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In This Issue

Message from the Editors

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

Welcome to the Spring 2016 edition of the ELUL Section Newsletter. We hope you all enjoyed some sun and lots of insightful discussion at the mid-year conference. The Spring 2016 edition is full of contributions from ELUL section members who generously volunteered their time to write articles on timely topics—particularly on areas touching and concerning water—that we hope will be of great interest to you. We also provide the popular and ever informative comprehensive updates on legal and administrative decisions of the recent past from some familiar faces.

We are already busy screening articles for our next edition. Please let us know if you have a topic of interest that you would like to see in a future newsletter or other suggestion to make this a useful tool for you in your practice.

Stormwater Permits Are Not One Size Fits All

By Michael A. Nesteroff and Julie S. Nicoll

It's rare for a stormwater lawsuit to result in a court decision since most settle in the early stages, but a ruling by U.S. District Court Judge John C. Coughenour in the Western District of Washington provides useful guidance for determining which of several stormwater permits issued by the Washington Department of Ecology may apply. In the case of *Puget Soundkeeper Alliance v. Cruise Terminals of America,*[1] decided on November 20, 2015, the answer is more than one permit may be necessary depending on the type of stormwater discharge.

In the case, Puget Soundkeeper Alliance, an environmental nonprofit organization, brought a Clean Water Act citizen suit against Cruise Terminals of America ("CTA") and its landlord, the Port of Seattle ("Port"), alleging that they discharged industrial stormwater runoff and other pollutants into Elliott Bay without a National Pollutant Discharge Elimination System ("NPDES") permit. The court found that a portion of the facility's stormwater system drained into a municipal separate sewer system and another portion drained into a combined sewer system. CTA argued that it had sufficient coverage for the discharges under its Vessel General Permit ("VGP") and the Port's Phase I Municipal Stormwater Permit.

The court sided with Puget Soundkeeper Alliance, finding that the Municipal Permit itself may not be adequate for the cruise terminal's discharges to the municipal separate sewer system. The court's ruling was supported by the permit language, which states that a separate NPDES permit is required for facilities that create stormwater discharges associated with industrial activity. However, the court held that discharges to the combined sewer system are not considered discharges to "waters of the state" and do not require an Industrial Stormwater General Permit ("ISGP"). Thus, the

court held that no permit is required for discharges to the combined sewer system.

Puget Soundkeeper Alliance also argued that CTA and the Port were required to seek coverage under the ISGP, in addition to their coverage under the VGP, for vessel cleaning and maintenance activities conducted at the facility. The court found that the VGP covers discharges incidental to normal vessel operations and coverage under the ISGP is not required for any incidental discharges directly into Elliott Bay from vessels that have obtained a VGP. The court further held that even though the VGP covers all incidental discharges from a vessel, it does not cover incidental discharges from land-based facilities that work on vessels. Therefore, discharges from a land-based facility are not covered under the VGP. The court reasoned that vessels with VGP coverage that dock at the cruise terminal are separate point sources from the cruise terminal's stormwater drainage system, which require coverage under the ISGP. With respect to CTA's operations at the Port's facility, the court ultimately held that an issue of fact existed as to whether residue from vessel maintenance and cleaning activities fell on the cruise terminal and denied in part both of the parties' respective motions. The court further held that because the Port and CTA exercised sufficient control over the cruise terminal, they both may be found liable for unpermitted discharges regardless of who the facility's operator is.

Judge Coughenour's order provides the regulated community with valuable guidance — not all stormwater discharges should be treated equally. While all incidental discharges from a vessel are covered under the VGP, incidental discharges from land-based facilities that maintain vessels require coverage under the ISGP. Additionally, the Municipal Permit does not cover facilities that create stormwater discharges associated with industrial activity. To confirm that your facility is in compliance with the Clean Water Act and has sufficient coverage under the appropriate stormwater permit, it is important to evaluate your facility's potential point sources, stormwater discharges, and drainage systems, and examine the language of the various permits to determine whether more than one may apply.

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1 Case No. 2:14-CV-00476.

A Report from the Confluence of Water Rights, Rural Water Supply, and Growth Management

By Jacqui Brown Miller

Introduction

On October 20, 2015, the Washington Supreme Court heard oral argument in *Hirst v. Whatcom County.*[1] The court's decision is eagerly awaited by water law and growth management practitioners. *Hirst* represents the most recent conflict over efforts to balance domestic rural water supply with instream resources when rural property owners seek to drill domestic water wells that rely on permit-exempt groundwater withdrawals in basins where minimum instream flows ("MIFs") are not consistently met.

The primary issues presented in *Hirst* are:

1. Under the Growth Management Act ("GMA"), how far must local governments go – through their comprehensive plans and development regulations – to assure they do not authorize local development in the absence of legally available water or in a manner that generally harms water resources?
2. How do local GMA responsibilities intersect with Washington's surface water and groundwater codes and with the Washington Department of Ecology's ("Ecology") regulatory authority for administering them?

Relevant GMA and Land Use Provisions

Under the GMA and the Planning Enabling Act, most local governments must create county-wide planning policies, a comprehensive plan, and development regulations. Comprehensive plans must be consistent with planning policies, development regulations must be consistent with comprehensive plans, and decisions regarding project approvals are evaluated for consistency with development regulations.[2]

The legislature recognized the inextricable link between land use and water use and that the pursuit of prosperity and associated expanding land development will continue to increase competition for

water resources.[3] Thus, Washington land use laws require local governments to:

- Develop land use planning documents that are informed by the goal of protecting the environment and enhancing quality of life, including water quality and water availability.[4]
- Enact comprehensive plans and development regulations that provide for protection of the quality and quantity of groundwater used for public water supplies;[5] enhance rural and non-urban areas, including rural character, or patterns of land use and development compatible with fish habitat and consistent with protecting natural surface flows and groundwater recharge;[6] and include measures to protect rural character by protecting surface water and groundwater resources.[7]
- Approve land plats and land subdivisions only with an affirmative finding that appropriate and adequate provisions for potable water supply are in place.[8]
- Approve building permit applications only with affirmative evidence of adequate and legally available water supply.[9]

Relevant Water Law Provisions

Ecology protects instream resources, in part, by establishing regulations that set and protect minimum instream flows – MIF rules. Under Washington law, MIFs established by rule are water rights protected under the priority system from impairment by junior water rights and by unpermitted water use.[10]

In determining whether to issue new water right permits, Ecology determines whether the new proposed water right will impair any senior water rights, including MIF water rights established by rule. However, in areas where municipal water is not available from an established water purveyor, particularly in rural areas, the need for domestic water often is met through individual wells that rely on permit-exempt groundwater withdrawals (essentially wells that are for domestic uses in an amount not exceeding 5,000 gallons per day ("gpd")).[11] Even though these withdrawals, once perfected, are water rights, Ecology does not subject them to its pre-approval impairment analysis because water withdrawals via private exempt wells are exempt from Ecology's permitting system. Therefore, these water rights are being established with no analysis or assurance that the new groundwater appropriation does not impair senior MIF water rights or any other senior water right. [12]

Introduction to the *Hirst* Litigation

It was within the context of the above-described legal and policy framework that Hirst and Futurewise challenged Whatcom County's local land use regulations on grounds that they allegedly fail, under the GMA, to protect surface and groundwater quality, water availability, or water for fish.[13]

Hirst/Futurewise argue that the GMA requires counties to enact growth management regulations that (1) restrict or prohibit development if that development relies on permit-exempt withdrawals in areas where MIFs are not met and (2) protect the rural character by protecting surface water and groundwater resources.[14]

A complicating nuance is that Ecology's MIF rules are inconsistent – some address permit-exempt water withdrawals as they relate to MIFs and others do not. Hirst/Futurewise argue that the GMA requires counties to protect MIFs from permit-exempt water withdrawals, even where Ecology's MIF rules are silent regarding whether it is legal for permit-exempt wells to impact MIFs. They also argue that the GMA requires counties to accomplish this protection by passing county regulations that prohibit permit-exempt water withdrawals in areas where such withdrawals would impair MIFs.[15]

Whatcom County, on the other hand, argues that it is sufficient for county regulations to prohibit new development if the development would rely on permit-exempt well water that Ecology has determined to be unavailable (through a MIF rule that explicitly addresses permit-exempt wells).[16] According to Whatcom County, if an Ecology MIF rule is silent regarding the allowable impact of exempt wells on MIFs, then a local government may default to the position that water to support permit-exempt wells is legally available.[17] According to Whatcom County, Hirst/Futurewise's position, if taken to its logical conclusion, would upset the regulatory system that governs water rights because it would insert local governments into roles and responsibilities allocated to Ecology. [18]

Evolution of the Case Law Leading up to *Hirst – Campbell and Gwinn, JZ Knight*, and *Kittitas*

The GMA[19] and the Planning Enabling Act[20] have long required that counties and cities link their land use planning with surface and ground water planning, both in their general planning efforts and when reviewing specific projects. However, until relatively recently there has been little judicial review of these state-imposed local mandates or of the proper integration of state and local water resource management and land use planning. Recent judicial scrutiny seems to be prompted by more extreme water scarcity and conflicts over water,[21] growing scientific understanding of the connection between surface water and ground water, the lack of clarity over the regulation of permit-exempt wells, and, as shown by *Swinomish Indian Tribal Community v. Washington State Department of Ecology*,[22] the MIF rules that are increasingly affecting the confluence of water rights and land use law.

Ecology v. Campbell and Gwinn, LLC

In 1999, in the Yakima River Basin where water rights were not being issued because water supply was insufficient, developer "Campbell and Gwinn" began developing twenty residential lots without filing a water right application. The developer argued it could legally drill a series of single wells, each serving one or two lots, and obtain water rights for each well under the water-permit exemption set forth in RCW 90.44.050, because each well would use less than the 5,000 gpd limitation. Ecology sued to stop Campbell and Gwinn, asserting "daisy-chaining" wells together to support one larger, artificially segmented development was not authorized under the permit exemption.[23]

The case went to the Washington Supreme Court, which held that the 5,000 gpd exemption could not be used to allow collective withdrawal of more than 5,000 gpd in a proposed residential subdivision, even if multiple wells would each serve one individual lot and each well would be used to withdraw less than 5,000 gpd.[24] This case clarified that qualifying for the exemption does not depend solely on who ultimately withdraws the water and puts it to beneficial use. Project context also is a relevant factor to be considered in determining if the exemption applies. Also, determining whether the exemption applies must be done prior to well construction.[25]

JZ Knight v. City of Yelm

In 2008, JZ Knight, who owned a Group A water system[26] near Yelm, challenged the City of Yelm's approval of several developments, asserting that sufficient legally available water did not exist to support Ecology's approval of the developments' water right applications. Knight could no longer use certain wells comprising her senior water right due to surface water having gone dry. She asserted that, if approved, the developments' appropriations would impair her use. The Thurston County Superior Court held: "[Under RCW 58.17.110,] Yelm must make findings of 'appropriate provisions' for potable water supplies by the time of final plat approval. … *[S]uch findings would require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions."*[27]

Based on this reasoning, JZ Knight won her case.

Kittitas County v. Eastern Washington Growth Management Hearings Board

2011 brought to a close seven years of litigation over Kittitas County's comprehensive plan and development regulations. The County's planning efforts were challenged before the Growth Management Hearings Board ("GMHB" or "Board"), which held that the county did not comply with the GMA's mandate to protect water resources because its "subdivision regulations allow[ed] multiple subdivisions side-by-side, in common ownership, which [could] use multiple exempt wells … contrary to the GMA's requirements to protect water quality and quantity."[28] The Board connected the GMA's mandate to protect water with the *Campbell and Gwinn* court's interpretation of RCW 90.44.050 as disallowing the "daisy-chaining" of exempt wells when total groundwater use would exceed the 5,000 gpd permit exemption cap.[29]

The Washington Supreme Court affirmed the Board. The court held that counties would evade the court's *Campbell and Gwinn* holding if they separately evaluate multiple subdivision applications for properties that are all part of the same artificially segmented development. In doing so, counties could approve subdivisions of land in reliance on the availability of permit-exempt wells under circumstances in which *Campbell and Gwinn* would require Ecology to issue water permits under RCW 90.44.050.[30]

The court rejected arguments made by the parties that RCW 90.44.040 preempts counties from separately appropriating groundwater, holding that RCW 90.44.040 does not prevent counties from protecting public groundwater from detrimental land uses or from enacting local regulations that are consistent with Washington's water code. In fact, held the court, "several relevant statutes indicate that *the County must regulate to some extent to assure that land use is not inconsistent with available water resources. The GMA directs that the rural and land use elements of a county's plan include measures that protect groundwater resources."*[31]

The court contrasted the role of Ecology with the role of local governments, observing that while Ecology is responsible for permitting groundwater appropriation, counties are responsible for land use decisions that affect groundwater resources, including the subdivision of land. Ecology should maintain its statutory role and also assist counties in their land use planning, so they can meet their duty to adequately protect water resources in addition to assuring that appropriate provisions are made for potable water supply. Interpreting RCW 58.17.110 as only requiring counties to assure water is physically underground would effectively allow them to condone the evasion of Washington's water permitting laws and impose a costly burden on nearby property owners with existing water rights.[32]

In 2014, Kittitas County adopted an ordinance to comply with the Supreme Court's decision – Ordinance No. 2014-055. The Board approved the ordinance[33] and it is being called a template for other local governments.

The *Hirst* Case – on Review before the Supreme Court

Like Kitsap County,[34] Whatcom County has undergone a lengthy process of defending amendments to its comprehensive plan and development regulations against assertions that they are legally inadequate under the GMA. Whatcom County

began defending its planning efforts in 2005 and the Board found the County's comprehensive plan and development regulations did not comply with the 1997 GMA amendments that required enhanced protections to rural character.[35] In 2009, the Washington Supreme Court affirmed the Board's decision.[36]

In 2012, in an effort to comply with the 2009 decision, Whatcom County amended its planning regulations, enacting Ordinance 2012-032, which amended the Comprehensive Plan's Rural Element Policy 2DD-2.C.2 through .9, adopting by reference various pre-existing County regulations.[37]

GMHB Decision – Held Whatcom County's Updated Planning Efforts Invalid

Hirst/Futurewise alleged that Whatcom County's 2012 updated planning ordinance No. 2012-032 fails to comply with the GMA regarding the protection of surface and groundwater quality, water availability, and water for fish.[38] The Board agreed.

In its decision, the Board relied on principles from the Supreme Court's *Kittitas* decision, setting the stage for its evaluation of Whatcom County's regulations. The *Kittitas* principles recited by the Board include: Counties cannot practicably assure there will be adequate potable water supply, which they must do before approving building permits and subdivision applications, without first ensuring that local land use plans and regulations are consistent with water availability.[39] Local governments must "plan for land use in a manner that is consistent with the laws providing protection of water resources and establishing a permitting process"[40] and local governments – not Ecology – are responsible for making decisions on water adequacy as part of land use decision making, particularly with respect to exempt wells."[41]

The Board next turned to the question of whether Whatcom County adopted measures that fully apply the GMA's water resources requirements under the local circumstances.

Relying on the Supreme Court's *Postema* decision, the Board determined that a development application must be denied if the applicant intends to rely on a new withdrawal from a hydraulically connected groundwater source in a basin that Ecology has explicitly closed to groundwater withdrawals or that Ecology effectively has closed by promulgating a MIF rule that establishes a MIF water right, which subsequent groundwater withdrawals likely would impair.[42]

In determining that the applicable MIF rule – the Nooksack Rule – closed the basin to further groundwater withdrawals unless a project proponent could show those withdrawals would not impair MIF water rights, the Board seems to have relied on a 2011 letter from Ecology to Snohomish County officials that Ecology provided to Whatcom County staff as an example of what happens to groundwater availability in a basin when there are unmet MIFs – the basin is closed to additional withdrawals, including from exempt wells.[43]

Following the 2011 Ecology letter and *Postema*, the Board determined that Nooksack Rule closed the basin to any further groundwater withdrawals, including those from permit-exempt wells, unless a project proponent can demonstrate, factually, that the subject groundwater is not in hydraulic connectivity with an impaired surface water body protected by the Nooksack rule.[44]

The Board acknowledged that Policies 2DD-2.C.6 and .7 only allow the county to approve a subdivision or building permit that relies on a permit-exempt well if the proposed well site/groundwater falls outside the boundary area that Ecology explicitly has determined, by rule, has no water available for development. However, held the Board, "this is not the standard to determining legal availability of water,"[45] and "this restriction falls short of the *Postema* standard, as it does not protect instream flows from impairment by groundwater withdrawals."[46] Policy 2DD-2.C.6 and .7 and the regulations they adopt by reference "do not require the County to make a determination of legal availability of groundwater in a basin where instream flows are not being met."[47]

The Board held that the GMA mandates that a comprehensive plan measure protect rural character, defined as development and land use patterns consistent with protecting natural surface water flows. Based on this reasoning, Whatcom County's regulations did not comply with the GMA: "[Policy 2DD-2.C.6] does not govern development in a way that protects surface water flows and thus fails to meet the requirements of RCW 36.70A.070(5)(c)(iv);"[48] and "2DD-2.C.7 fails to limit rural development to protect ground or surface waters with respect to individual permit-exempt wells as required by RCW 36.70A(5)(c)(iv)."[49]

Division I Court of Appeals Decision – Overturned the Board's Decision

May Local Governments Defer to Ecology Rules, Even if Ecology's Rules Are Not Conclusive on the Issue of Water Availability for Exempt Wells?

Whatcom County appealed the Board's decision. The Court of Appeals agreed with certain broad principles set forth by the Board,[50] but seemed somewhat incredulous that the Board would fault Whatcom County for seeking to meet the GMA's requirement to determine the availability of water by following consistent Ecology regulations regarding the availability of water. The court wrote, "*The Board concluded that the County's use of Ecology's rules as a means of meeting the requirements of the GMA fails to comply with this statute. Rather, the Board appears to conclude that the County must make its own, separate determination of the availability of water in order to fulfill the requirements of the GMA.*"[51] [52]

The court found that the Washington Supreme Court, in *Kittitas*, anticipated *consistent, not inconsistent*, local regulations by counties in land use planning to protect water resources.[53] With the goal of consistency in mind, the appeals court deemed it appropriate for the County to incorporate Ecology's regulations to assess water availability and held that this approach is consistent with the GMA.[54]

Should the Hearings Board have Relied on a 2011 Ecology Letter to Construe the Nooksack Rule?

Next, the court was critical of the Board's interpretation of the extent to which Ecology's Nooksack MIF rule closed Whatcom County's water basins to further appropriation. The court held that the Board erred when it determined that water is not available for permit-exempt withdrawals in WRIA 1 (which contains the Nooksack Basin in Whatcom County) and that all development permits must be denied if the applicant cannot demonstrate that a proposed new permit-exempt groundwater withdrawal will not impair Nooksack Rule MIFs.[55]

The appeals court explained that the Board should not have relied on the 2011 letter from Ecology to Snohomish County officials about the way Ecology interprets the Skagit basin MIF rule. The court held that because the letter merely explained how Ecology interprets Snohomish County's Skagit basin MIF rule, the Board erred in extrapolating it to the Whatcom County Nooksack MIF rule.

Ecology filed an amicus brief disagreeing with the Board's application of the 2011 Ecology letter to Whatcom County, arguing that the Whatcom County-oriented Nooksack Rule, unlike the Snohomish County Skagit basin rule, does not expressly mandate groundwater closures to certain private permit-exempt wells in rural areas of Whatcom County or, in all instances, the denial of development applications that rely on these wells.[56] In other words, Ecology argued that the Nooksack basin in Whatcom County is not closed to permit-exempt wells and their withdrawals, regardless of what Ecology said to Snohomish County in the 2011 letter and regardless of what Ecology staff may have said to Whatcom County staff about how the logic set forth in the 2011 letter might apply to the Nooksack Rule.

The Court of Appeals held that the Board erred in applying information in the letter about the Skagit River Basin MIF rule in Snohomish County to the Nooksack Basin in Whatcom County.

The appellate court also recognized, based on *Postema*, that different basin rules contain different language and expressly declined "to search for a uniform meaning to rules that simply are not the same."[57]

In sum, the appellate court overturned the Board's decision because it felt the decision effectively would require that the County reach a legal conclusion regarding water availability for permit-exempt wells that is not consistent with Ecology's interpretation of the Nooksack Rule.[58]

Does the Prior Appropriation Doctrine Apply to County GMA Decisions?

Hirst argued, under *Postema*, that a MIF set by Ecology rule is an existing water right that may not be impaired by subsequent groundwater withdrawals, including withdrawals from permit-exempt wells. Accordingly, argued Hirst, the Washington Supreme Court's decisions in *Postema* and *Swinomish* support the Board's conclusion that the GMA requires Whatcom County to avoid authorizing exempt-well activities that cause impairment to surface waters and, in particular, impairment to MIF water rights.

Hirst argued that this is true even if Ecology's Nooksack Rule did not explicitly foreclose all groundwater availability to permit-exempt wells because the Nooksack rule was promulgated before Ecology understood the hydrologic connection between groundwater and surface water and *Swinomish* requires that the original intent of Washington water law change with advances in our understanding of science (indicating that the position taken by Ecology in its amicus brief was rooted in the days before advances in our understanding of hydrogeology were made).[59]

In dismissing this argument, the court did not squarely address this issue. Rather, the appeals court wrote that the Board's reliance on the standards set forth in *Postema* to invalidate the County's regulations was misplaced, because the facts in *Postema* addressed decision criteria for evaluating groundwater appropriation permit applications, not permit-exempt withdrawals. The appeals court apparently felt *Postema's* principles should not be extended to cases dealing with permit-exempt wells.[60] The appeals court also wrote that *Swinomish* is factually distinguishable because it involved the Skagit Basin Rule, a rule in which Ecology expressly prohibited permit exempt withdrawals that would impair MIFs.[61]

The upshot of the court's ruling is that it is legal for local governments to make determinations that water is legally available for permit-exempt groundwater wells that support building and subdivision applications, even where there are unmet senior MIF water rights and a likelihood of hydraulic connectivity – as long as an associated MIF rule does not expressly regulate permit-exempt wells or otherwise state that groundwater is unavailable for development.

Before the Washington Supreme Court

Individuals and organizations that filed briefs in the *Hirst* case include Whatcom County, Hirst and Futurewise, Ecology, the Center for Environmental Law and Policy, the Washington Association of Counties, and the Washington Association of Realtors.

On October 20, 2015, the Supreme Court heard oral argument for this case.[62]

At oral argument, the attorney representing Hirst and Futurewise argued:

- The GMA requires local governments to assure that water is legally available before allowing growth and requires local governments to plan for water availability.
- Whatcom County must do an impairment analysis of whether proposed development will impair existing senior water rights, including an analysis of hydraulic connectivity between the proposed water use by the permit-exempt well and senior water rights, including MIFs.
- There is only one functional difference between permit-exempt water withdrawals and permitted water rights, and that is the permit requirement. Both types of water rights are subject to the water code, including the first in time, first in right requirement.
- The applicable MIF rule – the Nooksack Rule – explicitly provides that no more groundwater is allowed to be withdrawn in the basin where a MIF would be impaired – the rule does not explicitly exclude permit-exempt withdrawals from the requirement that no more groundwater can be withdrawn when, to do so, would impair a MIF water right.
- The various parties view the Nooksack Rule differently. Ecology believes that because the Nooksack Rule does not explicitly extend to permit-exempt withdrawals, the junior permit-exempt wells are exempt from any obligation to protect senior water users. Hirst, on the other hand, believes that the rule's failure to mention permit-exempt wells means that permit-exempt withdrawals, under *Cambell and Gwinn*, must still meet the requirement to not impair senior water rights. Where Ecology is not doing this analysis, under the GMA, it falls to the county to perform the analysis.

At oral argument, the attorney representing Whatcom County argued:

- The GMA requires local land use planning to be cooperative and consistent with Ecology's management of water resources.
- The GMA does not require that an impairment analysis be done by local governments, and counties are entitled to follow Ecology's lead on how to interpret and implement MIF rules.
- Whatcom County defers to Ecology's Nooksack rule. Therefore, the County does not need to obtain, from project applicants, an affirmative demonstration of lack of hydraulic continuity.
- Under *Postema*, the GMA does not have to be given priority over Ecology's MIF rule, based on its plain language.
- While the GMA seems to give local governments flexibility, in certain circumstances, to be more protective than Ecology (because of the GMA's short, broad, and vaguely worded mandate for counties to protect groundwater, surface water, and water quality), in the present case, the County is restrained by the operation of the Nooksack Rule and cannot do more than Ecology.
- The GMA is not the forum to address the concern of Hirst and Futurewise over Ecology's interpretation of the Nooksack MIF Rule. Arguments being made by Hirst and Futurewise would require that the County duplicate, and possibly contradict, Ecology's water resource management decisions, a result that the GMA would not require.

The crux issue is: before allowing development, does the GMA require that local governments "assure water availability" *or* that they "assure water availability as managed by Ecology." Hirst and Futurewise argued that Ecology's position that its Nooksack MIF rule does not apply to permit-exempt wells must fail because (1) it is not supported by the rule's plain language and (2) it violates the first in time, first in right priority rule. Whatcom County argues that local governments are entitled to defer to Ecology, and where Ecology has not addressed the issue, local governments may default to a determination of water availability.

Implications

The Supreme Court's decision in *Hirst* may shift evaluations and decision-making over the availability of water resources that historically have been within the sole jurisdiction of the State. Consistent with what several modern scholars have been advocating,[63] the decision may determine that the GMA gives this responsibility to local governments – further integrating the powers of different levels of government in assuring that growth does not exceed the carrying capacity of available water. Essays written by these scholars,[64] and the *Hirst* case, raise provocative questions about allowing water resource considerations to become a more driving force in land use planning. The Supreme Court's decision may provide direction to local governments as to whether, under the GMA, they may, must, or cannot defer to the discretion of state agencies, even where they have been in working in collaboration with them. Particularly regarding the availability of water resources, the court's *Hirst* decision could challenge the very attributes of Washington

water law by subjecting them to local land use planning and decisions.[65]

** This article was written in 2015 when the author was in the private practice of law, and not employed by any governmental agency. Any opinions expressed in this article are those of the author only and do not reflect the opinions of any past or current government employers.*

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1 Whatcom Cnty. v. Hirst, et al., Court of Appeals, Div. 1, No. 70796-5-1 (February 23, 2015) (on appeal Hirst, et al. v. Whatcom Cnty. and the W. WA GMHB, WA Supreme Court, No. 91475-3 (C/A 70796-5-I – consolidated w/72132-1-I & 70896-1-I)).

2 *See* RCW 36.70A.011, .020, .040, .060, .070, .080, .100, .120, .130, *et seq*. and RCW 36.70.545.

3 RCW 90.54.010. In addition, RCW 36.70A.020(12) identifies the GMA planning goals that are to guide comprehensive plans and development regulations, which have been interpreted to include water. *See* Cascade Columbia Alliance v. Kittitas Cnty., E. WA GMHB, Case No. 98-1-0004, Final Decision and Order, 5 (Dec. 21, 1998). The water code is also interrelated with land use decision making. *See, e.g.*, RCW 90.54.090 (Local jurisdictions "shall whenever possible, carry out power vested in them in manners which are consistent with the provisions of [the water code]") and RCW 90.54.130 (Ecology "may recommend land use management policy modification it finds appropriate for the further protection of ground and surface water in this state.").

4 RCW 36.70A.020(10).

5 RCW 36.70A.070(1).

6 RCW 36.70A.090(15)(d) and (g).

7 RCW 36.70A.070(5)(c)(iv); RCW 36.70.330.

8 RCW 58.17.110(2); RCW 58.17.150(1).

9 RCW 19.27.097(1).

10 In basins that have established MIF water rights by MIF rule, subsequent appropriations are junior to MIF water rights and, thus, cannot be authorized. The priority date for a MIF water right, created by rule, is the rule's effective date. RCW 90.03.345. The priority date for a permit-exempt well is the date the water is put to beneficial use. Five Corners Family Farmers v. State, 173 Wn.2d 296, 304, 268 P.3d 892 (2011). *See also* Squaxin Island Tribe v. Dep't of Ecology, 177 Wn. App. 734, 737 n.3, 312 P.3d 766 (2013) (holding that neither water rights obtained through the permitting process nor water rights obtained by beneficially using water from an exempt groundwater well may impair a senior MIF water right).

11 *See* RCW 90.44.050.

12 While permit-exempt wells are legislatively exempt from permitting requirements under RCW 90.44.050, "they are subject to the priority system; thus, permit-exempt wells may not impair senior surface water rights such as instream flows." Squaxin, 177 Wn. App. 734, 737 n.3 (2013) (citing RCW 90.44.030). *See also,* Swinomish Indian Tribal Cmty. v. Dep't. of Ecology, 178 Wn.2d 571, 593, 311 P.3d 6 (2013) ("[A] minimum flow or level cannot impair existing water rights and a later application for a water permit cannot be approved if the water right sought would impair the minimum flow or level.")

13 Hirst v. Whatcom Cnty., GMHB Case No. 12-2-0013, Final Decision and Order, 12 (June 7, 2013). *See* RCW 36.70A.070(5)(c)(iv).

14 Hirst, GMHB Case No. 12- 2-0013, 21 (2013).

15 *Id*. at 16, 17-18.

16 *Id*. at 18-19.

17 *See* Supp. Br. of Whatcom County, at 6-8, available at www.courts.wa.gov/content/Briefs/A08/91475-3%20Supp%20Brief%20-%20Resp.pdf; TV Washington (TVW) link to the oral argument before the Washington Supreme Court, available at: www.tvw.org/watch/?eventID=2015101023.

18 *See* Suppl. Br. of Whatcom County, 2-3, 6-8; *see* oral argument at TVW.

19 Chapter 36.70A RCW and as codified through chapter 19.27 (the Washington Building Code) and Chapter 58.17 RCW (the State Plats and Subdivisions Act).

20 Chapter 36.70 RCW.

21 In Washington, most of the available water, and in many areas, even more than that, has been appropriated. *See* "Water Availability in Your Watershed/WRIA," available at www.ecy.wa.gov/programs/wr/rights/wrpenapp_avail.html.

22 178 Wn.2d 571, 311 P.3d 6 (2013).

23 WA Dep't. of Ecology v. Campbell and Gwinn, L.L.C., 146 Wn.2d 1, 4-8, 43 P.3d 4 (2002).

24 Campbell and Gwinn, 146 Wn.2d 1, 10–13 (2002).

25 *Id*.

26 A Group A Water System is a "public water system with fifteen or more service connections, regardless of the number of people; or a system serving an average of twenty-five or more people per day for sixty or more days within a calendar year, regardless of the number of service connections; or a system serving one thousand or more people for two or more consecutive days." *See* RCW 70.119A.020(4).

27 JZ Knight v. City of Yelm, Thurston Cnty. Superior Court Case No. 08-2-00489-6, Amended Findings and Conclusions (November 7, 2008), *aff'd* JZ Knight v. City of Yelm, 173 Wn.2d 325, 267 P.3d 973 (2011) (emphasis added).

28 Kittitas Cnty., v. E. WA Growth Mgmt. Hearings Bd., 172 Wn.2d 144, 175, 256 P.3d 1193 (2011) (internal citations omitted).

29 Kittitas, 172 Wn.2d 144, 175-76 (2011) (internal citations omitted).

30 *Id*. at 177.

31 *Id. at* 178-79, *citing* RCW 36.70A.070(1), (5)(c)(iv), RCW 19.27.097, RCW 58.17.110 (emphasis added).

32 *Id*. at 180.

33 Kittitas Cnty. Conservation Coalition v. Kittitas Cnty., Order Finding Compliance, Case Nos. 07-1-0004c and 07-1-0015 (August 13, 2013).
34 Some have called the *Hirst* case *Kittitas II*.
35 Futurewise v. Whatcom Cnty., GMHB Case No. 05-2-0013, Final Decision and Order (Sept. 20, 2005).
36 Gold Star Resorts, Inc. v. Futurewise, 167 Wn.2d 723, 222 P.3d 791 (2009).
37 The Hirst Board focused most of its attention on two policies – 2DD-2.C.6 and .7. *See* Hirst v. Whatcom Cnty., GMHB Case No. 12-2-0013, Final Decision and Order, 39-42 (June 7, 2013) ("*Hirst* GMHB Decision").
38 Hirst GMHB Decision.
39 *Id.* at 22, *citing Kittitas Cnty.,* 172 Wn.2d 144, 178-79.
40 *Id.* at 23, *citing Kittitas Cnty.,* 172 Wn.2d at 180.
41 *Id.*
42 *Id.* at 40.
43 *Id.* at 41-42.
44 *Id.*
45 *Id.* at 41.
46 *Id.* at 40.
47 *Id.* at 40 -41.
48 *Id.* at 41.
49 *Id.* at 42.
50 Whatcom Cnty. v. W. WA Growth Mgmt. Hearings Bd., 186 Wn.App. 323, 45-46, 44 P.3d 125 (2015).
51 *Id.* at 48 (emphasis added).
52 *Whatcom Cnty.,* 186 Wn.App. 323, 46, 48 (2015).
53 *Id.* at 50-51, *citing* Kittitas, 172 Wn.2d at 178 (emphasis added).
54 *Id.* at 51.
55 *Id.* at 56.
56 *Id.* at 57-58.
57 *Id.* at 56-57, *citing* Postema, 142 Wn.2d 68, 87 (2000) (emphasis added).
58 *Id.* at 60.
59 *Id.* at 62-63.
60 *Id.* at 55.
61 *Id.* at 62-63.
62 The oral argument can be viewed on TVW at this link: www.tvw.org/watch/?eventID=2015101023.
63 *See, e.g.*, Wet Growth: Should Water Law Control Land Use? (Craig Anthony Arnold ed., Envtl. L. Inst. 2005) (a compilation of essays from water lawyers and scholars).
64 *Id.*
65 Land Use Planning and Water, A Review and Update, Tom McDonald, Envtl. and Land Use L. Newsletter, 5 (February 2015).

Voluntary Stewardship Program (VSP) – An Alternative Approach for Protecting Critical Areas on Agricultural Lands While Maintaining the Viability of Agriculture


By Ron D. Shultz, Washington State Conservation Commission, and Ryan Vancil, Vancil Law Offices PLLC

Introduced as House Bill ("HB") 1886, the Voluntary Stewardship Program ("VSP"), passed the legislature and was signed into law by Governor Christine Gregoire in 2011. The legislation reflected the extensive efforts of agricultural groups, environmental interests, tribes, and counties to reach agreement on a process to assist in the preservation of agricultural viability while protecting environmentally critical areas under Washington's Growth Management Act ("GMA").

The VSP is established at the Washington State Conservation Commission ("WSCC" or "Commission") and is to be administered by the Commission.[1] The primary purpose of the VSP is to protect and enhance critical areas on lands used for agricultural activities through voluntary actions by agricultural operators.[2]

VSP Relationship to the Growth Management Act

All cities and counties must adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.[3] This applies regardless of whether the county is a fully planning county under the GMA. This approach to designation and protection of critical areas is sometimes referred to as the "traditional GMA approach" in relation to the VSP.

The legislation creating VSP added new sections to the GMA statute and is codified at RCW 36.70A.700-760. VSP is an alternative approach to protecting critical areas in areas used for agricultural activities through development regulations.[4] In *Protect the Peninsula's Future v. Growth Management Hearings Board and Clallam County*, the court held "the legislature chose to distinguish alternative pathways to GMA compliance for counties that have elected to participate in the VSP and counties that have not."[5]

One unique feature of VSP within GMA is the focus of VSP on agricultural activities rather than designated agricultural lands.[6] VSP is to "promote plans to protect and enhance critical areas within the area where *agricultural activities* are conduct-

ed."[7] This is regardless of the underlying land use where the agricultural activities are occurring. "Agricultural activities" are defined for VSP purposes as "all agricultural uses and practices defined in RCW 90.58.065 [Shorelines Management Act]."[8]

Relationship to Regulatory Programs

The VSP is designed to protect and enhance critical areas on lands used for agricultural activities through voluntary actions by agricultural operators. Nothing in the VSP statute may be construed to grant counties or state agencies additional authority to regulate critical areas on lands used for agricultural activities.[9]

For an opt-in county, the protection of critical areas where agricultural activities occur must be done through voluntary, incentive programs implemented consistent with a work plan. Once the work plan is approved by the Commission it becomes the development ordinance for agricultural activities. Typical critical areas regulations do not apply for agricultural activities, even if a landowner chooses not to implement a stewardship plan. This is different from the traditional GMA approach where every landowner must comply with the critical area regulations.

VSP does not limit the authority of a state agency, local government, or landowner to carry out its obligations under any other federal, state, or local law.[10] For example, an agricultural landowner wishing to construct a building must still follow the local development regulations for construction of new buildings. Local clearing and grading ordinances must also be followed. If a landowner has a pre-existing agreement with a federal agency, such as a Habitat Conservation Plan ("HCP") under the U.S. Endangered Species Act ("ESA"), these requirements must still be followed, but they may be incorporated into a VSP landowner stewardship plan.

Following approval of a work plan, a county or watershed group may request a state or federal agency to focus existing enforcement authority in that participating watershed if the action will facilitate progress toward achieving work plan protection goals and benchmarks.[11]

"Opting-in" to VSP

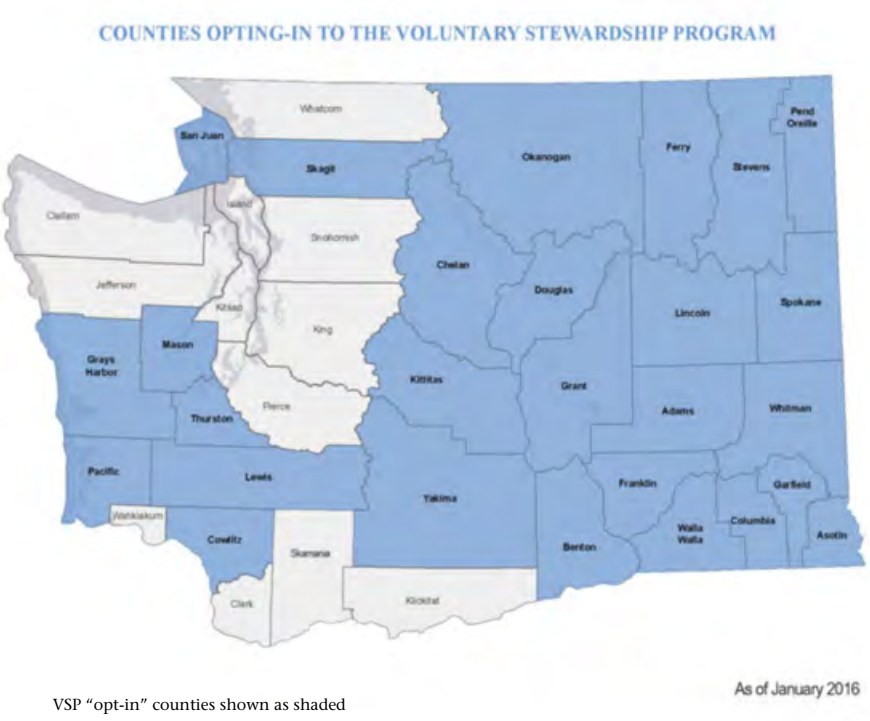
Once VSP became law, counties were given two options:

- Opt-in to the voluntary stewardship program, or
- Continue under existing law in GMA to protect critical areas on agricultural lands.[12]

VSP legislation included a specific provision wherein counties were not required to implement VSP unless funding was provided.[13]

County legislative authorities had six months from July 22, 2011 to elect if they wanted to opt-in to the program by adoption of a resolution.[14] The adopting resolution must state that the county: elects to have the county participate in the program; identifies the watersheds that will participate in the program; and nominates watersheds for consideration by the State Conservation Commission as state priority watersheds.[15]

By the opt-in date of January 21, 2012, 28 of 39 counties had opted-in. In December 2015 one opt-in county, Skamania County, had withdrawn from VSP.



VSP "opt-in" counties shown as shaded

Opt-Out or "Fails Out"

A county not opting-in to the VSP must review and, if necessary, revise development regulations adopted under GMA to protect critical areas as they apply to agricultural activities.[16] This requirement does not apply to counties having completed their review of their critical areas between 2003 and 2007.[17]

A county that has elected to opt-in may withdraw a participating watershed from the program by adopting an ordinance or resolution withdrawing the watershed from the program. A county may withdraw a watershed from the program at the end of three years, five years, or eight years after receipt of funding, or any time after ten years from receipt of funding.[18]

There are other circumstances when a county may "fail out" of the program. A "fail out" of the program occurs when:

(a) The work plan is not approved by the director of the Conservation Commission within the timeline allowed;

(b) The work plan's goals and benchmarks for protection have not been met;

(c) The Commission has determined that the county; state departments of Commerce, Ecology, and Fish and Wildlife; or the Conservation Commission, have not received adequate funding to implement a program in the watershed; or

(d) The Conservation Commission has determined that the watershed has not received adequate funding to implement the program.

RCW 36.70A.735(2).

Within 18 months of one of the events above a county must:

(a) Develop, adopt, and implement a watershed work plan approved by Commerce that meets specified critical areas and agricultural requirements. Commerce must consult with other state agencies before approving or disapproving the plan and its decision is subject to appeal before the Growth Management Hearings Board (Board); or

(b) Adopt qualifying development regulations previously adopted under the GMA by another jurisdiction for the purpose of protecting critical areas in areas used for agricultural activities. The "secondary" adoption of these regulations is subject to appeal before the Board; or

(c) Adopt development regulations certified by Commerce as protective of critical areas in areas used for agricultural activities. The Commerce's certification decision is subject to appeal before the Board; or

(d) Review and, if necessary, revise its development regulations to protect critical areas as they relate to agricultural activities.

RCW 36.70A.735(1).

The State Department of Commerce is required to adopt a rule implementing these options. The rule is codified at WAC 365-191, and the purpose of the rule is to "implement procedures for two of those four options: Department approval of a watershed work plan under RCW 36.70A.735(1)(a); and department certification of development regulations under RCW 36.70A.735(1)(c)."[19]

A county may also opt-out prior to the implementation of VSP by not accepting the funds made available to them for development of the work plan. Under RCW 36.70A.715(1)(a) a county must acknowledge receipt of funds. If a county does not acknowledge receipt of funds, the Commission may make a determination that the county has not received adequate funding to implement the program.[20] If such a determination is made, the provisions of RCW 36.70A.735(1) will apply.

Opt-in County Responsibilities

A county that has opted-in to the VSP is not required to implement the program in a participating watershed until adequate funding for the program in that watershed is provided to the county.[21] Once the Commission "makes funds available" the county must, within 60 days, conduct the following tasks:

- Identify an entity to administer the funds;
- Identify the watershed group for the program; and,
- Acknowledge receipt of funds.

RCW 36.70A.715(1)(a) and (b).

Designation of Watershed Group and Their Duties

A county must designate a watershed group once funds are made available.[22] A county must confer with tribes and interested stakeholders before designating or establishing a watershed group.[23] The watershed group must include broad representation of key watershed stakeholders and, at a minimum, representatives of agricultural and environmental groups and tribes that agree to participate. The county should encourage existing lead entities, watershed planning units, or other integrating organizations to serve as the watershed group.[24]

Once the watershed group is identified and funding is provided, a work plan must be developed. The work plan is to protect critical areas while maintaining the viability of agriculture in the watershed.[25] This balancing of the critical area protec-

tion with the viability of agriculture is unique as compared to the process in the "traditional GMA" approach. In GMA, when developing a critical areas ordinance, the critical areas must be protected. There is not a balancing with the goals of the landowner. But in VSP, the critical area protection must be done in the context of maintaining the viability of agriculture.

The work plan must also include goals and benchmarks for the protection and enhancement of critical areas.[26] Progress on these goals and benchmarks will later be reported to the Conservation Commission. If the watershed group isn't making progress on the goals and benchmarks, then the group must adaptively manage to ensure progress will be made in the next five years. If not, the county is out of VSP and must revert to the "traditional GMA" approach.

Finally, the watershed group shall develop and submit the work plan to the director for approval.[27] Although there is no specific timeline for when the work plan must be submitted to the Conservation Commission, there is a timeline for when the work plan must be approved. After the work plan is submitted to the Conservation Commission, there is a process of review involving the state Technical Panel and, potentially, the Statewide Advisory Committee. If the director of the Conservation Commission does not approve a work plan within two years and nine months after receipt of funding, the director must submit the work plan to the Statewide Advisory Committee for resolution.[28] Even with submitting the work plan to the Statewide Advisory Panel, if the director does not approve a work plan for a watershed within three years after receipt of funding, the work plan is deemed to be not approved and the county must, within 18 months, adopt one of the four options described above for a "fail-out" of VSP.[29]

Work Plan Elements

Once the county has accepted the VSP funding, has identified the lead entity for implementation, and has identified the members of the watershed group, the process begins for the work plan to be developed. When developing and implementing the work plan, the watershed group must satisfy several elements expressly listed in statute at RCW 36.70A.720(1)(a)-(l). The 12 elements listed in this statute cover a range of topics and can more easily be understood if reorganized into a sort of work plan template. When organized for this purpose, the work plan statutory elements break down into three categories: Existing information and resources; participation and landowner outreach; and monitoring and reporting. These categories and their associated statutory elements form a work plan template as follows:

Existing Information and Resource Condition

(a) Review and incorporate applicable

- water quality data and plans,
- watershed management data and plans,
- farmland protection data and plans, and
- species recovery data and plans;

(h) Incorporate into the work plan existing development regulations relied upon to achieve the goals and benchmarks for protection;

(e) Create measurable benchmarks that, within ten years after the receipt of funding, are designed to result in

(i) the protection of critical area functions and values; and

(ii) the enhancement of critical area functions and values through voluntary, incentive-based measures;

Participation and Landowner Outreach

(b) Seek input from tribes, agencies, and stakeholders;

(d) Ensure outreach and technical assistance is provided to agricultural operators in the watershed;

(f) Designate the entity or entities that will provide technical assistance;

(g) Work with the entity providing technical assistance to ensure that individual stewardship plans contribute to the goals and benchmarks of the work plan;

(c) Set goals for participation by agricultural operators conducting commercial and non-commercial agricultural activities in the watershed necessary to meet the protection and enhancement benchmarks of the work plan;

Monitoring and Reporting

(i) Establish baseline monitoring for:

(i) Participation activities and implementation of the voluntary stewardship plans and projects;

(ii) stewardship activities; and

(iii) the effects on critical areas and agriculture relevant to the protection and enhancement benchmarks developed for the watershed;

(j) Conduct periodic evaluations, institute adaptive management, and provide a written report of the status of plans and accomplishments to the county and to the commission within sixty days after the end of each biennium;

(k) Assist state agencies in their monitoring programs; and(l) Satisfy any other reporting requirements of the program.

Work Plan Approval

After the VSP watershed group has completed the work plan, the work plan is submitted to the director of the Conservation Commission for approval.[30] Upon receipt of a work plan the director must submit it to the VSP technical panel for review.[31] The technical panel reviews the work plan and reports to the Conservation Commission director within 45 days after the work plan is received at the Commission.[32]

If the technical panel determines the proposed work plan will protect critical areas while maintaining and enhancing the viability of agriculture in the watershed, they must recommend approval of the work plan.[33] And if the technical panel recommends approval, the director must approve the work plan.[34]

If the technical panel determines the proposed work plan will not protect critical areas while maintaining and enhancing the viability of agriculture in the watershed, they must identify the reasons for its determination and submit those to the Conservation Commission director.[35] The director must advise the watershed group of the reasons for disapproval.[36] The watershed group may modify and resubmit its work plan for review and approval consistent with the statute.[37]

If the director does not approve a work plan submitted under this section within two years and nine months after receipt of funding, the director shall submit the work plan to the statewide advisory committee for resolution. If the statewide advisory committee recommends approval, the director must approve the work plan.[38]

If the director does not approve a work plan for a watershed within three years after receipt of funding, the statutory "fail out" provisions will apply.[39]

Technical Panel

The VSP technical panel consists of the directors or director designees of the departments of Fish and Wildlife, Ecology, Agriculture, and the State Conservation Commission.[40]

The technical panel reviews the work plan and assesses whether at the end of ten years after receipt of funding, the work plan, in conjunction with other existing plans and regulations, will protect critical areas while maintaining and enhancing the viability of agriculture in the watershed.[41]

Statewide Advisory Committee

A statewide advisory committee is established in the VSP statute to advise the Commission and other agencies involved in development and operation of the program.[42] The advisory committee is appointed by the Conservation Commission with the appointments made from a list of nominees provided by stakeholders in the areas of representation on the committee. Members of the advisory committee are established in statute and consist of two persons each representing counties, agricultural organizations, and environmental interests.[43] A critical role for the advisory committee will be to assist the Conservation Commission and the watershed groups if the groups are not meeting their goals and benchmarks.

Work Plan Implementation

Not later than five years after the receipt of funding, the watershed group must report to the director of the Conservation Commission and the county on whether it has met the work plan's protection and enhancement goals and benchmarks.[44] If the goals are being met, the watershed group continues to implement the work plan.[45] But if the goals and benchmarks are not being met the watershed group must submit to the director of the Conservation Commission an adaptive management plan to put the watershed group on a path to meet the goals.[46]

Appeals of VSP Decisions

A VSP work plan is not final until approved by the director of the Conservation Commission.[47] The appeal of the decision to approve the work plan is not addressed in the petitions subject to review by the Growth Management Hearings Board ("GMHB"). The only VSP actions subject to review by the GMHB are certain actions the county must take after the failure of the work plan.[48] Under the Administrative Procedures Act ("APA"), final agency actions are subject to appeal to superior court. Since the VSP statute is silent on the proper venue of an appeal of the final action of approval of a work plan, the provisions of the APA would likely apply. The director of the Conservation Commission's final approval of a work plan would therefore be appealed to superior court.

The GMHB is to hear and determine only those elements of VSP relating to the actions taken by the county when the county opts out, fails out, or does not receive adequate funding.[49] These are the options of required actions a county must take as found in RCW 36.70A.735 discussed above. Specifically, the GMHB may receive petitions relating to:

- Whether the approval of a work plan is not in compliance with the requirements of the program;
- Whether the regulations adopted by Commerce are not regionally applicable and cannot be adopted, wholly or partially, by another jurisdiction; or
- That Commerce certification is erroneous.

RCW 36.70A.280.

Review and Program Evaluation

At the County Level

The VSP includes several elements for review and evaluation of the implementation of a work plan. VSP also includes consequences when progress is not being made towards the goals and benchmarks. These provisions — tracking, reporting, and consequences — are elements of critical areas protection not otherwise found in the GMA statute and are unique to VSP.

Under the VSP, watershed groups are required to, in their work plan, establish baseline monitoring for:

(i) Participation activities and implementation of the voluntary stewardship plans and projects;

(ii) stewardship activities; and

(iii) the effects on critical areas and agriculture relevant to the protection and enhancement benchmarks developed for the watershed;

RCW 36.70A.720(i).

The work group must also conduct periodic evaluations, institute adaptive management, and provide a written report of the status of plans and accomplishments to the county and to the commission within 60 days after the end of each biennium.[50]

At the State Level

The Conservation Commission, as part of their administrative functions for the program, is to review and evaluate the program's success and effectiveness and make appropriate changes to policies and procedures for implementing the program, in consultation with the statewide advisory committee and other affected agencies.[51]

The Conservation Commission is also to:

- Report to the legislature on the general status of program implementation;
- Conduct a review of the program, in conjunction with the statewide advisory committee, beginning in 2017 and every five years thereafter, and report its findings to the legislature by December 1st; and
- Report to the appropriate committees of the legislature as required.

RCW 36.70A.705(j)-(l).

Conclusion

The Voluntary Stewardship Program (VSP) presents a unique opportunity to address an important environmental issue area that has been a challenge for several decades — how to protect and restore critical areas impacted by agricultural activities and do so while keeping agriculture economically viable. Another unique feature of VSP is the fact that it is the product of a negotiated process among a group of entities who have battled over these issues since the creation of the GMA. Key policymakers should support these types of negotiated solutions. Showing support and success when traditional adversaries work together for a common solution may encourage more of these negotiated solutions for complex natural resource issues in the future.

Implementation of VSP at the local level will be difficult. The burden of the work load is placed on an all-volunteer watershed group. While similar structures have been successful in other natural resource areas such as salmon recovery planning and watershed planning, those experiences highlight the challenge of maintaining the local efforts over time with only volunteer participation. Previous watershed planning and salmon recovery planning efforts also teach us that ongoing state support through staff assistance and funding are critical for long-term sustained success.

Ron D. Shultz is currently the Policy Director at the Washington State Conservation Commission where he provides policy assistance on a variety of issues including the Voluntary Stewardship Program, the Office of Farmland Preservation, agriculture policy, water quality law, land use, mitigation and mitigation banking, and Puget Sound issues. Ron represents the Commission before the legislature and to state and federal agencies.

Ryan Vancil is the owner of Vancil Law Offices PLLC. His practice focuses on land use and real estate, with many clients coming from the Western Washington farming community. Currently he holds one of the environmental community seats on the Voluntary Stewardship Statewide Advisory Committee.

1 RCW 36.70A.705 (1).
2 *Id.*
3 RCW 36.70A.060 (2).
4 RCW 36.70A.710 (1)(a).
5 Protect the Peninsula's Future v. Growth Management Hearings Board and Clallam County, 185 Wn.App. 959, 964, 344 P.3d 705 (2015)
6 RCW 36.70A.710 (5).
7 RCW 36.70A.700 (2)(a) (emphasis added).
8 RCW 36.70A.703 (1).
9 RCW 36.70A.702 (4).
10 RCW 36.70A.702 (5).
11 RCW 36.70A.720 (3).
12 RCW 36.70A.710.
13 RCW 36.70A.710 (9).
14 RCW 36.70A.710 (1)(b).
15 RCW 36.70A.710 (1)(b)(i)–(iii).
16 RCW 36.70A.710 (6).
17 RCW 36.70A.710 (6)(b).
18 RCW 36.70A.710 (7)(a).
19 WAC 365-191-010.
20 RCW 36.70A.735 (2)(d).
21 RCW 36.70A.710 (9).
22 RCW 36.70A.715 (1)(b).
23 RCW 36.70A.715 (2).
24 RCW 36.70A.715 (3).
25 RCW 36.70A.720 (1).
26 *Id.*
27 RCW 36.70A.720 (2)(a).
28 RCW 36.70A.725 (5).
29 RCW 36.70A.725 (6); RCW 36.70A.735.
30 RCW 36.70A.720 (2)(a).
31 RCW 36.70A.725 (1).
32 RCW 36.70A.725 (2).
33 RCW 36.70A.725 (3)(a).
34 RCW 36.70A.725 (3)(a)(ii).
35 RCW 36.70A.725 (3)(b).
36 RCW 36.70A.725 (3)(b)(ii).
37 RCW 36.70A.725 (4).
38 RCW 36.70A.725 (5).
39 RCW 36.70A.725 (6).
40 RCW 36.70A.703 (11).
41 RCW 36.70A.725 (2).
42 RCW 36.70A.745 (2).
43 RCW 36.70A.745 (1)(a).
44 RCW 36.70A.720 (2)(b)(i).
45 RCW 36.70A.720 (2)(b)(ii).
46 RCW 36.70A.720 (2)(b)(iii).
47 *See* RCW 36.70A.725(3)(ii), (4).
48 *See* RCW 36.70A.280 (c)–(e).
49 RCW 36.70A.280.
50 RCW 36.70A.720 (j).
51 RCW 36.70A.705 (1)(f).

Growth Management Hearings Board

July 1, 2015 to February 12, 2016

I. July 2015 Cases

***Aagaard, et al v. City of Bothell,* Central Puget Sound Region Case No. 15-3-0001, Final Decision and Order (July 21, 2015)**

This case challenged the City of Bothell's amendments to its comprehensive plan and development regulations via Ordinance 2163 that allowed for an increase in residential development on 220 acres of land located within a critical area, a fish and wildlife habitat protection area, known as the Wayne Golf Course. The Board detailed the long-standing dispute over the use of this land, having given rise to seven petitions filed with the Board since 1995, which "against this backdrop" resulted in legislation that the petitioners assert were "meaningless" regulations that would not "ensure preservation" of the critical area. The petitioners' claims were premised on both the GMA and SEPA. GMA claims were ones of inconsistency between the comprehensive plan and development regulations; failure to comply with several GMA planning goals; failure to provide effective public participation and notice; failure to protect critical areas; and whether invalidity should be found. SEPA claims related to the issuance of a DNS.

The GMA issues of inconsistency with both the City's Comprehensive Plan and the GMA's planning goals were a primary focus of the case. The City's amendments, despite their alleged purpose of accommodating growth, were in conflict with its intent to protect critical areas, including those for fish and wildlife habitat protection. The Board concluded that modifications to regulations which were intended to protect these areas such as impervious and forest coverage failed to implement Comprehensive Plan Policies related to the natural environment. The Board further found that these regulation modifications created a conflict with the City's Critical Areas Ordinance so as not to ensure no net loss of ecosystem functions and values and give special consideration to the protection of anadromous fisheries. Because of these inconsistencies and conflicts, the Board invalidated Ordinance 2163 as substantially interfering with GMA Planning Goal 10.

In regards to SEPA, the petitioners' failure to exhaust their administrative remedies by appealing the DNS was uncovered by the Board at the hearing, not by the City during motions or briefing. The Board requested post-hearing briefs in which the petitioners contended the City waived the defense by not raising it earlier. The Board disagreed and then went on to invoke SEPA's and its long-

standing rule that failure to exhaust precluded the petitioners from challenging the DNS to the Board.

An appeal of the decision was filed by the City of Bothell in Thurston County Superior Court in August 2015.

***Snohomish County Farm Bureau v. Snohomish County,* Central Puget Sound Region Case No. 15-3-0003, Order of Dismissal (July 22, 2015), reconsideration denied (August 17, 2015)**

This matter pertained to modifications in the diking system so as to allow for a salmon recovery restoration project. The Board, on its own motion, asked the parties to brief the question of subject matter jurisdiction. As is clear from the GMA, 36.70A RCW, and a plethora of Growth Board cases the Board's jurisdiction is narrowly limited by the GMA. The key question the Board always asks is whether the challenged action adopts or amends a comprehensive plan or development regulation. Here, the Board found that it did not have jurisdiction because the ordinance being challenged was "a component of the site-specific project permit" for the restoration project and should have been challenged pursuant to LUPA, 36.70C RCW. In coming to this conclusion, the Board did make clear that just because an ordinance is adopted pursuant to a statute the Board does not have jurisdiction over, that does not necessarily mean that issues related to the ordinance's compliance with the GMA may not be subject to review by the Board. However, the Board dismissed the Farm Bureau's attempt to find the ordinance was a "tacit amendment" (e.g., de facto amendment) to a development regulation. The Farm Bureau sought, but was denied, reconsideration of the Board's finding that it lacked jurisdiction despite Farm Bureau's attempts to revive its "tacit amendment" theory. This dismissal was the second for the Farm Bureau, with the Board dismissal of a 2014 challenge to the interlocal agreement for the project, similarly finding that it was not a comprehensive plan or development regulation amendment (Case 14-3-0013).

II. September 2015 Case

Shoreline Preservation Society, et al v. City of Shoreline,* Central Puget Sound Region Case No. 15-3-0002, Order on Motions (Sept. 10, 2015); Order on Request for Clarification (Sept. 23, 2015)

Both the Petitioners and the City filed dispositive motions related to subject matter jurisdiction, SEPA standing, and public participation. As to jurisdiction, it was a SEPA Planned Action Ordinance (PAO) that was at issue, with the petitioners contending it amounted to a development regulation and the City asserting to the contrary. After looking at the various reasons petitioners alleged that the PAO was a development regulation and both its own case law and that of the courts, the Board concluded that it did not have that effect and, therefore, it did not have jurisdiction. In addition, because some of the petitioners' issues related to the adequacy of the City's EIS based on the PAO or compliance with PAO adoption procedures, those issues were dismissed as well. In regards to SEPA standing, the City asserted that several of the petitioners did not comment on the Draft EIS (DEIS) and therefore, based on exhaustion principles, did not have standing. The Board disagreed, finding, despite the fact that it was not an express issue raised to the Board, that the City should have done a Supplemental DEIS since an alternative changed and, moreover, the City offered a comment period on the FEIS which the petitioners availed themselves of. Lastly, while the Board deferred consideration of the public participation issues, the Board did find that public notice was sufficient, declining to address petitioner's issues based on statutes other than the GMA or SEPA.

III. December 2015 Case

Shoreline Preservation Society, et al v. City of Shoreline,* Central Puget Sound Region Case No. 15-3-0002, Final Decision and Order (Dec. 16, 2015)

This case dealt with the City's adoption of the 185th Street Station Subarea Plan so as to support Sound Transit's planned light rail station. The adequacy of the FEIS for these amendments was also challenged. The Board summed up the petitioners' case on the first page of its final decision and order: *Can a jurisdiction adopt a plan and zoning map that expands growth seven times over the current population in the area, without providing a capital facilities analysis as required under GMA?* Petitioners' issues related not only to financing of the necessary infrastructure but also coordination with outside service providers and the need to concurrently update other elements of the comprehensive plan. Unfortunately for the petitioners, the Board concluded that the level of capital facilities planning done by the City for the 185th Street Station Subarea Plan was sufficient and that, with this level of planning, concurrent amendment was not required. As to public participation, the petitioners' key concern was the amendments to the subarea plan, mainly the intensity of zoning, which they asserted violated the GMA's public participation requirements. The Board noted that the record demonstrated active deliberations by the city council, the legislative body tasked with the work, in meetings that were open and where public comment was allowed. The Board further stated that while the process may have been chaotic, that does not amount to a public participation violation. The City had also used phased zoning to implement the subarea plan, which petitioners complained was contrary to public participation. Once again, the Board disagreed, finding that the concept of phased zoning was developed through the public process and there was no requirement

to leave regulations open in perpetuity. While the petitioners set forth a few basic challenges to the FEIS, the key was the adequacy, primarily based on their capital facilities claims, but also alleging that the mitigation measures had to identify how they would be funded. The Board rejected the financing aspect and concluded the petitioners failed to demonstrate FEIS inadequacy.

An appeal of the decision (both the September 2015 Order on Motions and December 2015 Final Decision) was filed by the petitioners in Thurston County Superior Court in January 2016.

IV. January 2016 Cases

***Strahm v. Snohomish County,* Central Puget Sound Region Case No. 15-3-0004, Final Decision and Order (Jan. 19, 2016)**

This case is a challenge to a Snohomish County amendment of its Comprehensive Plan asserting that the land capacity analysis utilized was based on flawed data and methodologies resulting in insufficient urban land for the 20-year planning horizon based on OFM growth projections. In upholding the County, the Board stepped through the various components of planning — from the county-wide plans to the buildable lands report to the land capacity analysis to growth targets to annual review — before concluding that the petitioner's claims as to assumptions and methodologies were not flawed nor would they substitute petitioner's judgment as to assumptions for that of the County's. This case does a good job of walking a new practitioner through the steps needed to ensure an urban growth area is sufficient.

***Harless/Squamish Tribe v. Kitsap County,* Central Puget Sound Region Case No. 15-3-0005, Final Decision and Order (Jan. 22, 2016)**

Harless, joined by the Squamish Tribe, alleged that Kitsap County's Building Lands Report (BLR) did not comply with RCW 36.70A.215. As the Board noted, the purpose of the BLR is to determine if the county is achieving urban densities within its UGAs. The BLR is a comparison tool — comparing assumptions, targets, and objectives with actual "on the ground" development. Interestingly, while the Board determined that the issues were "to some extent premature," it did remand the BLR to Kitsap County but only due to a failure to provide for annual monitoring of adopted reasonable measures and the identification of such measures. It was these two aspects of the petition that the Board felt weren't premature due to the County's pending 2016 Comprehensive Plan Update that would address some of the issues raised.

V. February 2016 Cases

***Olympia Master Builders, et al. v. Thurston County,* Western Washington Region Case No. 15-2-0002, Order Denying Motion to Dismiss (Feb. 8, 2016)**

Thurston County sought dismissal of this appeal based on a failure of the petitioners to file within the 60-day statutory window of RCW 36.70A.290(2). The action under appeal was of the County's "interim permitting process" related to development permits and the Mazama Pocket Gopher, a threatened species under the Endangered Species Act. Assuming that this action was, as petitioners contend, a *de facto* amendment, the County asserted that it "published" the action more than 160 days prior to the appeal via various media outlets (e.g. press releases, newspaper articles, and blog posts). The Board disagreed, stating that it has previously held the appeal window does not close until publication occurs. Since neither RCW 36.70A.290(2) or WAC 242-03-030(16) provide any guidance as to what might constitute sufficient publication, the Board turned to an Attorney General opinion and other state laws, including RCW 65.16, that speak to publication requirements for ordinances and requires newspaper publication. Even though the Board recognized it did not have jurisdiction to determine compliance with RCW 65.15, since Thurston County had not published as required by RCW 65.16, the appeal window had not closed and the matter could proceed.

***Friends of Pierce County/Summit-Waller Community Assoc. et al. v. Pierce County*, Central Puget Sound Region Consolidated Case No. 15-3-0010c/12-3-0002c, Order on Motion to Dismiss/Supplement (Feb. 5, 2016)**

Pierce County sought dismissal of an issue that it asserted was outside the Board's subject matter jurisdiction. The County contended the issue was really a claim that it should have, but did not, use its comprehensive plan update process to adopt safety regulations for natural gas pipelines. Despite petitioner's attempt to find a mandate to adopt such regulations under the GMA given the Puget Sound Regional Council's Vision 2040 policy about transmission lines and County-wide planning polices, the Board concluded that there was no GMA requirement for the County to enact land use policies or regulations related to utility corridors. Thus, relying on prior case law that a failure to adopt an unmandated policy does not grant jurisdiction, the Board held it lacked jurisdiction in this regard as well.

*****The author of this synopsis represented the City in these proceedings*

Land Use Case Law Update

By Richard L. Settle, Of Counsel, Foster Pepper PLLC

I. Washington Supreme Court Decisions

Pre-Election Invalidation of Ballot Initiative to Amend Spokane City Charter with Provisions Imposing New Requirements on Zoning Changes for Major Developments and Water Rights: *Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 2016 WL 455957 (February 4, 2016).

While acknowledging that Washington courts generally refrain from pre-election review of initiatives, the Supreme Court held that this case was within an exception to the general rule recognizing the propriety of pre-election judicial determination of issues regarding the scope of local initiative authority. The court also noted that courts accord greater deference to constitutionally based state initiatives than statutorily authorized local initiatives and declined to apply heightened scrutiny to the standing of parties seeking pre-election review, reversing a Court of Appeals decision that had done so.

Envision Spokane gathered sufficient signatures to place on the ballot a local initiative that would amend the Spokane City Charter to include a "Community Bill of Rights." The Initiative contained four provisions requiring voter approval of zoning changes for large developments, restricting water rights in the City, giving employees new rights, and stripping corporations of their legal rights for violating the Community Bill of Rights. Only the first two provisions relating to land use and environmental law will be addressed in this account.

Petitioners Spokane County, individual City residents, including two city council members acting in their individual capacities, for profit firms, and nonprofit associations filed a declaratory judgment action challenging the initiative. The trial court ruled that the challengers had standing and the initiative exceeded the scope of local authority. The Court of Appeals reversed, holding that petitioners lacked standing under heightened scrutiny for pre-election challenge of the local initiative.

The Supreme Court reversed the Court of Appeals and affirmed the trial court, holding that established standing rules applied to declaratory judgment actions and rejecting heightened scrutiny of challengers' standing. The court concluded that the challengers' asserted interests were within the zone of interests protected by the applicable laws limiting local initiative power and that they would suffer injury in fact if the initiative were to pass.

After addressing multiple legal limitations on local initiative power, the court addressed the four primary provisions of the initiative. The first provision would have required that any proposed zoning changes to accommodate large developments be approved by voters in the neighborhood. The court affirmed the trial court's ruling that this provision was administrative, rather than legislative, in nature and therefore outside local initiative authority.

The second provision would have given the Spokane River the right to "exist and flourish," including the rights to sustainable recharge and sufficient flows to support native fish and clean water, and Spokane residents the right to access and use water in the City, as well as the right to enforce the Spokane's River's new rights. The court agreed with the trial court that this provision was beyond local initiative authority because it was (1) directly contrary to the system of water rights established by state law and in conflict with state water rights already determined for the Spokane River and (2) was administrative, rather than legislative in nature.

The court held that the other provisions were invalid, as well, and that the initiative would not be put on the ballot.

Water Law: Statutory Requirement to Retain "Base Flows" of Rivers and Streams and Scope of OCPI Exception. *Foster v. Washington State Department of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (October 8, 2015).

In this case, the Supreme Court expansively interpreted the statutory requirement that base flows of rivers and streams be retained and narrowly construed an exception to the mandate, under RCW 90.54.020(3)(a), authorizing otherwise prohibited withdrawals "where it is clear that overriding considerations of the public interest will be served." The court held that the "overriding considerations of the public interest (OCPI)" exception was erroneously applied by the Department of Ecology (Ecology), Pollution Control Hearings Board (PCHB or Board), and Thurston County Superior Court because the statutory OCPI exception authorized only temporary "withdrawals" and not permanent appropriations of water rights ("when the legislature intends for the assignment of a permanent legal water right, it uses the term 'appropriation'; when it intends for only the temporary use of water, it uses the term 'withdrawal'").

The decision invalidated the water rights granted and extensive mitigation requirements imposed by the Department of Ecology, after a 20-year long collaborative water planning process by the Cities of Olympia, Lacey, and Yelm. In the PCHB decision reversed by the Supreme Court, the Board found that Ecology's permit reflected "the exhaustion of every feasible flow related option to mitigate" and that the "overall mitigation package was more than sufficient to offset any depletions of stream flow."

Justice Wiggins, joined by Justices McCloud and Stephens, dissented, sharply criticizing the majority's holding and reasoning as "invalid," "novel," "unprecedented," "surprising," "wrong," and "contrary to the principles announced in *Swinomish Indian Tribal Community v. Department of Ecology,* 178 Wn.2d 571, 311 P.3d 6 (2013)…which never mentions the words 'temporary' or 'permanent.'" The lengthy, closely reasoned dissent might serve as a blueprint for legislative nullification of the majority's interpretation of the OCPI exception.

Both Ecology and the City of Yelm filed motions for reconsideration in November 2015 reflecting, and elaborating on the concerns articulated in the dissenting opinion. Ecology's motion warns that the majority's unprecedented interpretation of "withdrawal" to mean "not an appropriation" and "only temporary," if applied to other provisions of the Water Code, will wreak havoc on groundwater permitting and management of permit-exempt groundwater wells. Both motions echo the dissent's view that the majority's statutory construction was fundamentally flawed and inconsistent with previous case law. The motions were denied on March 3, 2016.

II. Washington Court Of Appeals Decisions

City of Seattle Lacked Authority to Require Grading Permits for Construction of "Work Bridges" on Temporary Easements to Gain Access for Permanent Construction of the SR 520 Bridge Project. *Washington State Dept. of Transp. v. City of Seattle,* 192 Wn. App. 824, ___P.3d___, 2016 WL 783919 (February 29, 2016).

The Court of Appeals held that the City unlawfully required the Washington State Department of Transportation (WSDOT) to obtain grading permits for the construction of "work bridges" on temporary easements to gain access for permanent construction of the West Approach Bridge portion of the State Route 520 floating bridge project.

State Route 520 (SR 520) is designated as a highway of statewide significance.[1] SR 520 runs east from Interstate 5 (I-5) in Seattle across Lake Washington to State Route 202 in Redmond. WSDOT began construction on the SR 520 floating bridge replacement project in April 2012. The project replaces the existing floating bridge and the connection of the bridge to the Montlake Boulevard interchange and I-5. The West Approach Bridge, an elevated structure, was designed to make this connection across wetland areas, shorelines, and the Washington Park Arboretum in the City of Seattle.

The construction of temporary work bridges was necessary to gain access to the permanent construction sites where the water is too shallow to allow work from barges. In 2013, WSDOT acquired temporary easements from the City of Seattle (City), State Department of Natural Resources, and the University of Washington to construct the work bridges for the West Approach Bridge.

Before beginning the project, WSDOT had obtained permits including shoreline substantial development and conditional use permits to construct the West Approach Bridge. The City also required WSDOT to obtain grading permits for the work bridges. WSDOT disagreed that the City could lawfully require grading permits for two reasons: (1) because WSDOT has plenary authority under state law to construct state highways without obtaining local land use permits; and (2) because a Seattle Municipal Code provision exempts from City grading permit requirements "[d]evelopment undertaken by [WSDOT] in state highway right-of-way," and under state law, state highway right-of-way includes areas necessary for temporary construction.

Nevertheless, WSDOT agreed to obtain the permits "under protest" to avoid delay. After the City issued the permits, WSDOT filed a "Petition for Review of Grading Permits" under the Land Use Petition Act, Ch. 36.70C RCW (LUPA), to resolve its disagreement with the City over whether grading permits could be lawfully required. The Petition claimed that the City's requirement of grading permits for the temporary work bridges was contrary to: (1) the express language of the City code grading permit exemption for state highway construction, and (2) WSDOT's preemptive statutory authority to construct highway projects without local permits except those specifically required by state law, such as permits under the Shoreline Management Act and Clean Water Act.

The City argued that the code exemption and, apparently, WSDOT's preemptive authority applied only within the portion of the right-of-way actually used for vehicular travel and not areas used only for temporary construction activities.

The trial court disagreed, ruling that the issue was not moot, even though WSDOT had obtained the grading permits "under protest," and invalidating the permits because the City had erroneously interpreted its code exemption and "state law preempts the application of Seattle's grading permit requirements to state highway construction projects."

The Court of Appeals affirmed, preliminarily holding that the case was not moot because effective relief could be provided by invalidating the unlawfully required grading permits and, even if moot, fell within the exception to the mootness doctrine for an issue of continuing and substantial public interest that is likely to recur. The court also affirmed the trial court's rulings and reasoning on the merits, invalidating the grading permits:

> The City's interpretation is contrary to the plain language and intent of the grading code exemption, gives no meaning to the language that exempts "[d]evelopment undertaken by the Washington State Department of Transportation in state highway right-of-

way," and ignores state law. The only interpretation that gives effect to all of the language of the exemption recognizes the definition of "state highway right-of-way" in Title 47 RCW and the exclusive authority of WSDOT to develop and acquire property for state highway right-of-way, including temporary construction easements that are integral to the construction of the SR 520 West Approach Bridge.

Longstanding precedent and state law establish WSDOT is the only agency authorized to site, design, construct, and acquire land for construction of state highways under Title 47 RCW. "Public Highways and Transportation," RCW 47.01.260(1); *Deaconess Hosp. v. Wash. State Highway Comm'n,* 66 Wn.2d 378, 393, 403 P.2d 54 (1965) (as "an organ of government," WSDOT comprises the only agent of government charged by law with carrying out the state's highway program and is vested with the authority to build and maintain highways).[2]

City of Seattle Liable for Damages Caused by City's Supersession of Quiet Title Judgment in Favor of Owners of Street End Property During City's Appeal; Measure of Damages Conclusively determined by City's Formula for Leasing Comparable Waterfront Street End Properties to Private Parties. *Holmquist v. King County,* 192 Wn. App. 551, ___P.3d___, 2016 WL 513178 (February 8. 2016).

The Holmquists and Kaseburg, owners of adjacent developed residential properties, prevailed in an action against King County to quiet title to intervening former street end property abutting Lake Washington on the basis of the County's vacation of the right-of-way in 1932. The City of Seattle was allowed to intervene. Both the City and County appealed, but only the City filed a notice of supersedeas without bond. After the Court of Appeals affirmed the trial court judgment, awarding one-half of the former street end property to each of the owners, they filed a motion for damages as a result of the City's filing notice of supersedeas, staying the effect of the trial court judgment while the appeal was pending.

The owners claimed that they were damaged by the City's maintenance, during the appeal, of a 4-foot by 4-foot sign on the vacated NE 130th street end right of way publicizing the City's intention to develop a forthcoming "NE 130th Shoreline Street End Improvement" and stating that the project is intended to "improve public access to the shoreline street end." The City also maintained a web site showing the street end as public waterfront, inviting public use and occupancy as a public beach. The trial court allowed the City to maintain its sign on the contested property during the appeal.

As a result of the City's notice of supersedeas, the public continued to use the contested property while the appeal proceeded for 21 months, including the summers of 2013 and 2014. Members of the public gained access to the property from the Burke-Gilman trail and used the property for swimming, storing and launching watercraft, parking cars, mooring boats, and staging beach parties.

The City's appeal was unsuccessful, and the Court of Appeals, in that decision, questioned the basis for the City's assertion of any interest that could justify the City's intervention in the quiet title action against King County, as the City never was in the chain of title.[3]

The trial court denied the motion for damages, and the owners appealed.

Preliminarily, the Court of Appeals agreed with the owners that governmental entities statutorily authorized to file supersedeas without bond are just as liable for damages resulting from the suspension of the trial court judgment as filers of supersedeas who are not exempt from the bonding requirement, following the "established rule that once an appeal has failed, the supersedeas obligor's liability for damages is absolute."

The court also agreed with the owners' contention that the trial court erred by denying them an award of damages even though they established that they were damaged by the City's supersession of the trial court's decision and presented a valid methodology for quantifying their damages. The owners claimed they were entitled to damages because they were deprived of the exclusive use of the street end property during the appeal while the public continued using the property as a public beach. The City conceded that the public used the beach as claimed, but argued that the owners suffered neither actual damage nor compensable loss because the owners could use the beach in concert with other members of the public. The court strongly disagreed: "[t]he City could not be more wrong."

The court reasoned that the right to exclusive possession is an essential element of property ownership, that the owners were entitled to damages because the City's actions deprived them of exclusive possession, that loss of rental value of the disputed property was an appropriate measure of damages, and that the City's formula for calculating the rent charged on leased street ends, presented by the owners with no alternative methodology presented by the City, was determinative of the amount of damages. Consequently, the court held that the owners were entitled to an immediate award of damages of $74,520, the amount they sought based on the City rental formula.

Department of Ecology Stormwater Permit Conditions Invalidated for Conflict with State Vested Rights Doctrine; Federal Clean Water Act Does Not Preempt State Vested Rights Statutes. *Snohomish County v. Pollution Control Hearings Board*, 192 Wn. App. 316, ___P.3d___, 2016 WL 225256 (January 19, 2016).

Snohomish County, King County, and the Building Association of Clark County (collectively, Challengers) appeal the Pollution Control Hearings Board (Board) order holding that condition S5.C.5.a.iii (the Condition) in the 2013-2018 Phase I Municipal Stormwater Permit (2013-2018 Permit) issued by the Washington State Department of Ecology (Ecology) does not violate the vested rights of property developers.

The 2013-2018 Permit requires Phase I permittees, which include specified counties and cities, to adopt by June 30, 2015 regulations of stormwater drainage and runoff into municipal stormwater sewer systems for new development, redevelopment, and construction activities. The challenged Condition provides that the new regulations required by the 2013-2018 Permit apply to all development applications submitted after July 1, 2015 and to applications submitted before July 1, 2015 if construction is not started by June 30, 2020.

Under Washington vesting statutes, applications for building permits (RCW 19.27.095), plat approvals (RCW 58.17.033), and development specified in a development agreement (RCW 36.70B.180) generally are governed by the zoning ordinances, subdivision regulations, and other land use control ordinances in effect on the date the application was submitted. Challengers argued that enforcement of the Condition would require county and city permittees under the 2013-2018 Permit to violate the vested rights of development applicants because (1) the required stormwater regulations are "land use control ordinances" under Washington vesting statutes, (2) an application submitted before July 1, 2015 might not result in the start of construction by June 30, 2020, and, therefore, (3) the Condition might require county and city permittees to apply stormwater regulations adopted after an application was submitted.

Ecology and Puget Soundkeeper Alliance (PSA) argued and the Board ruled that the 2013-2018 Permit would not require county and city permittees to violate the vested rights of development applicants because the required regulations are environmental regulations, not land use control ordinances. Ecology and PSA further argue that even if the regulations are land use control ordinances, the Federal Clean Water Act preempts Washington's vested rights statutes.

The Court of Appeals, Division II, held that: (1) the 2013-2018 Permit's required stormwater regulations are "land use control ordinances" under the state vested rights statutes, RCW 19.27.095 and RCW 58.17.033, and "development regulations" and "development standards" under the state development agreement statute, RCW 36.70B.180; (2) the challenged Condition would violate the statutory vested rights of development applicants who submit applications before July 1, 2015 but do not begin construction until after June 30, 2020; (3) the Washington legislature in the Clean Water Act and any other relevant law, did not authorize Ecology to compel county and city permittees to violate Washington law, and (4) federal law does not preempt Washington's vested rights statutes. Accordingly, because an administrative regulation in conflict with a statute is invalid, the court reversed the Board's order and remanded the case to the Board to direct Ecology to revise the challenged Condition S5.C.5.a.iii to specify that the county and city regulations required by the 2013-2018 Permit apply only to complete applications submitted after July 1, 2015.

Ecology, PSA, and other environmental organizations have filed petitions for review with the Washington Supreme Court.

City's Interference with Access to a Particular Street is Not a Per Se Taking; Genuine Issues of Fact as to alleged City Taking by Substantial Impairment of Access Precluded Summary Judgment. *TT Properties v. City of Tacoma,* 192 Wn. App. 238, ___P3d___. 2016 WL 123523 (January 12, 2016).

TT Properties (TTP) appealed a summary judgment dismissing its taking claims against the City of Tacoma. TTP's claims related to two separate properties, the "Pacific Avenue Property" and the "C Street Property," that were allegedly taken without compensation as a result of actions by the City to accommodate a Sound Transit project. TTP argues that the lower court erred by granting summary judgment because there were general issues of material fact concerning whether there was a taking by impairment of vehicular access to the property. The City argues that even if there were a compensable taking, the City was not the liable actor.

The Pacific Avenue Property abutted Pacific Avenue on the east, 27th Street on the south, former Delia Street on the north, and property TTP previously conveyed to the City on the west. This property lacked direct access to Delia Street because of the property's grade and a retaining wall. However, TTP retained an express easement over the property they sold to the City, allowing TTP to cross the City's property to reach Delia Street.

The C Street Property abuts a City alleyway that is 20 feet wide. TTP used the alleyway as an entrance to the C Street Property that also abuts, and is accessible by, East 26th Street to the south. Trucks and long-haul vehicles used the alleyway to enter the property, but had to "swing-wide" over a city-owned railroad right-of-way beyond the alleyway to gain entry to the TTP property.

In 2009, the Central Puget Sound Regional Transit Authority (Sound Transit) began a project known as the "D to M Street & Signal Project," designed to add 1.4 miles of new tracks on a City right-of-way as part of a connection of the Sounder commuter rail service from the Tacoma Dome station to a new station in Lakewood. The City entered into a "Rights-of-Use Agreement" (RUA), which, in relevant part, authorized Sound Transit to use some City-owned rights-of-way, including Delia Street. The RUA noted that "it is in the best interests of the public that the City authorize such use of the Public Rights-of-Way in support of Sounder Commuter rail service." Other than granting Sound Transit the right to use various rights-of-way, the City's involvement in the D to M Street project was limited to approving and permitting project development.

Sound Transit carried out the planned construction for the D to M Street project. This included closing the portion of Delia Street where the Pacific Avenue Property gained access via its easement. Sound Transit converted this portion of the former Delia Street to a grassy slope. The Pacific Avenue Property remains accessible from Pacific Avenue and 27th Street.

Pursuant to a City permit, Sound Transit also placed a "utility bungalow" on the City right-of-way abutting the alleyway along the C Street Property. The bungalow encroached about one foot into the alleyway, leaving an unobstructed alleyway width of 18.97 to 19.19 feet, substantially more than the 16-foot minimum width required by the City for alleyways. Nevertheless, the encroachment of the bungalow made it impossible for trucks to "swing wide" across the right-of-way to enter the alleyway and reach the C Street Property.

Pacific Avenue Property

The court held that closing the abutting portion of Delia street was not a *per se* taking because alternative access existed via abutting Pacific Avenue and 27th Street. Based on the general rule that a property owner is entitled only to reasonable vehicular access to the road system and not to access via a particular abutting street, the court proceeded to consider whether there was a material dispute of fact on whether TTP was left with reasonable access to this property after the abutting Delia Street was closed. The court held that there was a material factual dispute on whether access had been substantially impaired or reasonable access remained raised by evidence that the closure of Delia Street "has had a significant negative impact on value," that the Pacific Avenue Property was sold in 2013 "at a much reduced price," and TTP's businesses used Delia Street to exit the property "on a regular basis." The court held that summary judgment on this claim was erroneous because this evidence in the light most favorable to TTP, could reasonably support the conclusion that access to the property had been substantially impaired as a result of closure of Delia Street.

C Street Property

The court held that the encroachment of the utility bungalow into the 20-foot wide alleyway by just over one foot did not substantially impair access to the C Street Property, apparently reasoning that the encroachment itself did not prevent vehicles from "swinging wide" to gain entry to the property. Such a maneuver would have been prevented even if the bungalow were located just outside the alleyway, and the full 20-foot width remained, as TTP failed to show it had a property right to "swing wide" over the City's property beyond the 20-foot wide alley. Thus summary judgment of dismissal of the taking claim regarding the C Street Property was upheld.

Proprietary v. Regulatory Action

The City argued that even if a compensable taking occurred, the City was not the actor liable for the taking. The court disagreed, holding that there is a question of material fact regarding whether the City participated in a proprietary, rather than regulatory, capacity in the taking by allowing Sound Transit to use its right of way.

The court acknowledged Washington case law holding that liability for takings may not be based on governmental permitting and approval activities alone. However, the court held that there was a material factual dispute regarding whether the City acted in a proprietary, rather than merely a regulatory capacity. Evidence that the City acted in a proprietary capacity by allowing Sound Transit to use its rights-of-way, that the RUA contemplated that Sound Transit would use City rights-of-way, including Delia Street, to accommodate the D to M Street Project, and that the City granted Sound Transit use of rights-of-way because doing so was deemed to be in the best interests of the City and the public, construed in the light most favorable to TTP, could support the reasonable conclusion that the City acted in a proprietary capacity as a direct participant in the closure of Delia Street abutting TTP's Pacific Avenue Property. Thus, the Court reversed the summary judgment of dismissal of the taking claim for the Pacific Avenue Property.

County Failed to Comply with GMA Requirements in Designating Agricultural Resource Lands. *Concerned Friends of Ferry County v. Ferry County,* 191 Wn. App. 803, 365 P.3d 207, 2015 WL 8927147 (December 15, 2015).

Ferry County, in northeastern Washington, largely consists of the Colville Indian Reservation and forest lands under the jurisdiction of the Washington State Department of Natural Resources or the United States Forest Service. According to the state Office of Financial Management, the County had an estimated population of 7,400 in 2005, pro-

jected to increase to 10,250 by 2030. Cattle ranching is Ferry County's major agricultural industry.

After this sparsely populated county opted-in to the Growth Management Act, RCW Ch. 36.70A (GMA), its first designation of agricultural lands of long-term commercial significance (agricultural resource lands or ARL) was successfully challenged before the Growth Management Hearings Board (Board) in 2001. In the ensuing years, the challenges continued, and the Board issued a series of orders culminating in a 2013 ruling that the County's designation of ARL was not in compliance with GMA requirements.

The County responded to the Board's 2013 order with an ordinance adopting criteria and standards for the designation of ARL and an ordinance amending its comprehensive plan and designated ARL. Concerned Friends of Ferry County and Futurewise (collectively, Futurewise) mounted yet another challenge before the Board. And this time, the Board finally ruled that the County's ordinances were in compliance with GMA requirements. In upholding the County's designation criteria and designations of ARL, the Board relied in part on the County's unique features as an agricultural area of Washington state. The Board noted the substantial evidence in the record indicating that the County's viable crop land is quite limited due to poor soils, severe winters, short growing season, and sparse rainfall.

Futurewise appealed the Board's decision, contending that the County violated the GMA by (1) adopting designation criteria inconsistent with its comprehensive plan and the minimum guidelines of the Department of Commerce, and (2) erroneously applying these criteria resulting in the designation of too little Agricultural Resource Lands to comply with the goals and purposes of the comprehensive plan and the GMA. The Court of Appeals, Division II, on direct review of the Board's decision, held that the challenged County designation criteria were not clearly erroneous, but that the County's designation of ARL under the criteria was contrary to the GMA, Department of Commerce Guidelines, and the County's own comprehensive plan, reversing the Board.

Futurewise's challenges of the criteria and methodology for designating ARL began with the contention that a point-system for evaluating whether assessed parcels of land should be designated under the criteria was not authorized by the GMA or the County's comprehensive plan. The court strongly disagreed, stressing the merits of the point-system and noting that this Futurewise claim "borders on the frivolous." Futurewise next challenged the soil classification criterion because it assigned a declining number of points from Class II soils down to Class IV soils, but no points to Class I soils. The court summarily rejected this challenge, as well, because there were no Class I soils in the County. The remaining challenges of designation criteria addressing "Availability of Public Services," "Proximity to the Republic Urban Growth Area," "Predominant Farm Size," "Proximity to Markets/Services," "History of Nearby Land Uses," and "500-Acre Block Group Minimum" also were held to be without merit.

Futurewise's challenges of the County's application of the criteria and resulting designations of ARL fared much better. The court held that the County made numerous errors. Of special concern to the court was the minimal designation of land capable of growing hay for cattle, the County's primary agriculture product. While nearly 500,000 acres of federal and state grazing land were designated as ARL, the court noted that these lands fed cattle for only about six months a year, while hay was needed to sustain the cattle for the rest of the time. The County had not shown that the grazing lands could be used to produce hay, and only a few hundred acres that may have been capable of producing hay were designated ARL.

As a result, the court reversed the Board's compliance decision, holding that the County's designation of ARL was clearly erroneous because in conflict with GMA requirements, Department of Commerce guidelines, and the County Comprehensive Plan. So the epic battle over ARL designations in Ferry County goes on.

SEPA: MDNS; Cumulative Impacts; Timing of Mitigation Measures. Ocean Resources Management Act; Mootness. *Quinault Indian Nation v. Imperium Terminal Services, LLC,* 190 Wn. App. 696, 360 P.3d 949 (October 20, 2015).

Imperium and Westway each proposed major expansions of existing facilities they operated at the Port of Grays Harbor (Port) in the City of Hoquiam (City). Their existing facilities included large storage tanks for methanol, biodiesel, and other products, rail spurs and yards to deliver materials to be stored in the tanks, and related structures and equipment. The expansions included new storage tanks and new or extended rail spurs and yards. The purpose of the expansions was to allow the facilities to be used to receive unit trains filled with crude oil and unload and store the crude oil for subsequent transfer to Port terminals and shipment by vessels or barges.

Westway and Imperium applied to the City and State for Shoreline Substantial Development Permits (SSDPs) and other regulatory approvals. The City and State Department of Ecology (Ecology) served as SEPA co-lead agencies. The co-leads issued a SEPA mitigated determination of nonsignificance (MDNS) for both proposals. One of the mitigation measures required by the MDNS was the preparation and submission of oil spill prevention plans, including demonstration of financial responsibility, in compliance with state law. In the SEPA checklists and other threshold environmental review, the co-leads did not consider the cumulative impacts of

the two proposals along with a third similar proposal in the area by U.S. Development Group, LLC (USD) that was in the conceptual stage (permit) applications had not been submitted.

After the City issued SSDPs to Westway and Imperium, the Quinault Indian Nation and several environmental interest groups (collectively, Quinault) appealed the permits to the Shorelines Hearings Board (SHB). Quinault argued (1) the MDNS issued for both proposals was invalid because the co-leads "failed to adequately consider the cumulative impacts of the three proposed crude-by-rail terminals in Grays Harbor," (2) the MDNS and permits were invalid because they were issued prior to demonstration of financial responsibility under state law, a mitigation measure required by the MDNS, and (3) state and local decision-makers failed to comply with the Ocean Resources Management Act (ORMA).

The SHB issued summary judgments ruling that (1) the MDNS was invalid for failure to assess cumulative impacts of the potential conceptual USD proposal along with the two actual proposals, (2) ORMA did not apply to the two proposals, and (3) demonstration of financial responsibility was not required at the SEPA threshold determination stage but could wait until subsequent filing of oil spill prevention plans.

Following the SHB decision, the co-leads withdrew the MDNS and the permits, issued a Determination of Significance (DS) with the concurrence of Westway and Imperium, and began preparation of an environmental impact statement (EIS). Quinault and Imperium obtained discretionary review of the summary judgment rulings by the Court of Appeals.

The court decided Quinault's cumulative impact claim was moot because the co-leads and project proponents had agreed to issue a DS and prepare an EIS. Quinault's contention that the issue should have been decided under the substantial public interest exception to mootness was unpersuasive to the court.

While the issue of the timing of the mitigation measure requiring demonstration of financial responsibility to carry-out a clean-up plan also was moot, the court decided this issue under the substantial public interest exception to mootness. On the merits, the court held that the plain language of the statute and regulation governing the financial responsibility requirement did not specify that it had to be satisfied at the threshold determination and permitting stage as long as it was met prior to commencing operations. Thus, it was within the SHB's discretion under SEPA to allow the financial responsibility mitigation measure to be satisfied subsequent to the threshold determination and permit issuance.

The court also upheld the SHB's ruling that the Ocean Resources Management Act was inapplicable to the proposed terminal expansions, reasoning that ORMA applied only to on-ocean projects, such as oil drilling platforms. Westway and Imperium's projects were entirely land-based. The potential subsequent shipment of crude oil from Port facilities was not part of their proposals.

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1 RCW 47.08.140(1); RCW 47.17.720.

2 *Slip Opinion* at 13–14 (emphasis in original).

3 *Holmquist v. King County,* 182 Wn.App.200, 328 P.3d 1000 (2014).

Federal Case Law Update


By Matt Love, Tyson Kade, and Carly Summers, Van Ness Feldman LLP

National Environmental Policy Act ("NEPA")

***City of Mukilteo v. U.S. Dep't of Transportation*, 2016 WL 852918 (9th Cir. March 4, 2016)**

In *City of Mukilteo v. U.S. Department of Transportation*, 815 F.3d 632, the Ninth Circuit denied a petition for review of the Federal Aviation Administration's ("FAA") finding of no significant impact ("FONSI") under NEPA regarding a proposal to commence commercial passenger airline service at Paine Field airport in Snohomish County, Washington. The petitioners had challenged the FAA's decision not to prepare an environmental impact statement asserting a failure to analyze impacts associated with additional airlines utilizing the airport beyond what was proposed.

Under NEPA, an agency is required to analyze the environmental impacts of the proposed action.[1] This includes indirect effects that are "reasonably foreseeable," and cumulative impacts that result from the addition of impacts from current and past actions to those of "reasonably foreseeable" future actions.[2] In addition, under the Clean Air Act, an agency must analyze "reasonably foreseeable" emissions resulting from its action.[3]

The Ninth Circuit found that, based upon the administrative record, the FAA considered the reasonably foreseeable, demand-based projections of flight operations per day. In doing so, the court deferred to FAA's flight volume forecasting, and rejected petitioners' speculative argument that FAA was required to also consider expanded operations should other airlines also seek access. The Ninth Circuit also rejected two "bias-based arguments." First, regarding the assertion that the FAA favored commercial service, the court stated that NEPA does not prohibit agencies from having or expressing a favored outcome. Second, the court found that FAA's creation of a schedule by which a FONSI would issue did not predetermine the outcome, and that FAA complied with NEPA by conducting a "careful and thorough" review of the final environmental assessment before issuing its finding.

***Idaho Wool Growers Ass'n v. Vilsack*, 815 F.3d 1095, 2016 WL 805683 (9th Cir. Mar. 2, 2016)**

In *Idaho Wool Growers Association v. Vilsack*, the Ninth Circuit affirmed the Forest Service's decision to reduce domestic sheep grazing in the Payette National Forest in central Idaho to protect bighorn sheep against disease transmission. The appellants had challenged the Forest Service's failure to consult with the Agricultural Research Service ("ARS") before preparing a supplemental environmental impact statement ("SEIS"), failure to supplement the SEIS, and the choice of particular models to evaluate the risk of contact and disease transmission between domestic and bighorn sheep.

Under NEPA, federal agencies are required to "have available, and will carefully consider, detailed information concerning significant environmental impacts, and that the relevant information will be made available to the larger public audience."[4] Federal agencies are required to "take a 'hard look' at the environmental consequences of their actions by preparing an EIS for each 'major Federal action significantly affecting the quality of the human environment.'"[5] An EIS must provide a full and fair discussion of significant environmental impacts to allow for an analysis of reasonable alternatives to avoid those impacts.[6] Agencies must consult with any federal agency with expertise concerning the proposed action of the environmental impact involved.[7] NEPA also requires supplementation of draft or final EISs if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[8]

Regarding the duty to consult, the Ninth Circuit stated that the pivotal question is whether the other federal agency has "special expertise" concerning one significant aspect of the proposed decision. While the court acknowledged that the Forest Service may have had a duty to consult with ARS, it concluded that any violation of this duty was harmless because no prejudice resulted from the lack of consultation. The court likewise dismissed the argument that the Forest Service failed to supplement the FSEIS when a new study was published, noting that the Service considered the report in unpublished form, and that the study actually bolstered the contemplated action. Finally, the court deferred to the agency's technical scientific analysis and held that the modeling was reasonable because it used top-rate model designers, was based on peer-reviewed methodologies, and incorporated actual data.

Endangered Species Act ("ESA")

***Defenders of Wildlife v. Jewell*, 815 F.3d 1, 2016 WL 790900 (D.C. Cir. Mar. 1, 2016)**

In *Defenders of Wildlife v. Jewell*, the D.C. Circuit concluded that the U.S. Fish and Wildlife Service ("FWS") reasonably relied upon a voluntary state conservation plan when withdrawing a proposal to list the dunes sagebrush lizard as an endangered species.

Under Section 4 of the ESA, FWS must determine whether to list a species as threatened or endangered based upon five statutory criteria, including the inadequacy of existing regulatory mechanisms.[9] FWS is required to make its listing determination "solely on the basis of the best scientific and commercial data available to [the Service] after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision … to protect such species," including "predator control, protection of habitat and food supply, or other conservation practices."[10] FWS has adopted a policy to assist in analyzing conservation efforts that have not yet been implemented, or have not yet demonstrated their efficacy, at the time of a listing decision.[11]

After finding that the plaintiffs waived an ESA statutory challenge to FWS's interpretation of the Policy, the D.C. Circuit found that FWS's application of the Policy and consideration of the conservation plan was not arbitrary or capricious. The plaintiffs asserted that FWS failed to establish that the conservation plan is sufficiently certain to be implemented and effective under the criteria of the Policy. Regarding implementation, the court found that the administrative record indicated that participation would be high and consistent with the levels previously identified as being necessary for the lizard's survival, and that it was reasonable for FWS to conclude that the plan had sufficient structure, regulatory mechanisms, and planning to achieve the necessary conservation benefit. Regarding effectiveness, the court found that: the plan's limits on habitat destruction and associated mitigation requirements were sufficient; FWS could rely upon predictions of future enrollment in the plan; and confidentiality laws and provisions would not interfere with implementation and enforcement of the plan.

***Alaska Oil and Gas Ass'n v. Jewell*, 815 F.3d 1544 2016 WL 766855 (9th Cir. Feb. 29, 2016)**

In *Alaska Oil and Gas Ass'n v. Jewell*, the Ninth Circuit reversed a district court decision vacating the Fish and Wildlife Service's ("FWS") designation of critical habitat for the polar bear. The designation consists of 187,000 square miles of sea ice, terrestrial denning, and barrier island habitat in Alaska.

For species listed under the ESA, FWS is required to "designate any habitat of such species which is then considered to be critical habitat."[12] For areas occupied by the listed species, critical habitat is defined as "the specific areas … on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection."[13] A designation of critical habitat must be made "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.[14] FWS may exclude areas from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, unless the failure to designate such area will result in the extinction of the species.[15]

The Ninth Circuit faulted the district court for holding FWS "to a standard of specificity that the ESA does not require." The Ninth Circuit stated that the ESA requires a focus on the features essential to protecting the species, and that such areas can be designated even if there is no available evidence documenting current activity. Regarding terrestrial denning habitat, the court upheld FWS's methodology to define the areas designated as critical habitat in 5-mile increments extending inland from the coast, noting that it was an appropriate zone for purposes of site inclusion and administrative convenience. Regarding barrier island habitat, the court found that FWS appropriately looked to the specific features of the islands that meet the polar bears' critical needs and to the area in which they occur. In doing so, the court upheld the inclusion of a "no disturbance zone," which had been included as part of the designation to protect barrier islands from human disturbance. The Ninth Circuit also found that FWS satisfied its procedural requirements under ESA section 4(i) to provide an explanation to the State of Alaska, and stated that the court would not analyze the substantive sufficiency of the agency's responses. Finally, the court summarily dismissed arguments regarding FWS's assessment of economic impacts and special management findings, and that ESA section 7 required consultation with affected states prior to the designation.

Clean Air Act ("CAA")

***West Virginia v. U.S. Environmental Protection Agency*, 136 S.Ct. 1000 (2016)**

In *State of West Virginia v. U.S. Environmental Protection Agency*, the U.S. Supreme Court stayed the implementation of the Clean Power Plan ("CPP") rule until resolution of the consolidated lawsuits in the D.C. Circuit. Twenty-five states had petitioned for the stay, primarily arguing that Section 111(d) of the Clean Air Act does not authorize EPA to mandate emission source reductions (including greenhouse gas) or set emissions targets, and that the CPP illegally regulates sources that are already regulated under CAA Section 112. The states argued they would face irreparable harm to comply with a rule that may ultimately be struck down as illegal. The Supreme Court granted the stay pending disposition of consolidated challenges to the law currently pending before the D.C. Circuit Court.

***Nebraska v. U.S. Environmental Protection Agency, 812 F.3d 662, 2016 WL 403655* (8th Cir. Feb. 3, 2016).**

In *Nebraska v. U.S. Environmental Protection Agency*, the Eighth Circuit denied petitions for review of the Environmental Protection Agency's ("EPA") partial disproval of the Nebraska Regional Haze State Implementation Plan, including the rejection of Nebraska's best available retrofit technology (BART) determination for Gerald Gentleman Station, and EPA's promulgation of a federal implementation plan.

Under the CAA, state's must submit implementation plans requiring specific major stationary sources emitting "any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility" to "procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the [BART]."[16] States consider five factors to determine BART, an emission-based limit, including "cost of compliance, energy and nonair quality environmental impacts of compliance, existing pollution control technology in use at the source, the remaining purposeful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology."[17] States initially determine BART emission limits, with EPA serving an oversight role and determining BART if the state analysis does not comply with the Act. States may also use a BART alternative, if there will be an overall improvement in visibility based on a comparison of the average differences between BART and the alternative over all affected Class I areas.[18]

In its state implementation plan [SIP] determining BART for Gerard Gentleman Station, Nebraska found that the source control costs were not reasonable and that no SO_2 controls were required. The Sixth Circuit noted that EPA found errors in Nebraska's cost determination, resulting in an overestimate of the costs and thus a reasonable basis to reject them and the SIP. In addition, the court upheld the EPA's plan, which relied on the area-wide Transport Rule rather than the source-specific rule, noting that EPA may use an alternative to BART if there will be an "overall improvement in visibility…." The court confirmed that when the state makes a flawed determination upon which its analysis is based, it prevents the state from conducting the meaningful consideration of the factors required by the BART guidelines. Giving deference to the EPA technical expertise, the court concluded that EPA's reliance on the Transport rule, an area-wide rather than source-specific BART, was not arbitrary and capricious.

***Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685 (6th Cir. Nov. 2, 2015)**

In *Merrick v. Diageo Americas Supply, Inc.*, the Sixth Circuit held that the Clean Air Act ("CAA") does not preempt state common law claims brought against emitters for nuisance, trespass, or negligence. Plaintiffs alleged that ethanol emissions from a distillery caused the propagation of whiskey fungus on their property.

Under the CAA, ethanol emissions are regulated pursuant to the mandate that EPA develop national ambient air quality standards (NAAQS) to set a uniform level of air quality for the protection of human health and the environment.[19] EPA does not, however, generally regulate individual sources of emissions. Instead, the CAA reserves to states their authority to adopt and enforce state standards, limits, and "any requirement" respecting control or abatement of air pollution.[20] States create and submit State Implementation Plans (SIPs) to EPA and, once, approved, their requirements become enforceable federal law.[21]

The distillery's emissions were covered by a CAA permit, issued by the state under its EPA-approved SIP. However, the Sixth Circuit held that the states' rights savings clause expressly preserves the state common law nuisance standards at issue. The court found that the phrase "any requirement" contained in 42 U.S.C. § 7416 is sufficiently broad to encompass common law rules, and that an expansive reading of this phrase is consistent with a variety of other statutes. Consistent with decisions issued by other courts, the Sixth Circuit concluded that the CAA does not preempt claims brought by plaintiffs under the common law of the source state. Finally, the court found that allowing such common law claims would not disrupt the CAA's comprehensive federal regulatory regime.

Clean Water Act ("CWA")

***Askins v. Ohio Department of Agriculture, 809 F.3d 868, 2016 WL 66614* (6th Cir. Jan. 6, 2016)**

In *Askins v. Ohio Department of Agriculture*, the Sixth Circuit affirmed a district court's holding that the citizen suit provision of the CWA does not permit citizens to bring suits against regulators for failure to perform regulatory functions. The plaintiffs had alleged that the Ohio Environmental Protection Agency transferred authority over the animal feeding operations portions of the state-NPDES program to the Ohio Department of Agriculture prior to receiving actual approval from the U.S. Environmental Protection Agency ("EPA").

Under the CWA, the EPA may delegate NPDES programs to states.[22] Once a state obtains approval of its NPDES program from EPA, it may also delegate authority to a different state agency — but must notify the EPA prior to that delegation.[23] The new agency may not administer any part of the state-NPDES program without the EPA's prior approval.[24] The CWA citizen-suit provision authorizes suit "against any person (including … any other governmental … agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of an effluent standard

or limitation."[25] The phrase "effluent standard or limitation" includes those established by "a permit or condition thereof issued under [the NPDES program]."[26]

The Sixth Circuit rejected the notion that the CWA's citizen suit provision allows citizens to seek review of EPA's approval of state NPDES programs. Instead, in rejecting the claims against the state agencies, the court concluded that the citizen suit provision is limited to suits against persons "alleged to be in violation of an effluent standard or limitation," which did not include alleged violations of the notification requirement. Similarly, the court found that the notification requirement related to the NPDES program and was not a "condition" of an NPDES permit. The court also found that the CWA does not permit citizen suits against regulators, who are not polluters, for procedural violations. Finally, in rejecting the claims against EPA, the court stated that the plaintiffs failed to identify any non-discretionary duty that EPA failed to perform.

Resource Conservation and Recovery Act ("RCRA")

***Center for Biological Diversity v. U.S. Forest Service*, No. 13-16684, *2016 WL 145595* (9th Cir. Jan. 12, 2016)**

In *Center for Biological Diversity v. U.S. Forest Service*, the Ninth Circuit reversed the district court's dismissal of a complaint for lack of standing. The complaint alleged that the Forest Service was a "contributor" under RCRA for failing to regulate the disposal of spent lead ammunition in the Kaibab National Forest that was poisoning wildlife.

Under RCRA, any person may commence a civil action on his own behalf against any person, including the United States or any agency thereof, "who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."[27] The statute does not define the term "contributor" but courts have applied the ordinary meaning defining "contribute" as "to be an important factor in; help to cause."[28] The Ninth Circuit has previously held that the civil suit provision allowing claims against contributors "requires that a defendant be actively involved in or have some degree of control over the waste disposal process to be liable under RCRA."[29]

In finding that plaintiffs established Article III standing, the Ninth Circuit noted that causation was not too attenuated because the Forest Service has the authority to control certain conduct of the third-party hunters who dispose of the ammunition. In distinguishing the Supreme Court's decision in *Norton v. S. Utah Wilderness Alliance*, which held that suits brought under section 706(1) of the Administrative Procedure Act could not proceed where there is an absence of a "discrete agency action that it is required to take," the Ninth Circuit found that the RCRA citizen suit provision is broader in scope and not limited to compelling non-discretionary action unlawfully withheld. The court remanded the case for a determination on whether plaintiffs' claims should be dismissed for failure to state a claim.

Magnuson-Stevens Fishery Conservation and Management Act ("MSA")

***Anglers Conservation Network v. Pritzker*, 809 F.3d 664 (D.C. Cir. 2016)**

In *Anglers Conservation Network v. Pritzker*, the D.C. Circuit affirmed that there is no right to judicial review of an action by a Fishery Management Council ("FMC"). Appellants challenged a decision by the Mid-Atlantic FMC to postpone a decision to amend its mackerel fishery management plan ("FMP") to include river herring and shad as protected stocks.

The Magnuson-Stevens Fishery Conservation and Management Act ("MSA") seeks to "promote domestic commercial and recreational fishing under sound conservation and management principles."[30] The MCA established eight FMCs, each with "authority over a specific geographic region and is composed of members who represent the interests of the states included in that region."[31] Under the MSA, the FMCs "shall" propose fishery management plans and implementing regulations for the fisheries under its authority.[32] In addition, the FMCs "shall" propose amendments to those plans when necessary.[33] After receiving a proposal from a FMC, the National Marine Fisheries Service ("NMFS") must decide to accept, reject, or partially accept the proposed plan or amendment.[34] NMFS may also prepare a fishery management plan if "the appropriate Council fails to develop and submit [a plan] after a reasonable period of time."[35]

In rejecting appellants' claims, the D.C. Circuit noted that the only "action" identified is attributable to the Mid-Atlantic FMC. The court stated that, because this action could not be attributed to NMFS or any federal agency, neither the APA nor the MSA provide a right of review. In addition, even if the action could be deemed an agency action, it represented an intermediary step, not a final action subject to judicial review. Finally, assuming the ability to compel agency action under the APA applied, the court found that appellants' claims fail because NMFS has discretionary, and not mandatory, authority to prepare a fishery management plan in this circumstance.

Alaska National Interest Lands Conservation Act

***Sturgeon v. Frost*, 136 S. Ct. 1061, 2016 WL 1092415 (U.S. March 22, 2016)**

In *Sturgeon v. Frost*, the Supreme Court reversed the Ninth Circuit and held that the Alaska National

Interest Lands Conservation Act's ("ANILCA") Alaska-specific exceptions to the National Park Service's ("NPS") authority over federally managed preservation areas, and its distinction between public and non-public lands, prevent NPS from regulating the use of hovercraft in a federally managed preservation area in Alaska. Mr. Sturgeon had filed suit against the NPS seeking a judgment allowing him to operate a hovercraft within the boundaries of the Yukon-Charley Rivers National Preserve to reach his preferred hunting grounds.

Under ANILCA, Congress set aside 104 million acres of land in Alaska for preservation purposes. In addition to federal land, the reserved area consists of state, Native corporation, and private lands. ANILCA makes several exceptions to NPS authority over the preservation areas, including drawing a distinction between "public" and "non-public" lands within the conservation unit areas. The statute provides that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of each unit."[36] The statute defines "land" to include "land, waters, and interests thereon," and "public lands" as including lands to which the United States has title.[37] ANILCA distinguishes between public and private lands, noting that "[n]o lands which . . . are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such unites."[38] Alaska law permits the use of hovercraft, but NPS regulations do not.[39]

Mr. Sturgeon argued that because the State of Alaska owned the Nation River, over which he operated the hovercraft, the NPS's prohibitive regulation did not apply. In reversing the Ninth Circuit, the Supreme Court held that ANILCA clearly carves out exceptions to NPS's general authority over federally managed preservation areas, and to hold otherwise would ignore the Alaska-specific provisions and allow NPS to regulate non-public lands through rules applicable outside Alaska. The decision was limited to an interpretation of 16 U.S.C. § 3103(c), and the Court did not decide whether the Nation River qualifies as "public land" under ANILCA, whether the NPS has authority to regulate activities on the river, and whether the NPS has authority over both "public" and "non-public" lands within the conservation system units in Alaska.

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1 40 C.F.R. §1508.9.
2 *Id*. §§ 1508.8(b) & 1508.7.
3 *See* 40 C.F.R. § 93.153(b) (requiring agencies to analyze indirect and direct emissions); *id*. at § 93.152 (defining "indirect emissions" as those that are, among other things, "reasonably foreseeable").
4 Lands Council v. McNair, 537 F.3d 981, 1000 (9th Cir. 2008).
5 42 U.S.C. §4332(2)(C).
6 40 C.F.R. §1502.1.
7 42 U.S.C. §4332(2)(C).
8 40 C.F.R. § 1502.9(c).
9 16 U.S.C. § 1533(a)(1).
10 *Id*. § 1533(b)(1)(A).
11 *Policy for Evaluation of Conservation Efforts when Making Listing Decisions*, 68 Fed. Reg. 15,100, 15,113 (March 28, 2003) ("Policy").
12 16 U.S.C. § 1533(a)(3)(A)(i).
13 16 U.S.C. § 1532(5)(A)(i).
14 16 U.S.C. § 1533(b)(2).
15 *Id*.
16 42 U.S.C. 7491(b)(2)(A).
17 *Id*. at 7491(g)(2).
18 40 C.F.R. 51.308(e)(3)(ii).
19 42 U.S.C. § 7409(b)(1).
20 42 U.S.C. § 7416.
21 42 U.S.C. § 7604(a).
22 33 U.S.C. §§ 1342(b), 1314(i)(2).
23 40 C.F.R. § 123.62(c) ("notification requirement").
24 *Id*.
25 33 U.S.C. § 1365(a)(1).
26 33 U.S.C. § 1365 (f)(6).
27 42 U.S.C. § 6972(a)(1)(B).
28 Zands v. Nelson, 779 F. Supp. 1254, 1264 (S.D. Cal. 1991).
29 Hinds Investments, L.P. v. Angioli, 654 F.3d 846, 851 (9th Cir. 2011).
30 16 U.S.C. §1801(b)(3).
31 16 U.S.C. § 1852.
32 16 U.S.C. §1852(h)(1).
33 16 U.S.C. §1853(c).
34 16 U.S.C. § 1854(a)(3).
35 16 U.S.C. § 1854(c)(1).
36 16 U.S.C. § 3103(c).
37 *Id*. § 3102.
38 *Id*. § 3103(c).
39 36 C.F.R. § 2.17(e).

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