mandate, dated October 2, 2013.

Significant Recent Land Use Case Law

By Richard L. Settle, Foster Pepper PLLC; Seattle University School of Law

I. United States Supreme Court

Taking Limitation: *Nollan/Dolan* Nexus/Rough Proportionality Standards Apply to Regulatory Exactions of Money and Regulatory Requirements for Expenditures of Money. *Koontz v. St. Johns River Water Management District,* __ U.S. __, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (June 25, 2013).

See article on the *Koontz* case by Roger Wynne in this issue of the Newsletter.

II. Washington Supreme Court Decisions

EFSEC and Wind Energy: State Energy Facility Site Evaluation Council Recommendation of Approval and Governor's Approval of Siting of Wind-Powered Energy Facility Upheld by Supreme Court. *Friends of the Columbia River Gorge v. State Energy Facility Site Evaluation Council,* 178 Wn.2d 320, 310 P.3d 780 (August 29, 2013).

The Whistling Ridge Energy Project, a proposed wind-power energy facility in the Columbia Gorge area of southeastern Washington, was vigorously opposed by two environmental groups. Friends of the Columbia Gorge and Save Our Scenic Area ("Friends") challenged the decision of the State Energy Facility Site Evaluation Council (EFSEC) to recommend that Governor Gregoire approve the proposed facility and the decision by the Governor to grant approval. Thurston County Superior Court certified the case directly to the Supreme Court.

Stressing the broad discretion of EFSEC and the Governor under the Energy Facilities Site Locations Act (EFSLA), chapter 80.50 RCW and implementing regulations, the Supreme Court affirmed EFSEC's recommendation and the Governor's approval, holding that:

- Application for wind-powered energy facility contained sufficient discussion of risk of nighttime avian collisions.
- Application contained sufficient discussion of wildlife mitigation measures.
- Application was not required to establish no net loss of wildlife habitat.
- Application was not required to contain wildlife surveys and assessments.

- Requirement to use available and reasonable mitigation measures did not require use of all possible mitigation measures.
- Facility was consistent with county code.
- County's moratorium on acceptance of State Environmental Policy Act (SEPA) checklists was not a land use regulation and was not relevant to the proposed facility because the county was not the SEPA lead agency.

Other issues regarding the requirements of EFSLA and implementing regulations and related SEPA compliance were previously decided by the Supreme Court in *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council,* 165 Wn.2d 275, 197 P.3d 1153 (2008).

Taking Limitation: Department of Ecology Order Requiring Corrective Action by Rancher to Prevent Pollution of Creek by Cattle Did Not Effect a Taking without Compensation. *Lemire v. Department of Ecology,* 178 Wn.2d 227, 309 P.3d 395 (August 11, 2013).

Joseph Lemire runs a small cattle operation in Columbia County. Pataha Creek runs through his grazing land. The creek is on a state list of polluted water bodies. In 2003, the Department of Ecology ("Ecology") and the Columbia Conservation District performed a watershed evaluation that identified Lemire's ranch as having conditions detrimental to water quality. On the basis of a number of visits to the ranch between 2003 and 2008, Ecology documented a number of conditions that could contribute to pollution in the creek. After attempting to work with Lemire for several years to implement management practices to curb pollution of the creek with little success, Ecology issued an administrative order prescribing a number of corrective actions including livestock fencing and off-stream water facilities.

Lemire appealed Ecology's order to the Pollution Control Hearings Board ("Board"). The Board upheld the order. Lemire then obtained judicial review in Columbia County Superior Court, claiming that the order violated the Water Pollution Control Act and effected a taking without compensation. The trial court reversed the Board, ruling that Ecology's order was unsubstantiated by the record and effected a taking without compensation. Ecology appealed, and Division Three of the Court of Appeals certified the case to the Supreme Court. This account of the court's decision addresses only the taking claim.

Lemire claimed that Ecology's order effected a taking by prescribing fencing along the riparian corridor that would prevent his cattle from crossing the creek to graze his land on the other side and from drinking water from the creek, in violation of his stock water rights. The parties and amici extensively briefed relevant taking doctrine, and some observers expected the court to use this case to reduce confusion about the relationship between taking doctrine under the Fifth Amendment of the federal constitution and under Article 1, section 16 of the state constitution. However, the court declined the invitation to comprehensively address state and federal taking doctrine, holding that the factual predicate for the taking claim was not supported by the evidence.

Lemire's taking claim was based on the premise, which Lemire characterized as "undisputed," that Ecology's order precluded his cattle from crossing the creek to graze on his land on the other side. However, Ecology had disputed this characterization of the order in the trial court arguing that the order allowed for cattle crossing the creek and limited drinking of water from the creek. Lemire's claim also was based on deprivation of his stock water rights. But the trial court found nothing in the record regarding stock water rights. So the court held there was no evidentiary foundation for a taking of such rights. Thus, the court concluded that "on this record, we cannot agree that a per se taking was established."

III. Washington Court of Appeals

SEPA: Memorandum of Understanding Between City of Seattle and King County Specifying the Terms of Their Potential Participation in a Proposed New Sports Arena Was Not An "Action" under SEPA Because the Decision Whether to Proceed with Their Participation in the Development of the Arena Was Expressly Reserved Until After Completion of an Environmental Impact Statement. *International Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 309 P.3d 654 (September 9, 2013).

Private investor Chris Hansen, through ArenaCo, proposed that the City of Seattle ("City") and King County ("County") participate in the development and ownership of a new sports arena south of downtown Seattle near the existing football and baseball stadiums. After extensive negotiations, the City and County signed a Memorandum of Understanding (MOU) specifying City and County participation in the financing and operation of the proposed facility. However, their commitments were expressly contingent on a future decision to proceed with their participation in the project after the completion of an environmental impact statement (EIS) under SEPA.

Timing of SEPA Review

The International Longshore and Warehouse Union, Local 19 (ILWU) sued the City, County, and ArenaCo, seeking invalidation of the MOU because it was signed before preparation of an EIS analyzing the comparative adverse environmental impacts of the proposed arena and alternatives to the proposal. The ILWU represents 3,000 members who work at

the Port of Seattle loading and unloading container cargo and servicing cruise ships. The union opposes an arena in the proposed location because of concerns that its construction and operation would disrupt and drive away maritime business and employment from the area.

The union contended that the MOU was an "action" under SEPA that was barred before completion of the EIS and claimed that the extensive time and effort devoted to the negotiation of the MOU would create irreversible political momentum in favor of an arena at the proposed location. The EIS process would be "a sham," the union argued, with no realistic chance of being seriously heeded.

While the lawsuit proceeded, the Board of Governors of the National Basketball Association denied permission for the Sacramento Kings to be sold to Hansen's group and relocated to Seattle. Nevertheless, no party argued that the union's SEPA claim was moot. The MOU will be in effect for five years.

MOU Between City and County Was Not a SEPA "Action"

Division One of the Court of Appeals upheld summary judgment against ILWU and dismissal of the lawsuit. The court reasoned that the MOU was neither a "project action" nor a "nonproject action" under SEPA. Because the MOU was not an "action" it was not barred prior to completion of the EIS. Moreover, because judicial review of SEPA noncompliance claims must "without exception be of the governmental action together with its accompanying environmental determinations," RCW 43.21C.075(6)(c), the claim that the MOU violated SEPA was not justiciable.

SEPA: MDNS for State Parks & Recreation Commission Classification of 279 Acres in Mount Spokane State Park for "Recreation" Use Allowing Development of One Lift and Seven Ski Runs Was Clearly Erroneous; Standing. *Lands Council v. Washington State Parks & Recreation Commission,* ___Wn. App.___, 309 P.3d 734 (September 17, 2013).

The State Parks & Recreation Commission ("Commission") issued a SEPA MDNS for its classification of 279 acres of an 850-acre "potential ski expansion area" in Mount Spokane State Park as "recreation," allowing development of one lift and seven ski runs. The classification was conceptual in nature and subject to modification of specific locations of proposed alpine skiing facilities. The MDNS included a commitment to future EIS preparation when specific projects were proposed.

Standing

The court held that the Lands Council had standing to challenge the Commission's SEPA compliance. The Commission argued that the Lands Council could not satisfy the injury in fact element of standing because no specific location and development of potential future alpine ski facilities had been proposed or approved and, therefore, the requirement of an immediate, concrete, and specific injury had not been met. The court disagreed, reasoning that the Commission's classification decision allowed the development of an alpine ski lift and runs in a previously undisturbed area that was used and valued by the Lands Council. Even though the precise location and specifications of the facilities had not been determined, their inevitability as a result of the classification decision was enough to cause specific, immediate injury in fact to the Lands Council.

The court alternatively reasoned that standing requirements are relaxed for injuries in fact that are procedural in nature, such as injury to the Lands Council's interest in the development and dissemination of information on the environmental impacts of the classification decision through SEPA review. Under this relaxed standard, where there is a "reasonable probability" that deprivation of a procedural right will threaten a concrete interest, standing is satisfied.

SEPA MDNS

On the merits of the Lands Council's SEPA claims, the court held that the MDNS was clearly erroneous. By issuing an MDNS that contained the commitment to EIS preparation before Commission approval of the precise location of specific development of alpine ski facilities, the Commission implicitly acknowledged that the development of such facilities on the 279 acres classified for "recreation" allowing the development of a ski lift and seven ski runs would have significant adverse environmental impacts requiring an EIS. Thus, the court held that issuing an MDNS on the classification proposal and deferring EIS preparation until subsequent specific proposals were made violated SEPA because the classification would generate momentum that would be difficult to stop when an EIS was subsequently prepared.

GMA and SEPA: Growth Management Hearings Board Had Jurisdiction Over GMA compliance, as well as SEPA Compliance of Site-Specific Rezones Expanding a LAMIRD and Implementing Concurrent Comprehensive Plan Amendments; Board's Determination of Noncompliance with GMA Requirements Was Not Erroneous Under Applicable Standards of Review; Challenge of Board's Determination of SEPA Noncompliance Was Abandoned Because Not Substantiated by Argument. *Kittitas County v. Eastern Washington Growth Management Hearings Board,* 176 Wn. App. 38, 308 P.3d 745 (August 13, 2013), *order amending opinion* filed September 5, 2013.

Ellison proposed two amendments to the Kittitas County comprehensive plan map and zoning map to allow the development of the Thorp Travel Center on a 29-acre site in a rural and agricultural

area on Interstate 90. The proposed development would include a 4,000 square foot fuel station, a 10,000 square foot retail store, a 5,000 square foot retail store, a 6,000 square foot restaurant, a 24,000 square foot hotel with 50 units, a 5,000 square foot recreational vehicle park with 45 spaces, and parking lots with spaces for hundreds of cars and trucks. These businesses would operate 24 hours a day, employ up to 140 people, and generate $10.9 million in revenues annually.

One of the two sets of concurrent comprehensive plan and site-specific zoning map amendments (i.e., rezones) would expand an existing local area of more intense rural development (LAMIRD) from 12 to 30.5 acres. The other set of amendments would change the comprehensive plan designation of the site from Rural to Commercial and the zoning classification from Agriculture 20 to Commercial Highway.

Growth Board v. Superior Court (LUPA) Jurisdiction Over Site-Specific Rezones

Futurewise appealed the two sets of amendments along with SEPA compliance for the amendments to the Eastern Washington Growth Management Hearings Board ("Growth Board"). The Growth Board ruled that it had jurisdiction over all of the amendments, rejecting the argument by Ellison and the County that the Board lacked jurisdiction over the site-specific rezones.

Division Three of the Court of Appeals held that the Board had jurisdiction over the rezones, articulating a fine distinction between rezones that are authorized by an existing comprehensive plan and rezones that are adopted concurrently with a comprehensive plan amendment and that depend on the concurrent comprehensive plan amendment for their validity. Because in this case the rezones would not have been authorized by pre-existing comprehensive plan provisions and were valid only because of the concurrent comprehensive plan amendments, they were not authorized by an *existing* comprehensive plan and, thus, were subject to Growth Board jurisdiction. The court acknowledged that rezones authorized by an *existing* comprehensive plan are project permit approvals and are not subject to Growth Board jurisdiction but are appealable exclusively to superior court under LUPA.

Comment: This fine distinction that the court regarded as dictated by relevant statutory provisions seems to be a trap for the unwary. By simply adopting the corresponding comprehensive plan amendment *before* the rezone, the comprehensive plan authorization would be in place at the time of the rezone, and the rezone would be a project permit approval reviewable only through a LUPA action in superior court.

GMA Noncompliance of LAMIRD Expansion

A Kittitas County Comprehensive Plan provision seemed to authorize LAMIRDs for the purposes the amendments were designed to serve: "Type 3 LAMIRDs … 'Rural Employment Center[s]—Intensification of development on lots containing isolated nonresidential uses or new development of isolated small-scale businesses that are not principally designed to serve the rural area, but do provide job opportunities for rural residents.'" *Kittitas County*, 308 P.3d at 753 (citing KITTITAS COUNTY COMPREHENSIVE PLAN 8.5.8).

However, the Growth Board ruling that the two sets of amendments were noncompliant with GMA requirements was upheld. The court, after analyzing GMA's requirements for LAMIRD designation along with the County LAMIRD provisions and other relevant comprehensive plan provisions, concluded that the Board was within its authority and did not err under applicable standards of review in ruling that the amendments violated GMA requirements that LAMIRDs be "isolated," "small in scale relative to surrounding uses," and consistent with relevant comprehensive plan provisions.

SEPA Noncompliance

The Growth Board's determination of SEPA noncompliance also was upheld. The court held that assignments of error were abandoned because they were not substantiated by argument and that related findings of fact were verities on appeal because they were unchallenged.

GMA and SEPA: Growth Board, Not Superior Court Through a LUPA Action, Had Jurisdiction over Site-Specific Rezone Implementing a Concurrent Comprehensive Plan Amendment; Board's Determination that Site-Specific Rezone Was Noncompliant with GMA and SEPA Requirements Was Not Erroneous Under Applicable Standards of Review; Nor Was Board's Invalidity Determination Erroneous; Attorney Fees Under RCW 4.84.340-.360 and .370 Are Not Recoverable for Actions Before the Hearings Boards. *Spokane County v. Eastern Washington Growth Management Hearings Board,* 176 Wn. App. 555, 309 P.3d 673 (September 10, 2013).

This is a sequel to *Spokane County v. Eastern Washington Growth Management Hearings Board,* 160 Wn. App. 274, 250 P.3d 1050, *review denied*, 171 Wn.2d 1034 (2011) (*Spokane County I)*, involving a concurrent comprehensive plan amendment and rezone to allow expansion of a nonconforming market and restaurant on a 4.2-acre site in a rural area apparently characterized by nonconforming commercial uses. Neighbors challenged the amendments.

Growth Board v. Superior Court (LUPA) Jurisdiction Over Site-Specific Rezones

The principal issue in this case and the *Kittitas County* case, above, is the same. Division Three of the Court of Appeals held that the issue was governed by the law of the case doctrine on the basis of the earlier *Spokane County I*. However, the court nevertheless addressed the issue for explanatory purposes, again rejecting the argument that a site-specific rezone implementing a concurrent comprehensive plan amendment is not reviewable by the Growth Board but only by superior court through a LUPA action. Please see the discussion of this issue in the account of the *Kittitas County* case, above, that will not be repeated here.

GMA and SEPA Noncompliance

On the merits, as in *Kittitas,* the Growth Board decided that the challenged site-specific comprehensive plan amendment and rezone were noncompliant with GMA, because the County's amendments, in effect, created a LAMIRD without complying with GMA requirements for LAMIRD designation, and SEPA, because the environmental checklist did not identify long-term impacts of the amendments. The Board issued a determination of invalidity.

The court upheld the Board's determination of noncompliance with GMA requirements for LAMIRDs, under applicable standards of review, and the Board's ruling that the SEPA environmental checklist was noncompliant, stressing the excessive generality of the County's checklist that lumped together the annual comprehensive plan amendment proposals and failed to address the impacts of the separate amendments with any specificity.

Invalidity Determination

The Board's invalidity determination precluding prospective vesting under the amendments was also upheld.

Attorney Fees

Requests for attorney fees under RCW 4.84.340-.360 and .370 were denied because those statutory provisions do not authorize awards of attorney fees for appeals to state hearings boards.

LUPA: Spokane County Conditional Use Permit for a Private Airstrip Remanded for Insufficient Notice; Property Owners Sufficiently Named; Summons Not Required for LUPA Petition; Cost Bill and Attorney Fees Denied. *Prosser Hill Coalition v. County of Spokane*, 176 Wn. App. 280, 309 P.3d 1202 (Aug. 22, 2013).

Silverbird, LLC and several individuals ("Silverbird") sought a conditional use permit (CUP) for a private airstrip with a 2,500-foot long and 250-foot wide runway area. Silverbird proposed the development of "high-end houses" adjacent to the airstrip and the permanent "occupancy" of the site by 15 aircraft. The site and neighboring lands were designated "rural traditional" in the Spokane County Comprehensive Plan. After a hearing, the CUP was approved by the Spokane County Hearing Examiner.

The Prosser Hill Coalition ("Coalition"), representing neighbors concerned about noise, safety risks and reduction in their property values, opposed the CUP before the Examiner and brought a LUPA action challenging the CUP. The superior court remanded the CUP to the County because of insufficient notice; the County and Silverbird appealed. Because notice was not given in strict compliance with County Code requirements, Division Three of the Court of Appeals upheld the lower court's remand of the CUP for proper notice and rehearing.

Notice

The Code required a CUP applicant to post a notice of hearing sign "on the site along the most heavily traveled street lying adjacent to the site." Apparently strict compliance would have been impossible because there were no streets running along the site from which a notice posted on the site could be seen. The two public roads nearest to the site of the proposed airstrip are Cheney-Spokane and Jensen. The site is closest to Cheney-Spokane Road which is paved and a major thoroughfare. However, the required sign was posted not on the site or on Cheney-Spokane Road but on Jensen Road, a dirt road that leads to a private road that serves the site. The sign also erroneously stated that the site was "north and west of Jensen Road" while the site actually is north and west of Cheney-Spokane Road. The Code also required notice to property owners within 400 feet by mail and to the public by newspaper publication, the satisfaction of which was uncontested.

The Examiner denied the Coalition's request for a continuance to correct the notice deficiencies, ruling that nothing indicated that interested property owners or members of the public were confused or did not receive actual notice of the proposal and hearing. The court disagreed, affirming the remand for insufficient notice, reasoning that strict compliance with the Code's notice requirements was required and the deficiencies were not harmless errors because some unknown interested people may not have received notice. The court noted the difficulty of providing "proof of a negative."

Property Owners Not Named in Caption of LUPA Petition

The court also addressed and rejected several defenses to the LUPA action raised by. Silverbird. All of the property owners of the site were not identified in the caption of the original LUPA petition, while they were named in the body of the petition. The trial court granted the Coalition's motion to accurately amend the caption and denied Silverbird's

motion to dismiss the petition because all property owners were not listed in the caption and the amendment of the petition occurred after the 21-day limitation period. The court affirmed, holding that allowing the amendment was not an abuse of discretion, the amendment related back to the date of filing and service of the original petition under CR 15(c), and omission of property owners from the caption was not fatal where they were named in the body of the petition.

Summons Not Required by LUPA

Silverbird's motion for dismissal also was based on the lack of a summons accompanying the petition. The Court affirmed the trial court's denial of dismissal because LUPA requires only delivery of the petition, and not a summons, to satisfy service requirements.

Costs and Attorney Fees

The trial court's denial of the Coalition's request for award of costs was affirmed because the Coalition was not a substantially prevailing party where the relief obtained was remand to correct procedural notice deficiencies. The court also denied requests for attorney fees by the Coalition and Silverbird because the requests were made only in their reply briefs and under RAP 18.1(b), a party requesting attorney fees must "devote a section of its opening brief to the request."

LUPA: 21-Day Limitation Period for Filing and Serving LUPA Petition Commenced on the Day an Oral Decision Was Made by the City Council and Entered into the Record by Posting Video Recording on City's Website the Same Day and/or Delivery of DVD Copy of the Video to Tacoma Public Library and Posting Closed-Caption Transcript on City's Website the Next Day.
***Northshore Investors, LLC v. City of Tacoma,* 174 Wn. App. 678, 301 P.3d 1049 (2013).**

1981 Planned Residential District Approval

In 1981, the City of Tacoma ("City") granted a rezone to planned residential district (PRD) and plat approval for a residential development, "Northshore Country Club Estates," on a 338-acre site, 116 acres of which was the Northshore Golf Course. The area of the residential development was separately owned from the golf course. The developer of the proposed residential estates and owner of the golf course had entered into an agreement allowing the developer to include the golf course as open space in the PRD thereby allowing greater density in the residential development. The rezone to PRD and plat approval were subject to the condition of a binding legal commitment enforceable by the City that the golf course use be maintained in perpetuity.

2007 Proposal to Modify PRD

In 2007, applications were submitted by Northshore Investors for a rezone modification, preliminary plat, and site plan approval to redevelop the golf course property as "the Point at Northshore" with 860 new residential units. The proposal would have changed the 1981 PRD condition committing the golf course to open space use in perpetuity to allow the redevelopment of the golf course. The applications were vigorously opposed by Save NE Tacoma (SNET), which represented residents of the PRD.

In 2010, the City Hearing Examiner recommended that the City Council deny the rezone modification and the other applications for permits and approvals that depended on the rezone modification. Northshore Investors administratively appealed the Hearing Examiner's recommendation to the City Council and filed a LUPA action in superior court. Because exhaustion of the administrative appeal was a prerequisite to judicial review through the LUPA action, the parties stipulated that Northshore Investors could file amended LUPA petitions addressing the Council's decision within 21 days of the Council issuing its final decision. The stipulation noted "[i]f the City Council issue[d] a decision on April 13, 2010, the related appeal deadline would be on or about May 4, 2010."

City Council's Decision on Proposed PRD Modification

On April 13, the Council heard the appeal on the controversial proposal. The hearing was broadcast live on television and streamed live on the City's official website. At the hearing, a motion to concur in the Examiner's recommendation was passed by the City Council, rejecting the rezone modification. Later on the day of the hearing and Council decision, a video recording of the hearing was posted on the City's website. The following day, April 14, a DVD copy of the video was delivered to the Tacoma Public Library, and the voting record and a closed-caption transcript of the hearing were made available on the City's website.

On April 15, the City Clerk mailed a "Notice of Appeal Results" to the parties.

On May 3, 20 days after the Council's April 13 hearing and decision, Northshore Investors filed, but did not serve, an amended LUPA petition, incorporating its appeal of the Council's decision denying the rezone modification.

On May 6, 23 days after the Council heard the appeal, the amended LUPA petition was served on the City and SNET.

Filing of Amended LUPA Petition

A motion to dismiss the LUPA petition for failure to serve within 21 days of the City's land use decision denying the rezone modification was denied by the superior court and appealed to Division Two of the Court of Appeals. The City and SNET argued

that the City's decision was made and the 21-day limitation period began to run on April 13, the day of the Council's voice vote on the motion to concur with the Examiner's recommendation. Northshore Investors argued that the City's decision was not issued, under LUPA, until three days after the written "notice of appeal results" was mailed on April 15. The court agreed with the City and SNET, holding that the amended LUPA action should have been dismissed because no written decision was required and the limitation period began to run when the Council's oral decision was "issued" by entering it into the public record through the website postings on April 13 and 14. On the basis of either of these two dates, service of the petition on May 6 was untimely. The court extensively discussed the LUPA provisions governing when a land use decision is "issued" in relation to the facts of this case. The court also concluded that Northshore Investors had ample notice that the "land use decision was scheduled for and was in fact made at the April 13 hearing."

The court dismissed the original LUPA actions, as well, because no effective relief could be granted in those actions given the court's disposition of the amended LUPA petition.

Attorney Fees

The court also denied the City's request for attorney fees under RCW 4.84.370 because the trial court decided for the City on the merits while the Court of Appeals did not reach the merits, upholding the superior court decision solely on the procedural ground of untimeliness. In so holding, Division Two reaffirmed its position, in conflict with Division One of the Court of Appeals, that to qualify as the "prevailing party" the City's land use decision must be upheld on the merits in the superior court and on appeal.

Richard L. Settle, Professor of Law at the 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 serves as a member of the Department of Ecology SEPA Rule-Making Advisory Committee established by the 2012 Legislature in 2ESSB 6406.

Federal Environmental Law Update

By Chris D. Zentz, Tyson C. Kade and Matthew A. Love, Van Ness Feldman, LLP

I. National Environmental Policy Act ("NEPA")

***Montana Wilderness Ass'n v. Connell*, 725 F.3d 988 (9th Cir. 2013).**

In *Montana Wilderness Association v. Connell*, the Court of Appeals for the Ninth Circuit held that the Bureau of Land Management ("BLM") complied with NEPA when issuing a Final Environmental Impact Statement ("FEIS") for the Upper Missouri River Breaks National Monument (the "Monument"). Among other things, the appellants alleged that BLM violated NEPA by failing to take a hard look at cumulative effects by neglecting to analyze how a number of activities occurring within the Monument would cumulatively impact certain species and habitat contained in the Monument. Additionally, the appellants argued that BLM failed to consider a reasonable range of alternatives because BLM did not consider a "middle ground" alternative to the activities proposed within the Monument.

For major federal actions significantly affecting the quality of the human environment, the agency is required to prepare an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C). "An EIS is a thorough analysis of the potential environmental impacts that provide[s] full and fair discussion of significant environmental impacts and … inform[s] decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse

impacts or enhance the quality of the human environment." *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004) (quoting 40 C.F.R. § 1502.1). An EIS also must consider "cumulative impacts," which are "[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." 40 C.F.R. § 1508.7. An EIS "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. To this end, an EIS shall "[r]igorously explore and objectively evaluate all reasonable alternatives," so as to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. Additionally, "[the] existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004).

The appellants argued that BLM failed to consider the cumulative impacts of various activities taking place within the Monument, including airstrips, roads, oil and gas development, and livestock grazing. In rejecting the appellants' arguments, the Ninth Circuit noted that "[a]t the most basic level, [appellant] faults the FEIS because it does not include sections devoted exclusively to cumulative impacts … ." *Mont. Wilderness Ass'n*, 725 F.3d at 1002. The court stated that "[a]n agency … has discretion in deciding how to organize and present information in an EIS." *Id*. After noting the FEIS's extensive discussion of the impacts of various activities on species and habitat found in the Monument, the court concluded that "notwithstanding the absence of a cumulative impact section … the FEIS certainly considers the effects of roads, airstrips, planes, … camping and development on opportunities for … the primitive recreational experience." *Id*. at 1003-04. Similarly, the Ninth Circuit rejected the appellants' range of alternatives argument and held that, "Although [the appellants] fault[] BLM for failing to consider an additional mid-range alternative, [they] [do] not explain why another alternative was necessary to foster informed decisionmaking and public participation." *Id*. at 1005.

***W. Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013).**

The Court of Appeals for the Ninth Circuit, in *Western Watersheds Project v. Abbey*, held that BLM's environmental assessment ("EA"), which was prepared for the permit renewal of a grazing allotment contained within the Upper Missouri River Breaks National Monument (the "Monument"), violated NEPA because it failed to adequately analyze alternatives that involved reducing or eliminating grazing in the allotted area. Environmental groups, which were concerned about negative impacts of grazing on habitat within the Monument, argued that the EA violated NEPA because it failed to consider a reasonable range of alternatives. Similarly, the environmental groups argued that the EIS for the Monument failed to consider programmatic changes to grazing management within the Monument area.

An agency may prepare an EA to determine whether an EIS is needed. 40 C.F.R. § 1501.4(b). If the EA shows that the agency action may significantly affect the environment, then the agency must prepare an EIS. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001). If an agency concludes in its EA that the proposed action will not have a significant environmental impact, then it may issue a finding of no significant impact ("FONSI") and proceed without further study. *Te–Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 599 (9th Cir. 2010). NEPA's requirement that agencies "study, develop, and describe appropriate alternatives … applies whether an agency is preparing an [EIS] or an [EA]." *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (per curiam) (citations omitted). Although an agency must still "give full and meaningful consideration to all reasonable alternatives" in an EA, the agency's obligation to discuss alternatives is less than in an EIS. *Id*. However, the existence of a viable but unexamined alternative renders an [EA] inadequate. *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d. 853, 868 (9th Cir. 2004) (citations omitted).

The Ninth Circuit agreed with the appellants that BLM failed to analyze no-grazing and reduced-grazing alternatives before issuing a FONSI and declining to prepare an EIS. The court found BLM's argument that the grazing impacts were fully considered in a programmatic EIS for the entire Monument area unpersuasive. Specifically, the court held that "[t]he analysis in the … EIS was sufficient for the proposed programmatic action, but the proposed permit renewal at the site-specific level demands more. Where modification of grazing practices is not considered at a programmatic level for the full Monument area, it is all the more important that agency actions on site-specific areas give a hard and careful look at grazing impacts on Monument objects." *W. Watersheds Project*, 719 F.3d at 1051. As a result, the court reasoned that "[w]e do question how an agency can make an informed decision on a project's environmental impacts when each alternative considered would authorize the same underlying action—permitting grazing at the [same] level… . There is no meaningful difference between the four alternatives considered in detail as to how much grazing they allow." *Id*. In conclusion, the court held, "the EA process … was

deficient in its consideration of alternatives insofar as it did not consider in detail any alternative that would have reduced grazing levels … in light of the Monument's protected objects." *Id*. at 1053.

II. Endangered Species Act ("ESA")

***Conservation Congress v. U.S. Forest Serv*., 720 F.3d 1048 (9th Cir. 2013).**

In *Conservation Congress v. U.S. Forest Service*, the Court of Appeals for the Ninth Circuit upheld an order denying the appellant's requested preliminary injunction to enjoin a U.S. Forest Service timber sale. The appellant argued that: (1) the Forest Service's biological assessment ("BA") failed to evaluate adequately the potential cumulative effects of the timber sale on northern spotted owl's critical habitat; and (2) the U.S. Fish and Wildlife Service ("USFWS") issued an arbitrary concurrence letter accepting the BA's conclusion.

ESA section 7(a)(2) imposes both substantive and procedural duties on certain federal agencies. *Forest Guardians v. Johanns*, 450 F.3d 455, 457 (9th Cir. 2006). Section 7(a)(2) requires federal agencies, such as the Forest Service, to "insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). Before initiating any action in an area that contains threatened or endangered species, federal agencies must consult with the USFWS (for land-based species) or the National Marine Fisheries Service ("NMFS") (for marine species) to determine the likely effects of any proposed action on species and their critical habitat. *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998). The agency proposing the action (action agency) must independently determine whether the action "may affect" a listed species or its habitat under the ESA. 50 C.F.R. § 402.14(a). If yes, "formal consultation" with the appropriate consulting agency is generally mandatory. 50 C.F.R. §§ 402.14(a)–(c). An action agency may bypass formal consultation if it determines, and the consulting agency agrees, that the proposed action "is not likely to adversely affect any listed species or critical habitat." 50 C.F.R. § 402.14(b)(1). If, however, after this "informal consultation," the consulting agency disagrees that the proposed action is not likely to have adverse effects, then formal consultation is required. *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 693 (9th Cir. 2010); 50 C.F.R. § 402.14. In formal consultation, the consulting agency must prepare a biological opinion that advises the action agency as to whether the proposed action, alone or "taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4).

In analyzing appellant's claims, the Ninth Circuit first considered whether the Forest Service's BA properly evaluated the potential effects of the timber sale on the owl's critical habitat. In rejecting appellant's arguments regarding the analysis of cumulative effects, the court stated that "[i]n essence, [Appellant] demands that Defendants conduct a more extensive, NEPA-like cumulative impacts analysis. But NEPA and ESA call for different regulatory review, and we must defer to the procedural mechanisms established by the implementing agency." *Conservation Congress*, 720 F.3d at 1055. Additionally, the court stated that "[appellant's] argument also fails because there is simply no statutory mandate to consider cumulative effects during informal consultation." *Id*. In rejecting appellant's second claim, the court concluded that appellant's argument was based upon a "selected portion of the record taken out of context." *Id*. at 1058. The court noted that the USFWS did not act arbitrarily or capriciously in issuing the concurrence letter because, based on varying scientific data and publications, there was little evidence "that a thinning of 22 acres, out of a total of 408 acres of the owl's degraded foraging habitat, to a basal area of 100–125 square feet per acre would necessarily mean that the owl's total foraging habitat would be 'adversely' modified—which, in the regulatory context, means appreciably diminished." *Id*. at 1057.

***State of Alaska v. Lubchenco*, 723 F.3d 1043 (9th Cir. 2013).**

In *State of Alaska v. Lubchenco*, the Court of Appeals for the Ninth Circuit held that NMFS did not violate the ESA when it established fishing restrictions for areas in Alaska based upon a declining population of the western distinct population segment ("wDPS") of the ESA-listed Steller sea lion. A 2008 Recovery Plan for the wDPS of Steller sea lions divided the wDPS into seven sub-regions to monitor the species' overall recovery progress. The appellants challenged NMFS's fishing restrictions, alleging that they were improperly based on declines in sub-regions of the sea lion population rather than in the entire population of the listed species.

The ESA requires the Secretaries of Interior and Commerce to list endangered species and designate their critical habitats. 16 U.S.C. § 1533(c). Section 4(f) of the ESA requires the Secretary of Commerce to design and carry out "recovery plans" and to implement programs to conserve the species under Section 7(a)(1). *Id*. at §§ 1533(f), 1536(a)(1). Section 7(a)(2) of the ESA mandates that federal agencies ensure that actions they take will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). Under the ESA, when a governmental entity plans to take action that may impact an endangered species, it must consult with the agency that has authority over

the species. The consulted agency must then prepare a Biological Opinion ("BiOp") to determine whether the planned action will either likely jeopardize the species' continued existence or adversely modify its critical habitat. *See id.*; *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008). If either of those criteria is met, the agency may suggest a reasonable and prudent alternative ("RPA"), which is designed to avoid jeopardy or adverse habitat modification. 16 U.S.C. § 1536(b)(3)(A); *Nat'l Wildlife Fed'n*, 524 F.3d at 925.

In a 2010 BiOp, NMFS included an RPA that recommended closure of all mackerel and cod fishing in one part of the region and reducing the catch allowed in others due to the likelihood that continued fishing in areas of the critical habitat of the wDPS of Steller sea lions would be "likely to adversely modify" this critical habitat and jeopardize the continued existence of the wDPS of the Steller sea lion. *State of Alaska*, 723 F.3d at 1051. The appellants argued that NMFS should not have considered sub-regional declines of the wDPS of Steller sea lions and, instead, the agency should have considered the species as a whole when determining whether the population decline in two sub-regions was significant. *Id.* at 1052-53. In upholding the BiOp, the Ninth Circuit stated that "[w]e have consistently held that the ESA permits agencies to consider the impact of actions on sub-populations, as long as such impact would affect the population as a whole." *Id.* at 1052. Therefore, the court concluded that "[t]he analysis of sub-regions in the BiOp yielded significant information that, in light of the Recovery Plan's concerns, led to the conclusion that sub-regional declines indicated that the entire species was in jeopardy." *Id.* at 1053. Additionally, the court recognized that NMFS properly considered species recovery when restricting fishing in portions of the wDPS of Steller sea lions' critical habitat. Specifically, the court noted that, "Relying on the Recovery Plan, the agency concluded that the fishery reauthorizations would appreciably diminish the wDPS's chances of recovery as the fishery could fully extirpate the species in at least one subregion." *Id.* at 1054.

III. Clean Water Act ("CWA")

***Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C. Cir. 2013).**

In *Mingo Logan Coal Co. v. EPA*, the Court of Appeals for the D.C. Circuit concluded that EPA has the authority to withdraw its approval of a disposal site for dredged or filled material four years after issuing a CWA section 404 permit for discharge to the disposal site. Mingo Logan challenged EPA's withdrawal on the grounds that: (1) EPA lacked statutory authority to withdraw the discharge site specification after a permit had been issued; and (2) EPA's decision to withdraw the permit was arbitrary and capricious under the Administrative Procedures Act ("APA").

The CWA provides that "the discharge of any pollutant by any person shall be unlawful" except as in compliance with specifically enumerated CWA provisions, including section 404. 33 U.S.C. § 1311(a). Subsection 404(a) authorizes the Secretary to issue permits allowing discharge of dredged or fill material "at specified disposal sites," which are to be "specified for each such permit by the Secretary … through the application of guidelines developed by the Administrator, in conjunction with the Secretary." *Id.* at § 1344(a), (b). The Secretary's authority to specify a disposal site is expressly made "[s]ubject to subsection (c) of [section 404]." *Id.* at § 1344(b). Subsection 404(c) authorizes the Administrator, after consultation with the Corps, to veto the Corps's disposal site specification—that is, the Administrator "is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and … to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines … that the discharge … will have an unacceptable adverse effect" on identified environmental resources. *Id.* at § 1344(c).

In rejecting appellant's arguments, the D.C. Circuit found that the plain language of the CWA was unambiguous and provided EPA with authority to withdraw the site specification. Specifically, the court stated that "[s]ection 404 imposes no temporal limit on the Administrator's authority to withdraw the Corps's specification but instead expressly empowers him to prohibit, restrict or withdraw the specification '*whenever*' he makes a determination that the statutory 'unacceptable adverse effect' will result… . Using the expansive conjunction 'whenever,' the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/withdraw a specification at *any* time." *Mingo Logan Coal Co.*, 714 F.3d at 613 (emphasis in original). Further, the court also noted that "[t]his construction is further buttressed by subsection 404(c)'s authorization of a 'withdrawal' which, as EPA notes, is a term of retrospective application." *Id.* The court remanded the issue of Mingo Logan's second argument to the district court for consideration on the merits. *Id.* at 616.

***Natural Res. Def. Council v. Cnty. of Los Angeles*, 725 F.3d 1194 (9th Cir. 2013).**[1]

In *Natural Resources Defense Council v. County of Los Angeles*, the Court of Appeals for the Ninth Circuit held that pollution exceedances detected at monitoring stations downstream from municipal stormwater discharge locations were sufficient to establish liability as a matter of law for violations of the terms of the defendants' National Pollutant Discharge Elimination System ("NPDES") permit, which governs municipal discharges throughout

Los Angeles County. The defendants asserted that the measuring locations did not adequately attribute any pollution to any particular source and, therefore, they could not be held liable for actually discharging pollutants since no causal link could be established.

Section 301(a) of the CWA prohibits the "discharge of any pollutant" from any "point source" into "navigable waters" unless the discharge complies with certain other sections of the CWA. 33 U.S.C. § 1311(a). One of those sections is section 402, which provides for the issuance of NPDES permits. 33 U.S.C. § 1342. In nearly all cases, an NPDES permit is required before anyone may lawfully discharge a pollutant from a point source into the navigable waters of the United States. *Arkansas v. Oklahoma*, 503 U.S. 91, 101–02 (1992). Where a permittee discharges pollutants in compliance with the terms of its NPDES permit, the permit acts to "shield" the permittee from liability under the CWA. 33 U.S.C. § 1342(k). However, a permittee violates the CWA when it discharges pollutants in excess of the levels specified in the permit, or where the permittee otherwise violates the permit's terms. *Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1138 (9th Cir. 1998); *see also* 40 C.F.R. § 122.41(a) ("Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for [an] enforcement action"); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) (noting that "[t]he plain language of [the CWA citizen suit provision] authorizes citizens to enforce all permit conditions").

In addressing the alleged violations of the NPDES permit, the Ninth Circuit concluded that the terms of the NPDES permit were clear and unambiguous. Accordingly, the court stated that "[r]eading the clause that '[e]ach permittee is responsible only for a discharge for which it is the operator' to preclude use of the mass-emission monitoring data to 'assess [ ] compliance with this [Permit]' would render the monitoring provisions of the Permit largely meaningless." *Natural Res. Def. Council*, 725 F.3d at 1206. The court, in accepting the plaintiffs' reading of the permit, reasoned that, "Limiting a Permittee's responsibility to 'discharge[s] for which it is the operator' applies to the appropriate *remedy* for Permit violations, not to *liability* for those violations… . If the LA [municipal stormwater system] is found to be contributing to water quality violations, each Permittee must take appropriate remedial measures with respect to its *own* discharges. Thus, a finding of *liability* against the County Defendants would not, as defendants argue, hold any County Defendant responsible for discharges for which they are not 'the operator.'" *Id.*

IV. Clean Air Act ("CAA")

***Wash. Envtl. Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013).**

In *Washington Environmental Council v. Bellon*, the Court of Appeals for the Ninth Circuit held that the plaintiffs, several environmental groups, lacked standing to bring a citizen suit under the CAA against the Washington Department of Ecology and other state agencies (collectively, the "Agencies") for their alleged failure to regulate greenhouse gas ("GHG") emissions from the state's five oil refineries. Specifically, the plaintiffs alleged that the state agencies failed to define emissions limits for GHGs and to apply those limits to the oil refineries, which violated portions of Washington's CAA State Implementation Plan ("SIP").

The CAA authorizes the creation of air quality standards for a number of pollutants. These standards are called the National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7409(a), (b). The CAA instructs the EPA to publish a list of air pollutants that cause or contribute to air pollution and to issue NAAQS for each pollutant it has identified. 42 U.S.C. §§ 7408(a), 7409(a). The EPA refers to the air pollutants for which it has established NAAQS as "criteria pollutants" or "NAAQS pollutants." *See* 40 C.F.R. § 51.491. To date, the EPA has developed NAAQS for six criteria pollutants: sulfur dioxide, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead. 40 C.F.R. § 50. The EPA has not established NAAQS for GHGs. To ensure that air quality standards are met, the CAA establishes a cooperative federal-state scheme that relies heavily on state participation. *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1092 (9th Cir. 2007); 42 U.S.C. §§ 7401–7431. Once the EPA sets the criteria pollutants, each state must propose a SIP for the "implementation, maintenance, and enforcement" of the ambient air quality standards, 42 U.S.C. § 7410(a)(1), which is subject to the EPA's review and approval. *Safe Air for Everyone*, 488 F.3d at 1091; *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 695 (9th Cir. 2004). When the EPA approves a SIP, it becomes federal law and federally enforceable, and must be carried out by the state. *Safe Air for Everyone*, 488 F.3d at 1091; *Bayview Hunters*, 366 F.3d at 695. In Washington, the Agencies are responsible for implementing the CAA requirements.

In order to demonstrate standing, a plaintiff must satisfy three "irreducible constitutional minimum" requirements: (1) he or she suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Natural Res. Def. Council v. EPA*, 542 F.3d 1235, 1244 (9th Cir. 2008) ("NRDC"). Where, as here, plaintiffs are organizations, they may assert standing on behalf of their members as long as the

"members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000); *see also NRDC*, 542 F.3d at 1244.

The Ninth Circuit, in finding that the plaintiffs failed to meet the constitutional minimum to establish standing, addressed each of the three prongs highlighted above. First, the court accepted the veracity of statements for the plaintiff organizations' members indicating that they had suffered concrete harm. Specifically, the court noted that, "For the purposes of this case, we assume without deciding, that the declarations submitted by [plaintiffs'] members have provided 'specific facts,' of immediate and concrete injuries. Plaintiffs have therefore satisfied the first prong under *Lujan*." *Wash. Envtl. Council*, 732 F.3d at 1141. In addressing the second prong, the court noted that plaintiffs "must show that a causal connection exists between their asserted injuries and the conduct complained of—*i.e.*, the Agencies' failure to set and apply [emissions] standards [to the oil refineries]." *Id*. at 1142. According to the court, the plaintiffs failed to meet this prong of the *Lujan* test for constitutional standing. Specifically, the court reasoned that, "[p]laintiffs offer only vague, conclusory statements that the Agencies' failure to set [emissions] standards at the [o]il [r]efineries contributes to greenhouse gas emissions, which in turn, contribute to climate-related changes that result in their purported injuries." *Id*. The court also noted that proving the requisite causal link would be challenging, given the nature of GHG emissions. Particularly, the court noted that, "[there] are numerous independent sources of GHG emissions, both within and outside the United States, which together contribute to the greenhouse effect… . Because a multitude of independent third parties are responsible for the changes contributing to [p]laintiffs' injuries, the causal chain is too tenuous to support standing." *Id*. at 1144. Finally, in addressing the third prong of the *Lujan* requirements, the court also concluded that the plaintiffs failed to show that their injuries would be redressed by a favorable court decision. The court reasoned that, "[the] record is devoid of any evidence that [emissions] standards would curb a significant amount of GHG emissions from the [o]il [r]efineries… . Even if we assume that [emissions] standards would eliminate all GHG emissions from the [o]il [r]efineries, [p]laintiffs have not submitted any evidence that an injunction requiring [emissions] controls would likely reduce the pollution causing [p]laintiffs' injuries." *Id*. at 1146-47.

***Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).**[2]

The Court of Appeals for the Ninth Circuit, in *Rocky Mountain Farmers Union v. Corey*, reversed and remanded a district court's series of summary judgment decisions that held that California's Low Carbon Fuel Standard ("LCFS") program violates the dormant Commerce Clause. The LCFS program requires California fuel providers to reduce the "carbon intensity" of fuel sold in the state, and rates various fuels based on their "life-cycle" GHG emissions.

The dormant Commerce Clause addresses concerns about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008). For dormant Commerce Clause purposes, economic protectionism, or discrimination, "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994). "[O]f course, any notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). If a statute discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it "serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotation marks omitted). Absent discrimination, we will uphold the law "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Out-of-state ethanol producers challenged California's LCFS program after its enactment, arguing that the regulations discriminate against interstate commerce by assigning their fuel a higher carbon-intensity value than in-state fuel on account of the higher emissions associated with the production and importation of out-of-state ethanol. Out-of-state crude oil producers also sued the state for discriminatory treatment under the program. *Rocky Mountain Farmers Union*, 730 F.3d at 1077-78. In reversing the district court and vacating a preliminary injunction, the Ninth Circuit held that the LCFS does not facially discriminate against out-of-state ethanol producers, nor does it violate the prohibition on extraterritorial regulation. The Ninth Circuit reasoned that California's LCFS treated all out-of-state producers similarly because the LCFS based its treatment of producers on intensity of GHG emissions, which the court held was a proper, nondiscriminatory reason for disparate treatment under the dormant Commerce Clause. Specifically, the court reasoned that:

> [If] producers of out-of-state ethanol actually cause more GHG emissions for each unit produced, because they use dirtier electricity or less efficient plants, CARB can base its regulatory treatment on these emissions… . Comparing all sources of ethanol and all factors that contribute to the carbon intensity of an ethanol pathway, it appears that CARB's method of lifecycle analysis treats ethanol the same regardless of origin, showing a nondiscriminatory reason for the unequal results of this analysis.

Id. at 1090.

The court remanded to the lower court to consider whether the LCFS ethanol provisions "discriminate in purpose or in practical effect." If so, the district court should apply "strict scrutiny" to those provisions. If not, the court should apply what is known as the *Pike* balancing test, which will require the plaintiffs to show that the LCFS imposes a burden on interstate commerce that is "clearly excessive" in relation to its local benefits. The Ninth Circuit further held that the LCFS does not discriminate against out-of-state crude oil in purpose or practical effect. *Id*. at 1107.

***Alaska Wilderness League v. EPA*, 727 F.3d 934 (9th Cir. 2013).**

The Court of Appeals for the Ninth Circuit, in *Alaska Wilderness League v. EPA*, held that EPA reasonably interpreted an ambiguous CAA provision to conclude that the applicant, Shell Offshore Inc., was not required to analyze its drill vessel's potential impact on increment before obtaining an oil exploration permit. In 2011, Shell received three related permits to construct, operate, and conduct "polluting emitting activities" associated with oil exploration in the Beaufort Sea off of Alaska's North Slope. Appellants challenged the permits, alleging that EPA misinterpreted the CAA by failing to apply increment requirements to Shell's drilling vessel. Instead, the appellants contended that increment requirements should be based on geography—that is, increment requirements would be applicable to all sources at any time they are within the applicable geographic area.

The CAA imposes responsibility on both federal and state regulators to control and improve the nation's air quality. *Alaska, Dep't of Envtl. Conservation v. EPA*, 298 F.3d 814, 816 (9th Cir. 2002) (citing 42 U.S.C. §§ 7401–7671q). "The Act requires states to submit for the EPA's approval a state implementation plan ["SIP"] that provides for attainment and maintenance of the national ambient air quality standards ("NAAQS") promulgated by the EPA." *Id*. Title V of the CAA, 42 U.S.C. §§ 7661–7661f, requires certain sources, including sources operating only temporarily in a given location, to obtain permits to assure compliance with the CAA. *See* 42 U.S.C. § 7661c. In "clean air areas," the CAA imposes additional preconstruction permitting requirements under the Prevention of Significant Deterioration program (the "PSD"). *Alaska Dep't*, 298 F.3d at 816 (citing 42 U.S.C. §§ 7470–7492). The PSD imposes increment standards to maintain air quality in clean air areas by preventing the total pollution from exceeding a certain level over an established baseline for the given region. *Great Basin Mine Watch v. EPA*, 401 F.3d 1094, 1096 (9th Cir. 2005). Temporary sources may be subject to increment standards under 42 U.S.C. § 7661c(e), which reads, in pertinent part:

> The permitting authority may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter.

Here, the Ninth Circuit was asked to determine whether there are increment requirements "applicable" to Shell's drilling operation under 42 U.S.C. § 7661c(e) and the PSD.

In concluding that an incremental analysis was not required, the Ninth Circuit analyzed whether section 7661c(e) of the CAA was ambiguous, particularly with regard to whether the statute required an increment analysis for the Shell drilling operations prior to issuance of the permits. *Alaska Wilderness League*, 727 F.3d at 938-39. The court held:

> Section 7661c(e) is ambiguous in its use of the term "applicable." To give content to this term, Section 7661c(e) expressly incorporates and relies on "Part C of subchapter I of [Chapter 85]." 42 U.S.C. § 7661c(e). One Part C provision, 42 U.S.C. § 7473, sets forth increment standards generally and makes clear that permissible increment levels are established by geographic area. However, § 7473 does not specify how increments apply to minor, temporary sources like [Shell's drilling operation]. Section 7473 is also silent as to preconstruction increment analysis and imposes no preconstruction requirements on any source. As such, Alaska Wilderness cannot rely on § 7473 to support its argument… *Id*. at 938.

Therefore, the court concluded that, "Section 7661(c)(e) is ambiguous, and the EPA's interpretation is reasonable under the applicable statutes' plain language." *Id*. at 940.

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

***Voggenthaler v. Maryland Square LLC*, 724 F.3d 1050 (9th Cir. 2013).**

In *Voggenthaler v. Maryland Square LLC*, the Court of Appeals for the Ninth Circuit held two prior owners of a dry cleaning business liable under CERCLA and rejected their claims that CERCLA violated the Commerce Clause of the U.S. Constitution. The property owners argued that, since the groundwater remained wholly intrastate and did not affect interstate commerce, CERCLA could not permissibly regulate the parties' liability for cleanup costs.

CERCLA authorizes governments or private parties to clean up polluted sites and seek compensation from the polluters. 42 U.S.C. § 9607. It is designed to ensure that the cost of cleanup is "borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). The U.S. Constitution states that "[t]he Congress shall have Power … to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. Under its commerce power, Congress may regulate: (1) the use of the channels of interstate or foreign commerce; (2) the instrumentalities of interstate commerce or persons or things in commerce; and (3) those activities affecting commerce. *Perez v. United States*, 402 U.S. 146, 150 (1971).

In rejecting the property owners' arguments, the Ninth Circuit concluded that application of CERCLA was proper and did not violate the U.S. Constitution. Specifically, the court stated that "[g]roundwater may be regulated as an article of commerce, because any item that may be bought or sold, indeed all objects of trade, are articles of commerce… . The Supreme Court has expressly held that groundwater is an article of commerce, because it can be traded." *Voggenthaler*, 724 F.3d at 1059-60. The court also stated that the size of the impact on commerce was irrelevant when considering the validity of applying a federal statute to seemingly intrastate activities, so long as there is some relevant impact. Specifically, the court concluded, "[t]he Supreme Court has consistently held that Congress, under the Commerce Clause, can regulate commercial activities, even where the economic impact of the individual defendant's actions were far smaller than in this case … The Court has made no de minimus exception. Courts will not 'excise, as trivial, individual instances' of a class of activities that is within the federal power." *Id*. at 1061 (internal quotations and citations omitted).

VI. Water Law

***Pyramid Lake Paiute Tribe of Indians v. Nevada*, 724 F.3d 1181 (9th Cir. 2013).**

The Court of Appeals for the Ninth Circuit, in *Pyramid Lake Paiute Tribe of Indians v. Nevada*, held that the Nevada Department of Wildlife (the "Department") could not transfer water rights originally for irrigation of agriculture in the Truckee River Basin to sustain wetlands in a wildlife refuge area. Appellants argued that irrigation of wetlands fell within the types of "irrigation" contemplated under the water rights transfer provisions and, therefore, permitted the appellants to transfer both its "consumptive" and "non-consumptive" uses of its water rights.

Two federal court decrees—products of suits by the United States to quiet title to Truckee and Carson River water—govern water rights in portions of the Truckee River Basin. The Alpine Decree, at issue in this case, establishes "water duties" for different categories of irrigable lands within the river basin, which articulate the maximum quantity of water that a landowner may apply to a particular parcel. *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 888 (D. Nev. 1980). The Alpine Decree also establishes rules for transferring decreed water rights to new locations and uses within the Newlands Reclamation Project. *United States v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1066-67 (9th Cir. 2002). Of significance here, Administrative Provision VII of the Alpine Decree states that a party may only transfer the consumptive use portion of its water right to a use other than irrigation. *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. at 893.

The Ninth Circuit held that "irrigation," as the term was used in the Alpine Decree, means irrigation for agricultural purposes only and does not include irrigation for wetlands. Therefore, the court rejected the Department's attempt to transfer both the "consumptive" and "non-consumptive" uses of its water right to irrigate wetlands. Specifically, the court stated that, "[t]hough it does not define 'irrigation,' the *Alpine* Decree expresses a singular concern with the provision of irrigation water for agricultural use, and its references to irrigation uniformly relate to agriculture." *Pyramid Lake Paiute Tribe of Indians*, 724 F.3d at 1189. Similarly, the court noted that Nevada law is incorporated into the Alpine Decree and governs "both the process and the substance of a proposed transfer of water rights." *Id*. at 1190. The court determined that Nevada law distinguishes between "wildlife purposes" and other beneficial uses such as agricultural irrigation. *Id*. Therefore, the court held that "[b]oth the Decree and the state water code speak of irrigation solely in the context of agriculture and distinguish such use from the application of water for recreational, aesthetic, and wildlife purposes. There is simply no indication that either of the two relevant

sources embraces the application of water to sustain wildlife habitat in its definition of 'irrigation.'" *Id.* at 1190-91.

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1 Editor's Note: For an in-depth discussion of this case, see the article authored by Lynne M. Cohee in this newsletter.

2 Additional analysis can be found in the VNF Climate, Energy, & Air Update at: *http://www.vnf.com/news-alerts-875.html*.

Recent Decisions from the Growth Management Hearings Board


By Ed McGuire and Tadas Kisielius

This update does not provide a comprehensive summary of all decisions issued by the Growth Management Hearings Board ("Board"). Rather, it describes those decisions, or portions of decisions that contain issues of particular interest or new interpretations of the Growth Management Act (GMA) (chapter 36.70A RCW) or implementing guidelines promulgated by the Department of Commerce ("Commerce"). All decisions published by the Board can be found at *http://www.gmhb.wa.gov/*. This update covers selected decisions issued and published between October 1, 2012, and September 30, 2013. Effective July 1, 2010, the Eastern, Western and Central Puget Sound Boards were consolidated into a single statewide Board; however, cases are still heard by a three-member regional panel.

Critical Areas Issues

***Protect the Peninsula's Future, et al., v. Clallam County,* WWGMHB 00-2-0008/01-2-0020, Order on Motion to Dismiss, (Dec. 13, 2013).**

This Order resolves and closes a case involving a conflict between agricultural lands and critical areas that has lingered since 1999. In an earlier ruling, the Board had determined Clallam County's regulations did not protect critical areas. At issue in this case is the interpretation of the Volunteer Stewardship Program (VSP) (RCW 36.70A.700-760). The legislature enacted VSP in 2011 as an alternative to using regulations to protect critical areas on lands used for agricultural activities.

In this case, the County relied on the statutory provisions establishing the VSP in arguing its regulations comply with the GMA. The VSP establishes an elaborate, but optional, procedure for protecting critical areas while conserving agricultural lands. Counties which cannot gain approval of their work plan, or cannot implement their VSP are given options to comply with the GMA's requirement to protect critical areas. Clallam County chose not to participate in the VSP. In seeking compliance with the prior Board Order, Clallam County relied on one of the options provided in RCW 36.70A.735(1)(b), which provides in relevant part, that a county must:

> adopt development regulations previously adopted under this chapter by another lo-

cal government for the purpose of protecting critical areas in areas used for agricultural activities. Regulations adopted under this subsection (1)(b) must be from a region with similar agricultural activities, geography, and geology; and must (i) be from Clallam, Clark, King, or Whatcom Counties; or (ii) have been upheld by a growth management hearings board or court after July 1, 2011, where the board or court determined that the provisions adequately protected critical areas functions and values in areas used for agricultural activities.

The County asserted that since Clallam County is one of the four counties listed in .735(1)(b), the legislature determined its regulations complied with the GMA. Petitioners argued that since the County chose not to participate in the VSP, the provisions of .735 did not apply. Petitioners claimed those provisions only applied to participants whose work plans have not been approved, or who cannot achieve the approved work plan's goals and benchmarks, or if inadequate funding is received to implement the work program. Opponents argued none of these factors applied to Clallam County.

The Board acknowledged that Petitioners had presented a logical statutory interpretation, but concluded that the legislature's inclusion of Clallam County as one of the "safe harbor" counties was more compelling. The Board dismissed the challenge, rescinded a long-standing order of invalidity, and closed the case.

***Concerned Friends of Ferry County, et al., v. Ferry County,* EWGMHB 97-1-0018c, Order Finding Continuing Noncompliance [Fish and Wildlife Habitat Conservation Areas], (Jan. 23, 2013).**

This Order is the latest chapter in a long-standing case. As the Board says in its case synopsis, "Between 1999 and 2013 the Board has issued 15 separate Orders Finding Continuing Noncompliance with the GMA for Ferry County's failure to include Best Available Science ("BAS") in designating and protecting … fish and wildlife habitat conservation areas." This is Order number 15. The Board noted that the Superior Court, Court of Appeals and Supreme Court have upheld the Board on this issue. *See Ferry County v. Concerned Citizens of Ferry County,* 155 Wn.2d 824, 123 P.3d 102 (2005).

In its most recent attempt at compliance, the County classified several federally listed threatened species, but neglected to include bull trout and steelhead which are federally listed as threatened. Additionally, the County classified several species on Washington State's endangered, threatened, or sensitive species list, but declined to include upland sandpiper (E), grizzly bear (E), and lynx (T). The Board concluded that these omissions were unsupported by any evidence or reasoned justification in the record.

On the question of habitat designation, the Board found that for some classified species (bald eagle, peregrine falcon, gray wolf and common loon) no habitats had been designated and again noncompliance was found. The Board also concluded the project review approach to protection for some species and habitats was still lacking. The Board again remanded and imposed invalidity.

***Larson Beach Neighbors, et al., v. Stevens County,* EWGMHB 07-1-0013, Third Order on Compliance – Finding Continuing Noncompliance, (Feb. 22, 2013).**

The Board's original Final Decision and Order (FDO) finding noncompliance pertaining to protection of critical areas, was appealed and affirmed. *See Stevens County v. EWGMHB*, 163 Wn. App 680, 262 P.3d 507 (2011). This was the County's third effort at compliance.

In this phase of the proceedings Petitioners argued Stevens County had not adopted performance or design standards for protection of critical areas throughout the County, and that it specifically did not adequately address stormwater runoff. The County claimed it had required project applicants to complete a stormwater checklist, which after County review might require preparation of a stormwater management plan. The Board was not persuaded by the County's position and hailed back to the original FDO on the importance of clear and specific standards to protect critical areas. Additionally, the Board found the County had not conducted any environmental review to accompany the challenged ordinance. The matter was remanded.

***Citizens for Good Governance v. Walla Walla County [Futurewise and Port of Walla Walla – Intervenors],* EWGMHB 09-1-0013, Order Finding Compliance [Critical Aquifer Recharge Areas], (Jun. 3, 2013).**

In prior Board decisions Walla Walla County was found noncompliant with the GMA's requirement to protect critical aquifer recharge areas (CARA) used for potable water. In particular, the focus in this case as in prior compliance proceedings was the "shallow gravel aquifer" which underlies large parts of the populated county, including the cities of Walla Walla and College Place and unincorporated areas in the vicinity. While prior compliance proceedings addressed the County's overall approach to protecting the shallow gravel aquifer, the primary dispute in this most recent proceeding involved whether the portion of the aquifer underlying the Walla Walla Regional airport should have been designated and protected as a CARA.

The Board relied upon the WAC criteria for determining vulnerability: "Counties and cities must classify recharge areas according to the aquifer vulnerability. Vulnerability is the combined effect of hydrogeological susceptibility to contamination

and the contamination loading potential… .” WAC 365-190-100(3).

In general, the County applied a multi-tiered system in which it designated as critical aquifer recharge areas those areas in which the shallow gravel aquifer was near the surface and therefore an area of “High Vulnerability.” The County characterized the remaining area overlying the shallow gravel aquifer (including the regional airport) which was separated from surface activities by layers of lower-permeability soils as an area of “moderate vulnerability.” The County did not designate moderately vulnerable areas as critical areas, but nevertheless subjected them to increased regulatory requirements. In prior Board decisions, the Board questioned the County’s approach and the “moderate” classification generally, raising particular concerns about whether areas classified as “moderate vulnerability” were nevertheless susceptible to “horizontal permeability.”

On compliance, the County retained a hydrogeologist to investigate and offer responses to the Board’s FDO. The resulting technical report found no site specific horizontal permeability under the airport and concluded the risk of contamination was low due to the depth of the groundwater and underlying strata. Based upon this information the County entered a finding regarding aquifer vulnerability and excluded the area under the airport from designation as a CARA. Petitioner continued to disagree and offered letters suggesting the area above the groundwater was permeable. The Board noted that Petitioner’s evidence did not address the WAC standard regarding vulnerability, and found the science in the record supported the County’s conclusions on vulnerability. The Board entered a finding of compliance.

***Friends of the San Juans, et al., v. San Juan County,* WWGMHB 13-2-0012c, Final Decision and Order (Sept. 6, 2013).**

In this case a multitude of parties challenged San Juan County’s critical areas ordinance (CAO), including parties that asserted the County’s regulations went too far and impaired property rights and an interest group that alleged the regulations were insufficient to protect critical areas. The parties brought a wide range of claims, including allegations that: the public participation process was insufficient; the CAO suffered from internal inconsistencies; BAS did not support the regulations; buffer widths were insufficient; exemptions in the code were too broad; and the overall ordinance violated constitutional protections of property rights and Goal 6 of the GMA.

Petitioners raised various public participation claims. They identified meetings of a committee convened by the County consisting of County administration, planning staff, a deputy prosecuting attorney, planning commissioners, and elected officials. The meetings of this committee were not open to the public and there was no notice provided. Petitioners asserted violations of the Open Public Meetings Act (OPMA) and also asserted that the committee discussed the substance of the CAO in violation of GMA public process requirements. The County acknowledged the existence of the committee but asserted it was convened to coordinate scheduling for the consideration and deliberation on the Ordinance. The Board rejected Petitioners’ public process claims. With respect to compliance with the OPMA, the Board indicated it did not have jurisdiction, though it acknowledged that there could be scenarios in which OPMA violations provide evidence of GMA public participation violations. In this case, the Board ultimately determined that petitioners failed to provide any evidence demonstrating that the committee discussed substantive issues. Moreover, in denying the claim, the Board relied on the significant public comment opportunities available to the public.

With regard to buffer widths, the decision includes several pages of background information about the science behind water quality and habitat buffers. The Board ultimately concluded that water quality and habitat buffers as well as buffer averaging provisions departed from the ranges established in BAS, without sufficient justification. The Board relied on correspondence in the record from the Department of Ecology (“Ecology”) expressing concern over the County’s deviation from Ecology-preferred buffer widths for water quality, as well as an internal staff memorandum that acknowledged that the buffers for water quality were less than what “they should be.” The Board specifically rejected a regulation allowing septic systems in buffer areas, which departed from the BAS. The County did not include science that provided any “reasoned justification” for its approach and a finding in the Ordinance suggested that it was primarily an effort to accommodate the large percentage of citizens in San Juan County that rely on septic.

To protect fish and wildlife habitat conservation areas (FWHCAs), the County adopted a system of multiple buffers with different specific targets (e.g., tree protection, water quality, and coastal geologic protection), each with a different suite of protections and standards. Because the water quality buffer was deficient, the Board concluded the FWHCA buffer system also did not comply with GMA. However, the Board did not reject entirely the County’s basic approach of using multiple buffers. Indeed, the Board ultimately concluded the County’s tree retention standards were consistent with the GMA. However, the deficiencies for water quality buffers previously identified were the basis for a finding of noncompliance.

The Board rejected Petitioners’ claims that the County failed to properly classify and define FWHCAs such that the regulations were vague and did not contain sufficient definition to the regulated community. In essence, Petitioners challenged the reliance in the regulations on a field investiga-

tion to confirm extent and presence of FWHCAs. The Board rejected the argument and affirmed the County's site-specific approach, noting that the GMA does not require prior conclusive mapping of all FWHCAs.

Natural Resource Land Issues

***Concerned Friends of Ferry County, et al., v. Ferry County [Futurewise – Intervenor]*, EWGMHB 11-1-0003, Final Decision and Order, (Dec. 17, 2012).**

Petitioners challenged Ferry County's amended criteria, policies, and designations for Forest, Mineral, and Agriculture Resource Lands.

Pertaining to the challenged Forest Resource Lands provisions, Petitioners alleged internal inconsistencies among the Ferry County Comprehensive Plan's ("Plan") various resource land policies. The County countered that there were general policies and specific policies in the Plan but that the policies were compatible rather than inconsistent. The Board agreed with the County, concluding Petitioners had not carried the burden of proof.

For the Mineral Resource Land policies, the County designated only "existing mining operations subject to Department of Natural Resource permits," but considered the entire County (1.4 million acres) potentially subject to designation. This was the inconsistency argued by Petitioners. The Board noted that absent either a map indicating Mineral Resource Lands or a Future Land Use Map it was difficult to ascertain the County's intent. Consequently, the Board indicated an inconsistency existed.

In amending the Plan the County also deleted narratives explaining existing conditions and the context for conserving Agricultural Resource Lands. The County claimed that the Board did not have jurisdiction over repealed provisions or deleted language, since such actions were not amendments to its Plan. The Board claimed jurisdiction, and found that deletion of the narratives was noncompliant since they provided the statistical and historical description for identifying which Agricultural Resource Lands the County needed to protect. The matter was remanded.

***Concerned Friends of Ferry County, et al., v. Ferry County [Riparian Owners of Ferry County and Ferry County Cattlemen's Association – Intervenors]*, EWGMHB 01-11-0019, Ninth Compliance Order [Agricultural Resource Lands], (Feb. 8, 2013).**

This is the ninth Order finding continuing noncompliance the Board has issued since 2003 regarding Ferry County's Agricultural Resource Lands of Long-Term Commercial Significance (ARLLTCS). In this Order the Board outlined the statutory, WAC, and case law requirements for designating and conserving ARLLTCS. In its compliance action the County relied upon a document entitled "Background and Analysis Information" ("Report") to designate ARLLTCS. The County only designated public ARLLTCS.

The Board reviewed the Report to determine whether it addressed the designation factors required by the GMA, WAC, and the courts. Since the Report and the County designations based upon it contained exemptions, exclusionary factors and conflicting criteria, the Board determined the designations and the Future Land Use Map (FLUM) were noncompliant. The ARLLTCS designations shown on the FLUM only showed public lands, not private lands, or lands owned in fee by non-native Americans within the Colville Indian Reservation. The Board remanded, again, but declined to impose invalidity.

Procedural Issues

***Anderson, et al., v. City of Monroe*, CPSGMHB 12-3-0007, Order on Dispositive Motion, (Dec. 12, 2012).**

The City of Monroe adopted an ordinance redesignating 50 acres of land from "Limited Open Space" to "General Commercial." Petitioners appealed to the Board. Shortly after the ordinance was passed, the City Hearing Examiner issued an order determining the environmental impact statement accompanying the ordinance was "inadequate as a matter of law." The City subsequently repealed the challenged ordinance, redocketing it for the annual review cycle, and filed a motion with the Board asking the case be dismissed as moot. Petitioners objected, asserting that the matter was not moot since it involves issues that are likely to occur in the future – an exception to the mootness doctrine.

The Board cited court and Board precedent holding that the repeal rendered the challenge moot since there was no legislative action to challenge and the repeal of the ordinance provided the relief requested. The Board noted it assumes good faith on the part of public officials and to render a decision on this case would constitute an advisory opinion of the Board which is prohibited by the GMA.

Snohomish County Farm Bureau v. Snohomish County, CPSGMHB 12-3-0010, Order on Motions, (Jan. 31, 2013). [NOTE: The Board's decision on the merits in this case is discussed further in conjunction with its companion case, CPSGMHB 12-3-0008, in the section on "Shoreline Issues," below.]

The Board's rules permit a dispositive motion challenging a jurisdiction's compliance with the GMA's notice and public participation requirements. WAC 242-03-560. This Order involves such a challenge by Petitioner.

Petitioner alleged Snohomish County did not comply with the "broad dissemination" provisions

of RCW 36.70A.140 by not specifically notifying certain persons identified as "interested parties" on the County's notice listings. The County countered that Petitioner's challenge was misplaced since .140 addresses a generalized public participation program, not the notice requirements found at RCW 36.70A.035. Nonetheless, the County asserted that its procedures complied with notice requirements. The Board concluded the County complied with the public participation program requirements and Petitioner had failed to cite any authority for a requirement that proposed amendments be disseminated to interested persons. The issue was dismissed.

Additionally, Petitioner identified comments it provided to the County that were not responded to, as referenced in .140. The County asserted that no specific response was required, but that it had responded to Petitioner's issues by considering them and adopting the challenged amendment. The Board cited its prior decisions holding .140 does not require a jurisdiction to provide a specific answer to each public comment. Additionally, the Board commented that the County actually voted on and defeated amendments requested by Petitioner. This issue was dismissed.

Petitioner also claimed the County's action was not coordinated with numerous adjacent jurisdictions, as required by RCW 36.70A.100. The County responded that this issue should not be responded to, since it was beyond the parameters of issues to be decided in a dispositive motion according to Board rule. Further, the County asserted Petitioner did not have standing to bring this issue before the Board since Petitioner never raised it in the County's proceedings. The Board agreed with the County that Petitioner lacked standing to pursue this issue and it was dismissed.

***Association of Citizens Concerned About Chambers Lake Basin, et al., v. City of Olympia and SSHI LLC, dba DR Horton*, WWGMHB 13-2-00014, Order on Dispositive Motion, (Apr. 26, 2013).**

In this case, the Board addressed the question of whether and how Board consolidation would impact prior differences in Board precedent between decisions of the three regional boards. The Board was asked to rule on a motion to dismiss a party's SEPA claims for failing to establish standing. Historically, the three former regional Boards differed on what was required to establish standing to raise SEPA claims. The EWGMHB and WWGMHB allowed a petitioner to challenge a local government's compliance with SEPA through the more permissive GMA standing provisions. *See, e.g.*, *Superior Asphalt & Concrete Co. v. Yakima Cnty.*, EWGMHB No. 05-1-0012, 2006 WL 1370958, at *3 (Order on Dispositive Motions at 5-6) (Mar. 30, 2006), *http://www.gmhb.wa.gov/LoadDocument.aspx?did=1081*; *Whidbey Envtl. Action Network v. Island Cnty.*, WWGMHB No. 03-2-0008, 2003 WL 22896403, at *16-17 (Final Decision and Order) (Aug. 25, 2003), *http://www.gmhb.wa.gov/LoadDocument.aspx?did=462*. By contrast, the CPSGMHB required satisfaction of the more stringent two-part "*Trepanier* test" to raise SEPA issues. *See, e.g.*, *West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 94-3-0016, 1995 WL 903212, at *3 (Order Denying WSDF's Motion for Reconsideration of Order Granting Seattle's Motion to Dismiss SEPA Claim) (Jan. 10, 1995), *http://www.gmhb.wa.gov/LoadDocument.aspx?did=1959*.

Until this case, it has not been clear whether consolidation of the three boards into one would force resolution of this discrepancy. In this case the Board expressly preserved the distinction. The Intervenor, in seeking to dismiss the SEPA claims on standing cited to decisions of the CPSGMHB to argue that SEPA standing is determined by the more stringent *Trepanier* test. The Board acknowledged the distinction between the CPSGMHB and the other two boards on this issue and indicated that "those differences have not changed since the consolidation of the three separate boards in 2010." Because Petitioners had satisfied the more permissive GMA standing requirements, the Board denied the Intervenor's motion to dismiss the SEPA claims.

***Joshua Corning and Building North Central Washington v. Douglas County*, EWGMHB 13-1-0001, Final Decision and Order, (Aug. 26, 2013).**

Douglas County adopted an ordinance restricting the number of limited land segregations allowed on designated agricultural lands. Petitioners challenged the ordinance, alleging the County failed to notify the Department of Commerce for review and comment prior to enacting the ordinance. Petitioners sought a determination of invalidity from the Board.

The County acknowledged it had failed to notify Commerce prior to adopting the ordinance; however, the County subsequently submitted its ordinance to the state and received several comments. The County claimed the Commissioners reviewed the comments but decided not to change the enactment. The County also contended that it believed its action was part of an ongoing action to attain compliance with the GMA.

The Board reviewed its prior cases on notifying Commerce and determined that the late filing reasonably corrected the admitted violation of the GMA and to remand for notice would be duplicative and futile. Therefore, the request for invalidity was denied. The Board noted that this notification requirement pertains to state agency review and is not part of the GMA's broader public participation requirements. (Board Member Pflug dissented based upon the lack of evidence indicating the Commissioners actually considered the state comments received.)

Rural Area Issues

***Futurewise, et al., v. Whatcom County,* WWGMHB 05-2-0013/11-2-0010c, Compliance Order and Order Following Remand on Issue of LAMIRDs, (Jan. 4, 2013).**

The crux of this case involves Whatcom County's rural area provisions and procedures for designating limited areas of more intensive rural development (LAMIRDs). In the original 2005 FDO, the Board found noncompliance on LAMIRD and rural density issues. The Court of Appeals affirmed the Board on both matters. *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn. App. 378, 161 P.3d 748 (2007). The Supreme Court agreed on the LAMIRD issue, but remanded to the Board on the rural density question, concluding that the Board used a "bright line" rule in reaching its decision. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009). In a prior decision, the Board found compliance involving the County's rural densities. Order Following Remand from the Supreme Court – Rural Densities, (Sep. 9, 2011). This Order addresses the County's attempt to readjust its LAMIRDs and protect rural character.

Petitioners questioned the County's cross-referencing from its Comprehensive Plan ("Plan") to other policies and development regulations as adequate protection for rural character. The County argued nothing in the GMA prohibits such an approach. In reply Petitioners claimed that no specific dates to referenced policies or regulations were included, therefore, the regulations could be changed without reference to the Plan. The Board found no fault with the County's cross-referencing approach, but cautioned the County that when it updates or amends either its Plan or cross-referenced policies or development regulations the public must be given notice that both are under amendment due to its cross-referencing.

Petitioners also challenged a revised narrative in the rural element describing rural character and lifestyle, asserting that the revisions did not include all the components described in the GMA. RCW 36.70A.030(15)(a-g). Also, Petitioners claimed there was no discussion of 40-acre parcels, argued as necessary for a variety of rural densities, and necessary to be protected from further division. The County argued the larger 40-acre parcels were not before the Board and that it was within the County's discretion to define rural character. The Board concluded the narrative was adequate as descriptive text, but noted it would address specific protective measures elsewhere in its Order.

On the question of measures to protect rural character, the Board considered Petitioners' challenge to the County's rural population allocation, variety of rural densities and rural clustering provisions. The County acknowledged that, theoretically, its projected population increase could be accommodated in its existing rural areas, as asserted by Petitioners. However, the County claimed it had undertaken various measures including annual monitoring to avoid such an outcome, and encouraged growth in the urban areas. The Board noted that the GMA requires a population/land capacity analysis in urban areas only unless the County is a buildable lands county as identified in RCW 36.70A.215. Whatcom County is not identified in RCW 36.70A.215. However, the Board concluded that the County had voluntarily undertaken a monitoring program akin to those required by .215, and coupled with actions already in place, the County was addressing the potential "oversupply" of rural land issue. The Board found compliance.

The Board noted that "more than 78% of Whatcom's rural area is already zoned at densities of 1du/5ac or denser" and there were no criteria or provisions in the Plan to maintain or continue lower densities. Therefore the Board determined the County was not providing a variety of rural densities as required by the GMA. As to rural clustering, the Board opined, "if a County chooses to allow Rural Cluster Development, the County must do so in a permanent manner that is *consistent with rural character* and provides *appropriate rural densities that are not characterized by urban growth*." (Emphasis in original). In the County's case, the Board concluded that vesting too much discretion to local building officials did not adequately protect rural character and the criteria for preserving open space or reserve land was not in perpetuity, but subject to future development. Thus the rural clustering provisions were deemed noncompliant.

Much of the work the County accomplished in rectifying its LAMIRD designations was stipulated to by Petitioners as being compliant. However, Petitioners still challenged the County's designation of several Rural Neighborhoods, the County's criteria for LAMIRDs, and several additional LAMIRDs.

The prior FDO invalidated several LAMIRDs that were adjacent to UGAs. The County's response was to eliminate those LAMIRDs and create a Rural Neighborhood overlay designation for those areas. The County hoped to confine existing rural densities greater than one dwelling unit per five acres within the designation. Petitioners objected to this approach as well as the inclusion of several larger parcels within the LAMIRDs. The Board concluded that the new designation was appropriate, but the inclusion of larger parcels within the area was noncompliant since they could be divided.

The FDO also invalidated the County's criteria for establishing the logical outer boundary (LOB) for its LAMIRDs, as well as the regulations intended to contain rural development. The County had based the uses permitted within a LAMIRD on its zoning rather than uses that were permitted on July 1, 1990, as the GMA requires. The County subsequently revised its criteria to reflect uses and building sizes that existed in 1990. However, the County allowed for administrative exceptions of use and

size if subsequent research on a proposal could be related back to 1990.

The Board leaned on the Supreme Court's *Gold Star Resorts* decision, noting, "LAMIRDs are not … intended to be used continuously to meet needs … for additional commercial and industrial lands." The Board concluded that the exceptions the County created violated the GMA and ran counter to the *Gold Star Resorts* decision. Petitioners also objected to the revised LOBs of several LAMIRDs, which the Board reviewed and struck down since inappropriate parcels were included in the revised LAMIRDs. These were found noncompliant and invalid.

Additionally, the Board found the County had failed to adopt measures to protect the water resources of Lake Whatcom. Further discussion of the water resource issue is addressed below in *Hirst, et al., v. Whatcom*, WWGMHB 12-2-0017, Final Decision and Order, (Jun. 7, 2013).

***Hirst, et al., v. Whatcom*, WWGMHB 12-2-0017, Final Decision and Order, (Jun. 7, 2013).**

This case addresses whether the Rural Element of Whatcom County's Comprehensive Plan ("Plan") satisfies the GMA requirement to protect rural character by including measures to protect surface and groundwater resources. In general the case explores the extent to which a County must consider water resources issues and water quality concerns in the context of long-range land use planning.

Petitioners principally relied upon *Kittitas Co. v. EWGMHB*, 172 Wn.2d 144, 256 P.3d 1193 (2011). In that case, the Court concluded that Kittitas County's subdivision regulations failed to adequately protect water resources because they did not adequately prevent potential applicant abuse of the statutory exemption from water right permitting for domestic wells (so-called "permit-exempt wells"). In this case before the Board, the Board acknowledged that the County had provisions in place to address the specific subdivision issue in *Kittitas County*, but Petitioners challenged the County's rural element more broadly, arguing that it was inconsistent with broader legal limitations on water availability and was insufficient to address water quality problems.

Petitioners asserted that the GMA's requirements to protect rural character require land use patterns that are compatible with fish and wildlife habitat and protective of ground and surface waters. Petitioners pointed to Ecology's instream flow rule in WRIA 1 and argued that the proliferation of exempt wells in areas designated as "closed" in the rule demonstrated that the County's planning did not adequately protect water resources. With specific regard to water quality, they claimed the Plan's references to the County's existing water quality regulations were insufficient. Petitioners were particularly concerned that specific impervious surface area limitations only applied to rural residential development in certain areas in the County. Additionally, Petitioners attacked the County's on-site sewage regulations, which allowed owner self-inspection.

The County argued that its water availability regulations complement and are consistent with Ecology's regulation of water resources. With respect to water availability the County relied, in particular, on its regulation to address the deficiency identified in *Kittitas County* as well as a regulation that prohibits a building permit or subdivision in areas determined by Ecology by rule to be closed to new appropriations. The County challenged the Petitioners' characterization of the legal effect of the WRIA 1 instream flow rule, arguing that it did not have the preclusive effect on permit-exempt wells that Petitioners claimed. And the County asserted that if the Petitioners sought a stricter rule prohibiting permit-exempt wells, their proper remedy was to petition Ecology for an amendment to its instream flow rule. With respect to water quality, the County relied on its multi-regulatory approach to address the problem, which includes regulations that apply throughout the County and other, more stringent, regulations that apply in areas of documented water quality problems.

In reaching its decision, the Board interpreted several specific provisions of the GMA (RCW 36.70A.020(10), .030(15)(d) & (g), .070(1), .070(5)(c)(iv)):

> [R]ead together, these GMA provisions indicate that patterns of land use and development in rural areas must be consistent with protection of instream flows, groundwater recharge, and fish and wildlife habitat. A county Plan's rural provisions must include measures governing rural development to protect water resources.

The Board agreed with the Petitioners' arguments regarding the scope of these GMA provisions and concluded that the holding in *Kittitas County* pertaining to water availability in the subdivision context was likewise applicable to broader water availability issues and water quality issues such as avoiding groundwater contamination, managing surface water runoff, and preventing pollution. The Board also agreed with the Petitioners' interpretation of the legal ramifications of Ecology's instream flow rules on permit-exempt wells.

The Board determined there was substantial evidence in the record pertaining to water availability limits and water pollution in Whatcom County. The Board also took official notice of two references that the Board concluded were persuasive on the need to coordinate land use planning with water resource planning. Based upon this material the Board commented that most resource degradation in the Puget Sound region and in Whatcom County in particular could be attributed to land use and land development practices, which are governed by the GMA.

After reviewing the County's specific Plan policies and regulations the Board determined the County had not employed effective land use planning that contains measures to protect water supply and water quality, as required by the GMA. The Board detailed its reasoning on each policy and entered specific findings to support its noncompliance conclusion. The Ordinance amending the Plan and regulations was remanded to the County, but the Board declined to enter a determination of invalidity.

Both parties appealed. The County's appeal to Skagit County Superior Court challenges the Board's substantive determination, while the Petitioners' appeal to Thurston County Superior Court challenges the decision to not enter a determination of invalidity. The Petitioners' appeal has since been removed to Skagit County Superior Court to facilitate consolidation. Both parties have also initiated the process under the Administrative Procedures Act for direct review by the Court of Appeals. The Board issued certificates of appealability for both appeals and the parties have since filed motions for discretionary review with the Court of Appeals; the motions were argued on November 11.

Shoreline Issues

***Mooney, et al., v. City of Kenmore and Ecology,* CPSGMHB 12-3-00004, Final Decision and Order, (Feb. 27, 2013).**

Petitioners in this appeal of Kenmore's Shoreline Master Program (SMP) update challenged the adequacy of the City's protection of shoreline ecological functions in light of new information about sediment contamination in the shoreline from the existing and historic industrial uses along the north end of Lake Washington. Specifically, the Petitioners relied on a dredge report that documented high levels of pollutants in sediment near a waterfront property.

The Board first differentiated the standard and scope of review that govern appeals of "shorelines of statewide significance" from those that apply to appeals of all other "shorelines," generally. While an appeal that pertains to "shorelines" is governed by the "clearly erroneous" standard, the Board noted that the statute establishes the higher "clear and convincing evidence" standard for appeals pertaining to shorelines of statewide significance. Similarly the Board noted that the Shoreline Management Act (SMA) establishes a narrower scope of review for appeals pertaining to shorelines of statewide significance, which are reviewed solely for compliance with the policy of RCW 90.58.020 or the applicable guidelines. By contrast, appeals pertaining to all other shorelines can be reviewed for compliance with SMA requirements, SEPA procedures and with the internal consistency provisions of RCW 36.70A.070, 36.70A.040, 35.63.125 and 35A.63.105. The portions of Lake Washington in the City's jurisdiction are "shorelines of statewide significance" while the Sammamish River is not. Hence, the Board was required to review the City's SMP update under both standards, as applicable.

The Board addressed the City's and Ecology's challenges to the timeliness of the appeal due to the Petitioners' failure to comprehensively appeal all of the City's ordinances adopting the SMP. The City first adopted the SMP in 2010 in two ordinances – one (10-0312) adopting the policies and restoration plan and another (10-0313) adopting shoreline regulations. Ecology would not approve the Ordinance adopting regulations (10-0313) without the City first making minor changes, which the City did in a subsequent third Ordinance (12-0334) in 2012. Ecology's Final Approval letter followed on March 16, 2012, and Petitioners appealed. The Board rejected the City's and Ecology's argument that Petitioners should be precluded from challenging the policies and restoration plan because the third Ordinance (12-0334) that was the subject of the Petitioners' appeal addressed only the regulations, and did not change the policies or restoration plan that were adopted in Ordinance 10-0312. The Board indicated that Petitioners could "reasonably conclude" from Ecology's Final Approval letter that the third Ordinance (12-0334) constitutes the City's comprehensive update, such that the Petitioners' appeal of the third ordinance "is sufficient to encompass all the updated SMP that Ecology approved with its Final Approval, including the policies and plans contained in Ordinance 10-0312." This decision should provide some clarity, especially where jurisdictions adopt the SMP in segments and subsequent Ecology review results in "conditional approvals" with required amendments to some, but not all of the SMP.

With respect to the substance of Petitioners' claims, the Board rejected Petitioners' claims that the SMP update was inadequate for failure to specifically incorporate the dredge report into the update and the accompanying inventory. Petitioners had submitted the report to the City and Ecology in 2011 before Ecology's final approval, but after Ecology had initiated its review of the SMP. The Board indicated that the Ecology SMP Guidelines only requires consideration of the "most current" and "available" information. The Board also noted that there can be several months between a jurisdiction's initial filing of an SMP and Ecology approval. While acknowledging the need to be able to flexible to reconsider changes in light of new information in the intervening time between filing and approval, the Board concluded there was no duty to revise the inventory to incorporate new data. Moreover, the Board indicated that the SMP had a provision in place to take the information into account during individual permit review.

The Board similarly rejected the Petitioners' claims that the City's SMP failed to ensure "no net loss" of shoreline ecological functions. Petition-

ers argued that the SMP failed to address the continuing risk of contaminated soils by designating areas with such risk for continued industrial and commercial uses, but the Board was persuaded Petitioners' concerns were adequately addressed by SMP provisions, including: regulations of dredging; shoreline buffers and setbacks; mitigation sequencing; and requirements for cleanup and restoration of industrial sites during eventual redevelopment.

Finally, the Board's decision on the adequacy of the City's restoration program is notable. The Petitioners asserted that the plan was insufficient because it does not have any specific targets or deadlines and relied on redevelopment or site improvements that trigger clean up under MTCA. While the Board observed that a "more-aggressive strategy might be desirable," it concluded that the scheme was "not clearly erroneous."

***Snohomish County Farm Bureau v. Snohomish County and Ecology*, CPSGMHB 12-3-0008, Final Decision and Order, (Mar. 14, 2013).**

In this appeal of Snohomish County's SMP update, the Snohomish County Farm Bureau appealed the County's efforts to facilitate dike and dam removal as part of salmon habitat restoration efforts that could result in the inundation of prime farmlands. In general, the Bureau argued that these restoration efforts conflict with the general GMA mandate (and local implementing policies and regulations) to conserve agricultural lands of long term significance. The Board held that the Bureau was unable to meet its burden of proof.

The Board first noted that this case dealt with both shorelines and shorelines of statewide significance, though the exact delineation of shorelines of statewide significance was unclear to the Board. The Board therefore considered each issue under both standards of review.

The Board rejected the Bureau's appeal of an SMP provision that excused habitat restoration projects that propose flooding of designated agricultural lands from having to first de-designate the land. The Bureau argued, in essence, that the provision by-passed the County's docketing and de-designation process, thereby purportedly evading public process requirements and precluding agricultural advocates from participating. The Board declined to address the argument as it pertains to shorelines of statewide significance because of the limited scope of the Board's review, but entertained the arguments as they pertained to all other shorelines as part of its statutorily authorized review for consistency. The Board determined that the challenged SMP provisions were consistent with the County's comprehensive plan because there were no County policies requiring de-designation prior to implementing restoration. In short, the Board accepted the County's position that inundation of farm land is not inherently inconsistent with the underlying agricultural designation.

With respect to the Bureau's challenge to the consistency of the SMP provisions with GMA regulations, the Board identified an apparent statutory anomaly; the portions of the SMA limiting the scope of the Board's review of SMP provisions governing shorelines (i.e., not shorelines of statewide significance) specifically identify three statutory consistency provisions, none of which apply to "initially planning" counties (those that were required to plan by statute, rather than those that "opted in"). For purposes of this decision, the Board assumed that the legislature did not intend to exempt initially planning counties from review of consistency between SMP provisions and GMA development regulations and reached a decision on the merits, concluding that the Bureau failed to meet its burden of proof because the restoration activities at issue are "modification" of land, not "land use" changes.

The Board also rejected several challenges for consistency with statutory provisions, including the restriction in RCW 90.58.065 prohibiting master programs that "limit agricultural activities." While the Board agreed with the Bureau's grammatical construction of the statutory provision (there was dispute over whether the use of the conjunction "or" earlier in the sentence extended a limiting adjective to the disputed language), the Board disagreed with the Bureau's argument that allowing inundation of agricultural lands "limits agricultural activities." The Board concluded that inundated land is no longer being farmed such that the action does not "limit agricultural activities" as that term is defined in the SMA. With its interpretation, the Board focused on the specific definitions of "agricultural land" in the SMA, which relies on the presence of current agricultural activities; in that way, the Board's interpretation is quite different from the more expansive interpretation of agricultural lands under the GMA, for which presence of current agricultural activities is not determinative.

In a procedural quirk, the decision includes a "concurring" opinion, authored by two of the three panelists. While this concurring opinion agrees that the Board's decision is mandated by the existing law controlling adoption of SMPs, the concurrence was troubled by the tension in the case between the GMA goal of maintaining and enhancing the agricultural industry and the SMA goal of restoring shorelines. The concurrence observed that the County's approach would result in "the probable permanent removal of designated agriculture natural resource land without any consideration of the impact of such a decision on the agricultural industry, a result which would not be tolerated under a GMA analysis." The concurrence invited a more integrative approach through "legislative or judicial clarification of the appropriate balance" between the SMP update and GMA principles; however, the Bureau did not appeal.

Separately, in *Snohomish County Farm Bureau v. Snohomish County*, CPSGMHB 12-3-0010 ("SCFB II"), the Bureau appealed subsequent amendments to the County's comprehensive plan that were designed to "link" habitat restoration efforts with the County's efforts to preserve agricultural resource lands. Notably, while none of the challenged provisions included an express exemption from the de-designation process for restoration projects, the Bureau alleged that the amendments amounted to a de facto exception in violation of the GMA mandate to conserve agricultural lands. The Board rejected the Bureau's appeal because the Bureau had failed to carry its burden of proving that the challenged policies would result in the loss of agricultural lands from restoration without a de-designation analysis.

Urban Area Issues

***Peranzi, et al., v. City of Olympia*, WWGMHB 11-2-001, Compliance Order, (Nov. 16, 2012).**

In its May 4, 2012, FDO, the Board found the City of Olympia's development regulations allowing a permanent homeless encampment in an area zoned Light Industrial was inconsistent with its Comprehensive Plan ("Plan") policies for the Light Industrial districts, and therefore, did not comply with the GMA. On remand, the City amended its Plan policies in an effort to remove the inconsistency.

At the compliance proceeding, Petitioners objected, alleging the regulations were challenged, not the Plan policies, and that Plan amendments were only permitted once per year. Therefore, Petitioners sought an Order of Continuing Noncompliance and Invalidity.

The Board summarily dismissed the challenge noting that the once per year amendment limitation contains an exception for resolving an appeal to the Board, which the City's amendments during compliance resolved. The Board found compliance.

***City of Shoreline, et al., v. Snohomish County, [BSRE Point Wells LLC – Intervenor],* CPSGMHB 09-3-0013c/10-3-0011c, Order Finding Compliance and Rescinding Invalidity, (Dec. 20, 2012).**

In its FDO, the Board found that Snohomish County's designation of Point Wells as an Urban Center was inconsistent with the County's criteria for designating such centers, and that the designation would cause the City of Shoreline's capital facilities plan to be noncompliant with the GMA since it had no existing provisions to serve the area.

On remand, the County deleted the Urban Center designation and identified Point Wells as an Urban Village. It also amended its Urban Village provisions to include policies requiring the provision of needed public services (provided by entities other than the County) to be incorporated into the capital facilities plan of the service-providing entity. Additionally, a policy was added to require property owners to negotiate binding agreements with service providers to limit the density of development to a level consistent with the service standards of the service providing entity. The Board found compliance and rescinded invalidity.

***City of Snoqualmie v. King County [Futurewise and City of Seattle – Amicus]*, CPSGMHB 13-3-0002, Final Decision and Order, (Aug. 12, 2013).**

King County amended its Comprehensive Plan ("Plan"), development regulations, County-wide Planning Policies (CPPs), and its urban growth area (UGA). The City of Snoqualmie appealed since its UGA expansion request was denied. The focus of the City's challenge was on the development and adoption of the CPPs, UGA expansion criteria, and the denial of the UGA expansion request.

In King County, the Growth Management Planning Council (GMPC), comprised of county and city representatives, develops, reviews, and makes recommendations on proposed CPP amendments to the King County Council. Snoqualmie challenged this process as an unlawful delegation of authority by the County, since the GMPC initiates all amendments to the CPPs. The County asserted the GMPC was the collaborative body developed to comply with the GMA, and the Council retains the power to reject, amend, or adopt the GMPC's recommendations.

The Board noted that the validity of the GMPC as the collaborative body in developing CPPs in King County was settled 20 years ago; nonetheless, the Board addressed the unlawful delegation issue posed by Snoqualmie. In dismissing the claim, the Board found that King County had ample opportunity to initiate amendments to the CPPs since the GMPC is chaired by the County Executive and five members of the County Council sit on the GMPC. Further, the County Council, not the GMPC, was responsible for adoption and amendment of the CPPs.

The City also complained that the ordinance adopting the CPP amendments was adopted after the ordinance adopting Plan amendments, thus the City argued, it could not guide the Plan amendments. The County established that the ordinances were adopted as a package concurrently and the County Council was aware of the processes in developing both sets of amendments. The Board agreed and dismissed the issue.

Snoqualmie next challenged the UGA expansion criteria of the County. Snoqualmie sought to expand its UGA to include an area encompassing the Snoqualmie Parkway and I-90 for retail development. In 2009, the Legislature amended the GMA's UGA provisions to clarify that nonresidential UGA expansions were permissible. The City claimed that King County did not revise its UGA expansion criteria to reflect this legislative change, nor consider a city-specific land capacity analysis rather than a county-wide land capacity analysis in sizing UGAs,

which the City claimed was part of the legislative amendment. The County asserted that the 2009 GMA amendment did not alter the need for a county-wide analysis in considering UGA expansions.

The Board concluded the County did not ignore the 2009 legislative amendments, since the record reflected discussion of the changes. Additionally, the Board determined, contrary to the City's claim, that the County "cannot review a city request for UGA expansion, however modest, in isolation from a county-wide analysis." The Board rejected the City's position. However, in reviewing the ordinance amending the County's Plan, the Board found no reference to consideration of the 2009 legislative amendments. The Board, therefore, remanded for corrective action.

Snoqualmie also alleged its proposed UGA expansion was denied because a dedication of open space was not included in the proposal, as required by the County. The County countered that its 4 to 1 Open Space program was voluntary and not a pre-condition for UGA expansion. The County also asserted that a UGA expansion is merited without open space dedication if a county-wide analysis shows there is insufficient land to accommodate growth, which the County claims was not the case here. The Board concurred. The Board also reviewed and considered the materials submitted by the City in support of its UGA expansion request and determined the County's decision was not clearly erroneous.

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. He is also an adjunct professor at Seattle University School of Law. He can be contacted at egmcguire@harbornet.com.

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2013 Legislative Update

By Jason Callahan, Senior Counsel, State House of Representatives' Office of Program Research and Karen Terwilleger, Senior Director for Forestry and Environmental Policy Director, Washington Forest Protection Association

I. Overview

Once again, the defining legislative issue during the 2013 regular session was a significant general fund budget deficit. The combination of a revenue shortfall, the implementation of the Supreme Court's "McCleary decision," a new executive branch administration, and divided political leadership led to challenges that resulted in the delayed start of the legislative interim and the passage of few substantive bills. In fact, the Legislature passed fewer bills in 2013 than at any time since 1983.

The Legislature did pass some environmental and natural resources bills in the 2013 regular session, and those topics surfaced again in the special sessions that followed. Listed below are brief descriptions of bills enacted into law related to energy, land use, water, toxics and natural resources issues. Also included is a summary of ESHB 1294, an interesting bill on flame retardants that did not pass but provided a venue for legislative dialogue on this emerging issue. The authors wish 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*.

II. Natural Resource Reform

A. HB 1112: Science and Public Policy (Fish & Wildlife)

HB 1112 requires the Department of Fish and Wildlife (WDFW) to identify peer-reviewed literature, scientific literature, and other sources reviewed and relied upon for significant agency action. WDFW also must provide the index of records required under the Public Records Act (chapter 42.56 RCW) that are relied upon or invoked in support of a proposed significant agency action. "Significant agency action" is defined as an act of WDFW that: (1) results in substantive requirements for a non-state actor with penalties for noncompliance; (2) establishes, alters, or revokes any qualification

or standard for the issuance, suspension, or revocation of a license or permit; (3) results in significant amendments to an existing policy or program; (4) results in the development of technical guidance, assessments, or documents used to implement a state rule or statute; or (5) results in the development of fish and wildlife recovery plans. "Significant agency action" does not include rulemaking by WDFW associated with fishing and hunting rules.

B. HB 1113: Science and Public Policy (Ecology)

HB 1113 requires the Department of Ecology (DOE) to identify peer-reviewed science, scientific literature, and other sources relied upon before taking a significant agency action within its Water Quality or Shorelands and Environmental Assistance programs. On its website, DOE also must provide an index, required by the Public Records Act, of public records invoked or relied upon in support of a proposed significant agency action. The term "significant agency action" is defined as an act of DOE that: (1) adopts, under delegated legislative authority, substantive requirements with penalties for noncompliance; (2) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; (3) results in significant amendments to an existing policy or program; or (4) results in the development of technical guidance, assessments, or documents used to implement a state rule or statute. In years past, the general theme of both HB 1112 and 1113 had been included in a single piece of legislation. The 2013 Legislature decided to introduce separate, focused bills for each agency, a strategy that ultimately proved successful.

C. 2E2SSB 5296: Model Toxics Control Act (MTCA)

SB 5296 passed late in the special session and amends a portion of the MTCA. This legislation includes the creation of a new account (the Environmental Legacy Stewardship Account). The new account receives distribution of Hazardous Substance Tax revenue along with the previously existing Local Toxics Control Account and the State Toxics Control Account. The new account initially will be funded by two $45 million transfers from the other accounts and by all Hazardous Substance Tax revenues above $140 million. Certain authorized uses for the existing two accounts are added, eliminated, and transferred among the new three-account lineup. The new Environmental Legacy Stewardship Account may be used for certain measures which feature performance and outcome-based projects, model remedies, technologies, procedures, contracts, or project management.

SB 5296 also creates a new radioactive mixed waste account under the hazardous waste management statute. The account initially is funded via a transfer of the mixed waste fee fund balance of the State Toxics Control Account, while future account revenues will be generated via the existing services charges on mixed waste facilities that treat, store, or dispose of mixed waste. Funds in the account may only be spent on the regulation of current mixed waste facilities or the decommissioning of such facilities.

Finally, SB 5296 authorizes the Department of Ecology to create model remedial actions for common types of facilities, hazardous substances, media, and geographic areas. Potentially liable persons who submit model remedy proposals to Ecology are exempt from the usual requirement that the party proposing the cleanup analyze alternative cleanup remedies. The bill also allows cities, counties, and port districts to create brownfield renewal authorities as municipal corporations with bonding authority.

III. Water Resources & Water Quality

A. SHB 1141: Water Pollution Loans

SHB 1141 authorizes DOE to assess an administration charge on loans issued under the Water Pollution Control Revolving Fund Loan program, a program that provides funding to cities, counties, special purpose districts, certain Federally-recognized Indian tribes, and other public bodies for water management infrastructure.

B. HB 1146: Water Right Examiner Bonding

HB 1146 requires certified water right examiners to furnish evidence of insurance or financial responsibility in a form acceptable to DOE. This financial responsibility requirement replaces the former requirement that each certified water right examiner be bonded for at least $50,000.

C. ESSB 5324: Mosquito Abatement and Stormwater

ESSB 5324 requires a county, city, town, water-sewer district, or flood control zone district to consider, and to the extent possible consistent with DOE's design guidelines for stormwater retention ponds, construct stormwater facilities to maintain and control vegetation to inhibit mosquito breeding, as well as consult with established local mosquito control districts when developing construction plans that include stormwater retention ponds. A county, city, town, water-sewer district, or flood control zone district must maintain and control vegetation growth in, without compromising the function of, stormwater retention ponds to minimize mosquito propagation. When notified of the presence of West Nile Virus or other mosquito-borne human diseases, a county, city, town, water-sewer district, or flood control zone district must consult with the Department of Health or the local mosquito control district as to the most effective Integrated Pest Management strategy to use.

D. 2SSB 5367: Yakima Basin Water Resource Management

SB 5367 authorizes DOE to implement the Yakima River Basin Integrated Water Resource Management Plan and develop water supply solutions that provide concurrent benefits to both in-stream and out-of-stream uses. The legislation creates state accounting infrastructure, along with formal processes for evaluating cost-benefit analyses and options for state financing.

IV. Climate and Energy

A. SSB 5369: Geothermal Resources

SB 5369 creates a new chapter in state law with the intent to provide for the allocation of revenues related to geothermal exploration. A new appropriated account, the Geothermal Account, is created to receive all revenues related to geothermal activities of the Bureau of Land Management under the Geothermal Steam Act of 1970. Seventy percent of all revenues in the Geothermal Account must be distributed to the Department of Natural Resources (DNR) with the remaining balance distributed to Washington State University (WSU). DNR's portion of the funding must be used for geothermal exploration and assessments. The portion dedicated to WSU must be used to encourage the development of geothermal energy. The current definition of "geothermal resources" is changed to expressly include within its scope all products of geothermal processes, fluids and steam artificially introduced into geothermal formations, heat found in geothermal formations, and any by-product derived from geothermal formations. The definition clarification also expressly excludes heat energy used in ground source heat exchange systems and helium. Exemptions are provided to the general statement that all water use related to geothermal resources is subject to the general water law appropriation procedure. These exemptions are for water reasonably lost during well testing or a temporary failure of geothermal extraction infrastructure and for water that is removed from an aquifer in the geothermal extraction process but later returned or reinjected into the same aquifer. DNR and DOE must cooperate to avoid permitting duplication related to geothermal activities that affect water.

B. SB 5297: Coal Transition Power

SB 5297 amends the state Energy Independence Act to allow qualifying utilities using coal power that fail to meet an annual target in I-937 (passed by Washington State voters in 2006) for acquiring eligible renewable resources to be in compliance with I-937 if the utility spent one percent of its total annual revenue requirement to meet the eligible renewable resource targets, had no increases in the demand for electricity for the previous three years, and did not sign any contracts for nonrenewable resources, other than coal transition power, after December 7, 2006.

C. E2SSB 5802: Greenhouse Gas Emissions (GHGs)

E2SSB 5802 requires the Office of Financial Management contract with an independent and objective consultant to prepare a credible evaluation of approaches to reducing GHGs. The evaluation must be provided to the Governor by October 15, 2013, for use by a workgroup composed of executive and legislative branch representatives and must include a review of other countries' and states' GHG emission reduction programs, regional efforts to reduce GHGs, and an analysis of Washington State's emissions and related energy-consumption profile. The review also must include available information from each program on the following: the effectiveness of the jurisdiction in achieving its emission-reduction goals; the impact on the economy, including power rates, agriculture, manufacturing, and transportation fuel costs; the effect on household consumption and spending, including measures to mitigate for low-income populations; displacement of emission sources due to the program; significant co-benefits, such as to public health; achievements in greater independence from fossil fuels and the economic costs and benefits; the most effective implemented strategy and the tradeoffs made; and opportunities for new manufacturing infrastructure, investments in cleaner energy and energy efficiency, and jobs, including in-state opportunities. An analysis of the state's emissions and related energy-consumption profile must include the following:

- total expenditure for energy by fuel category and sources of fuel;
- options for an approach to reduce emissions that would increase spending on in-state energy production relative to expenditures on imported energy sources, and effects to job growth and economic performance; and
- existing studies of the potential costs to Washington consumers and businesses of GHG emission reduction programs or strategies being implemented in other jurisdictions.

The evaluation must examine and summarize state and federal policies that will contribute to meeting the GHG targets. The recommendations must be prioritized to ensure the greatest amount of environmental benefit for each dollar spent and based on measures of environmental effectiveness, and include consideration of current best science, effectiveness, and how best to administer the program and polices.

V. Land use

A. SHB 1074: Plat Approvals

SHB 1074 modifies provisions governing subdivisions by extending the period by which subdivisions are governed by the terms of an approved final plat from nine to ten years and by removing a requirement that an associated project be within city limits.

B. ESHB 1652: Impact Fee Payment

ESHB 1652 obligates counties, cities, and towns to adopt deferral systems for the collection of impact fees from applicants for residential building permits through a covenant-based process, or through a process that delays payment until final inspection, certificate of occupancy, or equivalent certification.

C. ESHB 1717: Up-front Environmental Planning

ESHB 1717 authorizes local governments to recover reasonable expenses incurred in the preparation of nonproject environmental impact statements (EIS) for infill actions that are categorically exempt from requirements of the State Environmental Policy Act, and for development or redevelopment actions that qualify as "planned actions." The bill establishes requirements governing recovery fee assessments and related appeals, including requiring the fees to be enacted through ordinances, and to be reasonable and proportionate to the total expenses incurred by the local government in preparation of the EIS. ESHB 1717 also modifies provisions governing contracting between qualifying municipalities and real estate owners for the construction or improvement of water or sewer facilities by making the contracts mandatory, at the owner's request, and by allowing municipalities to collect associated fees.

D. SSB 5399: Growth Management Act (GMA) Penalties

Unless the Growth Management Hearings Board (GMHB) makes a determination of invalidity, SSB 5399 prohibits state agencies, commissions, and governing boards from penalizing jurisdictions during the period of remand following a finding of noncompliance by the GMHB and the pendency of an appeal before the GMHB or subsequent judicial appeals. If a comprehensive plan, development regulation, or an amendment is appealed to the GMHB and has not yet taken effect, the local jurisdiction may not be deemed ineligible, or otherwise penalized, in the award of a state agency grant or loan during the pendency of the appeal before the GMHB or during any subsequent judicial appeals. During these appeals, state agencies must accept an otherwise eligible application for a state grant or loan. For purposes of public facility loans or grants awarded by state agencies, and associated preferences for local governments that adopt required comprehensive plans and development regulations, a local government is deemed to have satisfied its adoption requirements if the local government adopts or adopted a comprehensive plan and development regulations before the state agency makes a decision regarding award recipients of loans or grants. A jurisdiction planning under the GMA that adopts a comprehensive plan and development regulations may request financial assistance for public works projects. Jurisdictions planning under the GMA are not required to adopt a comprehensive plan or development regulations before requesting financial assistance. Additionally, a jurisdiction planning under the GMA that has not adopted a comprehensive land and development regulations within specified time periods is not prohibited from applying for or receiving financial assistance if the comprehensive plan and development regulations are adopted before executing a contractual agreement for financial assistance. A jurisdiction planning under the GMA that adopts a comprehensive plan and development regulations may request a grant or loan for water pollution control facilities. A jurisdiction planning under the GMA that has not adopted a comprehensive plan and development regulations within specified time periods is not prohibited from receiving a grant or loan for water pollution control facilities if the comprehensive plan and development regulations are adopted before DOE disburses funds for the grant or loan.

E. SB 5417: Annexation Within a Code City

SB 5417 modifies provisions governing code city annexations of unincorporated "islands" of territory by eliminating the requirement that such territory include residential property owners, and by allowing a resolution of annexation when unincorporated territory either (1) contains less than 175 acres and all of its boundaries are contiguous with the code city, or (2) contains any amount of acreage, has boundaries that are at least 80 percent contiguous with the code city, and is within the same county and urban growth area.

VI. Toxics and Air Emissions

A. ESSB 5458: Asbestos in Building Materials

Beginning January 1, 2014, ESSB 5458 requires that the manufacture, wholesale or distribution of building materials containing asbestos be labeled.

B. ESHB 1245: Derelict & Abandoned Vessels

ESHB 1245 modifies the state's derelict vessel program by enhancing regulatory authority, providing funding and dealing with requirements for the sale of vessels from public entities. Beginning on July 1, 2014, the owners or operator of vessels that are more than 40 years old and longer than 65 feet must obtain a vessel inspection before transferring ownership of the vessel to another party. Be-

fore the ownership of a publicly-owned vessel can be transferred, a review of the vessel's seaworthiness must be completed. Any vessel deemed to be in an advanced state of deterioration must either be repaired before sale or permanently dismantled. If the vessel is deemed seaworthy and approved for sale, the state or local entity processing the sale must collect certain information from the buyer. DNR also is directed to develop and administer a turn-in program for soon-to-be derelict vessels. ESHB 1245 allows DOE and any authorized public entity (including most state and local owners of aquatic lands and shorelines) to seek a warrant in order to board a vessel, mitigate risk, determine ownership, or administer the laws relating to derelict and abandoned vessels. The $1 annual derelict vessel removal surcharge applied to each vessel registration is made permanent.

C. ESHB 1294: Flame Retardants – *Died in Conference Committee in Regular Session*

ESHB 1296 would have prohibited the manufacture, sale, or distribution of residential upholstered furniture or children's products containing TDCPP and TCEP in any product component in amounts greater than 100 parts per million (ppm). The legislation also would have banned the sale, manufacture, or distribution of children's products or residential upholstered furniture containing any flame retardant identified as a high priority CHCC in amounts greater than 100 ppm. Retailers who unknowingly sold products containing restricted flame retardants would have been shielded from liability. DOE would have been required, in certain circumstances, to grant manufacturer-specific exemptions allowing flame retardants on the CHCC list to be temporarily included in children's products or residential upholstered furniture. Under ESHB 1296, in order for a manufacturer to receive an exemption to include a flame retardant on the CHCC list, the manufacturer would have to demonstrate, and DOE would have to determine, that there was not a technically feasible, safer alternative to the chemical meeting fire safety standards.

VII. Forests, Fish, and Wildlife

A. E2SSB 5193: Gray Wolf Conflict Management

E2SSB 5193 establishes a funding mechanism for livestock damage caused by wolves. The bill authorizes WDFW to pay not more than $50,000 per year from the state Wildlife Account for claims and assessment costs for injury to or the loss of livestock caused by wolves. Compensation provided for damage to livestock may not exceed the animal's market value, replacing the specific statutory caps per animal under current law. In addition, although not part of legislation, a letter was signed by interested legislators to the Washington Fish and Wildlife Commission during the session. That letter served as the basis for what is now a permanent rule that allows a landowner to kill a wolf found in the act of predation in portions of the state where the gray wolf is not federally listed as threatened or endangered.

B. SSB 5634: DNR Cooperative Agreements

SSB 5634 allows DNR to enter into cooperative agreements with individuals, nonprofit organizations or volunteer groups to assist the agency with implementing its multiple use mandates, ensuring compliance with local ordinances, and fostering aquatic lands uses. The agreements may utilize the services of these groups to plan, construct, and operate recreational areas, trails, and facilities for educational, scientific, or experimental purposes or for other purposes that provide a benefit to lands managed by DNR.

C. SSB 5702: Aquatic Invasive Species

SSB 5702 requires a person who enters Washington by road and is transporting a watercraft used outside of the state to have documentation that the watercraft is free of aquatic invasive species.

Law School Reports

Gonzaga University School of Law – Environmental Law Caucus

Gonzaga's Environmental Law Caucus (ELC) brings students together in an educational setting to expand their knowledge of environmental law beyond the classroom into a more practical setting. The ELC provides students a variety of opportunities ranging from informational speaking events to cleaning up the local community through hands-on work. We encourage students of all educational backgrounds to participate in the club, and attempt to expand Gonzaga's discourse regarding all types of environmental issues. This fall, the ELC got right to work during fall semester, participating in the "Power Past Coal" campaign in Spokane. An effort to stop the coal terminal proposals at Cherry Point and Longview, Washington, the movement gained quite a bit of community support and involvement in the Eastern Washington area. ELC members participated in phone banks which informed citizens on the scoping hearing that took place in Spokane at the end of September. Members also attended the rally and spoke at the hearing.

Spokane provides Gonzaga Law students a unique opportunity to interact with a tight-knit environmental community. We work directly with a variety of non-profits in the area, including the Spokane Riverkeeper, The Lands Council, and the Spokane Conservation District. Our volunteers were also able to take part in, and have a huge impact at, Spokane's annual Spokane River Cleanup.

This year the ELC hopes to take a balanced approach between practical modern environmental law and environmental activism. The ELC is co-sponsoring a speaking event this October where Professor Mary Wood, the Philip H. Knight Professor of Law and Faculty Director of the Environmental and Natural Resources Law Center at the University of Oregon, will speak on her new book, *Nature's Trust: Environmental Law for a New Ecological Age*. The club is also planning to set up a "drafting an environmental citizen complaint under CAFTA" simulation for spring semester, utilizing contacts who are involved with the Environmental Cooperation Agreement under the CAFTA agreement.

Seattle University School of Law – Environmental Law Society

The mission of the Environmental Law Society (ELS) at Seattle University School of Law is to promote awareness of environmental issues affecting the Pacific Northwest. With a particular focus toward environmental justice, ELS strives to collaborate with groups both on campus and in the community to increase awareness of the disproportionate impacts of environmental issues on certain communities and to encourage meaningful involvement of all people with regard to their surrounding environment.

This fall, ELS has continued to strengthen its relationship with the Duwamish River Cleanup Coalition, a local organization that advocates for a successful restoration of the Duwamish River. A group of ELS members participated in a cleanup on the river and learned more about this effort to ensure the viability of the river. ELS is also partaking in a tour of the Bullitt Center, "The Greenest Commercial Building in the World," where ELS members will learn more about this sustainable endeavor.

This spring, ELS will again host a panel as a part of the school's Diversity Week. This will allow us to highlight our environmental justice focus as the topic is "Borders and Barriers," which addresses the disparate treatment of diverse communities. We are in the planning stages of this event and we welcome any insight or ideas about how to make it as a successful as possible. We are also looking forward to co-hosting another networking event with our counterpart at UW and the ELUL Section to bring practicing lawyers and students together in a relaxed and fun environment.

Lastly, we will once again be making our big trip to the Public Interest and Environmental Law Conference (PIELC) in Eugene, Oregon. PIELC is an annual highlight of the ELS calendar, and is paired with a beach camping trip that caps the weekend. In order to raise money for the event, ELS is planning a fundraiser party to kick off the spring semester.

We welcome any input from the WSBA's Environmental and Land Use Law Section community. If you have any comments, suggestions, or activity ideas, please let us know. We appreciate all of your environmentally conscious efforts and look forward to working with you soon.

Please contact ELS co-presidents Nicole De Leon *(deleonn@seattleu.edu)* or Keith Masill *(masillk@seattleu.edu)* with any questions or comments.

University of Washington School of Law – Environmental Law Society
(formerly GreenLaw)

The Environmental Law Society (ELS) at the University of Washington is off to a strong start for the 2013-2014 school year. This summer ELS focused on building its membership and connecting with incoming 1Ls. Before classes started, members got together for service projects with EarthCorps, happy hours, and other networking opportunities. The ELS leadership established an ambitious list of goals for the organization and looks forward to working collaboratively with attorneys, other departments at the UW, and local non-profits and businesses.

A primary goal of ELS is to provide members with meaningful opportunities to develop legal skills while gaining exposure to the complex field of environmental law. ELS decided that the best way to achieve this while balancing other school-related priorities is through pro bono work. Each quarter our pro bono coordinators work with local attorneys who provide research questions related to cutting-edge environmental issues. Teams of students then work collaboratively to provide timely and thorough results to the attorney. The pro bono project this fall quarter is providing ELS members a chance to explore an exciting question related to international environmental law.

Another goal of ELS is to create opportunities for UW Law students to learn more about contemporary issues in environmental law. To achieve this goal, ELS is partnering with other organizations to host panel discussions, facilitate student trips to the Public Interest Environmental Law Conference in Eugene, and organize an interdisciplinary environmental law conference in spring 2014. ELS also had an opportunity to co-sponsor a lunchtime event with visiting professor Thomas Schoenbaum to explore the effectiveness of current international mechanisms for dealing with oil spills and other environmental issues.

ELS is committed to helping its members develop professionally and connect with Seattle-area practitioners. A favorite activity of the membership is a Speed-Networking Event where members help each other hone interviewing skills and clean up resumés. In addition, ELS members have found a fun, meaningful, and effective forum for networking with each other by inviting professors and local practitioners to join them for outdoor service projects. This November, ELS joined community members in Golden Gardens for a restoration project. ELS loves to partner with local firms, organizations, and agencies to host a variety of events for students and attorneys, so please contact us if this interests you!

Questions and comments can be addressed to ELS co-presidents, John Marlow *(marlowj@uw.edu)* and and Kiry Nelsen *(kmnelsen@gmail.com)*.

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