

# Environmental & Land Use Law

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## Editors' Message



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

The Summer 2015 edition of the Environment and Land Use Law Section newsletter features articles inspired by presentations given at the Section's Midyear meeting, which took place May 7-9, 2015 at the Alderbrook Resort on the Olympia Peninsula. From the Midyear meeting, we welcome the newsletter's annual legislative update, authored by Jason Callahan, Senior Counsel at the House of Representatives' Office of Program Research. Also from the Midyear meeting, Connie Sue Martin discusses tribal zoning and land use regulation as tools for environmental protection. In *Returning to the First Principles of Urbanism: Urbanism without Effort and Land Use Law*, Chuck Wolfe shares with us his perspective on how to approach urban land use planning.

This edition also features a timely summary of the Environmental Protection Agency's Waters of the U.S. rule; a persuasive piece advocating for the use of SEPA's substantive authority to say "no" to fossil fuel projects; a discussion of two Washington court decisions interpreting the widely discussed 2014 *Gull Industries* decision; and a discussion of pitfalls and best practices for local governments integrating legalized recreational marijuana into planning schemes. The newsletter rounds out with familiar case law updates for the Growth Management Hearings Board, Pollution Control Hearings Board, and Shorelines Hearings Board.

We greatly appreciate all of you who continue to volunteer your time and talent to write articles that interest and engage our readers. If you are interested in contributing to a future edition of the newsletter, please contact Diane Meyers or Valerie Rickman.

## 2015 Legislative Update



By Jason Callahan, Washington House of Representatives' Office of Program Research

### Overview

The 2015 Legislature will go down in history as the longest session in the history of the state of Washington. While it wasn't until the atypically hot days of July that the Speaker's gavel finally brought session to a whimpering finish, the story of the 2015 Legislature began in November of 2014 and the statewide general elections. While most of the attention was focused on the national races that delivered both chambers of the United States Congress to the Republican Party, a local extension of that trend was playing out in Washington. The composition of the State Senate, which in 2013 was led by a coalition of 23 Republicans and 2 Democrats, changed to give the Republicans 25 members and a solid majority without Democratic coalition support (although one Democrat joined with the 25 Republicans to keep the "Majority Coalition Caucus" moniker). Over in the House, the Democrats survived the election in the majority, but their once sizable majority was whittled down to two votes. This set the stage for a continuation of divided government in Olympia.

The voters also provided an additional factor for the new Legislature to consider. Initiative 1351 passed with 50.96 percent of the vote. This initiative required a reduction of class sizes throughout the K-12 system and with it brought to Olympia an initial estimated upfront cost to state government of \$2 billion.<sup>1</sup> This new expense was added into a budget mix already facing a \$2.6 billion maintenance level shortfall and judicial expectations estimated well into the billions relating to fully funding education<sup>2</sup> and mental health services.<sup>3</sup>

The challenges of a divided government and substantial budget hurdles were not the only issues awaiting legislators in January. Governor Inslee also had waiting a series of three high-profile Governor-requested bills directly relating to environmental issues: toxics reduction, oil transportation safe-

*continued on p. 2*

ty, and climate change. With these factors in play, the environmental committees were poised to be as busy as the fiscal committees.

By the end of the regular session and three subsequent special sessions, two of the three main pieces of gubernatorial legislation had not been passed,<sup>4</sup> including HB 1314, which is the Governor's-request carbon markets bill. In fact, by session's end, the Governor saw a scaling back of the executive branch's authority over carbon emissions with the passage of a transportation revenue package that included a "poison pill" aimed at deterring any administrative action to implement a low carbon fuels standard in Washington.<sup>5</sup>

The Governor-requested bills were not the only legislative initiatives to receive attention. Below is a summary of those bills of interest to the Environmental and Land Use Section that made it all the way through to the Governor's desk. One "issue to watch" will be included under each subject heading based on a bill that received significant legislative attention but failed to achieve passage in both chambers.

Additional resources, such as the texts of the bills and the official supporting documents, can be found at [www.leg.wa.gov](http://www.leg.wa.gov). More detailed analyses of the bills below are included in these materials.

## **I. Solid Waste**

Solid waste is a common area for legislation, and the 2015 session was no different. Bills relating to paint stewardship, pharmaceutical waste, and transportation construction waste all passed at least one of the two chambers. The 2015 Legislature also added Washington to the list of states that have considered bills on the use of synthetic plastic microbeads in cosmetics. Although the bills on microbeads did not pass, they did open up a new legislative frontline on when and how plastics can be considered to be biodegradable.

In the end, two bills about solid waste management were signed into law.

### **Recycled Transportation Construction Materials and Concrete Aggregate (ESHB 1695)**

Relevant RCW Chapter(s): 70.95

The landscape of Washington's transportation system is changing with ongoing investments in so-called "mega-projects" made by the Legislature in recent years. New bridges, tunnels, and highways are in the process of being designed and built, which means that older infrastructure is in the process of being demolished. The demolition of Seattle's Alaskan Way Viaduct alone is expected to generate a significant amount of potentially reusable construction materials. Although there is an expected supply and demand for reused materials, there is not a clear certainty as to if, and how, these materials can be recycled into the state's new transportation portfolio.

The Legislature attempted to provide some certainty around the use of recycled and reused transportation construction material with the passage of ESHB 1695. The legislation creates an expectation that the Department of Transportation will work with the construction industry to develop criteria for the successful and sustainable long-term recycling of construction aggregate and recycled concrete materials in transportation infrastructure projects. It also requires that, beginning in the year 2016, the cumulative amount of recycled or reused materials used annually in Department of Transportation projects meet a 25 percent threshold. There is an exemption for the Department if the materials are not available or cost-effective.

Expectations are also placed on local governments. Larger local governments (100,000 residents or more) must request bids for transportation projects that include reused or recycled materials, and accept the bid with the highest percentage of recycled materials if it is the lowest responsible bid. Smaller local governments must evaluate their capacity for using recycled transportation project materials and implement strategies for reaching that capacity. Like the new requirements on the Department of Transportation, the requirements on local governments also take effect in the year 2016.

### **Pharmaceutical Waste (ESB 5577)**

Relevant RCW Chapter(s): 70.105

The Department of Ecology is the designated lead agency for implementing the federal Resource Conservation and Recovery Act (RCRA) in Washington; however, state law also provides separate authority for the Department of Ecology to control the management of dangerous wastes designated under state law. Certain types of waste are designated as dangerous by the state, including certain pharmaceutical medicines, but are not designated as hazardous under federal law. Both hazardous and dangerous wastes must be identified by waste generators and must be managed in accordance with regulations that apply to specific types of waste. Facilities that receive, sort, treat, and dispose of dangerous and hazardous wastes must receive a state or federal permit that authorizes the facility to handle those types of waste.

In 2008, the Department published an interim policy for the enforcement of dangerous waste regulations for pharmaceutical wastes generated by retail pharmacies, hospitals, and other patient care facilities.<sup>6</sup> Generators managing pharmaceutical waste under the 2008 interim policy must either send waste to a RCRA-permitted incinerator for disposal, or must segregate dangerous wastes designated as state-only dangerous waste but not as federal hazardous waste. State-only dangerous waste must be managed in accordance with the state's dangerous waste rules, which allows certain state-only pharmaceuticals to be disposed of in facilities permitted to incinerate municipal solid waste or

that meet certain other combustion temperature requirements.

Dangerous waste that is also infectious waste must either be sent to a RCRA-permitted facility or, if it is state-only dangerous waste, may be sent to a disposal facility with a permit to accept both state-only dangerous and infectious wastes. Salt-water, sugar-water, and other water solutions without vitamins or additives may be disposed of as sewage with approval from the local wastewater treatment facility. The 2008 interim enforcement guidance also details rules for waste accumulation practices, empty container management, recordkeeping, and for reverse distribution of unused and unwanted pharmaceuticals that can still be used for their original intended purposes.

The complexity of this regulatory scheme has created some enforcement concerns that were expressed by hospitals and other health care facilities. In response, the Legislature directed the Department to convene a stakeholder workgroup that includes state agencies, hospitals, and pharmaceutical waste-handling facilities. The work group must develop recommendations on new pharmaceutical waste policies, consistent implementation of existing rules, and consistent statewide regulatory enforcement. The resulting recommendations must be returned to the Legislature by December 31, 2015.

Until then, the Department of Ecology is encouraged to use its enforcement discretion, and is prohibited from using information shared during the work group process for enforcement purposes unless there is a substantial human health risk or a probability of environmental harm.

### **Solid Waste Issue to Watch: Microbeads (HB 1378 & SSB 5609)**

Relevant RCW Chapter(s): n/a

Multiple states have passed legislation addressing the use of synthetic plastic microbeads in cosmetic products.<sup>7</sup> The microbeads are non-allergenic abrasive agents added to cosmetics. The cosmetics industry has responded to concerns that the microbeads are too small to be filtered out by wastewater treatment plants and, as a result, are accumulating in the receiving waters of treatment plants by undertaking a process of phasing out their use and supporting state legislation that would prohibit their use.

The Washington version of the legislation, which would have phased out the use of synthetic plastic microbeads over a number of years, was held up in 2015 over the concept of “biodegradability.” The bills would have prohibited the use of “biodegradable” synthetic plastic microbeads; the extra word being seen as a loophole to some. Questions were raised around what sort of plastics were biodegradable, how they would be tested, what standards would be used, and whether the standards would reflect the cool marine waters of the Puget Sound.

The specific fates of the microbeads bills are something to watch in 2016. However, the questions the bills raised about the future use, recognition, and regulation of biodegradable plastic may become a significant emerging issue over the course of the coming years.

## **II. Wildfires**

The year 2014 was marked for many by two significant and tragic natural disasters. The March landslide in Oso was followed by the summer’s historic fire season. The Carleton Complex fire alone burned over 256,000 acres and nearly 300 homes, and was just one of 12 named fires that burned approximately 413,000 acres. The affected communities looked to Olympia to digest the lessons learned during the fires and to provide tools for the coming summer.

### **Wildland Fire Suppression (ESHB 2093)**

Relevant RCW Chapter(s): 76.04

Prior to the introduction of this legislation, five different fire-related bills were heard in the House Agriculture and Natural Resources Committee. After that hearing, various components of the five bills were merged into the one bill that ultimately passed.

The successful bill has multiple components and themes. One theme is to better link the state fire response to local resources. Along those lines, the bill requires the Commissioner of Public Lands to appoint and maintain a local fire liaison that will serve as a direct link between the Department of Natural Resources and local landowners in fire prone areas. The Department is also responsible for maintaining a list of qualified wildland firefighters in various communities to assist fire response efforts in linking into available local suppression resources.

Another theme addressed by the bill is the ability for citizens to assist in putting out a fire before it becomes destructive. The legislation creates a civil and criminal liability waiver for a person who accesses land for the purpose of attempting to suppress a wildland fire if the fire can reasonably be considered an imminent danger. The waiver of liability applies both ways: to the person accessing the land where the fire is beginning and to the landowner for any injury caused to the person.

### **Wildfire Issue to Watch: Wildfire Response Funding**

The Commissioner of Public Lands publicly endorsed a proposal to appropriate an additional \$4.5 million above baseline in wildfire investments in advance of the 2015 fire season. The money would be used to bolster fire crews, add equipment, and expand aerial firefighting capability. The final operating budget for the Department of Natural Resources, as it passed in the Legislature, provides only \$2 million for increased fire response capabili-



ties. Regardless, state law allows the Department of Natural Resources to spend money on fire response and seek reimbursement from the subsequent legislative session.<sup>8</sup> The hot and dry conditions are predicted to result in a fire season more serious than most; a prediction that if found to be accurate may result in a large reimbursement figure for the 2016 Legislature to consider.

### III. Wildlife and Fisheries

The prevalence of high-profile issues managed by the Department of Fish and Wildlife provided, as usual, a strong basis for legislative proposals regarding wildlife and fisheries. The Legislature considered a wide range of issues in this category. Interest in wildlife management included separate bills on the management of bears, wolves, and cougars. The recently enacted temporary hydraulic project approval (HPA) fees drew some attention with proposed exemptions to the fee, and related to the HPA program, the issue of how small-scale mineral prospecting is regulated made a return to the legislative hearing rooms. A new proposal to allow non-profit organizations to manage hatcheries advanced one step in the process, as did a proposal to regulate the sale of elephant and rhinoceros horn ivory. Finally, proposals were made to either rebalance the way commercial and recreational fishing allocations are calculated or change the fee structure supporting the various fisheries.

In the end, a handful of wildlife and fisheries bills made it to the Governor. These were either relatively minor expansions to the Department of Fish and Wildlife's enforcement authority or statutory reorganizations. The one bill of note with potential (future) regulatory ramifications dealt with forage fish.

#### Forage Fish Management (SSB 5166)

Relevant RCW Chapter(s): 77.55

This legislation commissions the Department of Fish and Wildlife to complete two studies related to the prevalence of forage fish in the Puget Sound. Forage fish are small, schooling fish that serve as a food source for other fish species, birds, and marine mammals. Examples of forage fish species are herring, smelt, anchovy, and sardine.

The first study, to be done in collaboration with the Department of Natural Resources, is a survey of the locations of surf smelt and sand lance spawning areas. The second study requires the Department of Fish and Wildlife to conduct a mid-water trawl at various depths throughout the Puget Sound to evaluate the prevalence of adult forage fish. Both surveys must be completed by June 30, 2017.

Although the bill only commissions studies, it was a high priority of the environmental lobby. The Department of Fish and Wildlife has the authority to condition hydraulic project approvals in marine waters on beaches that have been surveyed to show the presence of forage fish or their spawning habi-

tat. However, there are questions as to the ability of the Department to condition permits on beaches that have not been surveyed, regardless of whether or not the project site is suspected forage fish habitat.<sup>9</sup> Improved knowledge of forage fish habitat, and the number of beaches surveyed, should allow additional flexibility for the conditioning of hydraulic project approvals.

#### Wildlife and Fisheries Issue to Watch: Wolf Management (SHB 2017)

Relevant RCW Chapter(s): Title 77

The issue of wolf management has been contentious in Olympia since before the 2011 adoption of a wolf management plan by the Fish and Wildlife Commission. The management plan charts the recovery of the gray wolf, which is listed as an endangered species statewide by the Fish and Wildlife Commission and is listed as endangered by the federal government in the western two-thirds of the state. Concerns have long been expressed from the third of the state where wolves are not federally listed that the state recovery plan, which requires wolves to be established in each of the state's three recovery areas, creates a burden on northeast Washington to host populations that exceed recovery objectives and social tolerance.

Historically, bills attempting to legislate different management outcomes have been heard on the House committee level, but have not had much traction in the House beyond a policy committee. It came as a bit of surprise to some when SHB 2017 passed off the House floor and advanced to the Senate in 2015. The bill would have required the Fish and Wildlife Commission to reopen the wolf management plan and reconsider some of its elements. The reconsideration would have included changing the metric for determining recovery, evaluating the options as to proper distribution needed to be observed before recovery is declared, making changes to the existing wolf recovery zones, determining which preventative measures must be attempted prior to lethal action being authorized, considering changes to the cooperative agreement process, revisiting the criteria for the use of lethal management, examining the adequacy of current poaching penalties, and considering new data related to wolf/ungulate interactions.

The bill progressed all the way to the Senate floor before failing to be brought up for a vote. Although the bill did not make it to the Governor's desk, its progress out of the House signals hope for those interested in taking a fresh look at wolf recovery. The topic is sure to be on the agenda in the 2016 Legislature.

### IV. Transportation Permitting

Permitting reforms related to the Department of Transportation, and to local transportation projects, have been the subject of much discussion in recent years. As the costs of transportation projects

increase, so do efforts to find ways to complete projects at lower cost while still ensuring that environmental standards are satisfied. Both the House and Senate agreed to increase the gas tax by 11.7 cents. However, that agreement was conditional on a number of changes to how transportation projects are built, including permitting reforms.

#### **Local Government Stormwater Fees (SB 5314)**

Relevant RCW Chapter(s): 90.03

Local government utilities are authorized to levy a charge to the Department of Transportation on state highway rights-of-way for the construction, operation, and maintenance of storm water control facilities. The charge is statutorily capped at 30 percent of the rate for comparable real property. All revenue collected under these charges must be used solely for stormwater control facilities that directly reduce state highway runoff impacts or for the implementation of best management practices that will reduce the need for facilities. Each year, local government utilities are required to develop a plan for the expenditure of the charges for that calendar year and a report on how the charges were used in the previous year.

The state's 2014 supplemental transportation budget made temporary changes to this arrangement.<sup>10</sup> Until June 30, 2015, local government utilities are no longer required to use revenues related to these charges for facilities and best management practices specifically related to the runoff impacts of state highways. Although the focus of those expenditures must still relate to runoff issues, the direct nexus to state highways is removed. Also, for the same time period, the annual expenditure planning and reporting requirements are waived.

This legislation makes permanent the temporary change that was made in the 2014 Transportation Budget. As a result, local government utilities will no longer be required to use revenues related to stormwater charges collected from the Department of Transportation for facilities and best management practices specifically related to the runoff impacts of state highways.

#### **Replacement and Repair of Local Transportation Infrastructure (SHB 1851)**

Relevant RCW Chapter(s): 43.21C

One of the categorical exemptions to the State Environmental Policy Act ("SEPA") maintained in rule by the Department of Ecology is for repair projects for roads, bridges, and other transportation infrastructure that are undertaken by the Department of Transportation and that take place within an existing right-of-way and that do not add automobile lanes or otherwise change the capacity or function of the infrastructure.<sup>11</sup>

SHB 1851 directs the Department of Ecology to amend the rule that creates the categorical SEPA exemption for Department of Transportation repair projects to include repair or replacement projects

involving a structurally deficient city, town, or county bridge. The same limitations on the rule applicable to Department of Transportation projects would apply to local government projects. This outcome will be the result of a new categorical exemption adopted by the Department of Ecology and not an official statutory exemption.

#### **Replacement and Repair of State Bridges (HB 1219)**

Relevant RCW Chapter(s): 43.21C, 47.28

This bill can be seen as a companion measure to go along with SHB 1851 (above). HB 1219 creates a new statutory SEPA exemption for the repair or replacement of state bridges that are deemed to be structurally deficient. The exemption applies to the repair or replacement of the bridge as long as no vehicle lanes are added and extends to all state and local permits required for the repair or replacement of the structurally deficient bridge. This new statutory exemption is an expansion to the categorical exemption referenced above under SHB 1851.

#### **Local Permitting of Transportation Projects (2ESSB 5994)**

Relevant RCW Chapter(s): 90.58, 35.21, 35A.21, 47.01

This measure was billed as the prime regulatory reform that was necessary for the enactment of a higher gas tax. It addresses both local permits for state highway projects and the intersection of transportation projects and the Shorelines Management Act.

In regards to local permits for state highway projects, the bill requires cities and counties to make, to the greatest extent practicable, a final determination on all permits required for a project with an estimated cost of less than \$500 million no later than 90 days after the DOT submits a complete permit application. The DOT must report annually to the Governor and the Legislature any permit application that takes longer than 90 days to process.

The bill addresses the Shoreline Management Act ("SMA") in a number of ways. The initial SMA subtopic is the stay of construction for transportation projects. Under the bill, if all components of a state transportation project achieve no net loss of shoreline ecological functions, construction on the project pursuant to a permit issued under the SMA may begin 21 days after the date of filing, regardless of the status of any review proceedings. The determination that the project will result in no net loss of shoreline ecological functions must meet guidelines adopted by the Department of Ecology and must be demonstrated through a two-part process.

First, during the permit application and review process, the DOT must prepare an assessment of how the project affects shoreline ecological functions and provide the assessment to the local government making the permit decision. The assessment must include specific actions, developed in

consultation with the Department of Ecology, for avoiding, minimizing, and mitigating impacts to shoreline ecological functions to ensure no net loss of shoreline ecological functions result from the project. Second, the local government must review the assessment provided by the DOT and determine that the project will result in no net loss of shoreline ecological functions.

Although construction may commence on a project that demonstrates no net loss of shoreline ecological functions notwithstanding the pendency of any review proceedings, the Shorelines Hearings Board is not precluded from subsequently determining that the project or any element of the project is inconsistent with the SMA, the local shoreline master program, SEPA, or any applicable regulations.

The bill also addresses exemptions from permits and approvals under the SMA. Any person who is exempt from requirements to obtain a substantial development permit, conditional use permit, or variance under the SMA is also exempted from the requirement to obtain a letter of exemption or other review conducted by a local government to implement the SMA. Additionally, specially identified project and activity types that meet certain criteria are similarly exempted from requirements to obtain a substantial development permit, conditional use permit, variance, letter of exemption, or other local government review conducted to implement the SMA. Those projects and activities include DOT actions to repair state highways, lease ferry terminals, install safety equipment, maintain rights-of-way, and respond to unforeseen, extraordinary circumstances that is necessary to prevent a decline, lapse, or cessation of service

#### **Transportation Permitting Issue to Watch: Environmental Review Processes (2ESSB 5994)**

Relevant RCW Chapter(s): Title 43.21C

The bill addressed above also included a mandate to the DOT to continue work towards regulatory reform. In 2016 the DOT must coordinate a state agency work group to identify issues, laws, and regulations relevant to consolidating and coordinating the review processes under NEPA and SEPA to streamline the review of and avoid delays to state highway projects. The work group must include the DOT and the Department of Ecology and report their findings to the Joint Transportation Committee by December 31, 2016.

## **V. Land Use**

In Olympia, land use policies are generally considered by the committees with jurisdiction over local governments. Frequent drivers of work for these committees are, historically, proposed changes to the Growth Management Act and the Shorelines Management Act, zoning authorities, building codes, and the local impacts of new construction.

The 2015 session saw bills introduced on all of those topics; however, in the end, two bills related to land use were passed by both the House and the Senate.

#### **Impact Fees (ESB 5923)**

Relevant RCW Chapter(s): 82.02, 36.70A, 44.28

Local governments that fully plan under the Growth Management Act may currently impose impact fees on development activity as part of the financing of public facilities needed to serve new growth and development.<sup>12</sup> This bill requires any local governments that opt to collect impact fees to adopt and maintain a system for the deferred collection of impact fees for single-family detached and attached residential construction<sup>13</sup>. The collection of impact fees may be deferred until, at the local government's option, the completion of the final inspection, the issuance of a certificate of occupancy or equivalent certification, or the time of closing of the first sale of the affected property. The amount of impact fees that may be deferred must be determined by the fees in effect at the time the applicant applies for a deferral.

Each applicant for a single-family residential construction permit is entitled to annually receive deferrals for the first 20 single-family residential construction building permits per county, city, or town. A local government, however, may elect to defer more than 20 of the building permits for an applicant. With some exceptions, an applicant seeking an impact fee deferral must grant and record a deferred impact fee lien against the property in favor of the local government in the amount of the deferred fee.

#### **Geologic Hazards Mapping (SB 5088)**

Relevant RCW Chapter(s): 43.92

The March 22, 2014, landslide in Oso was an abrupt reminder that Washington is a geologically active state with potential real-life, human consequences. This bill, proposed by the Department of Natural Resources, clarifies and expands that agency's existing authorities as they relate to the creation, compilation, and sharing of geologic mapping data.

The Department of Natural Resources already maintains a state Geological Survey that includes geological maps assessing volcanic, seismic, landslide, and tsunami hazards.<sup>14</sup> This bill requires the Department to add to the Survey using the best practicable technology to further identify and map geological hazards and to estimate potential hazard consequences and occurrence probabilities. The Department of Natural Resources must also coordinate with other state and local government agencies to compile existing data and maintain a publicly available database of the collected maps and data.

The bill creates no expectation on how the data will be used by local governments when making lo-



cal land use decisions. However, there is an implied expectation that more accurate information regarding geologic hazards will prove to be a useful land use planning tool for local governments.

### **Land Use Issue to Watch: Floodplain Management (ESSB 5347)**

Relevant RCW Chapter(s): n/a

Landslides were not the only land-use-related hazard to capture the attention of the Legislature. Flooding, and floodplain management, was also a significant topic of discussion. This bill was similar to a bill discussed in 2014, and encapsulates an issue that does not seem poised to go away in 2016.

ESSB 5347 would have commissioned the State Conservation Commission, the Department of Natural Resources, the Department of Fish and Wildlife, the Department of Ecology, and the Department of Agriculture to jointly identify and assess three demonstration projects testing the effectiveness and costs of river management using various management strategies and techniques. The demonstration projects would have been located in Whatcom, Snohomish, and Grays Harbor counties and have the goals of protecting agricultural lands, restoring or enhancing fish runs, and protecting and enhancing public infrastructure and recreational access. Within those goals, the demonstration projects would examine a number of management strategies and techniques. The implementing agencies would also establish benchmarks and timetables for the implementation of the demonstration projects.

The implementing agencies would have to, in designing and assessing the demonstration projects, examine the sediment management conducted on the Fraser River in British Columbia and work closely with a stakeholder group and any federally recognized Indian tribes.

Funding the actual implementation of the demonstration projects would have been difficult, and the agencies were directed to develop possible funding mechanisms. This is a task that the agencies may still choose to do even without the legislation passing.

## **VI. Oil Transportation**

The changing transportation patterns and sources of oil in the state first captured the attention of the 2014 Legislature. Historically, the refineries in Washington have received up to 90 percent of the crude oil processed in the state via vessels arriving from Alaska. This has changed in recent years, with an increased amount of oil being received from inland sources on rail cars and through the pipeline system. Noting that the oil transportation trends were likely to continue, the 2014 Legislature commissioned a study of the topic by the Department of Ecology.<sup>15</sup>

The resulting study, which included 43 initial findings and recommendations, was delivered

to the Legislature in advance of the 2015 session. The study also served as the backbone to one of Governor Inslee's pieces of proposed legislation. Of his three key environmental proposals, only this proposal saw legislative passage during the regular session. In fact, it was the very last bill to pass during the regular session, with last-minute negotiations delaying the final adjournment into the early evening of April 24.

### **Oil Transportation Safety (ESHB 1449)**

Relevant RCW Chapter(s): 90.56, 88.40, 82.23B, 81.53, 90.56

This piece of legislation made changes in a number of areas related to the transportation of oil. The changes impacted the authority of the Utilities and Transportation Commission over railroads, who pays the state's oil barrel tax, what information must be disclosed by facilities that receive oil, railroad contingency response plans, and the very definition of word "oil" itself.

As for the last change, the word "oil" is redefined in oil-spill prevention, cleanup, and financial responsibility laws to mean any kind of oil that is liquid at 25 degrees Celsius and 1 atmosphere of pressure, including any distillate of that oil. This definition also expressly includes bitumen (which is a heavy oil that will not flow until heated or diluted), synthetic crude (which results from the processing of bitumen), and natural gas well condensate (which is a liquid hydrocarbon mixture recovered at natural gas extraction wellheads). The goal in this section is to more accurately link the statutory definitions of oil with the products being moved in Washington.

As for the disclosure of information about oil transportation, current law requires advance notice to the Department of Ecology before any over-water transfer of oil occurs between a vessel and a facility. This legislation extends some of the notice requirements to facilities that receive oil from a railroad or a pipeline. Specifically, facilities must provide advance notice to the Department of Ecology of all oil received via rail once a week. The information provided must include information about the route the oil will be taking, the time it will be received, the volume and gravity expected to be received, and the source region of the oil as shown on the bill of lading. Facilities receiving oil from pipelines must report to the Department of Ecology twice a year and include the volume of oil transported through the state and the source region of origin.

Once reported, the Department of Ecology must aggregate pipeline and rail transfer data quarterly on a statewide basis and publish it on its web site. The aggregation of data must be done by route through the state, by week, and by oil type. The quarterly reports may also include other information known to the Department, such as place of origin, modes of transport, the number of railroad

cars used, and the number of spills that occur in the state.

Non-aggregated information may be provided to state, local, or tribal emergency response agencies. However, the non-aggregated advanced notices are exempt from public disclosure under the Public Records Act.

Under current law, vessels and their receiving facilities must demonstrate certain financial assurance capabilities and maintain spill contingency plans. Debate around the legislation included whether to impose similar requirements on railroads that transport oil. In the end, authority was given to the Utilities and Transportation Commission (“UTC”) to require railroads to submit information regarding the company’s ability to pay damages in the event of a reasonable worst case spill or accident. This information must be included in a railroad’s annual reporting to the UTC. As for contingency plan requirements, they are extended to railroads. The plans must provide for the best achievable protection in the case of a spill or accident.

Funding new state oversight in the legislation was also a subject of conversation during the session. The current 4-cent/barrel tax placed on oil received into the state was extended to apply to railroad delivery of oil, as opposed to only marine transport. The Department of Ecology was also given flexibility to move funds among accounts and to access funding in accounts at lower cost thresholds. The result of these provisions is that an existing additional one-cent/barrel of oil tax that is only active at certain times will be active more often.

The Pilotage Commission was also given additional authority over marine oil transport. Under the legislation, the Pilotage Commission may adopt rules to require tug escorts and other safety measures in Grays Harbor that apply to oil tankers of greater than 40,000 deadweight tons, other towed vessels capable of transporting, and articulated tug barges. The Pilotage Commission’s authority to adopt tug escort and other maritime safety rules in Grays Harbor is contingent on certain permitting steps being taken that may lead to the citing of an oil storage or processing facility in Grays Harbor.

In addition to the financial assurances provisions of the railroads, the bill also gives new funding and authority to the Utilities and Transportation Commission Rail Safety Program. The current 1.5 percent of intrastate gross revenues regulatory fee paid by railroads to the UTC is increased to 2.5 percent. The UTC is also given the authority to enter private property to conduct hazardous materials inspections, investigations, and surveillance under a federal partnership and to adopt safety standards for private road crossings of railroads used to transport crude oil.

Cities of over 10,000 people, who under current law could not participate in the UTC’s rail safety programs, are given the option to participate in the UTC public road-railroad crossing safety inspection

program. Cities of over 10,000 people must provide a list of existing public crossings to the UTC within 30 days of the act’s effective date and must also notify the UTC within 30 days of the opening, closing, or modification of a crossing.

### **Oil Transportation Issue to Watch: Future Actions Related to ESHB 1449**

The passage of ESHB 1449 is not the final say the Legislature will have on the topic of oil transportation safety. The bill, along with making substantive changes in the law, also commissions the collection of additional information that may serve as the basis of future legislation.

The Department of Ecology is directed by the bill to conduct an evaluation and assessment of vessel traffic management and safety at the mouth of the Columbia River. This study must look at the need for tug escorts for various types of oil transportation vessels through the Columbia River, the required capabilities of any tug boats that are used, and standards of best achievable protection. A draft report is required to be completed by the end of 2017, with a final report due on June 30, 2018.

The Legislature also assigned itself work in ESHB 1449. Per the passed version of the bill, the House Environment Committee and the Senate Energy, Environment, and Telecommunications Committee will conduct a joint hearing during the 2015 legislative interim on oil spill prevention and response activities as they relate to the international shipment of liquid crude bulk oil. Representatives of the federal and Canadian governments will be invited to discuss cooperative efforts in prevention and emergency response and the expected risks of liquid bulk crude oil transportation in the Pacific Northwest.

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- 1 In the end, the Legislature voted to suspend I-1351 for four years in EHB 2266.
- 2 McCleary v. State of Washington 173 Wn.2d 477 (2014).
- 3 In re: the Detention of D.W. 181 Wn.2d 201 (2014) and Trueblood v. DSHS, 2015 U.S. Dist. LEXIS 43857 (W. D. Wash. April 2, 2015).
- 4 The three main pieces of Governor-requested environmental legislation are HB 1314 (climate), HB 1472 (toxic materials and chemical action plans), and HB 1449 (oil transportation safety). Of those, HB 1449 passed and is detailed below.
- 5 The final version of 2ESSB 5987, the measure that raises the gas tax among other transportation-related fees, redirects the new revenue collected by the bill away from transit and other multimodal projects and



towards road building if a low carbon fuel standard rulemaking process is initiated prior to July 1, 2023.

- 6 Department of Ecology Publication 07-04-024.
- 7 States that have passed legislation prohibiting the use of microbeads include New Jersey, Illinois, and New York. The Netherlands has also banned their use.
- 8 RCW 43.88.550.
- 9 See RCW 77.55.213 and the “reasonably related” test.
- 10 Chapter 222, Laws of 2014, Section 708.
- 11 WAC 197-11-800.
- 12 RCW 82.02.050.
- 13 The deferred collection of impact fees must be available by September 1, 2016.
- 14 RCW 43.92.025.
- 15 Chapter 221, Laws of 2014, Section 302.

## Tribal Zoning and Land Use Regulation as a Tool for Environmental Protection<sup>1</sup>



By *Connie Sue Manos Martin, Schwabe Williamson & Wyatt PC*

In 1887, Congress passed the General Allotment Act,<sup>2</sup> which required tribally held land to be divided among individual tribal members and the remaining “surplus” lands opened to white settlement.<sup>3</sup> The Act, which was designed to break up Indian reservations, was a departure from earlier federal Indian policies dominated by war, removal, treaty-making, and the establishment of reservations. The Act’s rationale was that by dividing reservation lands into privately-owned parcels, Indians would be forced to assimilate and the United States would no longer oversee Indian welfare or provide the meager annuities it had promised to provide under treaties it had negotiated, including the Stevens Treaties of 1854–1855 with Puget Sound tribes.

By the time the Act was repealed by the Indian Reorganization Act in 1934 (the “IRA”),<sup>4</sup> 90 million acres of land had been lost, nearly two-thirds of the total Indian land base at the time. Indian lands that were alienated under the Act were sold or transferred to non-Indians, but remained within the boundaries of reservations. As a result, trust lands, fee lands, and lands owned by tribes, individual Indians, and non-Indians were mixed together on the reservation, creating a checkerboard pattern. With the passage of the IRA, federal Indian policy progressed to one of sovereignty and self-determination, restoring tribal lands and permitting tribes to reorganize under federal law for purposes of self-government. However, because the non-Indians who had acquired title to Indian lands as a result of allotment held those lands in fee simple, the checkerboard pattern of ownership persisted, and remains a significant issue today.

A land base is critical, and tribes have been trying to reacquire their lost lands almost since the Act was repealed:

Like life, land is sacred to Native American people. The land has an intrinsic spiritual and cultural value and does not require manmade infrastructure or improvements to give it value. Most important, these lands are homelands—where the ancient stories took place, passed down to children in songs and dances so that each generation can learn about its culture and traditions. Land is what ensures continuity because it is not only where ancestors once lived, but also where future generations will be born; it constitutes a fundamental component of life. For all Native American people, the land where they reside today is the only land they have remaining to hand down to future generations of their tribe. Land is also a means to preserve their cultural identity separate and apart from mainstream society. In addition to its spiritual and cultural significance, tribal land plays an important practical role. Many nations rely on their land for their livelihood, which may be based on hunting, fishing, or agriculture. Tribal land also has political relevance because a land base helps tribes exercise tribal self-governance and self-determination. This is one reason why tribes without a federally or state-designated land base continue to try to claim rights to their aboriginal lands.<sup>5</sup>

This article focuses largely on the political relevance of tribal land. As a consequence of the persistence of checkerboard patterns of ownership in Indian country, jurisdictional disputes between local, county, state, federal and tribal governments regularly arise regarding who has authority to regulate activities within reservation borders, including (among other things) zoning and land use regulation, permitting, and environmental protection.<sup>6</sup> Those jurisdictional disputes will continue until and unless tribes succeed in their efforts to reacquire all lost lands within their reservations. For the most part, reacquisition occurs as one would expect—the tribe purchases fee title to property from a willing seller. That is not the only means, however.

### The Power of Eminent Domain

Eminent domain is considered an inherent power of all sovereigns. “The power of eminent domain does not depend for its existence on a specific grant in the Constitution. It is inherent in sovereignty and exists in a sovereign state without any recognition thereof in the Constitution. It is founded on the law of necessity. The provisions found in most of the state Constitutions relating to the taking of property for the public use do not by implication grant the power to the government of

the state, but limit a power that would otherwise be without limit.”<sup>7</sup>

[The] right of every State to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not well perform their great functions. It is a power not surrendered to the United States and is untouched by any of the provisions of the Federal Constitution, provided there be due process of law, that is, a law authorizing it, and provision made for compensation. This power extends to tangibles and intangibles alike. A chose in action, a charter, or any kind of contract, are, along with land and movables, within the sweep of this sovereign authority.<sup>8</sup>

It is generally accepted that one aspect of retained inherent sovereignty of tribal governments is the power of eminent domain.<sup>9</sup>

By its terms, the United States Constitution does not apply to Indian tribes. “As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”<sup>10</sup> Because of the absence of constitutional protections for individuals against the actions of tribal governments, in 1968 Congress enacted the Indian Civil Rights Act (“ICRA”), also known as the Indian Bill of Rights, using language taken nearly verbatim from the United States Constitution.<sup>11</sup> The ICRA imposes upon tribal governments restrictions that are similar to those applicable to federal and state governments,<sup>12</sup> and provides protections to both tribal members and non-tribal members.<sup>13</sup>

Section 1302(a)(5) of the ICRA mirrors the language of the Fifth Amendment, and provides that “[n]o Indian tribe exercising powers of self-government shall ... take any private property for public use without just compensation.”<sup>14</sup> By including this limitation on takings by tribal governments in the ICRA, Congress implicitly recognized that the power of eminent domain is one attribute of sovereignty retained by tribes.

The Internal Revenue Service (“IRS”) also recognizes eminent domain as a retained tribal power.<sup>15</sup> The IRS Code contains provisions that treat tribal governments like state governments for certain tax purposes.<sup>16</sup> In internal agency reviews of the legislative history of these provisions, the IRS concluded the provisions should apply to an Indian tribal government that exercises inherent sovereign powers.<sup>17</sup> According to the IRS, among those inherent sovereign powers is the power to tax, the power of eminent domain, and police powers, such as control over zoning, police protection, and fire protection.<sup>18</sup>

In the past decade, a number of tribes have considered exercising eminent domain powers in the same manner as their federal, state, and local governmental counterparts.<sup>19</sup> Tribal codes and constitutions have been amended to provide for the power to acquire lands within their political and territorial boundaries without the consent of the individual landowners.<sup>20</sup>

The Navajo Nation is one tribe that has exercised eminent domain powers. In *Dennison v. Tucson Gas & Electric Co.*,<sup>21</sup> the tribe took private land for the use of a right of way. The Navajo Supreme Court addressed the initial question of whether the tribe had eminent domain powers, and determined that it did:

Eminent Domain is the power of any sovereign to take or to authorize the taking of any property within its jurisdiction for public use without the consent of the owner. It is an inherent power and authority which is essential to the existence of all governments. Therefore, as in this case, the sovereign (the Navajo Tribal Government), has the power and the authority to take or to authorize the taking of the Dennison property, all or part of it, without their consent. Plaintiffs’ consent to the granting of the right-of-way is totally unnecessary.<sup>22</sup>

However, despite concluding that the tribe had eminent domain power, the court determined that the tribe’s taking had violated Navajo law, based on procedural and due process considerations under the ICRA and the Navajo Bill of Rights.<sup>23</sup>

The Salish & Kootenai Tribes’ eminent domain power, and the exhaustion of tribal court remedies, was addressed by a federal court in *Clairmont v. Confederated Salish and Kootenai Tribes*.<sup>24</sup> In that case, the plaintiff was a tribal member, and filed an inverse condemnation action alleging that the tribe had taken his private property without just compensation, in violation of the ICRA. The tribe conceded that the court had jurisdiction, but asserted that the court should abstain until the remedies available to the plaintiff in tribal court had been exhausted.

The court held that abstention was not appropriate because the text of the ICRA committed the jurisdiction to determine just compensation to the district court, and thus a final judgment reached in the tribal court which awarded less than just compensation would not be binding upon the district court:

[T]his court is not called upon to measure a process. It is called upon to determine whether under the Indian Civil Rights Act there has been just compensation for a taking. A final judgment reached in the tribal structure which awarded something less than just

compensation would not be binding upon a federal court. Since, in any event, the plaintiff would be entitled to a determination by this court of the amount of compensation to which he was entitled, there is no reason to send him back to the tribal court only to have him back again if he is dissatisfied with the result reached by the tribal court ... This case rests upon a statute which had the effect of vesting in the federal court the final judgment as to just compensation. Congress itself denied to the tribes the final power to decide the problem. Had Congress simply said that the tribes might not take private property without due process of law, the result would be otherwise.<sup>25</sup>

Here in Washington, the Yakama Nation also has adopted an eminent domain ordinance<sup>26</sup> which authorizes the Yakama nation “to condemn interests in real or personal property located within the exterior boundaries of the Yakama Reservation, as described in the Treaty of June 9, 1855 (12 Stat. 951), for public uses.”<sup>27</sup>

The Yakama Nation has begun to use its eminent domain ordinance to facilitate its efforts to build an electrical distribution system on the Yakama Reservation, through its tribal utility, Yakama Power. Yakama Power is the first tribal utility in Washington, the second in the northwest (behind the Umpqua Tribe in southwestern Oregon), and only the eighth nationwide.

The Yakama Nation is a major electric service customer, although much less so since formation of Yakama Power. The Yakama Nation’s ultimate goal is for Yakama Power to serve the entire reservation, including both tribal and nontribal residents, “to create on-reservation jobs in technical fields, provide more flexibility and security in electrical service to tribal enterprises such as the casino, and reap some of the benefits from the federal power system whose construction damaged some of the tribe’s lands.”<sup>28</sup>

In its efforts to fulfill that goal, the Yakama Nation has begun to acquire electric facilities on tribal land that are owned by private power companies, including twice using its condemnation authority to acquire such electric facilities in small batches. While those condemnations were for acquiring equipment and transmission lines—personal property—the ordinance provides for condemnation of real property, as well.

The condemnation process is as follows: (1) the Yakama Nation files a petition with the Yakama Tribal Court; (2) the Yakama Tribal Court schedules a hearing to occur no later than 60 days after the filing of the petition; (3) a jury determines just compensation, and (4) the court enters a judgment and the condemnee is paid. There is no right of appeal.<sup>29</sup>

Although it seems clear that tribes possess the power to condemn private property through emi-

nent domain, it has not been determined in any published decision whether tribes may condemn private property owned by a non-tribal member. In order to exercise its power, the tribe must also have jurisdiction over the person or the property. Tribes have extensive authority to condemn property owned by tribal members and jurisdiction for such actions is in the Tribal Court.<sup>30</sup> Whether a tribe has jurisdiction to condemn property located within the reservation that held in fee by non-tribal members, like other exercises of tribal authority over non-members, is an open question.<sup>31</sup>

### **Tribal Court Jurisdiction Over Non-Tribal Members**

Tribal jurisdiction cases are not easily encapsulated, nor do they lend themselves to simplified analysis.<sup>32</sup> The Supreme Court itself observed that questions of jurisdiction over Indians and Indian country are a “complex patchwork of federal, state, and tribal law.”<sup>33</sup> “There is no simple test for determining whether tribal court jurisdiction exists.”<sup>34</sup>

Tribal adjudicative jurisdiction—the authority of tribal courts to entertain suits—does not extend beyond its legislative jurisdiction.<sup>35</sup> Tribal courts are not courts of general jurisdiction, and a mere failure to affirmatively preclude tribal jurisdiction in a statute does not amount to a congressional expansion of tribal jurisdiction.<sup>36</sup> Tribal jurisdiction is also limited by geography: the jurisdiction of tribal courts does not extend beyond tribal boundaries.<sup>37</sup>

There are three exceptions to this general rule for civil jurisdiction. First, tribes may exercise jurisdiction over non-tribal members who enter consensual relationships with the tribe or its members. Second, tribes may exercise jurisdiction over non-tribal members within a reservation when the non-tribal member’s conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. These first two exceptions, enunciated in the case of *Montana v. United States*<sup>38</sup>, are based on the tribes’ inherent sovereignty, and exercises of jurisdiction under them must relate to a tribe’s right to self-government.<sup>39</sup> Third, tribes may exercise jurisdiction over non-tribal members when Congress authorizes them to do so. Congress may delegate federal authority to the tribes, or re-vest the tribes with inherent sovereign authority that they had lost previously.<sup>40</sup> Tribes may also exercise jurisdiction over non-tribal members under their power to exclude persons from tribal property.<sup>41</sup>

Two other significant principles must be factored into any consideration of the jurisdiction of a tribal court: (1) the federal policy of promoting tribal self-government, which necessarily encompasses the development of a functioning tribal court system;<sup>42</sup> and (2) because “tribal courts are competent law-applying bodies, the tribal court’s determination of its own jurisdiction is entitled to ‘some deference.’”<sup>43</sup> Thus, as a general rule, where



tribal court jurisdiction is plausible, principles of comity require federal courts to give the tribal court a full opportunity to determine its own jurisdiction in the first instance.<sup>44</sup>

Questions of exhaustion and tribal court jurisdiction typically arise where a tribal member first sues a non-tribal member in tribal court, the non-tribal member seeks a stay against the tribal court proceedings in federal court, and the federal court must determine whether to defer to the tribal court out of principles of comity.<sup>45</sup> A party will be deemed to have exhausted its tribal remedies once the tribe's highest court either resolves the jurisdictional issue or denies a petition seeking discretionary interlocutory review under tribal law.<sup>46</sup>

The exhaustion doctrine is prudential and a matter of comity, not a jurisdictional prerequisite.<sup>47</sup> Accordingly, it is subject to several exceptions. It is not required where "an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction."<sup>48</sup>

Exhaustion is also not required if federal law expressly provides that a claim can only be heard in federal court.<sup>49</sup> Finally, a district court should not abstain from considering the jurisdictional question if "it is otherwise plain that the tribal court lacks jurisdiction over the dispute, such that adherence to the exhaustion requirement would serve no purpose other than delay."<sup>50</sup>

"[Exhaustion] is not an inflexible requirement. A balancing process is evident; that is weighing the need to preserve the cultural identity of the tribe by strengthening the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights."<sup>51</sup>

The issue of tribal jurisdiction also arises in a regulatory context. In particular, whether and under what circumstances a tribe can regulate the on-reservation activities of non-tribal members through zoning, land use, permitting, or environmental protection.

### **Tribal Regulatory Authority**

As Congress understands the term, "Indian Country" includes both formal and informal Reservations, dependent Indian communities, and Indian allotments that may be restricted or held in trust by the United States Government.

As a result of checkerboarded land ownership, it is often difficult to make jurisdictional predictions regarding the regulatory authority of tribes. Determining a tribe's regulatory authority requires an analysis of several factors, including the sources and limitations of tribal power and whether federal statutory delegations, land holding, or demographic patterns suggest federal or state primacy with respect to regulatory authority.

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate ... the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements .... A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.<sup>52</sup>

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

### **Tribal Environmental Authority**

In addition to specific statutory authority provided by federal environmental statutes, tribal collaboration with federal agencies is an important avenue by which Indian tribes may become involved in environmental management and decision making.

The authority to delegate specific enforcement and regulatory authority to tribes under many federal environmental statutes lies most often with the U.S. Environmental Protection Agency ("EPA"). The EPA has developed several national and regional "Indian policies" designed to promote the federal government's general policy respecting tribal self-determination, which recognizes that Indians should play a central role in decisions affecting the future of Reservation life.<sup>53</sup> EPA's Indian Policy includes two primary principles: implementation of federal environmental statutes in Indian Country should be done by EPA or by tribes rather than states; and where authorized, EPA will cooperate with and assist tribes in the development and implementation of tribal programs that arise under federal environmental statutes.

Given EPA's enhanced tribal responsibilities in the Pacific Northwest resulting from the presence of a significant number of Indian tribes, EPA Region 10 similarly developed and abides by a Tribal Strategy it finalized in 1999<sup>54</sup> that outlines its commitment to and responsibility for environmental protection within Indian Country as well as tribal resources located outside of it. These resources include usual and protected hunting and fishing areas protected

by treaty and subsistence areas subject to Federal and State protection. Fundamental to this approach is EPA's pledge to support tribal self-government and management of environmental programs by assisting tribal governments in building the capacity they need to effectively determine and regulate the future quality of their Reservation Environment.

Nationally, EPA has authorized tribes to manage environmental programs under several federal laws that provide specific authority for tribal management, including the Clean Water Act (CWA)<sup>55</sup> and the Clean Air Act (CAA).<sup>56</sup> Where Congress has not provided specifically for tribal assumption of authority, EPA has determined that the decision to allow tribal management of environmental programs is within the Agency's discretion. Examples of EPA's exercise of its discretionary authority include the Resource Conservation and Recovery Act (RCRA)<sup>57</sup> and the Toxic Substance Control Act (TSCA).<sup>58</sup> In addition, three other federal environmental laws provide for a limited tribal role similar to that provided to states: the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA);<sup>59</sup> the Emergency Response and Community Right to Know Act;<sup>60</sup> and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>61</sup>

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

Tribal government authority to participate in environmental management decisions related to the Reservation environment stems not only from treaties and federal environmental statutes, but from tribes' adoption of their own environmental regulations. As with federal regulations, regulated business entities must become familiar with and thoroughly understand applicable tribal codes, ordinances, and regulations. Additionally, businesses must be cognizant of the fact that tribes enjoy general immunity from suit without their consent and can generally require that suits brought against them be filed in tribal courts. Environmental regulatory jurisdiction within a reservation is not dependent solely on the ownership status of the land in question.<sup>62</sup>

### **Tribal Zoning and Land Use Authority**

Although states may exercise some control over tribal lands under certain circumstances, states can-

not regulate the use of trust property in a manner that is inconsistent with federal treaty, statute, or agreement. This prohibition extends to the application of state and county zoning regulations to Indian trust lands. In *Santa Rosa Band of Indians v. Kings County*, the Ninth Circuit made it clear that the

application of state or local zoning regulations to Indian trust lands threatens the use and economic development of the main tribal resource ... handicaps the Indians ... living on the reservation and interferes with tribal government of the reservation.<sup>63</sup>

In reaching its decision, the court held that if tribes were subjected to local jurisdictional control, it would dilute, if not altogether eliminate, tribal political control of the timing and scope of the development of reservation resources and subject tribal economic development to the veto power of potentially hostile non-Indian majorities in local communities.<sup>64</sup>

In the absence of state and local zoning regulations, many tribes have adopted their own tribal zoning ordinances. These ordinances often establish comprehensive systems of land use regulations and the development of administrative structures for implementing these regulations. In addition, such ordinances frequently include use and density restrictions, requirements for building permits, and compliance with the Uniform Building Code. The adoption of tribal zoning, land use, and environmental protection ordinances is clearly well within a tribe's sovereign powers. Enforcement, particularly the enforcement of such ordinances against non-tribal members in tribal court, is a far more complicated matter.

### **Cooperative Land Use Planning**

One way that tribes have worked around this jurisdictional issue is by entering into cooperative agreements with adjacent municipalities. The Swinomish Tribe's agreement with Skagit County is an example.

The Swinomish Tribe was severely impacted by allotment, resulting in a checkerboard pattern of reservation land ownership with more than 46 percent of the lands owned in fee by non-tribal members.<sup>65</sup> The non-Indian population exceeds the Indian population by a 2:1 ratio.<sup>66</sup> The Tribe enacted a comprehensive land use plan in 1972 and exercised its inherent powers by enacting a zoning ordinance in 1978 that affected all lands within the exterior boundaries of the reservation, regardless of ownership type. At the same time, Skagit County was concurrently exercising its zoning authority over reservation fee lands through delegated powers presumed valid under Washington State's Planning Enabling Act.<sup>67</sup>

Rather than litigate the jurisdictional issue, Tribal and county governments agreed to resolve the conflict by entering into an agreement for cooperative land use planning. The Swinomish Joint Comprehensive Plan,<sup>68</sup> which articulated goals and policies to guide the stewardship of reservation lands and natural resources and outlined a framework for an implementation strategy that was agreed upon by the governments in 1996, was the first comprehensive planning effort attempted between a tribe and a county in the nation.<sup>69</sup>

The 1996 MOU created a procedure for reviewing land use applications and established a process for dispute resolution to ensure consistency in land use matters administered by the two governments:

Either planning agency may accept and transmit to the other applications for land use permits on reservation fee lands. In the event of a disagreement between the two agencies, staff members from both agencies must meet to resolve their differences. If they are unable to reach agreement, the matter is then forwarded to a 5-member advisory board appointed jointly by the governments to help mediate an acceptable outcome. If resolution is not reached, the matter is then referred to the governing bodies for final resolution. Further, while the County does not assert an interest over Tribal trust lands, in the spirit of regional cooperation, the Tribe also forwards trust land use permit applications to the County for comment. Currently, the planning departments are drafting a third MOU to resolve inconsistencies in development standards. It will outline common standards to be enacted to ensure the consistent administration of land use, building codes, and other regulations.<sup>70</sup>

The Swinomish-Skagit County MOU was the first agreement of its kind, but a number of other tribes have entered into similar agreements. In southern California, for example, the Agua Caliente Band of Cahuilla Indians entered into land use agreements with three cities (Palm Springs, Rancho Mirage, and Cathedral City) and with Riverside County, the jurisdictions of which overlap the reservation. Under each of those agreements, the tribe adopted relevant land use laws of the state, cities, and county as its own, and delegated to the cities and county, as the tribe's agents, the authority to enforce those laws on allotted trust lands owned by individual tribal members, but not tribal trust lands. County planning staff process land use applications on behalf of the tribe.

Riverside County also has a land use agreement with the Torres-Martinez Desert Cahuilla Indians, which provides for cooperative land use planning on non-Indian owned land within the tribe's reservation boundaries. The agreement establishes a

process for expediting projects to reduce administrative duplication, minimize dual application fees for permits and make informed decisions with the joint review and consultation by both county and tribal governments.<sup>71</sup>

Other tribes, in recognizing in their comprehensive planning the necessity and utility of cooperative approaches to land use planning, focus more on intergovernmental coordination than a single agreement governing all circumstances:

The Reservation is a community of Tribal and non-Tribal residents. The land uses and environment on the Reservation are affected by development regulations imposed by the Tribe, state agencies, and Snohomish County on Fee Simple lands within the Reservation's exterior boundaries .... The Federal government has a separate set of rules and regulations that apply to the Reservation and land use. To effectively achieve the goals contained in this Plan the Tribe must coordinate its efforts with all these groups. Many planning issues, such as transportation improvements, development, stormwater management, water quality management, and public services could be better managed through a coordinated approach. Jurisdictional decisions affect the environmental health of the Reservation. Therefore development regulations need to be coordinated to ensure the greatest level of protection for the Reservation environment. Intergovernmental coordination can lead to wise and rational use of Tribal resources and efficient provision of public services by minimizing conflicts and duplications.... The Comprehensive Plan goals and policies provide a fundamental framework to be used in discussions with other governmental agencies as they draft policies and regulations and as they take actions that could potentially affect the Reservation. This Plan should also be the basis for agreements between the Tribe and other agencies and jurisdictions that take actions and approve developments that can affect the Reservation's future.<sup>72</sup>

The checkerboard of land ownership on reservations makes it difficult, if not impossible, for tribal governments to implement comprehensive zoning, land use, and environmental protection ordinances over all of the land located within reservation boundaries.<sup>73</sup> Subjecting adjacent reservation parcels to inconsistent and potentially incompatible zoning policies "for all practical purposes would strip tribes of the power to protect the integrity of trust lands over which they enjoy unquestioned and exclusive authority."<sup>74</sup> Short of reacquiring all of the non-Indian owned fee land through purchase or condemnation, intergovernmental coordination and/or cooperation between tribes and municipal



governments is likely the most effective means of using tribal zoning and land use authority to protect the reservation environment and population.

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- 1 This article originally was prepared for the 2015 WSBA Environmental and Land Use Section Midyear Meeting and Conference.
- 2 25 USCA 331 *et seq.*, also referred to as the Dawes Act, after its sponsor, Senator Henry Dawes of Massachusetts.
- 3 "...[T]he real aim of [the Dawes Act] is to get at the Indians land and open it up for resettlement." - Senator Henry M. Teller, 1881.
- 4 P.L. 73-383.
- 5 Annette Alvarez, "Native American Tribes and Economic Development" (April 19, 2011), available at <http://urbanland.uli.org/development-business/native-american-tribes-and-economic-development/>.
- 6 *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).
- 7 *State ex rel. Eastvold v. Superior Court of State*, 44 Wn.2d 607, 609-10, 269 P.2d 560 (1954) (quoting 18 Am. Jur. 635, § 7).
- 8 *Cincinnati v. Louisville & N. R. Co.*, 223 U.S. 390, 400 (1912).
- 9 *See, e.g., Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc.*, 923 F. Supp. 2d 1186 (D. Ariz. 2013); *Clairmont v. Confederated Salish and Kootenai Tribes*, 409 F. Supp. 1161 (D. Mont. 1976).
- 10 *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).
- 11 82 Stat. 77, 25 U.S.C. §§ 1302-03.
- 12 *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079 (8th Cir. 1975). There are specific exceptions: the fifteenth amendment, portions of the fifth, sixth, and seventh amendments, and in some respects the equal protection clause of the fourteenth amendment are not the same in the ICRA as in the Bill of Rights of the U.S. Constitution.
- 13 *Dodge v. Nokia*, 298 F. Supp. 17 (D. Ariz. 1968) (term "any person" in 25 U.S.C. § 1302 is not limited to Indians).
- 14 25 U.S.C. §§ 1302(a)(5).
- 15 Mark J. Cowan, *Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes*, 6 FLA. TAX REV. 345, 363 n. 78 (2004) (noting that the three major sovereign powers of tribes, as mentioned in title 26, § 7871 of the U.S. Code, include taxation, eminent domain, and police powers).
- 16 26 U.S.C. § 7871(a) (2000).
- 17 Priv. Ltr. Rul. 2000-29-039 (July 21, 2000).
- 18 H.R. Conf. Rpt. No. 97-984 at 15 (Dec. 19, 1982).
- 19 Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, TULSA LAW REVIEW, Vol. 41 [2005], Iss. 1, Art. 4 at 70.
- 20 Examples include the Absentee Shawnee Tribe, the Cow Creek Band of Umpqua Tribe of Indians, the Eastern Band of Cherokee Indians, the Northern Arapaho Tribe, the Prairie Band of Potawatomi Nation, the Sac and Fox Nation, and the Winnebago Tribe. In an ongoing dispute over property at Wounded Knee, South Dakota, the Oglala Sioux Tribal Council has contemplated filing suit in federal court to condemn the land, which is owned by a non-tribal member, pursuant to Article 4 of the Oglala Sioux tribal constitution, which grants the tribe the authority to "purchase under condemnation proceedings in courts of competent jurisdiction, land or property needed for public purpose." In a dispute over a license to build and operate the Grand Canyon Skywalk, a glass bridge suspended over the Grand Canyon on the Hualapai Tribe's reservation, the Hualapai Tribe tried unsuccessfully to circumvent an arbitration action by enforcing a newly-adopted eminent domain ordinance and condemning the licensee's interest in the license.
- 21 1 Navajo Rptr. 95 (Navajo 1974).
- 22 *Dennison*, 1 Navajo at ¶¶ 30-31.
- 23 *Id.* at ¶¶ 38-39. Under the Navajo Tribe's 1960 eminent domain ordinance, the Navajo Tribal Council vested the exercise of the Eminent Domain power of the Navajo Nation in the Executive Branch of the Navajo Government, and provided by law the exact manner and the procedure to be followed in its execution or use. Under Navajo law, the tribal administrative agency is charged with estimating probable damages, and an offer is made to the landowner. If the landowner refuses to accept the compensation offered, condemnation proceedings may follow. In *Dennison*, the proper procedures were not followed and the exercise of eminent domain was deemed illegal. *Id.*, at ¶ 72.
- 24 409 F. Supp. 1161 (D. Mont. 1976).
- 25 *Clairmont*, 409 F. Supp. at 1162.
- 26 Revised Yakama Code of the Yakama Nation ("RYC") Title MX, § 110.
- 27 RYC Title MX § 110.01.01.
- 28 Deidre Gregg, "Dispute on reservation sparked by tribe's utility." *Puget Sound Business Journal* (5/28/2006), available at <http://www.bizjournals.com/seattle/stories/2006/05/29/story2.html?page=all>.
- 29 RYC Title MX § 110.21.02,
- 30 *United States v. Mazurie*, 419 U.S. 544 (1975) (tribes retain authority to govern "both their members and their territory"); RYC Title XM 110.02.01.
- 31 *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 554 U.S. 316, 334 (2008) (tribe lacked jurisdiction to regulate the alienation of land between nontribal members within a reservation).
- 32 *Philip Morris United States v. King Mt. Tobacco Co.*, 569 F.3d 932, 937-38 (9th Cir. 2009) (discussing jurisdiction of Yakama Tribal Court).
- 33 *Duro v. Reina*, 495 U.S. 676, 680 n.1, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990).
- 34 *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989).
- 35 *Strate*, 520 U.S. at 453, quoting *Montana*, 450 U.S. at 563.

- 36 Hicks, 533 U.S. at 367 (“[The] historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts .... Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense ....”).
- 37 Atkinson Trading Co. v. Shirley, 532 U.S. 645, 658 n.12, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001).
- 38 450 U.S. 544 (1981).
- 39 “[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*. 450 U.S. at 565. This restriction is “subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe’s political integrity, economic security, health, or welfare.” *Strate*, 520 U.S. at 446.
- 40 Hicks, 533 U.S. at 360.
- 41 Jane M. Smith, *Tribal Jurisdiction over Nonmembers: A Legal Overview*. Congressional Research Service (Nov. 26, 2013).
- 42 Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16–17, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).
- 43 Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 808 (9th Cir. 2011) (quoting *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990)).
- 44 *Elliott v. White Mt. Apache Tribal Court*, 566 F.3d 842, 850–51 (9th Cir. 2009).
- 45 *Phillip Morris USA*, 569 F.3d at 940.
- 46 *Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1217 (9th Cir. 2007).
- 47 *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997).
- 48 *Nat’l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n. 21 (1985) (citation omitted).
- 49 See *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 484–87 (1999) (holding that tribal court jurisdiction is foreclosed in cases under the Price-Anderson Act, 42 U.S.C. § 2210, because the statute expresses an “unmistakable preference for a federal forum” by allowing claims filed in state court to be removed to federal court, and finding the failure to mention removal from tribal courts to be based on “inadvertence”).
- 50 *Phillip Morris*, 569 F.3d at 938 (quoting *Strate*, 520 U.S. at 460, n. 14); see also *Boozar v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) (citing *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)).
- 51 *O’Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1146 (8th Cir. 1973).
- 52 *Montana v. United States*, 450 U.S. 544, 565–66, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).
- 53 Statement by B. Blum, EPA Deputy Administrator (Dec. 19, 1980), reaffirmed by Christine Todd Whitman (July 11, 2001).
- 54 “EPA’s Tribal Strategy, EPA Region 10, Strategic Plan for Tribal Programs.” U.S. Environmental Protection Agency (Aug. 1999, last updated May 25, 2003).
- 55 33 U.S.C. §§ 1251 *et seq.*
- 56 42 U.S.C. §§ 7401 *et seq.*
- 57 42 U.S.C. §§ 6901 *et seq.*
- 58 15 U.S.C. §§ 2601 *et seq.*
- 59 7 U.S.C. §§ 136 *et seq.*
- 60 42 U.S.C. §§ 11001 *et seq.*
- 61 42 U.S.C. §§ 9601 *et seq.*
- 62 See *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1221 (9th Cir. 2001).
- 63 *Santa Rosa Band of Indians v. Kings County*, 532 F.2d at 664.
- 64 *Id.*
- 65 Nicholas Christos Zaferatos, “Tribal Nations, Local Governments, and Regional Pluralism in Washington State: The Swinomish Approach in the Skagit Valley,” *Journal of the American Planning Association* (Winter 2004), available at <http://faculty.wvu.edu/zaferan/Zaferatos%20-%20JAPA%20Winter%2004.htm>, and Katherine Boyd, “The Swinomish/Skagit Joint Comprehensive Plan: A Model Land-Use Agreement,” *Intergovernmental Relations* (Mar. 21, 2005), available at <http://nwindian.evergreen.edu/pdf/papers/intergovernmentalAgreementboyd.pdf>.
- 66 Solomon Shirley, “Tribal/County Cooperation: Making It Work at the Local Level,” *Culture, Resources and Conflicts*, Vol. 19.3 (Fall 1995), available at <http://www.culturalsurvival.org/ourpublications/csq/article/tribalcounty-cooperation-making-it-work-local-level>.
- 67 Zaferatos, fn 64.
- 68 Available at <http://www.swinomish.org/media/5816/swincompplan96.pdf>.
- 69 Zaferatos, fn 64.
- 70 *Id.*
- 71 “Torres-Martinez, Riverside County to Sign Land Use Agreement.” May 6, 2011 News Release. available at [http://district4.co.riverside.ca.us/web/news/articles/news\\_0104.html](http://district4.co.riverside.ca.us/web/news/articles/news_0104.html).
- 72 2009 Tulalip Tribes Comprehensive Land Use Plan, at 5–6, available at [http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/community\\_development/Comprehensive-Land-Use-Plan/Introduction.pdf](http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/community_development/Comprehensive-Land-Use-Plan/Introduction.pdf).
- 73 Alexis Applegate, “Tribal Authority to Zone Nonmember Fee Land Using the First Montana Exception: A Game of Checkers Tribes Can Win,” *Boston College Environmental Affairs Law Review*, Vol. 40(1), Art. 4 (2-1-2013) (citing Jon Witten & Amanda Eckhoff, “Controlling Land Use on the Reservation: The Powers of Tribes to Regulate Land Owned in Fee by Non-Indians,” 56 *Planning & Envtl. L.* 3 (2004)).
- 74 *Brendale*, 492 U.S. at 449 (Blackmun, dissenting in part).

## Returning to the First Principles of Urbanism: Urbanism Without Effort and Land Use Law

By Charles R. Wolfe, Attorney at Law



### The Background to the Book

As land use and environmental lawyers, we play major roles in debating the appropriate reach of government regulation of private property, either through an analysis of the fair reach of the police power, or an explicit deliberation of how far Constitutional protections might extend. Our job may be about human rights, but our language is often divorced from actual, day-to-day urban experience. The real stories about urban land use are often told in plain language, and through imagery of the cities and towns around us, in interdisciplinary arenas we should all better understand.

Why? Many clients today are addressing the repercussions of property development during evolutionary urban times, with light rail and streetcars, new city plans, regulations, parks, affordable hous-

ing issues and neighborhood activism on the front burner. Documentation of our changing cities fills the daily news, and the discussion more often than not centers on the visual and socio-economic consequences of public decision-making. These are the real stories referenced above, and they are just modern manifestations of the urban dynamics with first principles present for thousands of years.

For me, the Recession was a time to focus less on the law and more on first principles underlying the law's application. After 25 years as a lawyer I had worked in large firms and in the boutique setting of a solo-practitioner. I had focused on land use and environmental issues for a range of projects, some very large, and others more small scale. Associated clients included, as they do today, corporations, cities and counties, neighborhood groups, non-profit entities and, in between, individuals with contrasting wealth profiles.

Amid this diversity in project and client types, common themes appeared, sometimes again and again, regardless of scale. Similar fact patterns yielded not only familiar legal principles, but also familiar themes of the way people approach change in places where they live and work. In attending to these themes as much as on the literal letter of the applicable law, the idea of "precedent" gained new meaning.

In 2009, I was asked to contribute to the newly digital *Seattle Post-Intelligencer*, and not too long after, Seattle's *Crosscut*, another online news site. Other online publications, like *The Atlantic* and *The Huffington Post*, followed. In addition to commenting on land use planning and regulatory issues, I started writing about, and photographing, the plain language and imagery of the evolving urban setting, and thinking about how they applied to my practice.

Through travel, particularly to Europe, Australia, Africa and the Middle East, I saw even more repetitive and fundamental patterns in otherwise diverse cities. I also realized how, actually, I was implementing some tools of urban observation that I had learned growing up, as the son of an urban planning professor with New England town roots, the classic elements of which he had never forgotten.

All this thinking inevitably came back to lawyering. At some point, I concluded, that when advocating for a project or regulatory change, even when the law is on your side—no matter how "black letter" or innovative advocacy may be—intangible/fundamental relationships between human beings and cities/settlements must be addressed.

What are these extra-legal, innate relationships? What are the bases for classical debates between NYMBY ("not in my backyard") and YIMBY ("yes, in my backyard") that provide us, as lawyers, our roles? How do we capture them, related ideas and tools as we move forward, and adapt to the challenges of particular places?

In 2012, I began to pursue a short book called *Urbanism Without Effort*, in order to try and answer these questions. I built the book through depiction and description of many urban basics in several articles in *The Atlantic*, *The Atlantic Cities/CityLab*, *Grist*, *The Huffington Post*, *Crosscut* and my own blog, *myurbanist*. These articles frame, *inter alia*, huts and fortresses, carts and bicycles, and narrow paths and boulevards—and include narrative and photographs that feature places, spaces, buildings, and people as they appear in context, often by happenstance.

As a result, I have a rediscovered perspective, and when asked to address an issue—even in law practice—I now focus more on the implicit and organic evolution of urbanized areas rather than immediately embracing incomplete, popularized and/or prescribed urbanist labels, metrics, or points of view. Photographs and visual observation are sometimes as central as legal research—what I used to call "site visits" are now the basis for "urban diaries." I work the human fundamentals along with the legal analysis, in order to provide clients with a more holistic perspective of the multiple forces often at play.

### **The Urbanism Without Effort Premise, and the Pictures**

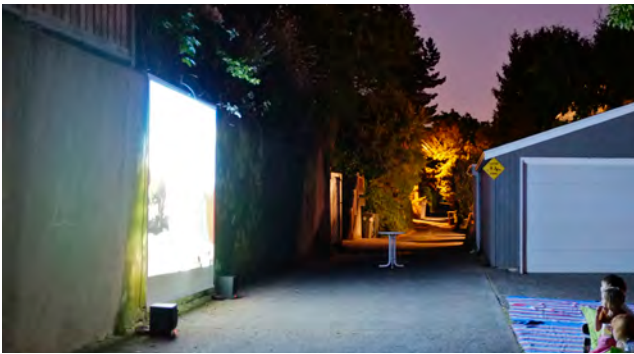
As urban stakeholders—residents, pundits, developers, associated professionals (e.g., lawyers, architects, planners, environmental consultants), and politicians—we like to discuss and debate aspects of *urbanism* and how cities should change to meet new challenges. But when we talk about urbanism, I think we often forget the underlying dynamics that are as old as cities themselves. As a result, we favor fads over the indigenous underpinnings of urban settlement and personal observation of urban change. We focus too literally on plans, model codes, transportation modes, building appearance, economic and population specifics, and summary indicators of how land is currently used. While we might champion the programmed successes of certain iconic examples, we risk ignoring the backstory of urban forms and functions, and failing to truly understand the traditional relationships between people and place.





I believe it is critical to first isolate spontaneous and latent examples of successful urban land use, before applying any prescription of typologies, desired ends, or governmental initiative. Such inspirational “urbanism without effort” is the basis for a clean, multidisciplinary slate for reinvigorating the way we think about urban development today.

This premise needs a definition and reference point, for all that follows here and in future inquiry. “Urbanism without effort” is what happens naturally when people congregate in cities—based on the innate interactions of urban dwellers that occur with one other and the surrounding urban and physical environment. Such innate interactions are often the product of cultural tradition and organic urban development, independent of government intervention, policy, or plan.



Urbanism without effort is not always initially obvious; it may seem more whimsical than remarkable when viewed from an aerial photo, an online map, or a satellite picture. In fact, it is almost invisible from these perspectives, as the fine urban grain is lost. It is best recognized and embraced from the ground and experienced firsthand, where it is possible to see more than just the physical outline of the city—it is possible to see life flowing through the urban form. This first-hand perspective, often informed by photography, focuses on organic and naturally-occurring urbanism, as distinguished from other *purposeful approaches* such as tactical, interventionist, insurgent, or “pop-up” urbanism.

While these more purposeful approaches may lead to *successful places*, I often wonder: Why don't they always have a meaningful and lasting effect? All too often these approaches are more sensational than not, and temporary by design. And often, the *status quo* returns after these purposeful installations, such as street-side tables, greened parking spaces, food trucks, or guerrilla gardens, are removed or abandoned. In comparison, urbanism without effort endures beyond a mere installation or exhibition. Because it is latent, it can grow and evolve.

Rather than assume that the popular and touted is readily adaptable, or readily subject to metrics or labels, we should return to first principles and isolate the fundamental, vernacular relationships between city inhabitants and what surrounds them. We need to look, analyze, and discern, until we remember what a basic sort of city life looks like. While we consider these inherent factors that shape spaces and their use, we also must remember that there is a certain, spontaneous magic attributable to good urban places that can awaken them, but will only occur when they are locally relevant and embraced.



As discussions continue today, the question of authentic versus a more prescribed urbanism should remain at the center of urban stakeholder dialogue. For example, Trent Noll wrote in *Planetizen* in 2010 that the naturally occurring basics of placemaking (i.e., comfort, variety, entertainment, and walkability) have existed from time immemorial in successful cities, and today's design challenge is a more purposeful implementation of these basics with a value-engineered mindset, to spur investment incentives for savvy developers. I do not argue with Noll's premise, but, from my perspective, the dialogue should be more visual, more interpretive, and more focused on the multidisciplinary underpinnings of urban life.

Understanding the history of a place is a gateway to authenticity for today's proffered solutions, and it enhances the quality of urbanist advocacy. A

healthy dose of urban history is as essential and exciting as it is nostalgic. It is essential that we spend the time necessary to rediscover, reinterpret, and wisely reapply the long-term calligraphy of interaction between humans and the urban environment. This especially rings true when community – as the essence of this interaction – can be conveyed or supplemented through media that *inspire the senses*, much like the original experience of “being there.”

I believe the best urbanism is often the urbanism we already have, and that understanding the organic nature of this “urbanism without effort” is key. We should strategically create opportunities for our cities to evolve sustainably, while providing room for the unexpected elements of human settlement and movement that are the urban legacy.

### And The Practical Side?

Questions certainly remain as to how to make the rich backstory of naturally occurring urbanism something that can be marshaled and used as more than humanistic reflection. *Urbanism Without Effort* contains several ideas surrounding the use of social media and sharing “urban diaries” that record best practices around the world.

The “Background to the Book”, above, relates my own story, and suggests that land use and environmental lawyers can better understand their day-to-day tasks if they reflect holistically on the larger forces at play in the matters they handle. In doing so, I often outline how they (as well as other professionals) can experiment with immersion techniques to understand project context and surroundings. For instance:

- Above all, as noted, we each need to get to know cities through creating urban diaries of examples using visuals and narrative.
- Context matters. What works there might not work here.
- Consider longevity of certain forms: pop-up versus permanent. How is this playing out in communities today?
- Consider the power of organic versus designed expressions, and how this relates to planning and regulatory practice in our cities and towns
- Proceed with an orientation towards:
  - Multiple forces that affect redevelopment, community form and character
  - Role of human fundamentals
- Awareness that/of:
  - Places survive differently
  - Role of hand-me-down, multi-scale precedent
  - Role of the evolving shared economy

In the book, I also propose a five-part inquiry as a potential path for those who want to attempt meaningful implementation in the context of their own community and/or professions. Items 4 and 5, below, are arenas where the lawyer will likely become enmeshed in debates over the workability of a concept—representing implementers, opponents or decision-makers.

The five-part inquiry proceeds from diary to contextual understanding to an adaptability analysis under local conditions, followed by a more practical inquiry of available policy avenues and implementation possibilities. Here is a progression for consideration.

1. Illustration and inspiration – An initial determination of whether the example resonates in a way that can be captured with photos, sketching, or a narrative to provide inspiration for today’s adaptation or innovation.
2. Consensus and understanding – Does the example provide a basis for a ground-up rather than top-down understanding, allowing for each individual to more readily understand his or her neighborhood or city?
3. Can the example work locally? – Does local context (factors such as culture, climate, topography, political structure) allow for integration of the original example with local policy or regulatory goals?
4. Necessity/baselines for policy, planning and regulatory reform – If necessary, can the example translate to a policy, planning, or regulatory reform initiative?
5. Implementation – What further actions would be necessary on behalf of government or private sector stakeholders to implement the example on a broader basis while avoiding an overly-prescriptive approach?

Today’s urbanists continue the quest to redefine cities based on the relationship between transportation and land use, and renewed sensitivity to climate change. Yet many of the issues surrounding today’s cities are universal and timeless, no matter how they are labeled or described. When we discuss today’s cities in the context of transportation choices, the role of nature in the city, housing affordability, and aesthetics, we often rush to recreate what has worked elsewhere, without first acknowledging and visually recalling the most latent or “effortless” examples.

We remain at a literal and figurative crossroads in this quest. During the gestation of *Urbanism Without Effort*, from 2009 until publication, several cities around the world were transformed by spontaneous factors illustrating the uncertainty of the many forces that shape city life—from social uprisings to hurricanes, military occupations to gun violence—and economic challenges faced by most



of the world. In many cases, outcomes have left urban places suddenly and dramatically transformed, from *Damascus* to towns on the *New Jersey Shore* to *Newtown, Connecticut*.

In the meantime, light rail and streetcars, new city plans, regulations, parks, and neighborhood activism forge on, implementing ideals of how cities should develop, reminding us of the multidisciplinary, ecumenical nature of the city, which underlays the spontaneous counterbalances that often we cannot predict. On one day we might champion the sustainable, open space or bicycle initiatives of *Barcelona* or *Copenhagen*, on the next the remaking of *Times Square* in New York City. But, all-in-all, today's multiple and/or professionally advocated conceptions of urbanism and sustainable urban forms are static snapshots, multiplied and confounded by the rampant messaging of our digital age.

As a lawyer addressing the realities of incremental implementation, client needs, and regulatory, political, and pluralist offsets, I've seen the risks of advocating how others should live without consideration of background or context, resulting in more challenging or impossible implementation. Like others, I try in my own way to borrow from the anachronistic and basic, and represent both the past and more effortless first principles as something to champion rather than dismiss or ignore, with many of the lessons of *Urbanism Without Effort* in mind.

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## Significant Recent Land Use Case Law



By Richard L. Settle, Of Counsel, Foster Pepper PLLC and Seattle University School of Law

### I. Washington Supreme Court Decisions

**Municipal Water Law; SEPA; Constitutional Separation of Powers Doctrine.** *Cornelius v. Washington State Department of Ecology*, 2015 WL 594309, 344 P.3d 199 (February 12, 2015).

In 2003, the Legislature adopted substantial amendments to Washington's water law that collectively are known as the 2003 Municipal Water Law ("MWL"). The MWL recognized that governmental entities that had been granted water rights based on system capacity, not actual beneficial use because they were designed to provide water to populations expected to grow over time, should not be subject to rules regarding perfection, relinquishment, and abandonment that governed other water permits and rights. The MWL, for the first time, defined "municipal water supplier" and "municipal water supply purposes" and declared that water rights certificates issued on the basis of water system capacity, rather than actual beneficial use, were in good standing.

The MWL was challenged on facial constitutional grounds in *Lummi Indian Nation v. State*<sup>1</sup> because its effect was to preserve senior water rights that otherwise would have been lost, to the disadvantage of holders of junior water rights. The court, while denying the facial challenge, acknowledged that its decision left room for future "as applied" constitutional challenges.

In this case, *Cornelius*, the holder of water rights junior to those of Washington State University ("WSU") and drawing from the same declining aquifer underlying the Palouse basin, constitutionally challenged the MWL, as applied by the Department of Ecology ("Ecology"). Ecology had granted an application by WSU for an amendment of its water rights to allow withdrawal from some of its other wells. In granting the amendment, Ecology determined that WSU's rights, although originally granted for "domestic" purposes, were in "good standing" and had not been relinquished. Ecology's determination was based on the 2003 MWL that retroactively characterized WSU as a municipal water supply immune from otherwise applicable rules on perfection of water permits and relinquishment of rights. Ecology's decision was upheld by the Pollution Control Hearings Board ("PCHB"). The Supreme Court, in a 6-3 decision, affirmed the PCHB, characterizing *Cornelius'* appeal as a "thinly veiled facial challenge."



Cornelius also argued that Ecology violated SEPA by failing to conduct supplemental environmental review of the impact of increased water withdrawal as a result of WSU's proposed water system consolidation and the effective increase in water available to be withdrawn because of the MWL.

WSU, as the lead agency, had prepared an environmental checklist and issued a determination of nonsignificance ("DNS"). WSU did not acknowledge that any increase in water withdrawal from the aquifer would occur as a result of the proposed amendment. Ecology, as an agency with jurisdiction over the proposed amendment, relied on WSU's DNS and did not supplement WSU's analysis.

The court rejected Cornelius' SEPA challenge, reasoning that it was based on the flawed premise that Ecology's application of the MWL increased the amount of water that WSU would withdraw from the aquifer. The court held that the MWL, as applied by Ecology, did not expand or revive, but merely confirmed WSU's existing water rights, and, thus, Ecology was not required to supplement WSU's environmental review.

**Duty to Maintain Dedicated Public Drainage Facility: Successor City Required to Maintain Drainage Pipe Dedicated to Predecessor County in Residential Plat.** *Crystal Ridge Homeowners Association v. City of Bothell*, 2015 WL 600640, 343 P.3d 746 (February 12, 2015).

A 1987 residential plat approval in Snohomish County was explicitly conditioned by the hearing examiner on installation of an underground drainage pipe to intercept and divert water away from the site so houses could be safely built and occupied.

The recorded plat showed on its face a "25' sanitary sewer ... and drainage easement." The plat also contained the notation that "drainage easements designated on this plat are hereby reserved for and granted to Snohomish County for the right of ingress and egress for the purpose of maintaining and operating stormwater facilities." Subsequently, the jurisdictional limits of the City of Bothell encompassed the plat, and the City succeeded to the obligations of the County.

In 2010, the Homeowners' Association ("HOA") and several property owners sued the City, alleging that the interceptor pipe failed and damaged several properties within the subdivision. The claimants moved for summary judgment, seeking a declaratory judgment that the City, as successor to the County, was responsible for maintaining the pipe. The City filed a cross motion for summary judgment, seeking a declaratory judgment that the HOA was responsible for the interceptor pipe. The trial court denied the City's motion and granted summary judgment in favor of the claimants. The Court of Appeals affirmed the trial court's ruling in favor of the claimants.

In a 6-3 decision, the Supreme Court affirmed on the basis of the plain language of the plat, dedicating the easement to the County (now the City) "for the purpose of maintaining and operating stormwater facilities." The City's argument that the pipe was not a stormwater facility but a groundwater facility failed because no such distinction was made in the relevant laws and language on the plat, and evidence showed that the groundwater intercepted by the pipe came from a variety of sources, including stormwater.

The case demonstrates the importance of clearly allocating the obligation to maintain dedicated public facilities.

**Eminent Domain: Authority of Public Utility District to Condemn Easement on State-Owned School Lands; Intervention by Environmental Group with No Property Interest.** *Public Utility District No. 1 of Okanogan County v. State of Washington and Conservation Northwest*, 182 Wn.2d 519, 342 P.3d 308 (January 29, 2015).<sup>2</sup>

This is the latest and perhaps last chapter in the decades-long struggle of Okanogan County PUD ("PUD") to install an electric transmission line in order to provide reliable service to residents of Okanogan County.

PUD is a municipal public utility district charged to conserve the state's water and power resources and supply public utility services to residents of Okanogan County.<sup>3</sup> To supply electricity to the region, PUD operates a high-voltage transmission line connecting the communities of Twisp, Okanogan, and Pateros (the Loup-Loup line) and a lower-voltage distribution line from Pateros to Twisp (the Methow Valley Floor line). The existing system has long experienced problems with reliability, capacity, and line loss.<sup>4</sup> As a result, residents have suffered excessive and costly line losses and frequent power outages.

In 1996, PUD proposed the installation of a new, higher-capacity transmission line from Pateros to Twisp. The next 12 years were consumed by scoping, preparation, public processes and litigation related to an Environmental Impact Statement ("EIS") identifying and analyzing the environmental impacts of, and alternatives to, the proposed transmission line. The EIS ultimately was upheld by the Court of Appeals in 2008<sup>5</sup> and review denied by the Washington Supreme Court.

Installation of the proposed transmission line required PUD to obtain an 11.6-mile easement across school lands managed by the Washington Department of Natural Resources ("DNR"). They comprise a portion of the largest publicly owned tract of shrub-steppe habitat in the Methow Valley. Some of the lands currently are leased for cattle grazing, generating about \$3,000 of annual income for the benefit of Washington schools. The grazing leases expressly recognize that they are subject to easement rights and provide remedies in the event

that all or part of the land is condemned by a public authority.

While the EIS challenges were pending, PUD applied for the necessary easements over the school lands, invoking DNR's easement application process. PUD filed a formal application for the easements in October 2008 and was told the application would be processed in two to three months. At the time of the Supreme Court's decision on January 28, 2015, the application had been pending for over five years.

In late 2009, PUD filed a petition to condemn the necessary easements in Okanogan County Superior Court. Prior to the condemnation hearing, Conservation Northwest ("CNW") moved to intervene. The trial court granted CNW a limited right to intervene. CNW and DNR filed separate motions for summary judgment, contending that PUD did not have authority to condemn the school lands because of their trust status and present use as grazing land. The trial court denied these motions and granted summary judgment in favor of PUD, upholding its authority to condemn the school lands. Following summary judgment, there was no contest to entry of the order on public use and necessity.

The trial court's decision was appealed. However, appellate review was stayed in order to resolve a dispute regarding the Washington Attorney General's duty to represent the Commissioner of Public Lands in the matter.<sup>6</sup>

Once appellate review proceeded, the Court of Appeals held that PUD had authority to condemn the school lands notwithstanding their trust status and the lease of grazing rights, and agreed with the trial court's determination that PUD's proposed use of the easements would be compatible with DNR's use of the land. The court did not address the propriety of CNW's intervention. The Supreme Court granted DNR's petition for review regarding PUD's condemnation authority and PUD's cross-review petition on the intervention issue.

On January 29, 2015, the Supreme Court upheld CNW's intervention and affirmed the decisions of the trial court and Court of Appeals that PUD had authority to condemn easements on the school lands.

### Intervention

PUD contended that CNW's intervention was unlawful because RCW 8.12.120 supersedes CR 24 and allows only those with compensable property interests (i.e., those with real property interests within the scope of a condemnation action) to be parties to the condemnation proceeding. Alternatively, PUD argued that the trial court's CR 24 analysis and ruling was erroneous. The Supreme Court disagreed, reasoning that while RCW 8.12.120 requires the joinder of those with compensable property interests, the statute does not prohibit a court from exercising its authority under the court rules. This authority includes joining parties challenging

a condemnor's authority even though they have no compensable property interest.

### Condemnation Authority

DNR and CNW conceded on appeal that RCW 54.16.050 broadly authorized PUD to condemn property rights, "including state, county, and school lands" for a broad range of purposes, including "transmission lines." However, they contended that the school lands through which PUD sought to condemn easements were exempt from PUD's condemnation authority by virtue of their trust status or present use for cattle grazing. The Supreme Court disagreed, holding: (1) public utility districts have express statutory authority to condemn school lands held in trust by the state; (2) a present or prospective public use does not categorically exempt property from condemnation by a municipal corporation, abrogating language to the contrary in *State ex rel. City of Cle Elum v. Kittitas County*<sup>7</sup>; (3) condemnation of an easement through school lands by public utility districts does not violate the Washington Constitution; and (4) the legislative grant of authority to public utility districts to condemn school lands is not a breach of the state's fiduciary duties as trustee of school lands.

## II. Washington Court of Appeals Decisions

**Growth Board Erroneously Interpreted GMA's Protection of Water Quality and Quantity Requirements in Ruling that County's Comprehensive Plan Rural Area Provisions were Noncompliant. *Whatcom County v. Western Washington Growth Management Hearings Board*, 2015 WL 754200, 344 P.3d 1256 (Wash. App. Div. I) (February 23, 2015).**

Whatcom County ("County") successfully appealed a Growth Board ruling that challenged provisions of the rural element of the County's comprehensive plan were noncompliant with Growth Management Act ("GMA") requirements for the protection of water availability and water quality. The exhaustive analysis and exposition of the law on GMA's requirements for local protection of water resources, in the opinion authored by Judge Cox, provides thorough guidance to local governments.

The court rejected the argument that the County violated GMA requirements by deferring to Ecology rules and policies regarding water availability, stressing the importance of cooperation and consistency between the County and Ecology.

While acknowledging that the rural element of the County's comprehensive plan was required to "protect" water quality, the court rejected the argument that the County had an obligation to not merely "protect" but to "enhance" water quality: "without firm instruction from the legislature to require enhancement, we decline to impose a duty to enhance water quality."<sup>8</sup>

**GMA Critical Area Regulations: Alternative Pathway to Compliance with GMA Critical Areas Requirements through Voluntary Stewardship Program Is Available Only to Counties that Officially Opt-in to Program. *Protect the Peninsula's Future v. Growth Management Hearings Board*, 2015 WL 686883, 344 P.3d 705 (Wash. App. Div. II) (February 18, 2015).**

Since at least 1999, *Protect the Peninsula's Future* ("PPF") has been critical of Clallam County's critical areas ordinances ("CAO"). PPF successfully appealed the County's CAO in 1999 to the Western Washington Growth Management Hearings Board ("Board"). After the County modified the CAO in response to the Board's decision, PPF again petitioned the Board and obtained a ruling that the CAO was noncompliant and invalid. In the County's appeal of the Board's ruling, the matter was remanded to the Board for further proceedings.<sup>9</sup>

Before the Board could determine on remand whether the CAO, as amended, was compliant, the legislature in 2007 enacted a moratorium on changes in GMA critical areas regulations. The moratorium lasted until 2011 when the legislature amended the GMA with provisions for a Voluntary Stewardship Program ("VSP"), an alternative track to achieving compliance with GMA's critical areas regulatory requirements in certain agricultural areas. A county electing to participate in the VSP program was authorized to achieve compliance in a number of ways, including the adoption of the CAO of one of four counties—Clallam, Clark, King, or Whatcom. Clallam County did not elect to participate in the VSP.<sup>10</sup>

In 2012, after the moratorium had expired, PPF resumed its suspended compliance review before the Board. The County moved to dismiss, claiming that by enacting RCW 36.70A.735(1)(b), the legislature had superseded the Board's invalidation of the County's CAO, and the CAO was conclusively compliant as a result of the legislation. The Board agreed with the County's interpretation of the effect of RCW 36.70A.735(1)(b) and dismissed PPF's petition: "[c]learly the legislature concluded the development regulations of those four counties were sufficiently protective of critical areas in areas used for agriculture." PPF appealed.

The Court of Appeals reversed the Board's dismissal on the basis of the plain language of the VSP statute that literally creates the alternative pathway to achieving compliance with GMA's critical area protection requirement only for counties that affirmatively choose to participate in the VSP. The court rejected the argument that the VSP should be construed to avoid the absurd result that other counties could achieve compliance by adopting Clallam's CAO, but Clallam, itself, could not, without going through the hoop of officially deciding to participate in the VSP. The court reasoned that the canon of construction calling for statutory interpretations that avoid absurd results applied only to ambiguous

statutes, the VSP plainly provided that its alternative pathway was available only to counties electing to proceed under the VSP, and, thus, only the legislature could act to avoid the absurd result.<sup>11</sup>

**GMA Mineral Resource Land Designation. *Concrete Nor'west v. Western Washington Growth Management Hearings Board*, 342 P.3d 351 (Wash. App. Div. II) (February 3, 2015).**

A gravel mine operator applied for an amendment of the Whatcom County Comprehensive Plan and Zoning Maps to designate a parcel of the applicant's property as mineral resource land ("MRL"). The staff recommended approval, as did the planning commission. However, the proposed amendments to designate the proposed MRL were not approved by a majority of the County Council. The Growth Board upheld the County Council decision, as did Thurston County Superior Court and the Court of Appeals.

The court reasoned that the relevant comprehensive plan policies established criteria for designation of MRL, but did not establish a duty to designate, under the facts of this case, when the criteria were satisfied. The applicable designation criteria authorized denial of MRL designation in order to protect water quality and other public interests even when the property proposed for designation satisfied the criteria for mineral resource land of long-term commercial significance. In short, under the applicable provisions of the County's comprehensive plan, the County had authority, but not a duty, to designate the proposed MRL.

**Purchaser of Illegally Divided Lot has No Right to Rescind under RCW 58.17.210 After Illegality of Division has been Cured. *Hoggatt v. Flores*, 185 Wn. App. 764. 342 P.3d 359 (Feb. 1, 2015)**

A 2004 illegal division of a four-acre parcel of Cowlitz County land into an acre lot and a three-acre lot is now cured and final after only 11 years and two decisions by Division I of the Court of Appeals.

To make a long story short, the Hoggatts illegally divided a four-acre parcel, which included their former residence, into a three-acre parcel that they retained for purposes of building a new home and a one-acre parcel with their former home that they sold to Flores. They did this illegally by simply having two tax parcels created without complying with state and local subdivision requirements.

Apparently because Hoggatts would have been unable to obtain any permits to build their new home on their illegal three-acre parcel under RCW 58.17.210, they attempted to short plat the two lots to legalize the division. However, Flores, whose signature was required on the short subdivision application, refused to sign unless Hoggatts agreed to conditions that they found unacceptable. Hoggatts went to court, seeking an order requiring Flores to sign the application or, in the alter-



native, an order requiring the County to process the short plat application without Flores' signature. The trial court granted this relief to the Hoggatts, and Flores' first appeal was unsuccessful.<sup>12</sup> Pursuant to the first trial court decision and while the first appeal was pending, the Hoggatts' short plat application was approved, curing the previously illegal division. After remand to Cowlitz County Superior Court and a subsequent change of venue to Clark County Superior Court, Flores sought a ruling in both courts that he had an absolute right to rescind his purchase of his formerly illegally subdivided lot. Both courts rejected his argument, and his second appeal to the Court of Appeals was unsuccessful.

This saga finally ended in 2015 when the court, in this case of first impression, held, on the basis of the unambiguous language of RCW 58.17.210, that the right to rescind may be exercised only until an illegal division is cured. Because the illegal division that produced Flores' parcel had been cured and his lot had become lawful before he unequivocally sought rescission, that remedy was no longer available.

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- 1 170 Wn.2d 247, 241 P.3d 1220 (2010).
- 2 Foster Pepper represented Public Utility District No. 1 of Okanogan County in this case
- 3 Laws of 1931, ch.1, §1.
- 4 Gebbers v. Okanogan County Public Utility Dist. No. 1, 144 Wn. App. 371, 375, 183 P.3d 324 (2008).
- 5 *Id.*
- 6 Goldmark v. McKenna, 172 Wn.2d 568, 572, 259 P.3d 1095 (2011).
- 7 107 Wash. 326, 181 P. 698 (1919).
- 8 Whatcom County v. W. Wash. Growth Mgmt. Hearings Bd. (citing Swinomish Indian Tribal Community v. W. Wash. Growth Mgmt. Hearings Bd., 161 Wn.2d 415, 427-30, 166 P.3d 1198 (2007)).
- 9 Clallam County v. W. Wash. Growth Mgmt. Hr'gs Bd., 130 Wn. App. 127, 121 P.3d 764 (2005).
- 10 RCW 36.70A.735(1)(b).
- 11 Author's Comment: Presumably, the County also could avoid the absurd result by simply opting-in to the VSP and adopting its own CAO.
- 12 Hoggatt v. Flores, 152 Wn. App. 862, 218 P.3d 244 (2009).

## Clean Water Rule: The Ebb and Flow of "Waters of the US"



By Joanne Kalas, Riker Danzig Scherer Hyland & Perretti LLP

On June 29, 2015, the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Army Corps") published a final rule entitled "Clean Water Rule: Definition of 'Waters of the United States'"<sup>1</sup> to go into effect on August 28, 2015. The Clean Water Rule is described in its preamble as being a "definitional rule" that "does not establish any regulatory requirements," but instead defines the scope of waters regulated by the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et. seq.* ("Clean Water Act" or "CWA").<sup>2</sup> The definition of "Waters of the United States" provides jurisdictional limits for the EPA and Army Corps to address unpermitted discharges to the nation's water bodies in violation of the CWA. This includes the authority to regulate the discharge of pollutants, including sewage and industrial waste, via the National Pollution Discharge Elimination System ("NPDES") program under § 402<sup>3</sup> of the CWA, as well as the discharge of oil and hazardous substances under § 311<sup>4</sup>. Perhaps most controversially, the definition determines the extent of the federal government's jurisdiction to regulate the discharge of dredge and fill material to federal wetlands under § 404 of the CWA.<sup>5</sup> Water bodies that do not fall under federal jurisdiction are otherwise left to the jurisdiction of the state where the water is located. Nearly all U.S. states have assumed at least partial authority from the federal government to carry out permitting under § 402,

including Washington State, yet only two states, New Jersey and Michigan, have assumed authority to carry out permitting under § 404.

The CWA makes illegal the “discharge of any pollutant” with certain exceptions, including pursuant to permits under CWA §§ 402 and 404.<sup>6</sup> The statute itself defines a “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source . . . .”<sup>7</sup> The CWA defines “navigable waters” as “waters of the United States, including the territorial seas,” however, the CWA does not define the term “waters of the United States.”<sup>8</sup> The resulting void has spawned decades of court battles and has left the Army Corps with great latitude in determining the scope of its jurisdiction under the CWA when regulating discharges to wetlands under § 404. Under the current rule, the Army Corps routinely conducts case-by-case jurisdictional determinations regarding wetlands and adjacent water bodies in deciding whether they fall under the Army Corps’ permitting scope. This precludes the ability of landowners and developers to make improvements upon or near federal wetlands without a § 404 permit, which may be in addition to permits or approvals needed under state law.

In promulgating the new Clean Water Rule, which replaces prior regulations and guidance that contained less specificity, the EPA and Army Corps state that the intent of the rule is to provide greater clarity, consistency, and predictability to the regulated public regarding the scope of “waters of the United States” in a way that is consistent with the CWA, Supreme Court precedent, and science.<sup>9</sup> The new rule defines the following waters as “jurisdictional by rule”: traditional navigable waters (such as rivers, lakes, and bays), interstate waters (including interstate wetlands), the territorial seas, and impoundments of, tributaries to, and waters adjacent to otherwise jurisdictional waters. The Clean Water Rule’s new definitions for “tributaries” and “adjacent” waters have sparked the most debate, with critics of the rule claiming that they impermissibly expand the jurisdiction of the CWA. The rule also categorically excludes certain water bodies from the definition, including waters previously excluded, as well as new categories, such as prior converted cropland, groundwater, and certain ditches, which the EPA states follows long-standing federal policy.<sup>10</sup>

The new rule also provides for the continuation of case-by-case jurisdictional determinations, where “waters of the United States” include waters having a “significant nexus” to traditional navigable waters, interstate waters, or the territorial seas, including those within the 100-year floodplain and 4,000 feet of the high tide line or ordinary high water mark of jurisdictional waters. This also includes regional types of water, such as prairie pot holes, western vernal pools, and Texas coastal prairie wetlands, that have a “significant nexus” to jurisdictional waters. The definition of “significant nexus” in the rule is based on the test in Justice Kennedy’s

concurring opinion in *Rapanos v. U.S.*,<sup>11</sup> which was one of 5 opinions in a highly divided court where no majority rule emerged. *See also* EPA and Army Corps Guidance Memorandum, Dec. 2, 2008 (implementing opinions in *Rapanos*). The new rule states that water bodies, including wetlands, have a “significant nexus” if they, “either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, and biological integrity” of traditional navigable waters, interstate waters, or the territorial seas.<sup>12</sup>

The application of the new “significant nexus” definition could result in a determination of federal jurisdiction over a water body that would not have resulted under the current rule. For example, the Army Corps, Seattle District, has determined that isolated wetlands do not fall under federal jurisdiction where they are not adjacent and have no surface connection to traditionally navigable waters and have no effect on interstate commerce. Under the new rule, further analysis is required regarding whether a “significant nexus” exists before making the same determination. However, because isolated wetlands are regulated under Washington state law, an entity wishing to place fill into an isolated wetland still must seek approval from the Department of Ecology, regardless of whether it must also seek a § 404 permit from the Army Corps. Because it can potentially create an extra layer of federal oversight, the “significant nexus” test is criticized by opponents of the rule as unnecessarily expanding the jurisdiction of the federal government under the CWA.

The EPA and Army Corps have responded to criticism by stating that definitions with heightened specificity, such as the identification of categorically jurisdictional waters, provide greater clarity, predictability, and consistency in jurisdictional outcomes that are provided earlier in the development process to the benefit of the regulated community. Prior to implementation of the current rule, determinations of what tributaries and adjacent waters fall under the scope of the CWA is left largely to Army Corps staff performing case-by-case jurisdictional determinations in the field, which could be subjective and unpredictable because of less clarity in applicable regulations and guidance.

The Clean Water Rule has resulted in continued debate over the jurisdiction of the EPA and Army Corps to regulate discharges to the nation’s water bodies under the CWA. It has already been challenged in various federal courts with multiple lawsuits by over a dozen states and industry groups stating that the rule is *ultra vires* and unconstitutional, and by environmentalists that focus on challenges to the categorical exclusions in the rule. In addition, separate legislative challenges are making their way through each house of Congress that would require the EPA to redraft the rule.<sup>13</sup> The Congressional Budget Office estimates that implementing S. 1140, currently due for full U.S. Senate

review this summer, would cost \$5 million from 2016 to 2020 for the EPA and Army Corps to develop a new proposed rule.

As of the writing of this newsletter, in at least one of the lawsuits, a request for a preliminary injunction to prevent the rule from going into effect has been filed, which is scheduled to be heard before the rule's scheduled effective date of August 28th. Regardless of the legal avenue by which it travels, a challenge to the Clean Water Rule in one form or another is likely to eventually result in a petition for certiorari to the U.S. Supreme Court. Given the potential for split decisions among the circuits due to the varying jurisdictions where suits have been filed, the Court may feel compelled to grant review on this basis.

If the rule goes into effect in its current form, it remains to be seen whether the critics of the rule, its supporters, or the federal government will be correct in predicting its effect: will the rule drastically expand EPA's and the Army Corps' jurisdiction and regulatory scope; will it result in greater clarity and predictability for the regulated community when developing land; or will it to some extent do both?

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1 80 F.R. 37054-01, 33 C.F.R. 328.

2 80 F.R. 37054.

3 33 U.S.C. § 1342.

4 33 U.S.C. § 1901.

5 33 U.S.C. § 1344.

6 See § 301(a), 33 U.S.C. § 1311(a).

7 § 502(12), 33 U.S.C. § 1362(12).

8 See § 502(7), 33 U.S.C. § 1362(7).

9 See 80 F.R. 37054.

10 *Id.* at 37096–98.

11 547 U.S. 715, 780 (2006).

12 80 F.R. 37106.

13 See S. 1140 and H.R. 1732.

Environmental Policy Act (“NEPA”), SEPA broadly serves two purposes: first, to ensure that government decision-makers are fully apprised of the environmental consequences of their actions, and second, to encourage public participation in the consideration of environmental impacts.<sup>1</sup> For decades, SEPA has served these purposes effectively, requiring full environmental reviews for projects with significant environmental impacts, and providing an efficient process to screen and potentially mitigate projects with less significant impacts, without full reviews.

But SEPA is more than a purely “procedural” statute that encourages informed and politically accountable decision-making. In enacting SEPA, the state legislature gave decision-makers the affirmative authority to condition or even deny projects where environmental impacts are serious, can't be mitigated, or collide with local rules or policies. This authority, like all government authority, is not boundless: the denial of a project must be made on the basis of policies adopted by the relevant government body in light of significant adverse impacts that cannot be reasonably mitigated. This authority has been exercised relatively sparingly. Indeed, in some cases, decision-makers are unaware that they even have it, and incorrectly believe that as long as proposals comply with all applicable development codes, then agencies have no choice but to approve the project.

The importance of SEPA's substantive authority—the power to say no—has never been higher. Recent shifts in international energy markets and domestic supplies have put Washington state at the center of a national debate over the transportation of fossil fuels. With its proximity to both domestic sources of coal and oil, as well as international Pacific Rim markets, Washington is being targeted to serve as a transportation hub for numerous coal and crude oil projects. These projects involve a number of serious environmental, economic, and cultural impacts of great concern to the public: coal stockpiles will blow dust into surrounding communities, oil projects threaten spills and explosions, and vast increases in train and marine traffic threaten to disrupt communities and commerce along transit corridors throughout the state. Additionally, building new infrastructure for mining, transporting and exporting fossil fuels threatens to undermine Washington's efforts to reduce emissions of greenhouse gases and mitigate the worst impacts of climate change.

This article seeks to inform the debates over these projects, and others like them. It explains in greater detail what communities can consider in their SEPA reviews, why consideration of certain impacts like rail traffic is not pre-empted by federal laws, and how SEPA's substantive authority can be exercised to condition or even deny fossil fuel projects that present unacceptable impacts.

## The Power to Say “No”: SEPA's Substantive Authority and Controversial Fossil Fuel Projects

By Jan Hasselman, *Earthjustice*



### Introduction

The State Environmental Policy Act (“SEPA”) is Washington's core environmental policy and review statute. Like its federal counterpart, the National



## I. SEPA Requires Evaluation of All of the Risks and Impacts of Proposed Fossil Fuel Projects.

In adopting SEPA, the state legislature declared the protection of the environment to be a fundamental state priority.<sup>2</sup> SEPA declares that “[t]he legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”<sup>3</sup> This policy statement, stronger than a similar statement under the National Environmental Policy Act (“NEPA”), “indicates in the strongest possible terms the basic importance of environmental concerns to the people of the state.”<sup>4</sup> At the heart of SEPA is a requirement to fully analyze the environmental impact of government decisions that have a significant impact on the environment.<sup>5</sup> Under SEPA, a full environmental impact statement (“EIS”) is required for any action that has a significant effect on the quality of the environment.<sup>6</sup> Significance means a “reasonable likelihood of more than a moderate adverse impact on environmental quality.”<sup>7</sup>

A critical threshold question in assessing proposed fossil fuel transportation projects relates to the “scope” of the impacts that can be considered in SEPA review. The scope of the EISs for big coal and oil projects has generated substantial controversy, in part because many of the impacts of greatest concern to the public are physically and temporally distant from the projects themselves. For example, coal and oil terminals on the coast would result in dramatic increases in train traffic throughout the state and beyond; in addition to the traffic, there are risks of spills, pollution, and even catastrophes like the one in Lac Megantic, Quebec, where 47 people were killed when a train carrying Bakken crude oil derailed in the center of town. Similarly, shipping oil via tanker through commercially and culturally important waterways like the Salish Sea, Columbia River, and Grays Harbor raise questions about risks of spills and interference with fishing and other users. People are also deeply concerned with the climate impacts of these projects. For example, by providing huge volumes of low-cost Powder River basin coal new access to Pacific markets, will these projects facilitate more consumption of coal that further disrupts the climate?

Although initially disputed by project proponents, the legal duty under SEPA is quite clear: these physically or temporally distant impacts must be considered under SEPA—anything less is reversible error. The issue appears to be settled, as the vast majority of such impacts are already being considered in projects under SEPA review.

Under SEPA’s governing regulations, a SEPA document must fully evaluate all of the direct, indirect, and cumulative effects of projects.<sup>8</sup> While SEPA itself does not define direct, indirect, and cumulative impacts, NEPA does, and these definitions

have been borrowed for use in interpreting SEPA.<sup>9</sup> Indirect impacts are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”<sup>10</sup> Cumulative impacts include “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”<sup>11</sup> Also important in the context of fossil fuel transportation are impacts with a low likelihood but high consequences, like spills from rail or marine transportation.<sup>12</sup> Importantly, the regulations specifically direct that an “agency shall not limit its consideration of a proposal’s impacts only to those aspects within its jurisdiction, including local or state boundaries.”<sup>13</sup>

Washington’s courts and hearings bodies are only starting to grapple with these important issues, but the conclusions so far are consistent: indirect impacts of fossil fuel transportation projects, including transportation of the fossil fuels to and from proposed terminals, must be considered in the SEPA process. For example, in *Quinault Indian Nation v. Hoquiam*, the Shorelines Hearings Board vacated modified determinations of non-significance (“MDNSs”) for two crude oil terminals in Grays Harbor for failing to adequately consider the cumulative and indirect impacts of rail and vessel traffic.<sup>14</sup> Similarly, in a recent decision in Skagit County, the county Hearing Examiner invalidated an MDNS for a rail project at the Shell refinery in Puget Sound because it failed to take into account the risk of rail accidents in places physically distant from the refinery itself.<sup>15</sup> Presented with extensive information regarding the risks of oil spills or fires from trains in heavily populated or environmentally sensitive areas along the rail route, the final decision concludes that the County “severely truncated” the inquiry by “reducing it to such a limited geographic scope.”<sup>16</sup> Shell’s attempt to have this decision overturned by the Skagit Superior Court was rejected in May of 2015.

The requirement to study indirect impacts associated with coal and oil terminals is equally clear under SEPA’s federal analogue, NEPA. For example, in *Mid-States Coalition for Progress v. Surface Transp. Bd.*,<sup>17</sup> the Eight Circuit Court of Appeals agreed that an EIS for a rail project was required to study the potential increased long-term demand for coal that could arise if the project was built. Similarly, in *Border Plant Working Group v. Department of Energy*,<sup>18</sup> a court invalidated an EIS for power transmission lines because the decision-maker failed to consider the impacts of the operation of the Mexican power plants linked to the lines. Recent EISs for controversial projects like the Tongue River Railroad and the

Keystone XL evaluate potential market impacts on fossil fuel production and consumption.<sup>19</sup>

In the EIS processes that have already started, the Washington State Department of Ecology (“Ecology”) and other co-lead agencies have been clear that the scope of the EISs will include indirect impacts distant from the projects themselves of chief concern to the public. For example, in announcing the scope of the EIS for the Gateway Pacific Terminal near Bellingham, Washington, Ecology confirmed that the EIS would look at—in addition to the obvious onsite impacts like wetlands fill, habitat loss and pollution—impacts of increased rail and marine vessel traffic throughout the state and even beyond.<sup>20</sup> Similarly, the EIS will consider impacts to climate from increased coal combustion that could occur if the project is authorized.<sup>21</sup> The same is true for the coal terminal in Longview, and the proposed oil terminals in Grays Harbor and Vancouver.<sup>22</sup>

In sum, SEPA is broadly worded to require consideration of environmental impacts, and it directs agencies to act “to the fullest extent possible” when assessing the environmental impact of a proposal. SEPA rules direct lead agencies to look beyond their jurisdictional boundaries for environmental impacts that are likely, and not merely speculative, that could occur as a result of the proposed project. Because the projects involve transportation of significant volumes of fossil fuels to and from the project, these impacts are reasonably foreseeable causes of the projects, and must be included in the EISs. The SEPA EISs underway for various projects appear to be embracing these duties and a full discussion of potential impacts in the EISs is expected.

## II. Consideration of Rail-Related Impacts Under SEPA is Not Preempted by Federal Law.

Advocates for new fossil fuel transportation infrastructure like to perpetuate the myth that since rail and marine transportation is regulated under federal law, consideration of its effects under SEPA is federally preempted. Federal preemption can be a genuine issue when it comes to local efforts to *regulate* rail activities—although federal preemption is not quite as sweeping as some seem to think, there are plainly limits on what local jurisdictions can do to regulate or manage railroads.<sup>23</sup> But the notion that lead entities engaged in SEPA reviews must pretend that these impacts simply don’t exist is a significant overreach. There are two reasons why consideration of rail impacts caused by fossil fuel transportation projects is not preempted by federal law.

First, the law is clear: to even potentially fall under federal preemption, the activity in question must be undertaken by “rail carriers.”<sup>24</sup> Because rail carriers are regulated by a federal agency, the Surface Transportation Board (“STB”), and major rail construction projects are subject to NEPA, fed-

eral preemption of major rail carrier projects makes some sense.

There is ample precedent dealing with the application of preemption to “transloading” facilities and other terminals that ship or receive goods by rail. The STB has developed a clear standard: unless the facilities are owned or operated by the railway itself, the question of federal preemption does not even arise.<sup>25</sup> For example, in the recent *SEA-3* order, the STB rejected the argument that federal preemption barred local analysis of a liquefied petroleum gas rail terminal on land leased from the railway. “The Board’s jurisdiction extends to rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier’s agent, or the rail carrier exerts control over the third party’s operations.”<sup>26</sup>

None of the proposed Washington projects cross this threshold inquiry because the proponents are not rail carriers like BNSF or Union Pacific, nor are the projects to be controlled by the rail carriers. Instead, the terminals are simply potential customers of the railway. The STB does not regulate these projects, nor is it analyzing them under NEPA. It has never been the case that everything with a connection to the railroad falls under ICCTA’s preemption provision. There does not appear to be a single case, from any federal, state, or local jurisdiction in the nation that has applied federal preemption to prevent consideration of rail-related impacts of a non-railway project.

Second, even if one were to imagine a fossil fuel transloading project was being carried out by a rail carrier itself—so far, a purely academic exercise—it does not necessarily mean that consideration of impacts of rail under SEPA is preempted. ICCTA expressly preempts state law related to the *regulation* of rail transportation.<sup>27</sup> “ICCTA preemption only displaces ‘regulation,’ i.e., those state laws that may reasonably be said to have the effect of ‘managing’ or ‘governing’ rail transportation and permits the continued application of laws having a more remote or incidental effect on rail transportation.”<sup>28</sup> “The text of [the ICCTA], with its emphasis on the word regulation, establishes that only laws that have the effect of managing or governing rail transportation will be expressly preempted.”<sup>29</sup> Accordingly, where local communities attempt to regulate the railroad itself—for example, by enacting local rules specifically enacted to limit air pollution from idling trains—those efforts can be preempted.<sup>30</sup>

A handful of cases deal expressly with the question of whether local environmental reviews of rail projects (under SEPA-like statutes) are preempted, and reveal that it’s a nuanced and fact-specific analysis focusing on the level of interference with rail operations. For example, in *County of Amador v. El Dorado County Water Agency*, a California court declined to find preemption of the California Environmental Quality Act (“CEQA”), a similar

California environmental review statute, in an environmental review of a rail project.

The environmental review contemplated by [the California Environmental Quality Act] serves an informational purpose. This review does not impose conditions or mandate how a project should be run. It simply explains the effects of the project, reasonable alternatives, and possible mitigation measures “so that the public can help guide decision makers about environmental choices.”<sup>31</sup>

In another case, however, the STB found that a CEQA review of a high-speed rail project was preempted because it was a “preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity’s right to construct a line that the Board has specifically authorized, thus impinging upon the Board’s exclusive jurisdiction over rail transportation.”<sup>32</sup> The STB emphasized that this subject rail line was under its jurisdiction, had been reviewed pursuant to NEPA, and had already been approved.<sup>33</sup>

In so ruling, the STB emphasized that “not all state and local regulations that affect rail carriers” are preempted by federal law. Such regulation is appropriate “where it does not interfere with rail operations” and that police powers to protect the public health and safety remain as long as they “do not unreasonably burden interstate commerce.”<sup>34</sup> The Board laid out a list of different kinds of local regulations that had been found permissible under this standard, including requirements to: (a) share information; (b) use “state or local best management practices” when they construct facilities; (c) implement “precautionary” measures at facilities, as long as fairly applied; (d) meet periodically with citizens’ groups and government officials to discuss concerns; and (e) submit environmental monitoring to local agencies.

As Skagit County Superior Court Judge Michael Rickert ruled from the bench in dismissing Shell’s effort to obtain judicial review over the Hearing Examiner’s conclusion that an EIS is required for the Shell refinery crude-by-rail terminal, federal preemption limits what jurisdictions can do to *regulate* rail—it does not impose limits on what they can *consider*. That makes sense, since there are many things that a jurisdiction may wish to do in response to the information collected under SEPA that raise no preemption concerns at all. For example, in light of the risks posed by oil train derailments, a lead entity may wish to use its zoning and other land use authorities to limit new construction near the rail lines. Alternatively, it may elect to focus greater attention on its emergency response capabilities, or call for greater public participation and education. None of these outcomes would run afoul of preemption limits—but they also could not

be contemplated if the jurisdiction was preempted from even analyzing rail-related effects.

In short, local communities will likely run into preemption arguments if they seek to regulate actual railroad projects or activities: setting local emissions standards for trains, or design specifications for crude oil tank cars. They should not run into any preemption arguments at all regulating non-rail carrier projects like terminals (unless they are under the direct control of the railroads), or considering rail-related impacts under SEPA.

### III. SEPA Provides Substantive Authority to Condition or Deny Proposed Fossil Fuel Projects.

Having established that lead entities are both authorized and obligated to consider the full range of direct, indirect, and cumulative impacts—including impacts associated with rail and marine transportation, and downstream impacts of fossil fuel combustion—and that such consideration is not barred by principles of federal preemption, the next question is what they can do with such information. Of course, the purpose of SEPA is not to generate the information for its own sake. Rather, the purpose of SEPA is to inform an underlying substantive decision; e.g., whether or not to grant some underlying permit or authorization to take action that potentially affects the environment.<sup>35</sup> Accordingly, the information developed under SEPA on indirect and cumulative impacts of fossil fuel projects is intended to inform the ultimate permitting decision.

On this point, SEPA is explicit. It provides substantive authority for government agencies to condition or even deny proposed actions—even where they meet all other requirements of the law—based on their environmental impacts.<sup>36</sup> As one treatise points out, when this premise was challenged by project proponents early in SEPA’s history, “the courts consistently and emphatically responded that even if the action previously had been ministerial, it became *environmentally discretionary* with the enactment of SEPA.”<sup>37</sup>

Courts have repeatedly recognized that this denial authority exists, even where projects otherwise comply with all relevant applicable codes. Indeed, the state Supreme Court explicitly affirmed that “under the State Environmental Policy Act of 1971 a municipality has the discretion to deny an application for a building permit because of adverse environmental impacts even if the application meets all other requirements and conditions for issuance.”<sup>38</sup> An appeals court similarly affirmed that “counties therefore have authority under SEPA to condition or deny a land use action based on adverse environmental impacts even where the proposal complies with local zoning and building codes.”<sup>39</sup> There are numerous other examples.

The complete text of the applicable language bears repeating in full:



The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal and public corporations, and counties. Any governmental action may be conditioned or denied pursuant to this chapter: PROVIDED, That such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. Such designation shall occur at the time specified by RCW 43.21C.120. Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decision maker. Mitigation measures shall be reasonable and capable of being accomplished. In order to deny a proposal under this chapter, an agency must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact. Except for permits and variances issued pursuant to chapter 90.58 RCW, when such a governmental action, not requiring a legislative decision, is conditioned or denied by a nonelected official of a local governmental agency, the decision shall be appealable to the legislative authority of the acting local governmental agency unless that legislative authority formally eliminates such appeals. Such appeals shall be in accordance with procedures established for such appeals by the legislative authority of the acting local governmental agency.<sup>40</sup>

This authority is amplified in Ecology's SEPA regulations, which lay out additional procedures and requirements for conditioning or denial pursuant to SEPA's substantive authority.<sup>41</sup> For example, in order to deny a proposal under SEPA, an agency must find that "reasonable mitigation measures are insufficient to mitigate the identified impact."<sup>42</sup>

In other words, communities that are reviewing proposed projects have the discretion to deny those projects, as long as: (a) the denial is based on an appropriate policy that is incorporated into local codes or rules; (b) the community finds that the project would result in significant adverse impacts; and (c) "reasonable mitigation measures" cannot mitigate those impacts. These criteria are likely to be scrutinized closely by the courts when entities

use their substantive SEPA authority to deny a project.<sup>43</sup> Even so, in the case of major fossil fuel infrastructure projects, like coal and oil terminals, it should not be difficult to satisfy these criteria.

With respect to the first criterion, jurisdictions have numerous policies to protect the public's health, safety, and welfare that they could invoke to justify denial. Jurisdictions also have policies to avoid contributing to climate change which could be invoked. For example, Cowlitz County (which is the co-lead agency for the Millennium Bulk Terminals coal export project EIS) has adopted a code provision laying out policies "as possible bases for the exercise of authority under SEPA."<sup>44</sup> That code provision incorporates by reference "state and federal statutes and regulations" that are designed to protect human health and the environment. In other words, Cowlitz County has explicitly incorporated all of the Washington state policies intended to address the threat of climate change, which could provide a basis for the County to deny projects that conflict with those policies.<sup>45</sup>

Skagit County, which will be considering whether to authorize yet another crude oil rail terminal adjacent to Puget Sound, similarly has identified a number of policies that may be used to deny or condition that terminal under SEPA.<sup>46</sup> The adopted policies are sweeping, including a "fundamental and inalienable right to a healthful environment" for all people, and a goal of "[a]chiev[ing] a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities." Skagit's substantive SEPA authorities explicitly incorporate its development, health, and safety codes, as well as its comprehensive plan and Shorelines master program.<sup>47</sup> Thus, the County's explicit SEPA authorities include—among many other things—its critical areas ordinance, which declares that "certain species of fish and wildlife represent important historic, cultural, recreational and economic resources" and that the County seeks "to protect fish and wildlife populations and their associated habitats."<sup>48</sup> Given that unusually explosive crude oil will be transiting critically important areas for salmon spawning, rearing, and migration, such policies could be used to support a denial of another crude oil transportation project.<sup>49</sup>

As to the second criterion, whether or not EISs for major fossil fuel projects will identify "significant" impacts of course remains to be seen—not even a draft EIS for any Washington project has been completed at this point. However, it does not require a great leap of the imagination to assume such impacts will be identified; after all, an EIS is not even performed unless the lead entity concludes that there are potentially significant effects. Numerous public, tribal, and expert commenters have identified a wide range of serious concerns associated with these projects, including the substantial risk of derailments, spills, and explosions from

unit trains carrying crude oil, heightened risks of oil spills and accidents from marine shipping of fossil fuels, and contribution of the projects to greenhouse gas pollution. For example, in finding that the Shell refinery crude-by-rail terminal required an EIS, the Skagit County hearing examiner repeatedly pointed to the dangers inherent in shipping crude oil by rail through populated and environmentally sensitive areas and found little evidence that the County had adequately scrutinized whether federal and state regulations—and oil spill response capabilities—were adequate to prevent additional accidents. Similarly, while not explicitly ruling on the issue, the Shorelines Hearings Board observed that it found “troubling” the failure to adequately consider risks of oil spills, seismic events, greenhouse gasses, and impacts to cultural resources.<sup>50</sup>

The “significance” of the projects’ effects is highlighted by their cumulative nature. As noted above, consideration of cumulative effects is plainly mandatory, and the large number of fossil fuel related projects in Washington state—in particular, their shared use of the state’s rail systems and waterways—presents serious questions of cumulative effects. These concerns formed the basis for the Shorelines Hearings Board summary judgment decision in the *Quinault* case, in which SEPA determinations were invalidated for failing to consider the cumulative effects of similar projects.<sup>51</sup> Similarly, the Skagit County Hearing Examiner highlighted other similar projects transporting crude oil in the region, finding that the County had failed to perform any meaningful analysis of cumulative effects at all.<sup>52</sup> Indeed, the Hearing Examiner observed that the 11 proposed or operating crude-by-rail projects in Oregon and Washington would involve significantly more crude oil transportation than the Keystone XL pipeline.<sup>53</sup> Collectively, environmental reviews are underway for projects that would add scores of new unit trains—carrying open cars of coal or unsafe tank cars of unusually combustible crude oil—to the state’s rails. Even if one project, standing alone, didn’t present significant concerns, the cumulative nature of these shared effects crosses that boundary.

Finally, as to the third criterion, it is likely that lead entities will not be able to identify mitigation measures that are “reasonable” and “capable of being accomplished” that actually mitigate the risks. Many of the impacts of these projects—vast increases in train and marine vessel traffic, and attendant increases in local oil spill hazards, for example—are intrinsic to the projects themselves, and it would presumably not be “reasonable” to limit them in a way that doesn’t dramatically alter the project itself. Moreover, limitations on local government’s ability to directly mitigate some effects means that some potential mitigation measures to promote safety may not be “capable of being accomplished,” unless the proponent agrees to them. And to the extent that EISs conclude that these transportation

projects will result in significant increases in fossil fuel consumption, leading to increased greenhouse gas emissions, it is difficult to imagine suitable mitigation to offset those emissions.

#### IV. Conclusion

In sum, state and local government agencies are justifiably concerned about authorizing major new industrial facilities in their jurisdictions that involve the transportation and management of large volumes of fossil fuels like coal and oil. They are hearing from their constituents and the public that these projects present serious environmental hazards and collide with community values. It is important that they understand that they have the right to say “no” to these projects, even where the projects meet all other requirements of local codes. As long as SEPA lead entities identify serious environmental impacts in the EISs that cannot be adequately mitigated under existing legal restrictions, and as long as they connect their decisions with existing SEPA policies, they have the authority to condition or deny those projects outright. As long as their reasoning is well explained and supported by the evidence in the administrative record, such denials should be upheld in any subsequent legal challenges.

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1 *Norway Hill Preservation and Prot. Ass’n v. King County*, 87 Wn.2d 267, 279 (Wash. 1976).

2 RCW 43.21C.010.

3 RCW 43.21C.020(3).

4 *Leschi v. Highway Comm’n*, 84 Wn.2d 271, 279–80 (1974).

5 RCW 43.21C.031(1).

6 WAC 197-11-330.

7 WAC 197-11-794.

8 WAC 197-11-060(2)(c).

9 *Quinault Indian Nation v. City of Hoquiam*, 2013 WL 6637401 (Shorelines Hearings Board, Dec. 9, 2013) (borrowing NEPA definition of cumulative effects for SEPA analysis of crude-by-rail terminal).

- 10 40 C.F.R. § 1508.8(b).
- 11 40 C.F.R. § 1508.7; WAC 197-11-060(4)(e) (requiring consideration of cumulative effects in determining whether significance threshold has been crossed); WAC 197-11-330(3)(c) (“Several marginal impacts when considered together may result in a significant adverse impact.”).
- 12 WAC 197-11-794 (“An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred.”).
- 13 WAC 197-11-060(4)(b). Indeed, SEPA constitutes a ringing affirmation of the connectedness of Washington with the rest of the planet. It speaks of “human-kind” and “human beings” rather than just citizens of this state. RCW 43.21C.010. SEPA explicitly calls on responsible agencies to “recognize the world-wide and long-range character of environmental problems” and take steps to cooperate in “anticipating and preventing a decline in the quality of the world environment.” RCW 43.21C.030(f); *Eastlake Comm. Coun. v. Roanoke Assoc.*, 82 Wn.2d 475, 487 (1973) (observing “unusually vigorous statement of legislature purpose ... to consider the total environmental and ecological factors to their fullest in deciding major matters”) (emphasis added). Those regulations also recognize that environmental impacts do not end at the state’s borders, and explicitly require consideration of the impacts of projects outside of the state’s jurisdiction. WAC 197-11-060(c); *Cathcart-Maltby-Clearview Comm. Council v. Snohomish Cty.*, 96 Wn.2d 201, 209 (Wash. 1981) (SEPA “also mandates that extra-jurisdictional effects be addressed and mitigated, when possible.”)
- 14 *Quinault Indian Nation v. City of Hoquiam*.
- 15 *RE Sources v. Equilon Enterprises*, Findings of Fact, Conclusions of Law and Order (Skagit Co. Hearing Examiner, Feb. 23, 2015), available at [http://earthjustice.org/sites/default/files/files/SL130468.Shell\\_.pdf](http://earthjustice.org/sites/default/files/files/SL130468.Shell_.pdf)
- 16 *Id.* at 12
- 17 345 F.3d 520 (8th Cir. 2003)
- 18 260 F. Supp. 2d 997 (S.D. Cal. 2003). *See also* *Ocean Advocates v. Corps of Engineers*, 402 F.3d 846, 867-68 (9th Cir. 2005) (requiring EIS for dock construction project to consider “increased vessel traffic” that would be proximately caused by project); *S. Fork Band Council of W. Shoshone v. DOI*, 588 F.3d 718, 725 (9th Cir. 2009) (“The air quality impacts associated with transport and offsite processing of the five million tons of refractory ore are prime examples of indirect effects that NEPA requires to be considered.”)
- 19 Whether they do so properly or even coherently—a subject of considerable public debate—is not the issue here, which is simply whether induced demand for fossil fuels is within the scope of transportation projects and terminals.
- 20 <http://www.ecy.wa.gov/geographic/gateway/pacific/gpt-faq.pdf>. Transportation of coal for the project will be studied “to the point where the extraction of natural resources originates,” albeit with less detail than within the state of Washington.
- 21 *Id.* at 7 (“In addition, Ecology will require the greenhouse gas emissions from the end use of coal, the predominate commodity to be shipped from the facility, to be addressed.”).
- 22 *Westway and Imperium Expansion Projects: Frequently Asked Questions*, available at <http://www.ecy.wa.gov/geographic/graysharbor/FAQterminals.pdf>; Energy Facility Site Evaluation Council, Scope of Draft EIS for Tesoro Savage Terminal (April 2, 2014), available at <http://www.efsec.wa.gov/Tesoro%20Savage/20140403FinalSepaScope.pdf>.
- 23 The Interstate Commerce Commission Termination Act (“ICCTA”) gives the federal Surface Transportation Board (“STB”) exclusive jurisdiction over “transportation by rail carriers.” *See* 49 U.S.C. § 10501(b)(1); *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998).
- 24 *Hi Tech Trans, LLC—Petition for Declaratory Order*, S.T.B. 34192, 2003 WL 21952136, at \*3 (Aug. 14, 2003) (emphasis added); *SEA-3, Inc.—Petition for Declaratory Order*, S.T.B. 35853, 2015 WL 1215490, at \*3 (Mar. 17, 2015).
- 25 *Id.*; *see also* *City of Alexandria, Va.—Petition for Declaratory Order*, S.T.B. 35157, 2009 WL 381800, at \*2 (Feb. 17, 2009).
- 26 *SEA-3*, at \*4.
- 27 49 U.S.C. § 10501(b).
- 28 *Humboldt Baykeeper v. Union Pac. R.R. Co.*, 2010 WL 2179900, at \*2 (N.D. Cal. 2010) (internal citations omitted); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001) (application of local zoning and occupational license ordinances against a company leasing property from a railroad does not constitute “regulation of rail transportation” and is not preempted by the ICCTA).
- 29 *Franks Inv. Co. LLC v. Union Pac. R.R.*, 593 F.3d 404, 410 (5th Cir. 2010).
- 30 *Ass’n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).
- 31 76 Cal. App. 4th 931, 961, 91 Cal. Rptr. 2d 66 (Cal. Ct. App. 1999).
- 32 *Cal. High-Speed Rail Auth.—Petition for Declaratory Order*, S.T.B. 35861, 2014 WL 7149612 (Dec. 12, 2014).
- 33 Indeed, it’s critical to remember that this project was a rail project, carried out by a rail carrier, and subject to the direct jurisdiction of the STB. Its reasoning does not apply to non-carrier transloading terminals.
- 34 *Cal. High-Speed Rail Auth.* at \*6.
- 35 WAC 197-44-400.
- 36 RCW 43.21C.060.
- 37 *Richard Settle, SEPA: A Legal and Policy Analysis* (Dec. 2014) at §18.01[2] (emphasis added).
- 38 *West Main Associates v. Bellevue*, 106 Wash.2d 47, 53 (1986).
- 39 *Donwood v. Spokane County*, 90 Wash. App. 389 (1998).
- 40 RCW 43.21C.060; *see also* WAC 197-11-030(1) (“The policies and goals set forth in SEPA are supplementary to existing agency authority.”).
- 41 WAC 197-11-660.
- 42 WAC 197-11-660(f)(ii).
- 43 *Settle, supra* note 37, at § 180.01[2] (“Substantive SEPA authority is alive and well but must be exercised in strict compliance with all pertinent requirements, which must be supported by thorough documentation and convincing evidentiary support in the administrative record.”).
- 44 *Cowlitz County Code*, § 19.11.110(A).
- 45 *See, e.g.*, RCW 80.80.005(1)(a) (Washington is “especially vulnerable to climate change because of the state’s dependence on snow pack for summer stream flows and because the expected rise in sea levels threatens our coastal communities.”); RCW 70.235.070(1)(



adopting standards that seek to reduce GHG to 1990 levels by 2020, and 50% below 1990 levels by 2050); RCW 80.80.040 (setting a GHG emissions standard for new power infrastructure); RCW 70.235.005(3) (state will “minimize the potential to export pollution, jobs and economic opportunities”). See also Governor’s Executive Order 09-05 (“effective and immediate action to reduce greenhouse gas emissions ... is essential to the future well-being of all Washingtonians”).

46 SCC 14.12.200(4).

47 None of this is unusual. The City of Hoquiam, for example, which has SEPA authority over several proposed oil terminals in Grays Harbor, has nearly identical provision in its code. See Hoquiam City Code § 11.10.220

48 Skagit County Code § 14.24.020.

49 See *RE Sources v Equilon*, Final Order, *supra* note 15, at ¶ 58 (“The Skagit River is the most productive river of wild salmon in the Puget Sound area.... The tracks also pass the south fork of the Skagit adjacent to the river’s estuary, an area which is being rehabilitated as an important habitat for young salmon. No mention of the consequences of a spill along this area is made.”).

50 *Quinault Indian Nation v. City of Hoquiam*, 2013 WL 6637401, \*16 (Shorelines Hearings Board, Dec. 9, 2013).

51 *Id.* at \*14.

52 *RE Sources v Equilon*, Final Order, *supra* note 15, at 12.

53 *Id.* at 7.

Washington’s recreational and medical marijuana industries.<sup>1</sup> Among other changes, the LCB’s jurisdiction was expanded to include medical marijuana, which previously had been largely unregulated. State licenses will now be required to grow, process, or sell medical marijuana, imposing stringent restrictions on existing collective gardens and dispensaries. Local jurisdictions will assume a secondary role in regulating these new LCB-registered cooperatives.<sup>2</sup> As of the time of this writing, the state legislature passed a law allocating tax revenue from marijuana businesses towards jurisdictions that allow such uses,<sup>3</sup> signaling an increased pressure on local jurisdictions to integrate marijuana-related uses into existing land use and planning policies.

The development, implementation, and enforcement of these new laws at the state and local level raises unique and complex legal issues, and local governments are exposed to significant risk when making both legislative and administrative decisions involving marijuana. This article (1) highlights the need to integrate existing local regulatory schemes, including development regulations and Comprehensive Plans, with the legalization of recreational marijuana and (2) suggests best practices for neutralizing those vulnerabilities, including updating comprehensive plans, revisiting existing development regulations, and ensuring compliance with the State Environmental Policy Act (“SEPA”).

## Potential Vulnerabilities and Best Practices for Integrating the Legalization of Recreational Marijuana into Local Land Use and Planning Schemes



By Ash Miller and Alanna Peterson, K&L Gates

### Introduction

Washington is only the second state to legalize recreational marijuana and the state is currently implementing a legal framework for taxing and regulating recreational marijuana for the first time in state history. Although the Washington State Liquor and Cannabis Board (“LCB”) is responsible for developing rules and regulations governing the production, processing, and retail sale of recreational marijuana, the burden of integrating those rules and regulations with local land use plans falls squarely on local jurisdictions. Local governments have been placed in the often difficult position of deciding how the legalization of recreational marijuana fits into the community’s vision for future development while balancing community values, needs, and goals.

The complexity of these issues is compounded by the recent passage of a law reconciling

### The Legalization of Marijuana: State and Local Roles

State and local agencies share the responsibility of implementing and enforcing the legalization of marijuana, although the interplay between those roles is often unclear.

The LCB is responsible for developing rules and regulations governing marijuana production, processing, and retail licenses. Prior to adopting those rules and regulations, the LCB completed an environmental checklist and issued a determination of nonsignificance (“DNS”) pursuant to the State Environmental Policy Act (“SEPA”), which requires state actions to analyze and incorporate environmental considerations into the decision-making process.<sup>4</sup> The LCB’s policies and procedures rely upon the assumption that local governments will address the potential environmental impacts of individual marijuana operations, as required by SEPA. In short, the LCB only analyzed its issuance of licensing regulations – it has yet to undertake any environmental analysis of any specific marijuana facility for which the LCB issues a license. Instead, the LCB left that work to local jurisdictions if and when the local jurisdiction is asked to issue land use approvals.

In addition to acquiring a marijuana license from the LCB, prospective marijuana producers and processors must also comply with other applicable state and local requirements, including zoning codes, land use regulations, SEPA, and Washington

state laws regulating air pollution (RCW 70.94), waste management (RCW 70.95 and 70.105), water pollution (RCW 90.48), and the use of groundwater (RCW 90.44).<sup>5</sup>

Statewide, each county and municipality must decide how marijuana production and processing will fit into existing zoning restrictions and permitting schemes.<sup>6</sup> This task is especially difficult given that local jurisdictions necessarily could not have contemplated the legalization of marijuana when they implemented their existing comprehensive plans and land use regulations. Some counties and municipalities have issued moratoriums on marijuana production and processing.<sup>7</sup> Others have issued ordinances outlining specific zoning restrictions for the production and processing of marijuana, in addition to other limitations.<sup>8</sup> Some have decided not to enact any new restrictions, and will instead treat marijuana production as traditional agriculture or farming under existing zoning restrictions. In addition, 61 cities and four counties have prohibited marijuana uses outright.<sup>9</sup> Planners and applicants must also juggle this complex and evolving legal landscape when making what would normally be routine permitting decisions.

### **The Land Use Planning Process**

Local governments engage in the planning process to ensure that the present and future development of the municipality is consistent with values, needs and goals of the community. The planning process involves both legislative actions, which outline community values and standards in comprehensive land use plans and development regulations, and administrative actions, which apply those community values and standards to site-specific projects.

The Growth Management Act (“GMA”), Chapter 36.70A RCW, establishes policies and procedures that local governments must follow in developing comprehensive plans and development regulations. Consistent with those policies and procedures, local governments develop comprehensive land use plans that apply statewide planning goals to the specific values, needs, and goals of the community. Local governments then implement those comprehensive plans through regulatory ordinances, such as zoning codes.

Local governments have broad discretion to create policies and procedures, and these local regulatory frameworks vary widely. For example, within limits set by state law, local governments decide what types of proposals require environmental review, notice to adjacent landowners, or public comment. Local governments shape the present and future pattern of development in their jurisdiction by enacting zoning districts and deciding what types of activities and development are permitted in them. Local jurisdictions can also shape development by deciding what types of administrative and quasi-judicial processes are available to landowners,

permit applicants, or interested parties that oppose certain development proposals or countywide policies.

The city council and board of county commissioners have the ultimate authority to make land use and planning decisions. The city council or board appoints members to planning commissions, which are groups of citizens that make recommendations to the council or board on changes to the comprehensive plan or regulatory ordinances. In many jurisdictions, the planning commission also reviews site-specific land use approvals, such as variances or rezones. Some local jurisdictions also have a board of adjustment or hearing examiner, which hears appeals of land use decisions. In other jurisdictions, the planning commission, council, or board may assume this role. Other jurisdictions instead hire a hearing examiner to serve the role of the board of adjustment and sometimes also to take the place of the planning commission in hearing applications for land use permits.

### **Potential Risks and Best Practices: Integrating the Legalization of Marijuana into the Existing Regulatory Framework for Land Use and Planning**

Local governments will likely make a combination of both legislative and administrative decisions to determine how to reconcile the existing regulatory framework with the legalization of marijuana. This task is particularly difficult given the novelty of legal marijuana use—local governments could not have contemplated the legalization of marijuana when they developed comprehensive plans and development regulations. Local jurisdictions need to make both administrative decisions, such as site-specific permitting and variances, or legislative decisions, such as ordinances and moratoria. The nature of the action depends on the nature of the decision being challenged. Below we highlight a few of the issues raised by these kinds of decisions, but this is by no means an exhaustive list.

#### **I. Land Use Issues**

*Local governments must determine how to categorize marijuana-related uses.*

Many jurisdictions have faced significant difficulty in determining how to characterize recreational marijuana uses. For example, jurisdictions differ on whether marijuana production is an agricultural or an industrial/commercial use. Even if a jurisdiction characterizes marijuana production as agriculture, the jurisdiction must still decide whether marijuana-related uses are consistent with existing agricultural zoning districts. This decision also implicates the processing and retail of marijuana, which are often considered accessory uses to production.

This may create problems if a local government’s characterization of marijuana is arguably

inconsistent with its comprehensive plan or development regulations. Local jurisdictions organized under the GMA are prohibited from issuing permits for uses that are inconsistent with their comprehensive plans.<sup>10</sup> For example, some comprehensive plans for rural counties highlight the preservation of the traditional rural or agricultural character of the community as a main planning goal. If a county has not amended its comprehensive plan or development regulations to specifically address marijuana, the county must decide whether marijuana falls under existing definitions of “agriculture” or is consistent with the concept of traditional rural character.<sup>11</sup> These decisions will be evaluated in light of the goals outlined in comprehensive plans.<sup>12</sup>

*Local governments should consider updating their comprehensive plans.*

Local jurisdictions should consider updating comprehensive plans to ensure that siting marijuana facilities will not negatively impact future development. For example, state law prohibits the siting of marijuana facilities within 1,000 feet of certain educational, recreational, and community gathering spaces.<sup>13</sup> If a local jurisdiction considers each proposed marijuana facility in isolation, instead of considering the effects of all proposed facilities, it may inadvertently create a checkerboard of 1,000-foot exclusion zones surrounding each facility that severely limits where the local jurisdiction can site certain public facilities in the future.

Although the LCB has stated that a license may be renewed even if sensitive uses, such as schools or playgrounds, move into an existing 1,000-foot buffer area, allowing such uses in close proximity is arguably inconsistent with the intent of such buffers and may expose the local jurisdiction to liability. For example, the close proximity of marijuana facilities and certain public spaces may give rise to private claims of nuisance per se and local governments may find themselves in the middle of a dispute that could have been prevented upfront through proactive planning. These issues can be averted through appropriate development regulations that are implemented in the context of a comprehensive plan update.

*Local governments should review their existing comprehensive plans and development regulations for consistency with state marijuana laws.*

Additionally, local jurisdictions should ensure existing comprehensive plans and development are consistent with state marijuana laws. For example, many comprehensive plans include provisions requiring compliance with federal laws. These provisions could introduce problems for local jurisdictions if not drafted carefully to accommodate the unique legal posture of recreational marijuana. Although the laws governing medical and recreational marijuana delegate authority to local jurisdictions to enact relevant land use regulations,

local governments must ensure that they only act within the limited zone of authority granted them by statute, lest local regulations be preempted by state law. “[A] state law preempts a local ordinance ‘when an ordinance permits what state law forbids or forbids what state law permits.’”<sup>14</sup> If a local ordinance “‘directly and irreconcilably’ conflicts” with state law, it is invalid.<sup>15</sup> Local jurisdictions should be particularly careful with respect to areas that are typically within local control, such as signage and fencing, but are now directly regulated by the LCB.

## II. SEPA Issues

*Local governments should develop a comprehensive, county-wide approach to marijuana regulation.*

Local governments should develop a comprehensive, countywide approach to regulating marijuana-related activities, instead of focusing on each site-specific project in isolation. SEPA requires that local governments consider the cumulative impacts of a proposed action, such as a proposed marijuana facility.<sup>16</sup> The “cumulative impacts” of the proposed facility are the combined effects of the proposed facility along with the “probable” effects of similar proposed projects.<sup>17</sup> Many local governments have received numerous permit applications to operate marijuana production or processing facilities and should consider the cumulative impact of all of those proposed facilities when making legislative and administrative decisions involving marijuana uses. Local governments may also wish to consider their regulatory context; if all surrounding jurisdictions ban or stringently regulate marijuana-related uses, it is likely that there will be a concentration of marijuana-related permit applications within the more permissive jurisdiction.

*Local governments have an independent obligation to comply with SEPA when making land use decisions.*

SEPA requires government agencies to examine the adverse environmental impacts of their proposed actions and avoid or mitigate those impacts. When multiple agencies are involved in reviewing a particular project, one agency generally elects to act as the lead agency to streamline environmental review. Although the lead agency has the primary responsibility for complying with SEPA,<sup>18</sup> that does not supplant the other agencies’ independent obligation to comply with SEPA when making decisions and ensure that impacts are examined and disclosed and mitigation measures are imposed.

The LCB’s policies and procedures are silent with respect to how the agency will comply with SEPA for each individual licensing decision. Each license issued by the LCB is an “action” under SEPA and the LCB must comply with SEPA each time it issues a license unless the action is exempt from SEPA. It can do this by acting as the “lead agency” under SEPA and issuing a DNS (or requiring an EIS) and accepting public and agency comments prior to



issuing a license. The LCB can also defer to the local jurisdiction to act as the SEPA lead agency and then the LCB can rely on the local jurisdiction's SEPA determinations before the LCB issues a license. This appears to be the LCB's preferred course of action for purposes of complying with SEPA for its individual licensing decisions.

When the LCB developed policies and procedures for administering marijuana licenses in Washington, it relied upon the assumption that local governments will act as the lead agency and address the potential environmental impacts of individual marijuana operations. That approach, however, does not contemplate a situation where the local government's environmental review is inadequate or where a local government fails to conduct any environmental review of a project. This regulatory oversight is particularly apparent where local governments have taken a minimal approach to regulation or have declined to regulate marijuana altogether, exposing both the LCB and local governments to potential litigation from project applicants, adjacent landowners, and concerned citizens.

Where the LCB has deferred to the local jurisdiction to act as lead agency, the local jurisdiction must ensure that it appropriately defines the breadth and depth of environmental review.<sup>19</sup> SEPA requires that the lead agency "carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer."<sup>20</sup> Local jurisdictions should be mindful of this obligation when reviewing land use approvals for marijuana facilities and, where appropriate, outline specific procedures for reviewing such approvals.

### III. Federal Preemption Issues

Marijuana is a schedule 1 substance under the Controlled Substances Act and as such its possession, production, and use are prohibited in most cases.<sup>21</sup> However, current federal policy is not to enforce the law under most circumstances in states that are legalizing recreational marijuana.<sup>22</sup> The federal government outlined eight enforcement priorities and expressed that it will rely on state and local governments to develop strict regulatory schemes to advance those priorities. Local governments bear much of the burden of ensuring the successful implementation of the legalization of recreational marijuana. The federal government's decision not to interfere with state efforts to legalize marijuana "rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those laws could pose to public safety, public health, and other law enforcement interests."<sup>23</sup> Often local governments will be on the

front lines when problems arise, through crime, code infractions, or neighbor complaints. Extra attention should be paid to these types of issues as they arise, both to help ensure that the current legal system operates as intended, and to show the municipality's actions were justified, should they ever come into question.

If this policy changes, the federal government may one day seek to invoke the Supremacy Clause of the U.S. Constitution to preempt or override state law.<sup>24</sup> Practically, while the risk of this may be low at the current time, municipal planning should consider the contingencies involved—for example, compliance with federal law can become a serious budget issue if federal funding is implicated.<sup>25</sup> At this point, local jurisdiction, should focus on enforcement and recordkeeping to minimize future risk. Should federal enforcement priorities change, local governments will benefit from quality recordkeeping, and clear delineations in codes and permitting files, for all marijuana-related land use decisions, policies, and enforcement actions.

### Conclusion

The legalization of recreational marijuana requires a complex and comprehensive response by local governments. Sorting through these issues may be especially burdensome for smaller jurisdictions and those in rural areas that lack the funding and personnel to undertake a sophisticated and comprehensive exploration of the interplay between marijuana and their jurisdiction's particular planning goals and regulations. Thus, the jurisdictions that can least afford it may be exposed to the most significant risks.

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1 On April 24, 2015, Governor Jay Inslee signed The Cannabis Patient Protection Act, a law that overhauls the state's existing framework for medical marijuana to complement its implementation of recreational marijuana. The Cannabis Patient Protection Act, SB 5052, 2015 Leg. § 70 (2015). Among other notable changes, recreational marijuana retailers may now also obtain an endorsement to sell medical marijuana. *Id.*

2 This article focuses on local approaches to the regulation of recreational, not medical, marijuana.

3 HB 2136, 2015 Leg., 2d. Spec. Sess. (Wash. 2015).

4 The LCB policies and procedures for administering marijuana licenses, including the adequacy of its supporting DNS, became final on December 1, 2013 and

- the time period for appealing those rules under the Administrative Procedures Act (“APA”) has passed.
- 5 See RCW 69.51A.140; LCB Fact Sheet. The Municipal Research and Services Center (“MRSC”) provides a map of the recreational marijuana ordinances across the state. MRSC, “Recreational Marijuana Ordinances across Washington,” *Recreational Marijuana: A Guide for Local Governments*, <http://mrsc.org/getdoc/8cd49386-c1bb-46f9-a3c8-2f462dcb576b/Recreational-Marijuana-A-Guide-for-Local-Governmen.aspx> (last accessed June 29, 2015).
  - 6 The Washington Attorney General released an opinion explaining that that I-502 does not preempt local governments from regulating marijuana businesses within their jurisdictions. Wash. Att’y Gen. Op. 2014 No. 2 (Jan. 16, 2014).
  - 7 Jurisdictions may adopt moratoria or interim zoning ordinances without holding a public hearing, but must do so within 60 days of adoption. RCW 35A.63.220. Moratoria and interim zoning ordinances may be effective for no longer than six months. *Id.*
  - 8 The State’s position is that local jurisdictions can restrict marijuana-related activities if such restrictions are a valid exercise of police power. Wash. Att’y Gen. Op. 2014 No. 2 (Jan. 16, 2014). “A law is a reasonable regulation if it promotes public safety, health, or welfare and bears a reasonable and substantial relation to accomplishing the purpose pursued.” *Id.* “Assuming local ordinances satisfy this test, and that no other constitutional or statutory basis for a challenge is presented on particular facts, we see no impediment to jurisdictions imposing additional regulatory requirements, although whether a particular ordinance satisfies this standard would of course depend on the specific facts in each case.” *Id.*
  - 9 MRSC, *Recreational Marijuana: A Guide for Local Governments*, <http://mrsc.org/getdoc/8cd49386-c1bb-46f9-a3c8-2f462dcb576b/Recreational-Marijuana-A-Guide-for-Local-Governmen.aspx> (last accessed June 29, 2015). Two outright bans on marijuana uses have been upheld in court challenges. See *Order Granting Defs.’ Mot. for Summ. J. and Den. Pls.’ Mot. for Summ. J., SMP Retail, LLC v. Wenatchee*, No. 14-2-00555-0 (Chelan Cnty. Super. Ct. Oct. 17, 2014) (upholding moratorium in Wenatchee); *Order Granting Part. Summ. J. and Other Pending Mots., MMH, LLC v. Fife*, No. 14-2-10487-7 (Pierce Cnty. Super. Ct. Sept. 8, 2014) (upholding ban in Fife).
  - 10 WAC 365-196-500(3).
  - 11 This issue is further complicated where a local jurisdiction’s Comprehensive Plan or development regulations define “agriculture” or “farming” to exclude activities that are prohibited by other federal, state or local laws. For example, in the taxation context the Washington State Legislature has declared, “[t]he terms ‘agriculture,’ [and] ‘farming’ ... may not be construed to include or relate to marijuana ... unless the applicable term is explicitly defined to include marijuana ...” RCW 82.04.213(3).
  - 12 A local government’s characterization of marijuana uses also impacts the types of challenges that project opponents might bring. For example, if a local government interprets marijuana production as an “agricultural activity conducted on farmland” and marijuana processing as an accessory use, state law would preclude adjacent landowners from bringing nuisance lawsuits. Such activities may constitute a nuisance, however, if the activities “ha[ve] a substantial adverse effect on public health and safety.” Some local jurisdictions have also adopted their own right-to-farm ordinances, many of which are more restrictive than the state law.
  - 13 RCW 69.50.331(8)(a); WAC 314-55-050(10). Local governments now have the discretion to reduce that buffer and permit the licensing of marijuana facilities up to 100 feet from such facilities “provided that such distance reduction will not negatively impact the jurisdiction’s civil regulatory enforcement, criminal law enforcement interests, public safety, or public health.” RCW 69.50.331(8)(b). This exception does not apply to elementary schools, secondary schools, or playgrounds. *Id.*
  - 14 *Cannabis Action Coal. v. City of Kent*, No. 90204-6, 2015 WL 2418553, at \*4 (Wash. May 21, 2015).
  - 15 *Id.* at \*4. In *Cannabis Action Council v. City of Kent*, the Washington Supreme Court considered whether local regulations restricting or prohibiting collective gardens are preempted by the Washington State Medical Use of Cannabis Act (“MUCa”), chapter 69.51A RCW, the state law permitting qualifying patients to participate in “collective gardens” to grow medical marijuana for personal use. Although the statutory provisions at issue were repealed before the court issued its opinion, this case is instructive to demonstrate the power of counties to restrict or prohibit medical and recreational marijuana use. In that case, the City of Kent enacted an ordinance prohibiting collective gardens in every zoning district and deeming any violation a nuisance per se. *Id.* at \*2. The Cannabis Action Coalition challenged the Ordinance, arguing that it was preempted by MUCa. *Id.* at \*3. The court rejected that argument, concluding that “local jurisdictions [have] the authority to enact zoning requirements pertaining to the land use activity of participating in a collective garden.” *Id.* at \*4. The court did explain that, although the ordinance was within the zone of delegated authority, there are limits: “[b]ecause the legislature ensured that cities have the power to adopt ‘zoning requirements’—but did not grant carte blanche to opt out of all medical marijuana activity—a city’s ordinance under RCW 69.51A.140(1) must concern a land use.” *Id.* at \*5.
  - 16 See WAC 197-11-060(4)(d)-(e).
  - 17 See, e.g., *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719 (2002).
  - 18 WAC 197-11-050(2).
  - 19 SEPA requires that lead agencies “make certain that the proposal that is the subject of environmental review is properly defined” for purposes of environmental review under SEPA. WAC 197-11-060(3). When defining a proposal, the agency must consider future approvals. WAC 197-11-055(2)(a)(i) provides that “[t]he fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.”
  - 20 WAC 197-11-060(4)(4)(c). “Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions.” WAC 197-11-060(4)(4)(d).
  - 21 21 USC §§ 801 *et seq.*
  - 22 In an August 29, 2013 letter, the DOJ outlines eight enforcement areas that it will continue to prioritize, and expressed that it will continue to rely on state and local governments to develop strict regulatory

schemes to advance those priorities. U.S. Dept. of Justice, Memorandum for all United States Attorneys, Guidance regarding Marijuana Enforcement (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. Those priorities are:

- (1) preventing the distribution of marijuana to minors;
- (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- (6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands;
- and (8) preventing marijuana possession or use on federal property.

23 *Id.*

24 “This memorandum is intended solely as a guide for the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA.”

25 Local governments rely heavily on federal funding to operate local programs, including transportation projects, environmental programs, health care, disaster relief, and law enforcement. Federal grant applications filed by states and local governments all generally require compliance with federal law. If a state or local government violates federal law, the federal government may stop funding those projects or, in some circumstances, require the state or local government to return funds that have already been disbursed.

## Two New Decisions Interpret *Gull Industries v. State Farm*



By Valerie K. Rickman, *Cascadia Law Group PLLC*

In 2014, the Washington Court of Appeals, Division I, published a decision in *Gull Industries, Inc. v. State Farm Fire and Casualty Co. and Transamerica Insurance Group, et al.* (*Gull I*), which addressed whether something less than a lawsuit filed in court—specifically, an independent cleanup—will trigger a Comprehensive General Liability (“CGL”) insurer’s duty to defend a party seeking coverage for environmental remediation costs.<sup>1</sup> The *Gull I* court held that an independent cleanup does not trigger a CGL insurer’s duty

to defend.<sup>2</sup> Two courts have now issued decisions that rely on *Gull I*, applying the decision in two new factual scenarios and finding, in both cases, against coverage. In the first case, *Jorgensen Forge Corp. v. Ill. Union Ins. Co.*,<sup>3</sup> the U.S. District Court for the Western District of Washington ruled that a letter encouraging participation in a Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) allocation process<sup>4</sup> did not trigger an insurer’s defense obligation under a pollution liability policy. In the second decision, *Gull Industries, Inc. v. Transamerica Insurance Group (Gull II)*,<sup>5</sup> the King County Superior Court ruled that environmental remediation conducted voluntarily but with agency oversight, such as those conducted under the Washington State Department of Ecology’s (“Ecology”) Voluntary Cleanup Program (“VCP”), did not trigger an insurer’s duty to defend because agency communications were not adversarial or coercive. These decisions are instructive for current and former owners and operators of contaminated sites in Washington seeking defense under historical CGL policies and newer pollution liability policies in the absence of an administrative enforcement order or a lawsuit.

In *Gull I*, the court held that Gull’s insurers owed no duty to defend under CGL policies for costs incurred while conducting an independent cleanup.<sup>6</sup> Beginning in 1984, Gull investigated and remediated a former gas station without any involvement by Ecology.<sup>7</sup> The only communication Gull received from Ecology was a letter acknowledging receipt of Gull’s report of contamination and intent to remediate.<sup>8</sup> The letter further advised Gull of its obligation to adhere to state law requirements in conducting the cleanup.<sup>9</sup> After completing the cleanup, Gull tendered claims for defense and indemnification to Transamerica Insurance Group (“TIG”) and State Farm Fire and Casualty Company (“State Farm”),<sup>10</sup> which both carriers denied.<sup>11</sup> Gull then brought suit against TIG, State Farm, and other insurers for declaratory judgment on the insurers’ defense obligations, among other claims.<sup>12</sup> On a motion for partial summary judgment, the trial court held that State Farm and TIG had no duty to defend Gull.<sup>13</sup> Gull appealed.

At issue in *Gull I* was whether the undefined term “suit” in a CGL insurance policy<sup>14</sup> requires a lawsuit to trigger an insurer’s defense obligation, or whether something short of a lawsuit will trigger the insurer’s duty to defend.<sup>15</sup> The court ultimately held an “agency action must be adversarial or coercive in nature in order to qualify as the functional equivalent of a ‘suit.’”<sup>16</sup>

### A. *Jorgensen Forge Corp. v. Illinois Union Ins. Co.*

On April 29, 2015, the U.S. District Court for the Western District of Washington issued a Memorandum and Order addressing Illinois Union Insurance Company’s (“Illinois Union”) duty to



defend its insured, Jorgensen Forge Corporation (“JFC”), for costs incurred while investigating and addressing liability associated with the Lower Duwamish Waterway Superfund Site.<sup>17</sup> In this suit, JFC alleged that Illinois Union had a duty to defend JFC against several environmental claims under a specialized pollution liability insurance policy, not a CGL policy.<sup>18</sup> The claims made policy issued by Illinois Union provided JFC with \$10 million of coverage for “claims” against JFC regarding a “pollution condition.”<sup>19</sup> Under the JFC policy, a “claim” was defined as

a written assertion of legal right received by the “insured,” including but not limited to a “government action,” suits or other actions alleging responsibility or liability on the part of the “insured” for “bodily injury,” “property damage,” or “remediation costs” arising out of “pollution conditions” to which this insurance applies.<sup>20</sup>

The policy expressly excluded coverage related to a 2003 Order from the United States Environmental Protection Agency (“EPA”) and a 2007 Order from Ecology.<sup>21</sup>

In a Motion for Partial Summary Judgment, JFC asked the court to find that Illinois Union Insurance Company was obligated to defend it against five claims.<sup>22</sup> The court agreed that four of the claims—all fairly characterized as orders from the EPA, Ecology, and the National Oceanic and Atmospheric Administration (“NOAA”)<sup>23</sup>—constituted “claims” asserting a legal right against JFC.<sup>24</sup> A fifth claim was based on a letter from four other Potentially Responsible Parties, collectively called the Lower Duwamish Waterway Group (“LDWG”). The LDWG letter “encouraged” JFC to join the LDWG’s efforts in investigating and cleaning the Lower Duwamish Waterway. Citing *Gull I*, the court concluded the LDWG letter did not meet the threshold requirement of “immediate and severe consequences” required under *Gull I* because the letter amounted to nothing more than an “invitation for voluntary participation.”<sup>25</sup> In essence, the court rejected the LDWG letter as a claim triggering Illinois Union’s defense obligation because it did not represent a “concrete threat of imminent harm should [JFC] refuse to join.”<sup>26</sup>

### **B. *Gull Industries v. Transamerica Insurance Group (Gull II)***

On May 14, 2015, the King County Superior Court issued an order on a Motion for Partial Summary Judgment in the ongoing dispute between Gull and TIG.<sup>27</sup> In its Motion for Partial Summary Judgment, Gull asked the court to find that TIG owed Gull a defense obligation for 22 service stations.<sup>28</sup> Gull did not assert in its motion that TIG was obligated to defend it for 197 other service stations that were remediated as independent clean-

ups, conceding essentially that no “suit” or “functional equivalent” of a suit had been brought.<sup>29</sup> Of the 22 service stations for which Gull did seek summary judgment, 12 service stations were cleaned up under a voluntary program, such as Ecology’s VCP.<sup>30</sup>

Gull argued that letters from Ecology and the Oregon Department of Environmental Quality, which threatened “immediate and severe” consequences if “Gull does not act to investigate and/or remediate” contamination, triggered TIG’s obligation to defend it.<sup>31</sup> Language cited by Gull as “adversarial” and “coercive” included the following: “further action is required to remediate contaminants at the site,” “action must be taken to remedy the situation,” and “[w]ork must be started immediately.”<sup>32</sup> TIG argued that the language in agency letters cited by Gull was merely a “strategic reiteration of the [Model Toxic Control Act’s] strict liability language.”<sup>33</sup>

The court agreed with TIG, finding that Gull had failed to offer “evidence of any communications by the state or federal environmental agencies...that explicitly or implicitly threaten immediate and severe consequences by reason of contamination.”<sup>34</sup>

### **C. Conclusion**

*Jorgensen Forge* and *Gull II* suggest that the reach of *Gull I* may be more extensive than some initially thought. First, while *Gull I* left open the question of whether participation in Ecology’s VCP would trigger a defense obligation, the court in *Gull II* did not even consider whether participation in the program, in and of itself, would trigger defense obligations. The clear implication from the *Gull II* order is that participating in Ecology’s VCP will not trigger an insurer’s duty to defend. Second, the *Jorgensen Forge* court applied *Gull I* to a different type of insurance product—a recently acquired pollution liability insurance policy—thereby expanding the types of insurance products to which the *Gull I* decision applies. Third, these cases shed light on what kind of communication is sufficiently adversarial or coercive to trigger defense obligations. In *Jorgensen Forge*, the court ruled that the LDWG letter did not trigger a defense obligation, even though the LDWG had the authority to take legal action against JFC if it did not agree to participate in the Allocation<sup>35</sup> process. In *Gull II*, numerous letters from regulatory agencies were all deemed not sufficiently adversarial or coercive to trigger a defense obligation. These cases tell us that, under *Gull I*, in order for a communication to be adversarial or coercive, a communication must do more than state the legal remedies available to the sender. While a Washington court has yet to interpret what constitutes “adversarial or coercive,” it may be that a potentially liable party must receive a draft complaint or be threatened with legal action if action is not taken by a date certain. If the threat of legal action by a date certain or a draft complaint is necessary to trigger an insurer’s defense obligation, the availability of defense costs

under standard CGL policies and other forms of environmental insurance will have been narrowed considerably.

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- 1 181 Wn. App. 463, 473, 326 P.3d 782 (2014).
- 2 It is well established under Washington law that a "suit" is not necessary to trigger a CGL insurer's duty to indemnify. See *Weyerhaeuser Co. v. Aetna Cas. & Surety Co.*, 123 Wn. 2d 891, 902, 874 P.2d 142 (1994).
- 3 *Jorgensen Forge Corp. v. Ill. Union Ins. Co.*, No. 2:13-cv-01458-BJR (W.D. Wash. Apr. 29, 2015).
- 4 A cost allocation is an alternative dispute resolution process by which the past and, if applicable, future costs for investigation and remediation activities (i.e., the response costs) for a contaminated property requiring cleanup are divided among two or more parties, typically based on equitable factors.
- 5 *Gull Industries, Inc. v. Transamerica Insurance Group*, No. 11-2-44427-9 (May 14, 2015).
- 6 181 Wn. App. at 477.
- 7 *Id.*
- 8 *Id.* at 477-78.
- 9 *Id.* at 478.
- 10 *Id.* at 468.
- 11 *Id.*
- 12 *Id.*
- 13 *Id.* at 469.
- 14 In relevant part, the policy language at issue in *Gull I* read as follows: "... and this Company shall have the right and the duty to defend any suit against the Insured seeking damages payable under the terms of this policy...." (State Farm) and "The Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage...." (TIG). *Id.* at 467-68.
- 15 *Id.* at 466.
- 16 *Id.* at 477.
- 17 *Jorgensen Forge v. Ill. Union Ins. Co.*, No. 2:13-cv-01458-BJR, at \*6-7 (W.D. Wash. Apr. 29, 2015).
- 18 *Id.* at \*2.
- 19 *Id.*
- 20 *Id.* at \*2.
- 21 *Id.* at \*2-3.
- 22 *Id.* at \*3-4.
- 23 NOAA serves as a federal the natural resource trustee.
- 24 *Id.* at \*6.
- 25 *Id.* at \*7.
- 26 *Id.* at \*7.
- 27 Order Deny. Pl.'s Cross-Mot. for Part. Summ. J., *Gull Indus. v. Allianz Underwriters Ins. Co., et al.*, No. 11-2-44427-9 SEA (King County Sup. Ct. May 14, 2015).
- 28 *Gull Industries, Inc.'s Cross-Mot. for Part. Summ. J.*, at \*1, *Gull Indus. v. Allianz Underwriters Ins. Co., et al.*, No. 11-2-44427-9 SEA (King County Sup. Ct. March 16, 2015).

29 *Id.* at \*3.

30 *Id.* at \*5.

31 *Id.* at \*3.

32 *Id.* at \*16-18.

33 Reply in Supp. of Def. TIG Ins. Co.'s Mot. for Part. Summ. J., at \*8-9, *Gull Indus. v. Allianz Underwriters Ins. Co., et al.*, No. 11-2-44427-9 SEA (King County Sup. Ct. April 17, 2015).

34 Order Deny. Pl.'s Cross-Mot. for Part. Summ. J., *Gull Indus. v. Allianz Underwriters Ins. Co., et al.*, No. 11-2-44427-9 SEA (King County Sup. Ct. May 14, 2015).

## Growth Management Hearings Board



*By Julie Ainsworth-Taylor, Assistant City Attorney, City of Shoreline*

*The cases shown below represent substantive decisions of the Growth Management Hearings Board from November 1 to June 30, 2015. The synopsis of each case provides key concepts and holdings from the case.*

### ***Hood Canal Sand & Gravel, et al v. Jefferson County, et al*, Western Region Case No. 14-2-0008c, Order Granting Motion (Nov. 12, 2014).**

Don't be afraid to ask the Board for certain things as the Board is understanding about real-world issues. Board granted a motion to alter the briefing schedule when Petitioner's computer crashed and corrupted the prehearing brief. With no objections from respondents or intervenor, a one-week extension was granted.

### ***WEAN v. Island County*, Western Region Case No. 98-2-0023c, Order Granting Continuance (Dec 2, 2014).**

Just because the Board can be understanding doesn't mean that it will let a jurisdiction talk its way out of delay. This case, dating back to 1998, related to critical areas exemptions for agricultural activity in rural lands. Island County has been non-compliant since that time. In the last order, the Board gave the County until November 14, 2014, and the County sought a continuance one week prior to the expiration date. The Board reprimanded Island County, stating that "had the County focused on achieving compliance in accordance with the schedule set forth ... this matter would be nearing resolution." The Board, therefore, denied Island County's request for a continuance until June 2016 and gave them until February 2015.

***Futurewise v. Benton County, Eastern Region***  
Case No. 14-1-0003, Order on Reconsideration (Nov. 17, 2014); Order Granting Certificate of Appealability (Dec. 16, 2014); Order on Invalidity (Jan. 15, 2015); Compliance Order (May 20, 2015).

A party's opportunity to argue a case is in the initial briefing, not during reconsideration. Petitioner asked the Board to reconsider its denial of invalidity, asserting that there was a high risk for vesting. The Board noted that reconsideration is not the time to reargue a case, introduce new facts, or correct errors made by the party. The Board advised that if the petitioner thought there was risk, then a petition to hold a limited scope compliance hearing regarding invalidity can be filed. And this is exactly what the petitioners did, with the Board granting the petition on December 16, 2014 and, on the very next day issuing a Certificate of Appealability in the case. As to the limited scope hearing, the Board considered Futurewise's evidence as to the potential and for vesting if land was annexed, the Board issued a determination of invalidity. The County's response was to repeal the offending legislation—the expansion of the Kennewick Urban Growth Area—and thus, compliance resulted.

***Thompson v. Mercer Island, Central Region***  
Case No. 14-3-0010, Order of Dismissal (Dec. 5, 2014).

The Board took almost all of its 10-page decision to explain how it didn't have jurisdiction to review the decision of the Planning Commission to deny the petitioner's preliminary short plat application. While this decision does nicely lay out the Board's jurisdictional boundaries, to call a preliminary short plat anything other than a project permit subject to the Land Use Petition Act would be a "stretch of the legal imagination."

***Abolins/Steinhoff v. City of Seattle, Central Region***  
Case No. 14-3-0009, Order on Motions (Dec 10, 2014).

The City moved to dismiss most of the petitioner's issues, asserting that they did not pertain to the challenged action or alleged violations of inapplicable GMA requirements or comprehensive plan policies/regulations and that the petitioner lacked standing. Before considering the motion, the Board noted that it rarely considered "summary judgment" motions because it prefers to make its decision on a full record and argument (*see, e.g., WEAN v. Island County, Western Region* Case No. 14-2-0009, Order on Motions (March 26, 2015)). And, if the motion only disposes of some issues, then inefficiency is inherent in the matter. The Board then went on to note that an inartfully worded issue statement can't be read in isolation, so the issues' relation to capital facilities was allowed to move forward. As to standing, while the City asserted petitioners only addressed parks and open space, the Board determined that the participation was

sufficient to "put the City on notice of their concerns about a broad range of density-related issues." Lastly, the Board did agree, in part, with the City's assertion that some of the issues included inapplicable policies/regulations, others did not, but that clarity in the briefing for the hearing on the merits would illuminate the issues.

***Blair, et al. v. City of Monroe, Central Region***  
Case No. 14-3-0006c Order on Motions (Jan. 2, 2015).

In denying a property owner's motion to intervene in compliance proceedings, the Board noted that the interest was not in achieving compliance but in ensuring the City took action so that a rezone could be advanced. The Board reiterated that it had no authority to direct what action the City should take to achieve compliance nor could the property owner. Generally, the Board will permit a property owner to intervene as a matter of course. However, here the Board concluded that the owner's interest would not be impaired because its ability to use its property is not diminished from the status quo should the City decide not to pursue the rezone. All was not lost for the property owner, as WAC 242-03-930 permitted the owner to become a "compliance participant" in all subsequent compliance proceedings.

***Whitten, et al. v. Spokane County, Eastern Region***  
Case No. 14-1-0006c, Final Decision and Order (Jan 7, 2015).

This case was a challenge to Spokane County's zoning regulations that allowed wedding/social events in a specific agricultural zone, alleging it failed to protect agricultural lands. The Board analyzed the challenged action under RCW 36.70A.177's innovative zoning techniques provisions. While the Board did find that under some circumstances weddings/social events could harm agriculture by allowing non-agricultural businesses, this was not the case here because the County had included key protective criteria from the RCW and related WAC and supplemented that criteria.

***Dragonslayer, Inc., et al. v. City of La Center, Western Region***  
Case No. 14-2-0003c, Order Denying Cert. of Appealability (Jan 9, 2015).

The City appeal the Board's August 11, 2014 Final Decision and Order, corrected on Oct. 24, 2014. The City sought a certificate of appealability on the issue of whether GMA planning cities may plan for urban services to federal lands. Even though detrimental delay is a threshold question, which the Board responded to in the negative, it elected to address the other components of a certificate—fundamental, urgent statewide or regional issues and precedential value. Because this case dealt with tribal land adjacent to the city's UGA, the Board answered in the negative to both.



***Snohomish County Farm Bureau v. Snohomish County*, Western Region Case No. 14-3-0013, Order on Motions (Feb. 4, 2015).**

The Farm Bureau challenged the adoption of an interlocal agreement (“ILA”)—between the County and the Snohomish County Diking District. The County moved to dismiss, asserting the Board lacked jurisdiction over the ILA because it related to a project permit. While the Board acknowledged the Farm Bureau’s multiple efforts to protect against the loss of agricultural land to salt water inundation for fish habitat restoration (this being the third case), the Board concluded that the ILA, on its face, is a component of a site-specific project permit and, therefore, no jurisdiction.

***Hood Canal Sand & Gravel, et al. v. Jefferson County*, Western Region Case No. 14-2-0008c, Final Decision and Order (March 16, 2015) and Certificate of Appealability (June 5, 2015).**

This 95-page final decision was related to Jefferson County’s Shoreline Master Program (“SMP”), which had been approved by Ecology. The Board upheld the SMP in all regards. As the June 5 Certificate demonstrates, the petitioners were not pleased with this ruling. The Board opened with a clarification of what it had authority to review when it came to RCW 90.58.120’s reference to “applicable guidelines.” The Board concluded this meant Part II of WAC 173-26 and all of WAC 173-26-010 to 173-26-160, but no other parts of WAC 173-26. The Board reiterated the two standards of review it is required to use for a SMP—clearly erroneous for “shorelines” and clear and convincing for “shorelines of statewide significance.” Several petitioners, including Olympic Stewardship Foundation and Citizens Alliance for Property Rights, and intervenors set forth numerous procedural and substantive issues. Issues related to scientific and technical information supporting the SMP; validity of buffers; regulatory provisions, including non-conforming uses, and much more. It must be noted that constitutional issues were rejected by the Board and a variety of issues were deemed abandoned due to absent or poor briefing. The length of this decision precludes a comprehensive analysis in newsletter format. A practitioner dealing with SMP amendments should independently read this discussion to comprehend the Board’s rationale on the issues based on Jefferson County’s SMP. Based on Ecology’s argument that the subsequent appeals is based on “key concepts under the Shoreline Management Act that are applicable to Ecology’s review and approval of other Shoreline Management Plans statewide,” the Board granted appealability to the three cases filed in the superior court.

***Spokane County, et al. v. City of Airway Heights*, Eastern Region Case No. 13-1-0007, Order of Abeyance (Mar. 20, 2015).**

The Eastern Region has issued several orders permitting the abeyance of a compliance schedule when an appeal is pending in the courts. At times, a stay has been issued by the courts, so the Order of Abeyance recognizes that stay. At other times, as is the case here, the appeal itself may be enough to place compliance proceedings on hold.

***Talis Abolins, et al. v. City of Seattle*, Central Region Case No. 14-3-0009, Final Decision and Order (Apr. 1, 2015).**

GMA for urbanized areas can be difficult. This case dealt with the rezone of a HUB Urban Village in the Rainier Valley. The Board opens this 52-page decision with a nice background of Seattle’s urban village concept and prior board holdings on this concept. Petitioners challenge the substantial increase in land use intensities with this rezone, specifically in relationship to open space, views, capital facilities planning, and coordination with impacted jurisdictions. As to open space, while the Board stated that Seattle couldn’t have it both ways, meaning both enough park space and not enough park space as its report found, the Board concluded that provisions of “design frameworks” that are not adopted as part of the comprehensive plan do support a finding of inconsistency. It is interesting that the Board found the Petitioners did not have standing to raise the “view preservation” claims but then tossing that standing aside, briefly addressed “view obstruction,” pushing the edge of their jurisdictional authority but still finding that the use of aspirational verbs didn’t create binding mandates. The Board then moved on to capital facilities planning, covering such issues as the need to concurrently update a CIP when doing a rezone. The Board sympathized with the petitioners but ultimately found that neither the City’s comprehensive plan nor the GMA required a concurrent CIP update; facilities available at the time of development was the trigger and that was effectuated by annual comprehensive plan updates. As to coordination, once again the Board sympathized with the petitioners’ frustration but found their argument did not support a finding of non-compliance.

***PRSM, et al v. City of Bainbridge Island*, Central Region Case No. 14-3-0012, Final Decision and Order (Apr. 6, 2015).**

As was the case in *Hood Canal*, this lengthy 119-page order pertained to Bainbridge Island’s SMP, as approved by the Department of Ecology. The Board upheld the SMP in all regards. This case was brought by numerous shoreline homeowners and homeowners’ association and challenges just about every aspect of the SMP from procedural issues (notice, opportunity for comment, etc.) to substantive issues (SMP elements, shoreline designation, regu-

latory provisions, scientific/technical information, critical areas within shorelines, etc.). The Board made clear that an intervenor may not raise its own issues, disregarding several arguments made as outside the scope of the intervention. As was the case for *Hood Canal Sand & Gravel*, a synopsis of this case isn't possible in newsletter format given the fact-specific nature of the issues to the City's SMP. Similarly, this case represents a broad challenge to almost every aspect of the SMP amendment process and, as such, practitioners facing a SMP amendment or appeal would benefit from a thorough read.

***Davis v. Stevens County, Eastern Region Case No. 14-1-0001, Order on Motion to Dismiss (Apr. 8, 2015).***

Board dismissed the matter due to the petitioner's failure to timely file a prehearing brief. WAC 242-03-710 permits a motion for dismissal of a matter if a party has failed to file a prehearing brief.

***WEAN v. Island County, Western Region Case No. 98-2-0023C, Order Finding Continuing Non-Compliance (May 1, 2015).***

This case dates back to 1998 and Island County's first comprehensive plan and GMA development regulations. The issue that continues from that case is the County's exemptions from its critical areas regulations for existing, ongoing agricultural activities that are consistent with best management practices in rural zones. In 2004, the Court of Appeals affirmed the Board in this regard and in 2006, the Board found the County's efforts compliance. WEAN, however, appealed, and in 2013 the superior court overruled the Board. In response, Island County enacted an "interim ordinance." WEAN did not object to the substance of the ordinance, only its interim nature. As it had done before, the Board stated that a jurisdiction cannot achieve compliance through the adoption of an interim ordinance. The reason for this is that an interim ordinance will, by its terms, expire in a set period of time. Once the interim ordinance expires, the County will again be out of compliance. A finding of compliance must be based on a permanent ordinance. In addition to this issue, WEAN disagreed about the County's failure to designate certain plant species as having local importance. The County objected, saying this issue was addressed a decade ago and was never challenged in any of the prior appeals. The Board "punted," saying it would address this, if necessary, when a permanent ordinance was enacted.

***Friends of the San Juans, et al. v. San Juan County, Western Region Case No. 13-2-0012c, Order Finding Compliance (May 14, 2015).***

This compliance proceeding related to the Board's finding that San Juan County failed to protect the functions and values of critical areas (Wetlands) when it allowed sleeved and water tight sewer lines and other utility lines within wetlands.

Some of the petitioners believed that compliance should not be found given the pendency of appeals in both the superior court and court of appeals. However, the Board noted that compliance actions are afforded the same presumption of validity as initial enactments and, therefore, absent a stay, the compliance proceedings should continue. There was no objection to the County's compliance efforts in regards to sewer lines but Friends of the San Juans did have issues about utility lines—stating that the new regulations did not have proper oversight, departed from best available science within justification, and were lacking in compensatory mitigation. The Board disagreed, finding the County's actions sufficient and issuing an order of compliance.

***Protect the Peninsula's Future, et al v. Clallam County, Western Region Case No. 00-2-0008/01-2-0020, Order on Invalidity (May 15, 2015).***

This case originated from a 1999 critical areas ordinance, which the Board found non-compliant and invalidated. After a futile attempt to achieve compliance, the County appealed the Board's ruling. The court reversed the Board and remanded. During the pendency of the action, the State Legislature enacted a moratorium on amending critical area regulations, which lasted until 2011. Compliance was re-initiated in 2014 resulting in a second appeal to the court, which, once again, reversed the Board and remanded. A remand hearing was held, with the Board continuing its position that Clallam County's regulations failed to comply with the GMA and should be invalid. A subsequent motion by the County for clarification as to the invalidity determination now sets a new hearing in September 2015.

***Dragonslayer, Inc., et al v. City of LaCenter, Western Region 14-2-0003c, Compliance Order (May 29, 2015).***

This case relates to encouraging urban development outside of the City's UGA and the extension of urban services into a rural area, something the GMA expressly prohibits. Despite two pending court appeals, one in superior court filed by the City of the Board's Final Decision and Order and the other in federal court filed by the Tribe, the Board reviewed the City's compliance efforts (remember the presumption of validity applies to legislation adopted for compliance). The Board was faced with three issues – all related to whether the City's comprehensive plan policies violated the GMA's mandates about containing urban growth in urban areas. The City's removal of "adjacent to" language for a policy was sufficient for the Board to find compliance. Similarly, the City's deletion of language referencing the evaluation of opportunities to coordinate development with the Cowlitz Tribe, when the policy was read alone, was compliant. However, other policies, when standing on their own, did show in-

consistency and non-compliance. Of interest is the Board's holding on a policy that spoke to extending urban services to tribal lands in violation of RCW 36.70A.110(4). The Board concluded tribal lands are not rural lands and, therefore, no violation of RCW 36.70A.110(4).

***WEAN v. Island County*, Western Region Case No. 14-2-0009, Final Decision and Order (June 24, 2015).**

This 50+ page decision deals with the protection of critical areas, specifically fish and wildlife habitat conservation areas, and the inclusion of Best Available Science ("BAS"). This case represents Island County's continued attempts at GMA compliance. While WEAN failed on a few issues, WEAN succeeded on a variety of issues including the foundational need to include BAS when designating and protecting critical areas; the protection of flora and fauna, specifically those rare/unique to Island County. Specific regulations were found in violation of the GMA—reasonable use, beaver dam removal, and exemption for agricultural uses. The Board did take official notice of a variety of documents, apparently not requiring a motion to supplement for reliance on these documents in the decision. Lastly, the Board concluded this matter was of unusual scope and complexity, thereby granting a one-year compliance period.

***Futurewise v. Thurston County*, Western Region Case No. 05-2-0002 Order of Motion for 1-year Extension (June 25, 2015).**

The Board issued yet another one-year extension in this 2005 case dealing with rural densities within Thurston County, a decade after the case was initiated.

## **Decisions of the Pollution Control Hearings Board and the Shorelines Hearings Board, Winter 2015**

*By Tom Morrill, Member of the Pollution Control Hearings Board and Shoreline Hearings Board*

***City of Snoqualmie v. Ecology*, PCHB Case No. 14-064 (Order on Motions for Summary Judgment, February 2, 2015)**

This case involved a penalty issued by the Department of Ecology ("Ecology") to the City of Snoqualmie ("City") due to events that occurred at the City's wastewater treatment plant November 15 through 18, 2013. On November 15, 2013, City Information Technology staff performed work on computers used by wastewater treatment operators. There was a misunderstanding as to the scope of work to be performed. The work involved disconnecting and re-booting the server that housed the facility's automated alarm system software. Upon re-boot, the software failed to establish a connection with the proper database. Thus, the plant's automated alarm system was not operational.

Later that evening, the facility experienced brief power anomalies resulting in the shutdown of Return Activated Sludge pumps, the wastewater aerators, and the headwork's screen motors. However, the ultraviolet disinfection system and the in-plant pump station continued to operate. Because the alarm system was not operational, facility staff were not notified of the system failures and the failures were not discovered until the next day. When the alarm system was reset, the system proceeded to notify the on-call operator for water and sewer of operational problems with the system. The facility operator restarted the failed systems and observed a level of turbidity that indicated the disinfection system may not have been working. The City notified Ecology of the November 15th events on November 18, 2013. Although key systems had shut down, there were no demonstrated exceedances of the facility permit limits.

On May 20, 2014, Ecology issued a Notice of Penalty to the City for alleged violations of three Permit conditions: Condition S3.E.1, immediately report "any failure of the disinfection system"; Condition S4.C, take "all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment"; and Condition S5, "at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) that are installed to achieve compliance with the terms and conditions of this permit." Ecology assessed a total penalty of \$32,000 for the



three violations. The City appealed the penalty and the parties filed cross motions for summary judgment. The Board granted summary judgment on two issues and denied summary judgment on two issues.

First, the Board granted summary judgment to Ecology concerning the alleged violation of Permit Condition S3.E.1. The City argued there was no duty to immediately report because the UV disinfection system remained operational and there were no exceedances of the permit discharge limits. The Board noted that there do not need to be discharge limit exceedances for there to be a permit violation, and determined that the events at the facility were significant enough to be covered by the phrase “any failure” in Condition S3.E.1.

Second, the Board granted summary judgment to Ecology concerning the alleged violation of Permit Condition S5. The City argued that the alarm system was not a part of the facility’s systems of treatment and control used to achieve compliance with the Permit. The Board found that the alarm system was “a related appurtenance” to the facilities treatment systems, and that failure to ensure operation of the alarm system constituted violation of Condition S5.

Finally, the Board denied summary judgment concerning the alleged violation of Condition S4.C, and the reasonableness of the penalty. Ecology argued that the City was required to apply chlorine for disinfection upon discovery of the system failures. The Board determined that there were material issues of fact concerning the reasonable steps the City was required to take to mitigate potential harms associated with the incident, and thus summary judgment was inappropriate. The Board also found that there were material facts in dispute as to the reasonableness of the penalty.

The parties subsequently reached a settlement on the remaining issues, so the case did not proceed to hearing.

***Paul Hagman v. Ecology*, PCHB Case No. 14-016c (Findings of Fact, Conclusions of Law and Order, February 27, 2015)**

Ecology issued a \$1,500 penalty to Mr. Hagman for two violations of the Construction Stormwater General Permit (“CSGP”): (1) failing to implement and maintain best management practices at his construction site, and (2) failing to submit Discharge Monitoring Reports (“DMR”). Mr. Hagman appealed the penalty and, while the appeal was pending, he submitted a Notice of Termination to Ecology, seeking to terminate coverage of the CSGP. Ecology denied the termination request and Mr. Hagman appealed the denial. The appeals were consolidated for hearing.

Prior to hearing, the Board issued summary judgment in favor of Ecology concluding in pertinent part that: (1) Ecology is authorized by RCW 90.48.144 to issue a penalty for violation of the

terms of the CSGP regardless of whether the violation also resulted in violation of water quality standards; (2) the notice and compliance provisions of ch. 43.05 RCW did not preclude issuance of a penalty to Mr. Hagman because the limitation on issuing penalties in RCW 43.05.150 does not apply where the alleged violation concerns the terms of a permit; and (3) the Board has jurisdiction over Ecology’s denial of the Notice of Termination. The Board also rejected Mr. Hagman’s request for a declaratory order as Ecology did not consent to its entry as required by RCW 34.05.240(1).

Following a hearing on the merits, the Board determined that Ecology had met its burden of demonstrating that Mr. Hagman had failed to implement BMPs at the site and had not submitted the required DMRs. The Board further concluded that the penalty was reasonable, and that Ecology’s decision to deny the Notice of Termination was appropriate as the site had not undergone final stabilization.

***Coalition to Protect Puget Sound Habitat v. Pierce County, Taylor Shellfish, and Seattle Shellfish*, SHB Case No. 14-024 (Findings of Fact, Conclusions of Law and Order, May 15, 2015)**

Coalition to Protect Puget Sound Habitat (“Coalition”) challenged an approval by Pierce County (“County”) of a shoreline substantial development permit (“SSDP”) for a geoduck farm in Pierce County. Taylor Shellfish and Seattle Shellfish received an SSDP for an 11-acre commercial geoduck farm on private tidelands located on the east shoreline of Case Inlet. The proposed new farm, called the Haley Farm, will be in the intertidal zone, and is not located on a shoreline of statewide significance.

The County issued the SSDP, in part, because it determined that the Haley Farm site is well-suited for geoduck aquaculture. The site has the requisite substrate and beach topography for geoduck farming. It has clean water with limited pollution sources, and there is no significant upland development in the area. The site is located in a Rural Residential Environment under the Pierce County Shoreline Master Program (“SMP”), and the uplands abutting the farm site are heavily wooded, with the closest residence approximately 2,000 feet away.

The Coalition’s challenge to the SSDP was based in part on potential impacts to the near shore environment, fish, birds and wildlife from site preparation, aquaculture gear, and harvest activities associated with geoduck farming. The Coalition also challenged the mitigated determination of nonsignificance (“MDNS”), contending that the County failed to consider the cumulative impacts associated with the Haley Farm in light of other existing aquaculture and reasonably foreseeable future aquaculture activities.

The Board held a hearing on the merits and heard extensive testimony from expert witnesses

on matters such as the near shore environment, sediment migration, geoduck farming practices, and the potential impacts from plastics associated with aquaculture gear. After weighing the evidence and considering the testimony from the experts, the Board concluded that the Coalition failed to prove the SSDP was inconsistent with the Shoreline Management Act or SMP. The Board also determined that the County had considered impacts from the Haley Farm along with other past, present, and reasonably foreseeable future actions. The Board concluded that the Petitioners had failed to show that the MDNS was clearly erroneous.

The Board ultimately affirmed the SSDP with an additional condition requiring that the applicants maintain a log that tracks the aquaculture gear that is placed on-site for farming activities and the aquaculture gear that is removed from use on the Farm. The purpose of the log is to monitor actual levels of escapement of gear from the Farm. The condition was added in response to evidence presented at the hearing concerning the potential for gear escapement.

*Tom Morrill was appointed in August 2014 to serve on the Pollution Control Hearings Board and the Shorelines Hearings Board.*

*Prior to his appointment, Mr. Morrill was the City Attorney for the City of Olympia for 7 years and the Deputy City Attorney for the City of Olympia for 2 years. Before working for the City of Olympia, Mr. Morrill worked in the Washington State Attorney General's Office for 12 years. During that time, he served as General Counsel to the Washington State Treasurer and represented the Department of Ecology on a wide variety of environmental matters. Mr. Morrill also previously practiced environmental litigation in the Seattle office of Davis Wright Tremaine. Following graduation from law school, Mr. Morrill was a judicial law clerk for the Honorable Robert R. Beezer on the United States Court of Appeals for the Ninth Circuit and for the Honorable William B. Enright in the United States District Court for the Southern District of California. Mr. Morrill earned a B.A. degree from The Evergreen State College and a J.D. from Cornell Law School.*



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