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## Editor's Message



By Diane Meyers, Miller Nash Graham & Dunn LLP

The calendar has turned, and we welcome to the editor desk Valerie Rickman, an attorney with Cascadia Law Group, formerly of the Washington State Attorney General's Office.

Valerie brings with her not only a depth of legal and policy experience, but bona fide editing chops from her days as Editor-in-Chief of the *Washington Journal of Environmental Law & Policy*. We are excited to have her on board.

The Winter edition has the familiar updates from the goings-on at the GMHB, the PCHB, and the SHB, along with land use and federal case law updates. We welcome Julie Ainsworth-Taylor, who takes over the GMHB update reins from Tadas Kisielius and Ed McGuire. Also included are articles ranging from the former ELUL Section Chief's take on the Washington Supreme Court decision on challenges to Kittitas County's revised Comprehensive Plan and development code; to a comprehensive update on revisions to water quality standards flowing from upward adjustments to fish consumption rates; to a discussion of the fallout from the *Gull Industries* decision; to two takes on the future of greenhouse gas regulation in Washington. If you have interest in penning updates or articles, please reach out to us.

We greatly appreciate all of you who continue to volunteer your time and talent to write articles that interest and engage our readers and look forward to working with you in 2015.



Valerie Rickman

## Land Use Planning and Water: A Review and Update



By Tom McDonald, Cascadia Law Group PLLC

In 2007, Kittitas County found itself in the midst of a perfect storm of land use planning under the Growth Management Act ("GMA") and water resource regulation under multiple state laws. Several parties challenged the County's revised Comprehensive Plan and development code before the Growth Management Hearings Board ("GMHB"). This case escalated the politically heated debate occurring in many other local jurisdictions over integrating local governments' land use planning and permitting with state regulations on water availability and management.

Over the next seven years, the GMHB issued a Final Decision and Order and six separate compliance orders. On appeal, the Supreme Court issued a decision affirming the GMHB.<sup>1</sup> In 2014, the Kittitas County Board of Commissioners adopted an ordinance to comply with the Supreme Court decision (Ordinance No. 2014-005). In July 2014, the GMHB reviewed the ordinance and held that Kittitas County was now in compliance with the GMA.<sup>2</sup> The GMHB closed the case, likely to the relief of all parties involved. The new ordinance defines comprehensive water resource requirements for the rural element land use planning under the GMA, and may serve as a template for other local governments.

In *Kittitas County*, the Supreme Court affirmed the GMHB's findings that Kittitas County was not in compliance with the GMA because it failed to protect rural areas, agricultural areas, and water resources in its land use planning under the County's Comprehensive Plan. The Court found that local governments subjected to the GMA must plan for the protection of water resources in their land use planning.<sup>3</sup> The Court held that the County's ordinance updating its subdivision regulations violated the GMA because it authorized the County to separately evaluate subdivision applications for properties that were part of the same development.<sup>4</sup> This would tacitly allow subdivision approvals to

*continued on p. 2*

avoid the requirement of obtaining a water right permit from the state and instead rely on the water code's groundwater permit exemption.<sup>5</sup> The Court concluded:

Without a requirement that multiple subdivision applications of commonly owned property be considered together, the County cannot meet the statutory requirement that it assure appropriate provisions are made for potable water supply.<sup>6</sup>

The Court addressed whether the County may be preempted from adopting ordinances that relate to the regulation of water when the state Department of Ecology (Ecology) is the primary administrator of the water code, specifically under RCW 90.44.040, which limits the appropriation of groundwater to the terms of the groundwater code.<sup>7</sup> The Court dismissed any such argument, finding that while Ecology has the authority to appropriate water, the code does not prevent the County from protecting groundwater from detrimental land uses.<sup>8</sup> The County "must regulate to some extent to assure that land use is not inconsistent with available water resources."<sup>9</sup> This language may be critical in the current Whatcom County litigation discussed below, in which the GMHB has ordered Whatcom County to be more protective of the water resources than Ecology's regulations would otherwise require.

Following the Supreme Court's decision, Kittitas County passed Ordinance No. 2014-005. This ordinance defines the water resource requirements for planning. It acknowledges that under the GMA, the County has the "duty and the authority to protect ground and surface water," and it "may place limitations on the establishment of new uses of groundwater" to protect ground and surface water. The requirements in the code are explicitly "not restrictions on water rights but rather are requirements for the establishment of new uses of water." Based on the unique nature of the state, federal, and tribal water rights in the Yakima River Basin, the ordinance further provides that any new groundwater withdrawals in the basin would, if not mitigated, threaten to interfere with senior water rights, stream flows, and public health and safety, warranting "application of these provisions to existing lots as allowed under RCW 58.17.170(3)."

With this ordinance, rural development in Kittitas County must provide adequate water for domestic use, and residential development will not be approved without adequate water as required by state and local regulations.<sup>10</sup> Under the development regulations, all proposed land division and building permit applicants must submit proof of an adequate water supply and, specific to the issues in the Kittitas County, a "certificate of water budget neutrality" may be required from the Department of Ecology. In addition, as part of settlement with

the other parties in the case, Kittitas County agreed to secure mitigation for historic groundwater uses that present the risk of impacts to more senior water rights and stream flows in the basin.

The impact of the Supreme Court's decision in *Kittitas County* is now being felt elsewhere in the state, including Whatcom County. Like the lengthy legal battle in Kittitas County, Whatcom County has been involved in defending amendments to its comprehensive plan since at least 2005. There the primary challenge has also been in regard to rural land designations. In the first petition for review of Whatcom County's amendments to its comprehensive plan and development regulations, the GMHB determined that the rural densities failed to protect the rural character.<sup>11</sup> The GMHB Final Order was appealed, and eventually the Supreme Court accepted review and in *Gold Star Resorts, Inc. v. Futurewise* issued a decision affirming the Order in part and remanding it in part.<sup>12</sup> The Court affirmed the GMHB's finding that Whatcom County must revise its comprehensive plan to conform to 1997 amendments to the GMA that set out criteria for establishing limited areas of more intensive rural development and rural densities (LAMIRDs). However, the Court also reversed the GMHB's reliance on a fixed standard regarding rural densities, finding that that the GMHB improperly relied on a "bright line" rural density rule of no more than one residence per five acres.<sup>13</sup>

In response to the Supreme Court's decision in *Gold Star Resorts*, Whatcom County amended its ordinances only to have them challenged again before the GMHB. Over the next four years, the GMHB issued additional final orders and compliance orders, continuing to find the County out of compliance with the rural element requirements under RCW 36.70A.070(5)(c). In 2013, the GMHB issued the Final Decision and Order that is the subject of a current appeal.<sup>14</sup> In its 2013 Order, the GMHB recognized that the newest petitions challenging Whatcom County's most recent ordinance, Ordinance No. 2012-032, included a challenge beyond the previous issue of Lake Whatcom water resources, and now included the protection of surface and groundwater resources under RCW 36.70A.070(5)(c)(iv). The GMHB stated the issue as:

Failure to protect surface and groundwater quality, failure to protect water availability, failure to protect water for fish and the comprehensive plan is internally inconsistent.<sup>15</sup>

In addressing this issue, the GMHB made findings that are seen as broadly defining the local jurisdictions' authority to determine water availability for the purposes of regulating land use planning and developments. The Order went beyond the issue in *Kittitas County* which, as described above, rejected an ordinance that allowed separate subdivision applications for properties that were part of the same

development to rely on the water codes groundwater permit exemption instead of applying for a water permit from the Department of Ecology. This practice has been described as the “daisy-chaining” of plat applications.<sup>16</sup>

In a lengthy and detailed analysis that relies on several decisions by the Supreme Court, including *Kittitas County* and *Postema v. Washington Pollution Control Hearings Board*<sup>17</sup> the GMHB held that protection of instream flows in the rural element of the comprehensive plan is paramount in land use planning under the GMA, and where groundwater withdrawals will impair instream flows to the detriment of the instream resources, Whatcom County must protect these groundwater resources from further depletion, notwithstanding that the withdrawals may be legally authorized under the groundwater permit exemption and also under Ecology’s regulations.

Notably, the GMHB did not give the County the discretion to simply rely on Ecology’s Nooksack River instream flow rules, Ch. 173-501 WAC, which do not explicitly govern permit-exempt groundwater withdrawals. Rather, the GMHB independently considered all of the evidence presented, including no less than 13 reports and studies, to conclude that while Whatcom County’s ordinances did not allow “daisy-chaining,” they failed to protect ground and surface waters from permit-exempt uses.<sup>18</sup> Under *Postema*, the County must develop regulations that meet a standard of no impairment to instream flows by further groundwater withdrawals.<sup>19</sup> If the groundwater withdrawal is in a basin that is closed to new surface water appropriations or if Ecology has set minimum flows that are not consistently met, “there is a presumption that no additional water is legally available.”<sup>20</sup>

As in *Kittitas*, here the GMHB relied on several sections of the GMA regarding the protection of the environment and water resources. The GMA was passed by the legislature with stated goals that planning consider conserving fish and wildlife habitat and the protection and enhancement of water quality and the available water supply.<sup>21</sup> In planning for rural areas, set forth in a county’s rural element of its comprehensive plan, the land use patterns and development are to be compatible with use of the land by wildlife and fish, and are to be consistent with groundwater and surface water discharge.<sup>22</sup> The rural element is to include measures that protect surface and groundwater resources.<sup>23</sup> The land use element of the comprehensive plans must protect the quality and quantity of the groundwater used for public water supplies.<sup>24</sup>

Pursuant to these goals, local governments must make a finding that there is appropriate provision made for potable water supply prior to approving subdivision applications.<sup>25</sup> Further, prior to approval of a building permit, the permit applicant must have a certificate of available water issued by an authorized purveyor (e.g., city water) that has

available water under a water right.<sup>26</sup> Otherwise, the applicant must have a water right or be able to verify the existence of an adequate water supply.<sup>27</sup>

In *Knight*, JZ Knight challenged the City of Yelm’s approval of several developments based on the provision that adequate water would be available pursuant to pending water right applications filed with Ecology. The Thurston County Superior Court held that preliminary plats must be conditioned to ensure the water supply at final plat, which would mean there are adequate water rights.<sup>28</sup> The Court found:

5. RCW 58.17.110 and YMC 16.12.170 make clear that Yelm must make findings of “appropriate provisions” for potable water supplies by the time of final plat approval. *Based upon the present record and this Court’s interpretation of the law, such findings would require a showing of approved and available water rights sufficient to serve all currently approved and to-be approved subdivisions. A finding of ‘reasonable expectation’ of potable water based upon Yelm’s historical provision of potable water would be insufficient to satisfy this requirement.*<sup>29</sup>

The Superior Court decision was appealed on the issue of standing; however, the Supreme Court opined:

Determining whether there are adequate water sources to serve the Tahoma Terra development is certainly within the public interest the City Council must consider before approving the plat application.

Whatcom County and Futurewise have appealed the GMHB decision on different grounds.<sup>30</sup> Ecology filed an amicus curiae brief in support of the County, and challenges the GMHB’s ruling that the County failed to comply with the GMA. Ecology’s decision to provide legal argument is significant. Ecology argues that the GMHB misinterpreted the scope of the Nooksack River instream flow rule. Ecology’s position is that a county’s comprehensive plan and development regulations comply with the GMA if they are consistent with Ecology’s regulations and determination of the availability of water in the basin. The County has the discretion to be more restrictive, but the GMHB erred in requiring a more restrictive approach.

As seen above, much of the current debate regarding the determination of adequate water supplies is within the context of the permit exemption for a groundwater permit. This is because it is an area where there is no clear governmental authority over the right of a person to develop a water right under the exemption.

A summary of the recent history of the legal battles over the exemption is helpful to understand these recent GMHB decisions. RCW 90.44.050 ex-

empties specific groundwater uses from the application and permitting process:

*[A]ny withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, ....*

(emphasis added). The Attorney General's Office had been the primary source for legal analysis regarding the exemption. Attorney General Eikenberry opined that RCW 19.27.097 provides that an applicant for a building permit must provide evidence of an adequate supply of potable water. Further, the authority to make this determination is the local agency that issues building permits.<sup>31</sup> In 1997, the Departments of Health and Ecology requested a formal attorney general opinion regarding the application of the groundwater exemption to developments that generally considered the exemption as allowing 5,000 gallons per day ("gpd") per well. In October 1997, Attorney General Gregoire issued a formal Attorney General Opinion ("1997 AGO Opinion No. 6"). A key finding of the AGO provides:

Where a project is to develop land and supply the development with domestic water from several wells, and each well will pump less than 5,000 gallons per day but all the wells together will pump more than 5,000 gallons per day, the project is considered a single withdrawal of ground water and is not exempt from the permit requirements of chapters 90.44 and 90.03 RCW.

While the 1997 AGO Opinion No. 6 does not analyze how the exemption from a groundwater permit relates to land use decisions, the scope and use of the exemption directly impacts the local government's review of available potable water supply, particularly for subdivision approvals under RCW 58.17.110. The determining factor is defining the "project." Either the subdivision proposal requires less than 5,000 gpd and is exempt from the permit process, or it is part of a larger "project" that will exceed 5,000 gpd, thereby requiring a permit. The AGO does not define "project" but does reference the case law developed under SEPA and the legislative intent to consider the impact of a proposal as a whole, and not separate it into small parts (based, for instance, on the number of wells).<sup>32</sup> The AGO, however, also recognizes that it is responding to a specific fact pattern, and if the facts varied, "such as withdrawals independently made by different persons, or a series of separate withdrawals

occurring over a long period of time, the answer might well be different."<sup>33</sup>

In 1999, the 1997 AGO Opinion No. 6 was challenged by a developer in Yakima County who had a 20-lot subdivision with no permitted water rights. Because new water rights were not being issued due to a lack of water supply, the developer began developing the lots under the theory that one to two lots can be served by a single well that withdraws water under the permit exemption of RCW 90.44.050. Each well would not exceed the 5,000 gpd limitation of the exemption. This was the classic "daisy-chaining" of the permit exemption.

Ecology filed action in Superior Court seeking declaratory and injunctive relief on the basis of the 1997 AGO opinion. On appeal of the Superior Court's decision, which held for the developer, the Supreme Court essentially confirmed the analysis of the AGO.<sup>34</sup> The court found that under the plain reading of the statute, whether the use was for a single use for a single home or a group use by several homes, the 5,000 gpd limit applied.<sup>35</sup> The Court distinguished individual lot owners, stating that while a developer may not claim multiple exemptions for homeowners, the individual homeowners may, independent of the development, seek to use water under the permit exemption.<sup>36</sup> Almost predicting the course of the cases to follow, the Court said that the "use of the exemption by developers will predictably and greatly expand unpermitted water use in the state."<sup>37</sup>

Ecology has no specific authority to deny individuals on a case-by-case basis the right to commence water use under the exemption or rely on the exemption for subdivision approval. Nor can Ecology limit the uses under the groundwater permit exemption.<sup>38</sup> Each exemption is independent and is authorized without considering the limitations of other exemptions; for example, the exemption for one-half acre of irrigation cannot be limited by including it within the 5,000 gpd limitation for domestic use.<sup>39</sup> Nor can Ecology impose lower or different limits on the quantity of water than authorized in statute. There is no authority for a "partial withdrawal."<sup>40</sup> Ecology may, however, regulate existing water uses that are created under the groundwater exemption to protect senior water rights from impairment.<sup>41</sup> Ecology also has the authority to promulgate a rule that "withdraws" the ground water from "further appropriations" when sufficient information is lacking for making "sound decisions."<sup>42</sup>

Ecology's authority to protect senior water rights from impairment includes the authority to regulate permit exempt groundwater withdrawals for the protection of minimum instream flows that are established in Ecology's regulations prior to the groundwater withdrawal.<sup>43</sup> However, when Ecology closes a surface water from further appropriation, it has determined that no water is available, and must deny any applications for a groundwater permit if

it would have any effect on the flow of the surface water.<sup>44</sup> The closure itself does not, however, allow Ecology to regulate groundwater withdrawals under the permit exemption. This is the crux of the debate in *Hirst* regarding Ecology's role. The GMHB held that Whatcom County must ensure that land use development does not allow a groundwater withdrawal under the permit exemption if it will affect the flow of the surface waters.

The *Kittitas* decision and the forthcoming decision in *Hirst* are important at several levels. These decisions will guide the local governments and the state agencies regarding decisions over resources historically thought to be solely in the jurisdiction of the state and primarily the Department of Ecology. These decisions will challenge the very attributes of water law through local land use planning and decisions rather than the traditional elements of water law, both in water availability and quality. They will decide whether under the GMA, the local jurisdictions should or should not defer to the discretion of the state agencies.

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- 1 *Kittitas County, et al v. EWGMHB*, 172 Wn.2d 144, 256 P3rd 1193 (2011).
- 2 *Kittitas County Conservation Coalition, et al. v. Kittitas County*, Order Finding Compliance, Case Nos. 07-1-0004c and 07-1-0015 (August 13, 2013).
- 3 *Kittitas County v. EWGMHB*, 172 Wn.2d at 177–80.
- 4 *Id.*
- 5 *Id.*
- 6 *Id.* at 180.
- 7 *Id.* at 178.
- 8 *Id.*
- 9 *Id.*
- 10 Kittitas County's Comprehensive Plan, Rural Lands, Chapter 8 (GPO 8.23, 8.30).
- 11 *Futurewise v. Whatcom County*, GMHB Case No. 05-2-0013, Final Decision and Order (Sept. 20, 2005).
- 12 *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 222 P 3d 791 (2009).
- 13 *Id.* at 734–35 (citing *Thurston County v. WWGMHB*, 164 Wn.2d 329, 357–60, 190 P.3d 38 (2008)).
- 14 *Hirst, et al. v. Whatcom County*, GMHB Case No. 12-2-0013 (June 7, 2013) (on appeal *Whatcom County v. Hirst, et al.*, Court of Appeals, Div. 1, No. 70796-5-I.).
- 15 *Id.* at 12.
- 16 *Id.* at 40.
- 17 142 Wn.2d 68, 11 P.3d 726 (2000).
- 18 *Hirst*, at 42.
- 19 *Id.* at 40.

- 20 *Id.* at 42.
- 21 RCW 36.70A.020; *Hirst*, at 20–23.
- 22 RCW 36.70A.020; *Hirst*, at 20–23.
- 23 RCW 36.70A.070(5)(c)(iv); *Hirst*, at 20–23.
- 24 RCW 36.70A.070(1); *Hirst*, at 20–23.
- 25 RCW 58.17.110; *Hirst*, at 20–23, (citing *Kittitas County*, 172 Wn.2d at 178–79, and *JZ Knight v. City of Yelm, et al.*, 173 Wn.2d 325, 267 P.3d 973 (2011)).
- 26 RCW 19.27.097; *Hirst*, at 20–23.
- 27 *Id.*
- 28 Thurston County Superior Court Case No. 08-2-00489-6 (Amended Findings and Conclusions, November 7, 2008).
- 29 *Id.* at 5–6 (emphasis added).
- 30 *Whatcom County v. Hirst et al.*, Court of Appeals, Division I, No. 70796-5-1.
- 31 AGO 1992 No. 17.
- 32 See 6 Wash. Att'y Gen. Op. 7 n.6 (1997).
- 33 *Id.* at 7, fn. 7.
- 34 *Ecology v. Campbell and Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002).
- 35 *Id.* at 12.
- 36 *Id.* at 14 n. 4.
- 37 *Id.*
- 38 6 Wash. Att'y Gen. Op. (2009).
- 39 *Id.*
- 40 *Id.*
- 41 6 Wash. Att'y Gen. Op. 17, fn.8 (1997).
- 42 RCW 90.54.050.
- 43 See Ch. 173-500 WAC; *Postema v. PCHB*, 142 Wn.2d 68, 11 P.3d 726 (2000).
- 44 *Postema*, at 95.

## Washington's Efforts to Address Fish Consumption When Regulating Toxics



By Doug Steding, Miller Nash Graham & Dunn LLP

### Introduction

Washington is known for its fish. Our economy, heritage, and history is, in many ways, tied to this natural resource, and we are somewhat unique among states because we have a group of federally-recognized tribes with court-affirmed treaty rights to take fish and shellfish from state waters. Against this backdrop, one of the biggest environmental debates of our generation is unfolding in Washington. It centers on how much fish residents of Washington consume from the state's waters, the shifting sources of toxics to state waters, and important policy decisions regarding what is an acceptable level of cancer risk associated with consuming fish.

This complex debate has come to the forefront over the past two years as Washington's Department of Ecology works to revise Washington's Water Quality Standards ("WQS") for toxic chemicals to be more protective of individuals who consume high amounts of fish from Washington waters. This process—if done right—could establish useful national precedent in how to address inputs of toxics into the nation's waters that come from sources not regulated by the Clean Water Act ("CWA"), but, if done wrong, could end with standards that are unachievable, leading to regulatory gridlock, litigation, and little to no improvement to environmental quality.

### Background

Washington, like most states, administers the CWA under authority delegated to it by the Environmental Protection Agency ("EPA"). This delegated program results in the Department of Ecology ("Ecology") having the primary rulemaking and administrative responsibilities for implementing the CWA in Washington, including adopting WQS,<sup>1</sup> issuing National Pollution Discharge Elimination System ("NPDES") permits to entities that discharge pollution to state waters, and producing regular assessments of the status of water quality for water bodies in the state.

Central to this program are the WQS, which provide the basis for protecting and regulating the quality of waters in Washington.<sup>2</sup> Those standards include specific designated uses of surface waters in the state, along with numeric criteria that are considered protective of those uses.<sup>3</sup> In addition, the standards contain policies designed to protect high-quality waters, and tools that specify how the

standards are to be implemented in permits. The numeric criteria thresholds are deemed protective of use of waters by aquatic life (such as temperature, dissolved oxygen, and turbidity), and human contact with waters through swimming or other recreational uses.<sup>4</sup>

Finally, and relevant to this article, Washington's WQS include numeric criteria for toxics chemicals, currently through cross-reference to the National Toxics Rule ("NTR"), a rule promulgated by EPA for 14 states in 1992 in response to those states not having adopted criteria for toxics on their own.<sup>5</sup> The toxics criteria contained in the NTR are numeric criteria for both fresh and marine waters for 94 chemicals, and include criteria protective of ecological receptors, along with Human Health Criteria ("HHC") based on both cancer and non-cancer effects. This article focuses on those criteria based on cancer effects, because those effects are at the center of the controversy regarding fish consumption rates and the revision of Washington's toxics criteria.

The HHC for carcinogens contained in the NTR are based on a cancer risk rate (one in a million) and other exposure parameters (body weight, lifespan, etc.). Coupled with this risk rate and these exposure parameters are estimates of the amount of a particular toxic compound that is consumed by humans from Washington's waters. This consumption estimate is based on two measures, the first being an estimate of the amount of water an individual may consume directly, the second being the amount of fish an individual may consume from the state's waters. The latter quantity used in the NTR is 6.5 grams of fish per day, or roughly one meal per month.

### The Controversy Develops

It has been recognized for years that the fish consumption rate used in the NTR is likely not representative of consumption rates of some populations in Washington.<sup>6</sup> However, the regulatory efforts to address this issue came to the forefront in the Pacific Northwest in 2010 when EPA disapproved Oregon's proposed human health criteria for its WQS because the fish consumption rate used in calculating those criteria (17.5 grams per day) was too low.<sup>7</sup> Oregon's Department of Environmental Quality responded to this disapproval by revising its criteria using a consumption rate of 175 grams per day, and EPA then approved those revised criteria in late 2011.<sup>8</sup>

Washington followed quickly Oregon's efforts, announcing its intent to revise Washington's WQS for toxics in late 2011, and beginning the rulemaking process in September 2012. At this point, and in recognition of the need to balance many differing stakeholder interests, Ecology convened a "Delegates' Table," to solicit feedback from those stakeholders regarding how to revise Washington's WQS to account for higher fish consumption rates. Ecology invited multiple groups, including tribes,

businesses, environmental groups, and agricultural industries, to participate in a series of meetings designed to address the complex scientific and public policy issues associated with the rulemaking.<sup>9</sup> Notably, a number of tribes and environmental organizations declined to participate in this process, and in doing so, expressed frustration regarding their perceived delay by Washington in addressing this issue.<sup>10</sup>

Ecology proceeded with its Delegates' Table meetings over a course of a year and a half, with the first being held on October 29, 2012 and the last on February 10, 2014. A central theme in these meetings was the widespread recognition that Washington's revised WQS, like Oregon's, would likely have to be based on a fish consumption rate measured in meals per day rather than meals per month as in the NTR. Although the math is not simple, a 20- or 30-fold increase in fish consumption rate was projected to result in a corresponding decrease in numeric criteria, that dischargers must comply with—and many municipalities and dischargers were concerned that these new, more stringent criteria, would be impossible to meet. As a result, although these meetings centered on all aspects of the upcoming rulemaking efforts, much of the dialogue was focused on the development of implementation tools such as variances, compliance schedules, and intake credits that would be necessary to use to help dischargers come into compliance with more stringent WQS for toxics.

Over this same time period, Ecology addressed the technical question of what was the appropriate fish consumption rate that it should use when revising Washington's WQS for toxics. Those efforts resulted in a technical document that summarized a number of public health studies that looked at fish consumption rates and sources of fish to subpopulations throughout Washington.<sup>11</sup> That document concluded that average fish consumers for the populations studied consumed 60–80 grams of fish per day (10 times the amount applied by the NTR, or about a third to a half of an average serving of fish) and upper-level consumption ranged as high as almost 800 grams per day (many servings of fish per day). From that, Ecology derived three alternative fish consumption rates that were discussed as part of the Delegates' Tables meetings: 125 grams/day, 175 grams/day, and 225 grams/day. A consensus developed among interested parties that Ecology likely would adopt the 175 grams/day number—the same rate used in Oregon's revised standards.

When it became apparent that Ecology might follow Oregon in adopting water quality criteria using this higher rate, the regulated community reacted strongly because of their concern that a 30-fold decrease in Washington's WQS for toxics would impose a significant economic burden on dischargers. In June 2013, Boeing reportedly held up budget negotiations, seeking money from the legislature to fund a study to look at the fish consumption

issue closely.<sup>12</sup> Later in 2013, the Association of Washington Businesses ("AWB") released a study that concluded the new standards based on the higher consumption rate would, in some cases, be impossible to meet because no technology existed to treat municipal wastewater to meet those standards.<sup>13</sup> The AWB study also concluded that trying to meet those standards would cost consumers, on average, an additional \$200 month in higher utility bills, with no certainty that such a capital investment in wastewater treatment would result in any demonstrated improvement in water quality. Industrial dischargers shared the municipal concerns, with some estimating that the cost of complying with standards that were almost 30 times more stringent may be on the order of \$7 billion.

The level of fear in the regulated community was matched by frustration felt by environmental groups and tribes. Over the past decade, some of those stakeholders had repeatedly taken the position that the efforts to revise Washington's WQS were taking too much time. Citing that delay, many of these groups declined to participate in the Delegates' Table process, and instead turned to the courts in what ended up as a failed attempt to try to compel EPA Region 10 to use its oversight authority under the CWA and adopt WQS for toxics for Washington using a higher consumption rate.<sup>14</sup> In addition to this lawsuit, tribal representatives increasingly took Governor Inslee, Ecology, and EPA to task, arguing that not promulgating new standards amounted to the state not protecting tribal treaty interests.

In addition to the significant challenges the regulated community would face in trying to comply with numeric criteria that were 30 times more stringent than the NTR, this debate raised policy questions regarding how Washington should address the shifting sources of toxics to Washington's waters. Forty years ago, the Clean Water Act was designed to address end-of-pipe pollution, but many of the carcinogens in Washington's fish come from diffuse sources not within the reach of the CWA. For instance, polycyclic aromatic hydrocarbons come from oil deposited on streets, or leach from pilings treated with creosote. Although PCBs were banned in the United States in the 1970s, PCBs are still being deposited to Washington waters after being transported through the atmosphere from other countries, and emerging research shows that PCBs may be inadvertently created through chemical reactions in paint such as the yellow marking paint used on roadways. Reducing risk from these types of pollutants is a modern challenge, and one that may not be met solely through application of the CWA, and many stakeholders argued to Ecology that simply lowering the state's WQS for toxics would not result in improvement of water quality because these diffuse sources would not be included in discharges controlled under the revised standards.

In sum, the regulated community was worried that new standards that were much more stringent would require enormous expenditures to try to meet those standards with no chance of success. Tribes and environmental groups strongly desired lower numeric criteria that reflected the higher rate of fish consumption in Washington, and were frustrated by the perceived delay in adjusting Washington's WQS to account for higher fish consumption rates. Ecology and the governor's office were tasked with balancing these competing interests, while, at the same time, wrestling with the fact that the regulatory tools of the CWA did not seem to line up with modern sources of toxic chemicals to Washington's waters.

### **Governor Inslee's Proposed Solution**

On July 10, 2014, Governor Inslee announced his preferred path forward.<sup>15</sup> This announcement came after extensive dialogue with stakeholders, including Ecology's Delegates' Table and other discussions the governor's office had with businesses, municipalities, the tribes and environmental groups.

As expected, Governor Inslee's proposal consisted of increasing the fish consumption rate used in calculating water quality criteria for toxics from 6.5 to 175 grams per day. But, to avoid a dramatic decrease in the numeric criteria, he proposed to increase the acceptable cancer risk level used in calculating Washington's human health criteria tenfold, from one in a million to one in a hundred thousand.

He combined these two changes with an "anti-backsliding" caveat: if a calculated numeric criterion using these new parameters was less stringent than the old NTR criterion, the old criterion would be retained. And, recognizing the disconnect between the CWA's regulatory scope and the present sources of chemicals to Washington's waters, the governor included in his proposal some additional actions to reduce toxics from non-CWA regulated sources, including giving Ecology new authority to regulate toxics in consumer products.

The governor's announcement changed the nature of the controversy. Before, it was one centered on how much fish people eat from Washington's waters, and whether water quality criteria calculated using a higher fish consumption rate were attainable by dischargers. After the governor's announcement, the public debate turned to the issue of cancer risk and what risk level was acceptable in calculating new standards.

### **Ecology's Draft Rule Language**

At the governor's direction, Ecology issued draft revisions to Washington's Water Quality Standards on the last day of September.<sup>16</sup> That draft proposal paralleled the governor's proposal from the summer, including a fish consumption rate of 175 grams, a cancer risk level of one in one hundred thousand, the "anti-backsliding" approach, and a

series of compliance tools such as variances, compliance schedules, and intake credits that were designed to mitigate the impacts the new standards would have on the regulated community.

The draft rule language was not well-received by tribal and environmental interests. While those stakeholders applauded the inclusion of the higher fish consumption rate, they criticized the increase in cancer risk level. In contrast, the regulated community has been largely silent—and the consensus seems to be that the governor's proposal and Ecology's draft rule presents a workable solution to the issues raised earlier in the stakeholder process.

### **EPA's Reaction**

Once finalized at the state level, Washington's WQS must ultimately be approved by EPA Region 10 as consistent with the goals of the CWA before they can be used by Ecology in administering the water quality program. As a result, tracking EPA's evolving view of the above proposal is useful in predicting whether the rules adopted by Ecology will ultimately pass EPA's muster when reviewed for consistency with the CWA.

As the above events unfolded, EPA Regional Administrator Dennis McClerran sent a number of letters to stakeholders and Ecology expressing EPA's preferences regarding the details to be included in Ecology's updated human health criteria. In April 2014, in response to pressures placed on EPA by the Northwest Indian Fisheries Commission due to tribal frustration regarding the perceived delay in Ecology revising the WQS for toxics, McClerran sent a letter to Maia Bellon, Director of the Department of Ecology, informing her that EPA would take steps to amend the NTR by May 31, 2015 if Ecology did not submit a rule for EPA review and approval by the end of 2014.<sup>17</sup>

Then, on July 1, 2014, McClerran sent a letter to Senator Doug Erickson, the chair of the Washington State Senate Energy, Environment and Telecommunications Committee, noting that EPA has "recommended" to Ecology that it retain the one in a million excess cancer risk level, and commenting that EPA saw no reason for Ecology to adjust this risk level.<sup>18</sup> On December 18, 2014, McClerran sent another letter to Maia Bellon encouraging Ecology's efforts to revise its WQS, but at the same time noting that EPA would begin developing new WQS for toxics for Washington, and would implement those standards by August 2015, if Ecology failed to produce a final rule for EPA review and approval before that time. However, in that letter, McClerran made no mention of a preferred cancer risk level, but did note that EPA would base its review of Ecology's draft rule on "an assessment of downstream waters protection, environmental justice, federal trust responsibility, and Tribal treaty rights," strongly suggesting that EPA still considers issues such as fish consumption rate and excess cancer risk as open.<sup>19</sup>



## Next Steps

Ecology is planning to begin the formal adoption of the draft rule in early 2015, and if Ecology gets through the rule-making process in an efficient manner, Ecology may get through the state rule-making process in time to meet EPA's August 2015 deadline. However, the governor is running a parallel legislative initiative intended to address the disconnect between current sources of toxics to Washington's waters and sources regulated under the CWA, and is working to introduce legislation that will give Ecology authority to regulate toxics in consumer products. The governor's hope is that he can present those legislative changes to EPA along with the proposed rule—potentially dampening the impact of the increased cancer risk by demonstrating to EPA that Washington is taking a holistic approach to addressing toxics in surface waters. Ultimately, whether Ecology ends up submitting a final rule to EPA for approval may depend on the legislature's ability to address and pass the governor's agenda—no small task given the significant budgetary issues posed by the *McCleary* mandate and the governor's other ambitious agenda regarding climate change.

Parties have already litigated this issue, and we can reasonably expect future litigation. If the governor fails to address tribal concerns, we may see litigation regarding tribal fishing rights, something similar to the recent decision out of the Western District of Washington finding that Washington's Department of Transportation was infringing on treaty rights by designing, constructing, and maintaining culverts that impeded fish passage. Disapproval of Washington's standards by EPA may also lead to legal challenges by stakeholders in federal court, and stakeholders may end up challenging Ecology's final rule in state court as well. In sum, the fish consumption controversy has been—and likely will continue to be—one of the most prominent environmental challenges Washington is addressing.

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1 WAC Ch. 173-201A.

2 WAC 173-201A-010.

3 WAC 173-201A-200 (fresh water); WAC 173-201a-210 (marine water).

4 See WAC 173-201A-200 (fresh water) and WAC 173-201A-210 (marine water). Washington's WQS also include numeric criteria for nutrients in lakes (WAC 173-201A-230) and radioactive substances (WAC 173-201A-240).

5 57 Fed. Reg. 60,848 (Dec. 22, 1992).

- 6 Columbia River Inter-Tribal Fish Commission, A Fish Consumption Survey of the Umatilla, Nez Perce, Yakama, and Warm Springs Tribes of the Columbia River Basin, Technical Report 94-3 (Oct. 1994).
- 7 Letter from Michael A. Bussell, Director, Office of Water and Watersheds, EPA Region 10, to Neil Mullane, Administrator, Water Quality Division, Oregon Department of Environmental Quality (June 1, 2010).
- 8 Letter from Michael A. Bussell, Director, Office of Water and Watersheds, EPA Region 10, to Neil Mullane, Administrator, Water Quality Division, Oregon Department of Environmental Quality (Oct. 17, 2011) available at [www.deq.state.or.us/wq/standards/docs/toxics/humanhealth/EPAApprovalLetter20111017.pdf](http://www.deq.state.or.us/wq/standards/docs/toxics/humanhealth/EPAApprovalLetter20111017.pdf) (last visited January 6, 2015).
- 9 A summary of the Delegates' Table and its meetings is available at [www.ecy.wa.gov/programs/wq/swqs/delegatestable.html](http://www.ecy.wa.gov/programs/wq/swqs/delegatestable.html) (last visited January 5, 2015).
- 10 Invitation letters and responses from stakeholders are available at [www.ecy.wa.gov/programs/wq/swqs/DelagateTbInviteltrs.html](http://www.ecy.wa.gov/programs/wq/swqs/DelagateTbInviteltrs.html) (last visited January 5, 2015).
- 11 Washington Department of Ecology, Technical Support Document, A Review of Data and Information about Fish Consumption in Washington, Version 2.0, Publication No. 12-09-058 (January 2013) available at [www.ecy.wa.gov/programs/tcp/regsfish/2012/FCRdoc.html](http://www.ecy.wa.gov/programs/tcp/regsfish/2012/FCRdoc.html) (last visited January 5, 2015).
- 12 Erik Smith, *Fish-Consumption Issue Surfaces as Major Issue as Lawmakers Hammer Out Budget Deal*, Washington State Wire, June 26, 2013, available at <http://washingtonstatewire.com/blog/fish-consumption-issue-is-hangup-as-lawmakers-hammer-out-budget-deal> (last visited January 5, 2015).
- 13 HDR, Treatment and Review Assessment, December 4, 2013, available at [www.awb.org/hdrtechreport/](http://www.awb.org/hdrtechreport/) (last visited January 6, 2015).
- 14 See *Puget Soundkeeper Alliance v. United States Environmental Protection Agency*, Western District of Washington Case No. C13-1839-JCC, filed Oct. 11, 2013.
- 15 Governor Jay Inslee, Policy Brief, Ensuring Safe, Clean Water for Healthy People and a Strong Economy, July 2014, available at [www.governor.wa.gov/documents/2014\\_clean\\_water\\_policy\\_brief.pdf](http://www.governor.wa.gov/documents/2014_clean_water_policy_brief.pdf) (last visited January 6, 2015).
- 16 Washington Department of Ecology, Water Quality Program, Toxics Language and Table, Preliminary Draft WAC 173-201A-240 (Sept. 30, 2014), available at [www.ecy.wa.gov/programs/wq/swqs/WAC240ToxicSPRELIMdraftfinal.pdf](http://www.ecy.wa.gov/programs/wq/swqs/WAC240ToxicSPRELIMdraftfinal.pdf) (last visited January 6, 2015).
- 17 Letter from Dennis McLerran, Regional Administrator, EPA Region 10, to Maia Bellon, Director, Washington Department of Ecology (April 8, 2014), available at [www.epa.gov/region10/pdf/water/wqs/nwifc\\_fcr-wahhc\\_bellon\\_ltr\\_04\\_2014.pdf](http://www.epa.gov/region10/pdf/water/wqs/nwifc_fcr-wahhc_bellon_ltr_04_2014.pdf) (last visited January 6, 2015).
- 18 Letter from Dennis McLerran, Regional Administrator, EPA Region 10, to The Honorable Doug Erickson, Energy Environment and Telecommunications Committee Chair (July 1, 2014).
- 19 Letter from Dennis McLerran, Regional Administrator, EPA Region 10, to Maia Bellon, Director, Washington Department of Ecology (December 18, 2014).

## Triggering the Insurer's Duty to Defend for MTCA Claims: *Gull Industries, Inc. v. State Farm Fire & Casualty Company*



By Jack Zahner, Bradley Hoff, Alexandra Gilliland, and Stephanie Weir, Foster Pepper PLLC



In June 2014, the Court of Appeals of the State of Washington, Division I, published a decision in *Gull Industries, Inc. v. State Farm Fire & Casualty Company*,<sup>1</sup>

which will significantly impact parties seeking coverage for environmental remediation costs. The decision is important for owners and operators of contaminated properties in Washington because it directly affects the scope of general liability coverage available for certain costs incurred to address liability under Washington's Model Toxics Control Act (MTCA). Specifically, the *Gull Industries* court held that an owner's voluntary remediation of a contaminated property – for example, through participation in the Department of Ecology's (Ecology) Voluntary Cleanup Program (VCP) – does not constitute a "suit" triggering a duty to defend under a general liability policy. Rather, only "an explicit or implicit threat of immediate and severe consequences by reason of the contamination" from Ecology or another third party triggers that duty to defend.<sup>2</sup>

Notably, the *Gull Industries* decision does not affect or undermine existing Washington law holding that voluntary remediation triggers an insurer's duty to indemnify its policyholder for MTCA remediation costs. But the *Gull Industries* decision is significant because Washington's regulations regarding the handling of environmental claims provide that investigative costs incurred "to determine the source of contamination, the type of contamination, and the extent of the contamination" fall within the duty to defend.<sup>3</sup>

### A. Factual Background

*Gull Industries* arose out of the discovery of contamination on a Gull gas station property located in Sedro-Woolley, Washington. During its period of ownership, Gull was insured under general liability insurance issued by Transamerica Insurance Group (TIG). From 1972 until 1982, Gull leased the station to Hayes and Mary Johnson, who were insured by State Farm. Both the TIG and the State Farm policies imposed a duty to defend the respective poli-

cyholders against "any suit," but neither policy defined the term "suit."

In 1984, Gull discovered that underground storage tanks at the Sedro-Woolley station released petroleum while the Johnsons leased the station. In 2005, Gull notified Ecology of the release of petroleum product at the station. Ecology responded with a standard letter acknowledging Gull's notice of suspected contamination and intent to pursue voluntary remediation. Ecology's letter stated that the property would be added to the Leaking Underground Storage Tank (LUST) database – with the caveats that "inclusion in the database does not mean Ecology has determined you are a potentially liable person under MTCA," and that Ecology had not formally reviewed or approved of the remedial actions planned by Gull.<sup>4</sup>

Ecology's letter also confirmed that because the reported groundwater and soil contamination was above applicable cleanup levels, the site would be placed on "Awaiting Cleanup" status, and that Gull would need to follow specific MTCA requirements. Ecology did not expressly or impliedly describe any specific consequences Gull would face if it failed to satisfy MTCA requirements.

In 2009 and 2010, Gull demanded that TIG and State Farm cover its MTCA defense, investigation, and remediation costs. Both insurers refused to provide coverage for Gull's defense and investigative costs on the ground that the letter from Ecology did not suggest or identify Gull as a potentially liable party ("PLP") subject to MTCA cleanup requirements. Gull then sued TIG, State Farm, and five other insurers in Skagit County, seeking a declaratory judgment of coverage and asserting claims for breach of contract, breach of fiduciary duty, and bad faith. The suit was subsequently consolidated with a separate King County suit brought by Gull regarding potential coverage for several other contaminated sites.

State Farm and TIG moved for summary judgment arguing that no "suit" had been initiated that would trigger the duty to defend under the policies. Gull contended that the duty to defend had been triggered because Gull faced strict liability for environmental investigation and remediation costs under MTCA. The trial court granted State Farm and TIG's motion for summary judgment holding that neither insurance company had a duty to defend. Gull appealed.

### B. The *Gull Industries* Decision

In its decision, the Court of Appeals first reiterated the distinction between an insurer's duty to defend and its duty to indemnify. The court noted that the question of "whether an insured could seek indemnification coverage for costs expended to clean up contaminated property under MTCA, even where [Ecology] made no overt threat of formal legal action" had been answered in the affirmative by the Washington State Supreme Court

in *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*<sup>5</sup> The court then observed, however, that the question of whether administrative actions falling short of an actual lawsuit triggered the insurer's duty to defend is a "vigorously contested issue" nationally.<sup>6</sup>

The Court of Appeals identified three different approaches taken by non-Washington courts that had addressed the issue:

- 1) a narrow construction of the term "suit," and resulting requirement that a formal complaint be filed in order to trigger the duty to defend;<sup>7</sup>
- 2) a broader construction of the term "suit" that allowed the issuance of a potentially responsible party (PRP) letter to trigger the duty to defend;<sup>8</sup> and
- 3) consideration of the coerciveness of the specific regulatory action taken by the government in determining whether the duty to defend is triggered.<sup>9</sup>

The Court of Appeals ultimately adopted the third approach, holding that the agency action must be "adversarial or coercive in nature in order to qualify as the functional equivalent of a 'suit.'"<sup>10</sup> The court determined that the policy of incentivizing voluntary cleanup, which the court in *Weyerhaeuser* found compelling with respect to triggering the duty to indemnify, was of "limited significance" with respect to triggering the duty to defend.<sup>11</sup> Instead, the court held that a duty to defend necessarily implies a need to "defend against something," and that the language in Ecology's letter did not establish any type of adversarial or coercive action that Gull needed to defend.<sup>12</sup>

The court reasoned that an insurer's duty to indemnify an insured for voluntary remediation costs does *not* automatically trigger a duty to defend where the latter duty is expressly conditioned upon the existence of a "suit." The court held that where the term "suit" is not explicitly defined – as was the case under the TIG and State Farm policies – that term "is ambiguous in the environmental liability context and may include administrative enforcement acts that are the functional equivalents of a suit."<sup>13</sup> The court further held that in order to be the functional equivalent of a suit triggering a duty to defend, the "agency action must be adversarial or coercive in nature" – that is, it must "communicate an explicit or implicit threat of immediate and severe consequences by reason of the contamination."<sup>14</sup>

Applying these standards, the court affirmed the trial court's grant of summary judgment on the ground that Ecology's letter to Gull "did not present an express or implied threat of immediate and severe consequences by reason of the contamination."<sup>15</sup> Absent any suggestion of some imminent consequence, the court concluded that the Ecology letter lacked the necessary "adversarial [or] coer-

cive" language suggestive of a "suit." Importantly, however, the court did not expressly require that such a threat from the Ecology be made in writing.

### C. The Impact of *Gull Industries*

The *Gull Industries* decision has already had an observable impact on the interactions between policyholders and their insurers, with insurers asserting the decision as the basis for refusing to cover investigative or defense costs associated with a contaminated property. The *Gull Industries* decision presents particular problems for policyholders without the funds to investigate known or suspected contamination in the absence of insurance coverage. As a consequence, *Gull Industries* may put such policyholders in a state of limbo after the initial discovery of soil or groundwater contamination. Without insurance funding, these policyholders might not be able to investigate and delineate contamination on their property or, consequently, determine the appropriate remediation options. This "Hobson's choice" and the resulting delay could result in contamination remaining in place longer and may result in contamination migrating further from the source, which brings the potential to drive up remediation costs and, somewhat ironically, the amount insurers will be obligated to indemnify.

In light of the *Gull Industries* decision, a party seeking to obtain insurance coverage for "defense costs" as defined under Washington's insurance regulations for environmental claims should seriously consider the potential consequences of engaging in the standard VCP process. Because the *Gull Industries* decision suggests that the letters that Ecology commonly issues to VCP participants do not constitute a "suit" triggering the insurer's duty to defend, VCP participation could actually limit access to available insurance coverage. Such a disincentive for VCP participation would be expected to increase Ecology's cost and burden associated with remediating contamination in Washington.

Owners and operators of contaminated properties should consider carefully whether VCP participation makes sense. A policyholder seeking insurance coverage for incurred "defense costs" associated with VCP participation should ensure it fully understands Ecology's position regarding the consequences of non-participation, and should have Ecology memorialize that position in writing.

In addition, a legislative solution is an option. For example, Oregon enacted a significant amendment to the Oregon Environmental Cleanup Assistance Act (the OECAA Amendment) that, among other changes, interprets the term "suit" broadly in the context of an environmental claim under an insurance policy to include instances when an agency "directs, requests or agrees that a policyholder take action with respect to contamination within the State of Oregon,"<sup>16</sup> and provides that environmental investigation costs and remediation costs incurred pursuant to a voluntary agree-

ment or consent decree may not be denied by an insurer on the ground that the expenses constitute “voluntary” payments.<sup>17</sup>

The *Gull Industries* decision does not address whether communications with private non-governmental entities constitute the functional equivalent of a suit and thus trigger an insurer’s duty to defend. A policyholder that receives an “adversarial or coercive” communication from a person or entity other than a governmental agency—for example, a demand letter or threat of legal action by a neighboring property owner—should consider notifying its insurer immediately about that communication.

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- 1 *Gull Indus., Inc. v. State Farm Fire & Cas. Co.*, 181 Wn. App. 463, 326 P.3d 782 (2014).
- 2 *Id.* at 466.
- 3 *See* WAC 284-30-930(3).
- 4 Letter from Gayle Garbush, Dep’t of Ecology, to Gull Industries Inc. (Nov. 29, 2005).
- 5 *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 874 P.2d 142 (1994).
- 6 *Gull Indus.*, 181 Wn. App. at 473.
- 7 *See* *Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co.*, 166 Ill.2d 520 (1995); *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 20 (Me. 1990); *Technicon Elecs. Corp. v. Amer. Home Assur. Co.*, 141 A.D.2d 124, 145-46 (1988); *Aetna Cas. & Sur. Co. v. Gen Dynamics Corp.*, 968 F.2d 707, 713-14 (8th Cir. 1992).
- 8 *See* *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 315 (Minn.1995) *overruled on other grounds by* *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009); *Coakley v. Me. Bonding & Cas. Co.*, 136 N.H. 402, 417-18 (1992); *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng’g. Co.*, 326 N.C. 133, 154 (1990); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1206 (2d Cir. 1989); *Morrisville Water & Light Dep’t v. U.S. States Fid. & Guar. Co.*, 775 F. Supp 718, 731-32 (D.Vt. 1991).
- 9 *See* *Hazen Paper Co. v. U.S. Fid & Guar. Co.*, 407 Mass. 689, 694-97 (1990); *Prof’l Rental, Inc. v. Shelby Ins. Co.*, 75 Ohio App. 3d 365, 372 (1991); *Hartford Accident & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 296-97 (Ind. Ct. App. 1997); *Ryan v. Royal Ins. Co. of Am.*, 914 F.2d 731, 741 (1st Cir. 1990).
- 10 *Gull Indus.*, 181 Wn. App. at 477.
- 11 *Id.* at 478-79.
- 12 *Id.* at 479.
- 13 *Id.* at 465.
- 14 *Id.* at 466.
- 15 *Id.* at 478.
- 16 ORS §465.479(2)(b).
- 17 ORS §465.479(2)(c).

## Climate Change and Clean Energy

### A Snapshot of Two Recent and Significant Reports Issued Under Governor Inslee’s 2014 Climate and Clean Energy Executive Order, and the Governor’s Subsequent Clean Energy and Pollution Limits Proposals.



By Leslie Seffern and Rod Brown

Governor Inslee issued his Washington Carbon Pollution Reduction and Clean Energy Action Executive Order 14-04 on April 29, 2014. One of numerous objectives of the Executive Order is “to meet our statutory commitment [to reduce greenhouse gas emissions statewide], to do our part in preventing further climate change, to capture the job growth opportunities of a clean energy economy, and to meet our obligation to our children and future generations.”

Under the executive order the governor’s office, state agencies, public entities and other organizations are working to develop and implement programs to reduce greenhouse gas emissions and promote clean energy in the following sectors and categories:

- **Carbon emissions** – Governor Inslee established a Carbon Emissions Reduction Taskforce to provide recommendations on the design and implementation of a market-based carbon pollution program.
- **Coal-fired electricity imported from other states (“coal-by-wire”)** – State agencies are directed to work with key utilities to reduce, and eventually eliminate, the use of electrical power produced by coal.
- **Clean transportation** – The state Department of Transportation will lead an effort with other agencies and governments to promote strategies, policies, and investments that support electrification of our transportation system, lower-emission multi-modal options, and clean fuels.
- **Clean technology** – The state Department of Commerce will work with Washington State University and others on a program to develop and deploy new renewable energy and energy efficiency technologies, including those with an emphasis on solar power.
- **Energy efficiency** – Commerce is directed to work with WSU and others to significantly

improve the energy performance of public and private buildings.

- **State government operations** – The state Department of Enterprise Services will lead efforts to achieve carbon reduction and energy efficiency improvements throughout state government including meeting goals established by Governor Inslee’s Results Washington.
- **Carbon pollution reductions** – The state Department of Ecology will review the state’s greenhouse gas emission reductions in RCW 70.235 and recommend updates.

Building on the work of the Climate Legislative and Executive Workgroup established by the legislature in 2013 to recommend greenhouse gas emissions reduction programs, the executive order directs that additional actions be taken now. A key action is the formation of the Carbon Emissions Reduction Taskforce (CERT) that was directed to recommend, by November 2014, a carbon emission limits and market mechanisms program for Washington. The program is intended to help meet greenhouse gas emissions reductions established by the legislature in 2008 for the state as a whole.<sup>1</sup>

In addition to the work of the CERT, a key step directed by the executive order is for the Office of Financial Management (OFM) to evaluate a clean fuel standard that reduces the carbon intensity of fuel over time. Because the transportation sector is responsible for almost half of the state’s greenhouse gas emissions, the executive order’s focus on transportation fuels is fundamental to achieving the statewide greenhouse gas emissions reductions.

Based in part on the CERT and OFM reports, on December 17, 2014, Governor Inslee announced a slate of proposals to curb pollution, and transition Washington to cleaner sources of energy.

The CERT report, OFM’s report and the December 17, 2014 Proposals are described below in more detail.

**CERT Process:** As discussed above, the executive order created the CERT. The governor appointed 21 leaders from business, labor, health, and public interest organizations to serve on the Taskforce. He appointed Ada Healey from Vulcan and Rod Brown from Cascadia Law Group to co-chair the Taskforce.

The executive order defined the scope of the CERT members’ discussions and perspectives, particularly:

- The drivers for action cited in the executive order, including the University of Washington’s findings related to effects of climate change on the economy, infrastructure, natural systems, and human health of the region;
- The Climate Legislative and Executive Workgroup finding that our state is not on

track to meet its statutory carbon emission reductions; and

- The governor’s specific request to “provide recommendations on the design and implementation of a carbon emission limits and market mechanisms program for Washington.”

The CERT process followed this charge. In particular, the governor did not ask the CERT whether or not the state should adopt a market mechanism, but rather if the state did, how could that best be done. In that context, the CERT maintained a balanced focus on the two primary market mechanisms typically associated with carbon emissions reduction: cap and trade, and carbon tax.

The CERT explored the experience of other jurisdictions with these market mechanisms, including the cap and trade systems used in the European Union and California and the carbon tax used in British Columbia.

The CERT structured its discussions according to an eight-topic Evaluation Framework. The topics reflected the objectives set out in the executive order (e.g., cost impacts to consumers and workers, protecting low-income households, and assisting energy-intensive, trade-exposed businesses), as well as key interests and needs expressed early in the process by CERT members. This framework is described in the CERT’s final report, and the governor expressed interest in using it as he and the legislature discuss climate legislation.

**CERT Findings:** The most unexpected CERT finding was that the two mechanisms—cap and trade and carbon tax—are not as different as people commonly believe. Despite the frequent debates between proponents of one mechanism versus the other, the evidence from real-world experience shows that the two mechanisms can be designed to be very similar to each other—not identical, but close. In particular, the CERT found that both mechanisms hold the potential to make unique contributions to the state’s policy and programmatic mix:

- Both approaches internalize a price on carbon, instead of allowing its costs to be imposed on others;
- Both approaches provide greater compliance flexibility than other regulatory approaches and therefore hold potential for supporting greater economic efficiency of emissions reduction; and
- Both approaches allow for coordinating with other jurisdictions with the prospect of adding momentum to motivate still more jurisdictions to move forward on carbon emissions reductions.

The two approaches have different inherent strengths and weaknesses, but the experience of other jurisdictions signals that there are specific

design elements and approaches available to mute or manage any deficiencies. The CERT found that “both come with advantages, while their disadvantages can be mitigated such that the differences between the two can be minimized.” That said, the governor and the legislature will have to be careful how they design any policy. Otherwise, a carbon tax could fail to achieve the emissions reductions needed, or a cap and trade system could impose unnecessary costs.

Importantly, the CERT also found that reaching the state’s carbon emissions reductions will require a comprehensive policy approach, because a market mechanism alone is unlikely to produce the needed reductions. In other words, the state will need to use many tools to reduce carbon emissions, not just a market mechanism. Also, the CERT noted that implementation of a market mechanism “requires thoughtful harmonization with Washington’s existing and potential future policy framework.” The state should use many tools, and should be careful to harmonize them for maximum efficiency and effectiveness.

Another surprising finding applied to the transportation sector. Even though the executive order did not ask the CERT to opine on this sector, the CERT members could not ignore the importance of a sector that creates 46 percent of the state’s carbon emissions. Because a market mechanism will not achieve all of the reductions needed in transportation, the CERT found that “a [transportation related] policy design going forward needs to address an integrated approach.” The CERT identified several aspects of this design, including: land use, equitable transit-oriented development, vehicle electrification, and the needs of low-income, vulnerable, and rural communities.

Finally, the executive order did not ask the CERT to opine on how the legislature should use any revenue generated from a carbon tax or from the auction of cap-and-trade allowances, but the CERT reported on five categories of potential uses:

- Address competitiveness impacts for trade-exposed industries;
- Support the central emission reduction objective of the policy;
- Address any prospective adverse impacts on economic and racial equity;
- Provide for measurable improvements to public health impacts; and
- Support adaptation investments to help, for example, agriculture to adjust to temperature and precipitation impacts.

The CERT noted several general principles that should apply to any use of revenues:

- The use of revenues needs to be calculated with the assumption that emissions will in

fact decline per the state’s statutory reductions. They are inherently transitional, as society moves toward a less carbon-intensive future;

- Revenue use can be vulnerable to budgetary pressures, so there is a need to protect the integrity of original revenue use intentions; and
- How revenues are reinvested is just as important as, or more than, the actual price on carbon. Thus understanding and carefully crafting revenue recycling options is critical.

The CERT submitted its final report to the governor on November 17, 2014. The governor is expected to use the CERT’s findings and observations as he crafts policy going forward.<sup>2</sup>

**OFM’s Clean Fuel Report:** Under the Executive Order, OFM was directed to evaluate the technical feasibility, costs and benefits, and job implications of adopting standards that would reduce the carbon intensity of fuels. OFM’s evaluation builds on a study commissioned by the Washington State Department of Ecology to assess greenhouse gas reductions under a low carbon fuel standard, and updates the study to reflect current data. The earlier study found that volumes of alternative fuels would increase, petroleum consumption would decrease, greenhouse gas emissions would decrease, and there would be small impacts on the state economy.<sup>3</sup> Because the transportation sector is responsible for almost half of the state’s greenhouse gas emissions, focusing on transportation fuels is fundamental to achieving the statewide greenhouse gas emissions reductions.

**OFM’s Analysis:** OFM issued its final report on December 12, 2014. It incorporates the input of subject matter experts, affected industries, and public interests. The report analyzes the impacts of a standard that would reduce transportation fuel carbon intensity by 10 percent, from 2012 levels by 2026, with reductions beginning in 2017 of 0.25 percent. The overall carbon intensity of transportation fuels is measured by the “well-to-wheel” greenhouse gas emissions per unit of energy produced. Included in the well-to-wheel emissions calculation are the emissions produced during feedstock production/recovery, feedstock transport to the fuel production plant, fuel production, fuel transport to refueling stations, combustion in the vehicle, and any indirect emissions from land use change.

**OFM’s Conclusions:** OFM’s report<sup>4</sup> concludes that for minimal potential increases in gas and diesel prices (2 cents/gallon in 2020 and up to 14 cents/gallon by 2026) there will be a number of important benefits of a low carbon fuel standard including:

- Reductions in cumulative greenhouse gases from 2017-2026 ranging from 3.25 percent to 3.5 percent when the carbon intensity of transportation fuels is reduced by 10 percent;

- Reductions in greenhouse gases ranging from 5.7 to 9.7 percent from transportation fuel in 2026 relative to business as usual;
- Increased volumes of alternative fuels;
- Decreased petroleum consumption; and
- Increasing jobs, personal income, and gross state product in Washington.

The CERT and OFM reports are encouraging in finding that the governor's policies in the executive order<sup>5</sup> will achieve the greenhouse gas emissions reductions the legislature established for Washington state.

**December 17, 2014 Proposals:** On December 17, 2014, Governor Inslee announced a slate of four categories of proposals that build on the executive order to transition to cleaner energy, and meet the statutory statewide greenhouse gas emission reductions. First, the Carbon Pollution Accountability Act would create a market-based program that limits carbon pollution and requires major polluters to pay for their emissions. Second, to provide cleaner transportation options for consumers, proposed legislation would do three things: (1) extend incentives for electric vehicles, (2) create an electric vehicle infrastructure bank, and (3) allow Washington to adopt a zero emission vehicle or "ZEV" program to encourage sales of zero emission vehicles such as electric plug-in vehicles. Informed by OFM's Clean Fuel report, showing no significant economic effects of a clean fuel standard, Department of Ecology will draft a clean fuel standard rule and solicit review and comments from legislators, stakeholders, and the public. After the stakeholder process, and based upon legislative proposals and progress this session, the decision will be made whether to initiating formal rulemaking to adopt the standard.

Third, to promote stronger growth in the clean energy industry, the governor proposes investing in the State Clean Energy Fund for research, development, and deployment of new renewable energy, and energy efficiency technologies; funding other technology development efforts including a new research building and additional test beds at the University of Washington Center for Advanced Materials and Clean Energy Technologies; and legislation to be proposed by Washington State University Energy Office to expand incentives for solar energy. Finally, the governor is proposing several initiatives to lower energy costs through greater energy efficiency; capital budget investments including weatherization projects for low-income homeowners; and energy efficiency projects on public buildings.

More information about the proposals can be found at: <http://bit.ly/PollutionActionWA>.

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- 1 See RCW 70.235.020(1)(a) (calling for reductions in greenhouse gas emissions to 1990 levels by 2020; to 25 percent below 1990 levels by 2035; and to 50 percent below 1990 levels by 2050, or 70 percent below the state's expected emissions that year).
- 2 The final report is available at [www.governor.wa.gov/issues/climate/cert.aspx](http://www.governor.wa.gov/issues/climate/cert.aspx).
- 3 See Washington State Department of Ecology, *Path to a Low-Carbon Economy, An Interim Plan to Address Washington's Greenhouse Gas Emissions*, (2010).
- 4 The OFM report is available at [www.ofm.wa.gov/initiatives/cleanfuelstandards/default.asp](http://www.ofm.wa.gov/initiatives/cleanfuelstandards/default.asp).
- 5 The Governor's Executive Order is available at [www.governor.wa.gov/issues/climate/default.aspx](http://www.governor.wa.gov/issues/climate/default.aspx).

## How A British Columbia-Style Revenue-Neutral Carbon Tax Would Work In Washington State

By William N. Appel

The lack of any prospect of federal action by either the United States or Canada to impose a price on carbon in fossil fuels and their products has shifted the burden of action onto their respective subdivisions. In 2008, British Columbia took the first step by enacting its Carbon Tax Act, which is worth perusing.<sup>1</sup> The British Columbia Ministry of Finance website expresses the ministry's hope to integrate its scheme with other jurisdictions:

As other jurisdictions, especially within North America, introduce similar carbon taxes or carbon pricing, government may again review and consider changes to the carbon tax.<sup>2</sup>

There are two basic ways to impose a price on carbon. You could impose an excise tax directly upon it as a component of fossil fuels or their products (structured so that it cannot be taxed more than once), which is proposed by Carbon Washington.<sup>3</sup> Or you could create a "cap-and-trade" market for the carbon content of fossil fuels and their products. "Cap-and-trade" relies on a governmental entity establishing and operating a market for carbon trading, the price of which will fluctuate as the market varies over time for the right to burn fossil fuels to produce carbon dioxide. Unlike "cap-and-trade," a carbon tax avoids the second-order carbon market uncertainty. This is particularly advantageous in determining the feasibility of major projects requiring long permitting periods and major financing to bring on line.<sup>4</sup>

This article describes how a carbon tax modeled on the British Columbia example would work. Because Washington taxes are collected within a constitutional and statutory scheme different from British Columbia's, the mechanisms, and in some cases, the legal rationales, differ. That said, there is nothing to prevent a close functional fit between the British Columbia and Washington carbon taxing systems as suggested by the B.C. Ministry of Finance.

A Washington version of a B.C.-style carbon tax proposal will, in all likelihood, rely on the state constitutional authorization of an excise tax. The proposed Washington version is encapsulated in the ballot title prepared by the Office of the Washington Secretary of State in connection with Carbon Washington's latest submission to that office in preparation for submission to the legislature in March 2015 and if necessary to the voters in November 2016:

This measure would impose a tax on certain fossil fuels, phase in a one percentage point retail sales tax reduction, reduce certain taxes on manufacturing and processing, and increase the working families tax exemption.

All legislation reflects policy, perhaps none more so than initiatives and legislative actions creating new chapters of the Revised Code of Washington. A carbon tax, whether enacted by the legislature or by the people, is no exception. Like all policy-oriented legislation, the devil is in the details, some of the more interesting of which are described below for the most recent iteration of the Carbon Washington proposal. (Minor changes are likely as Carbon Washington finalizes policy in the months ahead.)

### A. Imposition of the Tax

The carbon tax would be an excise tax imposed only once upon the earlier of the first sale (as under Chapter 82.08 RCW) or use (as under Chapter 82.12 RCW) of fossil fuels in the state of Washington. All acts taxed take place within the state, and similar to the taxation of fossil fuels imported into the state, the tax would extend to the use of electric power wherever generated, measured by the fuel used to generate the power consumed within the state. The tax rate would be \$15.00 per metric ton (1,000 kilograms) of carbon dioxide for the first year, \$25.00 per metric ton for the second year, and increasing thereafter at the rate of about 5 percent each 12-month period up to a maximum of \$100.00 per metric ton calculated in dollars of the year the tax is first imposed.

The tax rate would be applied to the carbon content of fossil fuels. Carbon content would be determined by application of data regularly published by the U.S. Energy Information Administration, Department of Energy, or its successor as of January 1 of each year.

The tax, subject to the exemptions listed below, would be broadly applied. While the state is prohibited from taxing municipal corporations (including cities and counties) for local purposes,<sup>5</sup> there is nothing preventing the state from taxing such municipal corporations for general state purposes.<sup>6</sup> Moreover, in the case of fossil fuels used in interstate commerce, a state's reach is subject only to federal preemption if and when expressly exercised (which it has not yet done).<sup>7</sup> The carbon content of fossil fuels whether manufactured within or without the state would be taxed if consumed in Washington. This even-handedness insulates the tax from allegations of impermissibly burdening interstate commerce.<sup>8</sup> It should also be noted that the state taxes itself for the motor vehicle excise tax,<sup>9</sup> a policy carried over into the proposed carbon tax scheme.

The United States itself is immune from direct state taxation,<sup>10</sup> although contractors to the United



States, to whom Washington's taxing power expressly extends,<sup>11</sup> can be taxed by states even though the cost of state taxation is passed through to and ultimately borne by the federal government.<sup>12</sup> Thus, while the federal government is not directly taxable by the state, contractors to both state and federal governments would be taxed and pass on to both entities the costs of carbon incurred in performing their contracts. This will encourage the use of non-fossil energy sources in both bidding for and performance of contracts in this sector of the economy.

The carbon content of fossil fuel used to generate electricity consumed in Washington state is included in the tax, regardless of whether generation occurred within or outside the state. The inherent carbon content of imported electricity would be determined by consulting Fuel Mix Disclosure Reports from utilities; any "undeclared resources" on these reports will be conclusively presumed to be one metric ton of carbon per megawatt hour, which is the U.S. average for coal-fired generation. Carbon content not declared or declarable on the requisite tax return filed with the Department of Revenue would result in a conclusive presumption that the fuel used was coal. In the case of electric power generation, application of this presumption would result in one metric ton of carbon per megawatt hour.

## B. Exemptions

The exemptions discussed below are typical and generally mirror existing state sales and use tax exemptions on goods and particularly fuels, and so do not discriminate against interstate commerce.<sup>13</sup>

1. Fuel entering the state already in the operating fuel tanks of motor vehicles, vessels, locomotives and aircraft;
2. Certain fossil fuels used solely for agricultural purposes;
3. Fuel purchased for public transportation; and
4. Fuel purchased for private nonprofit transportation.

## C. Revenue Neutrality: the Use of Funds

Imposing a charge on carbon is not primarily for the purpose of raising funds as in cases of real estate and B&O taxes. A carbon tax is primarily behavioral, similar to so called "sin taxes" on cigarettes and alcohol, designed to achieve an environmental benefit without further burdening an already challenged economy and particularly those struggling hardest. The carbon tax proceeds are therefore "recycled" in the following manner:

1. The state sales and use taxes imposed under Chapters 82.08 and 82.12 RCW respectively would track the phase-in of the carbon tax by a reduction of the state portion of the sales tax by 0.5 percent the first tax year, and an additional 0.5 percent reduction the second

tax year. Reduction of the state sales tax automatically reduces the state use tax *pari passu*.<sup>14</sup> Locally-imposed sales taxes authorized under Chapter 82.14 RCW would be unaffected. This is an overall refund benefitting all consumers, whether natural or corporate persons. Based on current budgetary estimates, when fully phased in this would mean an approximate annual \$1.7 billion refund to as broad a constituency as would pay the carbon tax.

2. Virtually all manufacturing B&O taxes would be effectively repealed by reduction to a uniform rate of .001 percent of gross manufacturing income. This leaves in place existing manufacturing income reporting so that the state remains aware of the state of its economy. The reasoning for this reduction is to address impacts on energy-intensive businesses that compete with businesses outside of the state. Under current budgetary estimates, this would result in an annual refund of approximately \$200 million. While the tax coupled with effective repeal of the manufacturing B&O tax might have little or no initial net impact on manufacturers' overall tax burden, this structure allows manufacturers to improve their profits and competitive position by reducing their use of fossil fuels.

3. The Working Families Exemption,<sup>15</sup> created in 2008 but never funded, provides a sales and use tax refund to qualifying low income persons who have filed for similar relief under an analogous federal Earned Income Tax Credit.<sup>16</sup> This program's current maximum rebate of \$50 would increase to a phased-in maximum of the greater of \$100 or 25 percent of the credit for which the applicant is qualified under the federal program. The state program would be funded to the extent estimated annually by the Department of Revenue to be sufficient. Carbon Washington estimates this tax program would require annual funding of approximately \$200 million. Because the flow of funds is provided by statute, funding of this program would cease to be subject to the budget process.

Those interested in determining the estimated cumulative effect on their personal finances if this program becomes law might want to experiment with the carbon tax calculator at <http://carbon.cs.washington.edu>.

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- 1 The British Columbia Carbon Tax Act, SBC 2008 Chapter 40 can be found at [www.bclaws.ca/Recon/document/ID/freeside/00\\_08040\\_01](http://www.bclaws.ca/Recon/document/ID/freeside/00_08040_01).
- 2 [www.fin.gov.bc.ca/tbs/tp/climate/carbon\\_tax.htm](http://www.fin.gov.bc.ca/tbs/tp/climate/carbon_tax.htm).
- 3 <http://carbonwa.org>.
- 4 The Washington Governor's Carbon Emissions Reduction Taskforce studied approaches to impose a price on carbon and recently released a report, which is available at [www.governor.wa.gov/issues/climate/cert.aspx](http://www.governor.wa.gov/issues/climate/cert.aspx). Governor Inslee's decision, looking toward a cap-and-trade approach, is broadly disclosed in his press release available at <http://www.governor.wa.gov/news/releases/article.aspx?id=389>.
- 5 *Larsen v. Seattle Popular Monorail Authority*, 156 Wn.2d 758, 131 P.3d 892 (2006); Wash. Const. art. 11, § 12.
- 6 *Sator v. State Dept. of Revenue*, 89 Wn.2d 338, 348, 572 P.2d 1094 (1977).
- 7 *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 106 S. Ct. 2369, 91 L. Ed. 2d 1 (1986).
- 8 *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (1940).
- 9 See RCW 82.36.240.
- 10 *M'Culloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1814).
- 11 Wash. Const. art. VII, § 3.
- 12 *U.S. v. New Mexico*, 455 U.S. 720, 737, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982).
- 13 *Maryland v. Louisiana*, 451 U.S. 725, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981).
- 14 See RCW.82.12.020(4).
- 15 RCW 82.08.0206, which is actually a rebate program.
- 16 26 U.S.C. § 32.

## Federal Case Law Update



By Chris Zentz, Tyson Kade, and Matt Love

### I. Endangered Species Act ("ESA")



***San Luis & Delta-Mendota Water Auth. v. Locke*, No. 12-15144, 2014 WL 7240003 (9th Cir. Dec. 22, 2014).**

In *San Luis & Delta-Mendota Water Authority v. Locke*, the U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the district court's summary judgment in favor of defendants—federal agencies and intervenor-environmental groups—in an action regarding a formal biological opinion ("BiOp") developed by the National Marine Fisheries Service ("NMFS"). The BiOp addressed the impact of continuing the diversion, storage, and conveyance of water from several California Central Valley rivers ("Central Valley Project") on certain threatened and endangered salmonid species located in the San Joaquin River Delta. Because the BiOp concluded that continued operation of

the Central Valley Project would jeopardize the ESA-listed salmonid species, NMFS required the Bureau of Reclamation ("Bureau")—which is the entity tasked with overseeing the Central Valley Project—to modify the way in which it pumped water out of the impacted rivers.

Plaintiffs, which consisted of a number of groups that rely on the water from the Central Valley rivers covered by the BiOp, challenged the BiOp on the grounds that several of its elements violated the arbitrary and capricious standard of the Administrative Procedures Act ("APA"). While the district court agreed and invalidated several portions of the BiOp, the Ninth Circuit reversed and concluded that the district court failed to give NMFS the substantial deference that was due under the APA. As an initial matter, the Ninth Circuit determined that the district court improperly relied upon extra-record, expert opinions and declarations to undermine the credibility of the BiOp. *Id.* at \*44. Regarding the deference afforded to NMFS under the APA, the Ninth Circuit stated that "[r]ather than evaluating the agency's decision-making process and deferring to the agency's scientific conclusions when those conclusions are fairly traceable to the record, the district court engaged in an in-depth substantive review of the science supporting the BiOp and substituted its own opinions, and those of the parties' experts, for the opinions of NMFS." *Id.* at \*48. The Ninth Circuit concluded that "the district court invalidated much of the BiOp under a quasi de novo review. But the APA does not permit such an in-depth review, particularly where, like here, the conclusions implicate agency expertise." *Id.* After independently reviewing the record, the Ninth Circuit upheld the BiOp in its entirety and concluded that, "[we] are satisfied that, when developing each component of the BiOp, NMFS relied on the factors that Congress intended it to consider, considered all important aspects of the problem, and offered explanations for its decisions that are in line with the evidence." *Id.* at \*49.

***Conservation Cong. v. Finley*, 774 F.3d 611 (9th Cir. Dec. 16, 2014).**

In *Conservation Congress v. Finley*, the U.S. Court of Appeals for the Ninth Circuit upheld the district court's conclusion that the U.S. Forest Service ("USFS") and U.S. Fish and Wildlife Service ("FWS") satisfied the ESA's consultation requirements based upon a biological assessment which found that a forest-thinning project in Northern California—known as the Beaverslide Project—was not likely to adversely affect the northern spotted owl, an ESA-listed, threatened species.

Section 7(a)(2) of the ESA governs consultations that take place between federal agencies. 16 U.S.C. § 1536(a)(2). Agencies are required to ensure federal actions are "not likely to jeopardize the continued existence" or "result in the destruction or adverse modification of [critical] habitat" of an endangered

or threatened species. *Id.*; see also *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1051 (9th Cir. 2013). The first step in the consultation process is for the acting agency to independently determine whether its action “may affect” an endangered or threatened species or its habitat. 50 C.F.R. § 402.14(a). If so, the agency must initiate either informal or formal consultation with the consulting agency, FWS (for land-based species) or the National Marine Fisheries Services (for marine species). *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 596 (9th Cir. 2014). Under informal consultation, if the two agencies agree in writing that the proposed action “is not likely to adversely affect” a listed species or critical habitat, no further action is necessary. *Conservation Cong.*, 720 F.3d at 1051; see also 50 C.F.R. §§ 402.13(a), 402.14(b)(1). However, if either agency makes a “likely to adversely affect” determination, formal consultation is required, which involves the preparation of a biological opinion. 50 C.F.R. § 402.14.

Plaintiffs argued that the agencies were required to reinitiate consultation to consider information contained in a recovery plan that FWS subsequently issued for the northern spotted owl. In affirming the district court’s grant of summary judgment to the federal agencies, the Ninth Circuit stated that “[50] C.F.R. § 402.16 does not require agencies to stop and reinitiate consultation for ‘every modification of or uncertainty in a complex and lengthy project.’” *Conserv. Cong.* at \*15. The Ninth Circuit reasoned that a close reading of USFS’s biological assessment revealed that “it directly and sufficiently addressed” the short-term effects that plaintiffs alleged were not considered. *Id.* at \*16. Similarly, the Ninth Circuit rejected plaintiffs’ argument that USFS failed to follow certain recommendations in the northern spotted owl recovery plan. The court noted that “declining to adopt particular recommendations in a recovery plan or a study—neither of which is binding on an agency—does not constitute failing to consider them under 50 C.F.R. § 402.16.” *Id.* at \*17.

***Alliance for the Wild Rockies v. USDA*, 772 F.3d 592 (9th Cir. Nov. 20, 2014).**

In *Alliance for the Wild Rockies v. USDA*, the U.S. Court of Appeals for the Ninth Circuit held that the defendant (federal agencies) met their ESA Section 7 and 9 obligations when issuing the Interagency Bison Management Plan (“Management Plan”). The Management Plan is designed to allow the federal agencies to encourage bison in the Yellowstone National Park to migrate to lower elevations to forage for food and avoid interaction with local cattle because bison carry a disease that is deadly to livestock.

Section 7(a)(2) of the ESA requires federal agencies to ensure, in consultation with the appropriate wildlife agency, that any action authorized or carried out by the agency “is not likely to jeopardize

the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of designated critical habitat. 16 U.S.C. § 1536(a)(2). The ESA implementing regulations further require agencies to reinitiate consultation if “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(b). Additionally, Section 9 of the ESA prohibits the taking of an endangered or threatened species. 16 U.S.C. § 1538(a)(1)(B). The ESA defines “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.” *Id.* at § 1532(19). “Harass” is further defined as “an intentional or negligent act ... which creates the likelihood of injury to wildlife by annoying it to such extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.

The plaintiff alleged that the defendant federal agencies violated the ESA by: (1) failing to reinitiate consultation under Section 7 of the ESA after conducting additional bison management activities outside the scope of those contemplated in the Management Plan; and (2) allowing low-altitude helicopter flights which allegedly could harass the threatened Yellowstone grizzly bear population. As an initial matter, the Ninth Circuit found that the plaintiff satisfied the ESA 60-day citizen suit notice requirement when it filed a complaint alleging non-ESA claims prior to the expiration of the 60-day period, but subsequently amended its complaint to add ESA claims after the notice period had expired. *Alliance for the Wild Rockies* at \*23. The Ninth Circuit then dismissed plaintiff’s Section 7 claims as moot because the defendants consulted on potential impacts to listed Yellowstone grizzly bears while the case was pending. *Id.* at \*19. In rejecting plaintiff’s Section 9 taking claim for harassment, the Ninth Circuit concluded that the record lacked evidence demonstrating that helicopter flights could be linked to any significant disruption of grizzly bear behavioral patterns. *Id.* at \*27.

## II. Clean Water Act (“CWA”)

***Alaska Comm. Action on Toxics v. Aurora Energy Serv., LLC*, 765 F.3d 1169 (9th Cir. 2014).**

In *Alaska Community Action on Toxics v. Aurora Energy Services, LLC*, the U.S. Court of Appeals for the Ninth Circuit held that industrial general permits issued under the Environmental Protection Agency’s (“EPA”) National Pollutant Discharge Elimination System (“NPDES”) program did not shield defendants from liability for non-stormwater discharges of coal into Resurrection Bay, Alaska.

Section 301(a) of the CWA prohibits the “‘discharge of any pollutant’ from any ‘point source’ into ‘navigable waters’ unless the discharge com-

plies with certain other sections of the CWA.” *Natural Res. Def. Council, Inc. v. Cnty. of L.A.*, 725 F.3d 1194, 1198 (9th Cir. 2013) (citing 33 U.S.C. § 1311(a)). Under CWA Section 402, if a discharger is covered by, and in compliance with, a NPDES permit, the permit “shields” the permit holder from liability, even if EPA promulgates more stringent limitations over the life of the permit. 33 U.S.C. § 1342(k); *Natural Res. Def. Council*, 725 F.3d at 1204. A general NPDES permit is issued pursuant to administrative rulemaking procedures for an entire class of hypothetical dischargers in a given geographical region. See 40 C.F.R. § 122.28. Any violation of the permit’s terms constitutes a violation of the CWA. See 40 C.F.R. § 122.41(a); *Natural Res. Def. Council*, 725 F.3d at 1204.

Plaintiffs alleged that the defendants’ coal loading facility in Seward, Alaska constituted an unpermitted discharge into navigable waters of the United States because it spilled coal into Resurrection Bay during the transfer of coal from trains to ships by conveyor system. *AK Comm. Action on Toxics*, 765 F.3d at 1172. In reversing the district court, the Ninth Circuit looked to the plain terms of the defendants’ general NPDES permit, which prohibited defendants’ non-stormwater discharge of coal. *Id.* The Ninth Circuit noted that the general NPDES permit contained an exclusive list of exempt discharges and, because the discharge of coal was not included, defendants’ discharge violated the terms of their general permit. *Id.* at 1173.

### III. Clean Air Act (“CAA”)

*Sierra Club v. U.S. EPA*, 762 F.3d 971 (9th Cir. 2014).

In *Sierra Club v. U.S. EPA*, the U.S. Court of Appeals for the Ninth Circuit struck down a prevention of significant deterioration (“PSD”) permit issued by the EPA to the defendants for construction and operation of a 600 megawatt natural gas-fired power plant in the city of Avenal, California. EPA granted the defendant’s application for a PSD permit without considering the most recently adopted, and more stringent, air quality standards. EPA asserted that, under limited circumstances, it had authority to grandfather certain permit applications into the older, less stringent air quality standards.

The CAA states that “[n]o major emitting facility may be constructed unless: ... (3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title ... that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any ... national ambient air quality standard [(“NAAQS”)] in any air quality control region ... [and] (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility ...,” 42 U.S.C. § 7475(a)(3)–(4). CAA Section 7410(j) states

that “[a]s a condition for issuance of any permit required by this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show ... that the technological system of continuous emission reduction which is to be used ... will enable it to comply with the standards of performance which are to apply to such source...” *Id.* § 7410(j).

On petition for review, the Ninth Circuit concluded that the plain meaning of the CAA required EPA to use the more recently adopted air quality standards when evaluating the defendants’ PSD permit application. The court stated that “[t]he plain language of the statute—which prohibits the construction of any ‘major emitting facility’ and refers to ‘any ... national ambient air quality standard,’ and ‘the standards of performance which are to apply to such source[,]’ as the applicable regulations—clearly requires EPA to apply the regulations in effect at the time of the permitting decision.” *Sierra Club*, 762 F.3d at 979. In addition, the Ninth Circuit rejected EPA’s argument that it had the authority to grandfather certain permit applications because, in the present case, EPA failed to comply with the administrative process for exercising its grandfathering authority, including a failure to conduct formal notice and comment rulemaking procedures. *Id.* at 982.

### IV. Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)

*Arizona v. City of Tucson*, 761 F.3d 1005 (9th Cir. 2014).

In *Arizona v. City of Tucson*, the U.S. Court of Appeals for the Ninth Circuit held that a district court has a duty to independently scrutinize the terms of a proposed consent decree under CERCLA. Several defendants who were responsible for a portion of the cleanup costs associated with the Broadway-Patano Landfill in Tucson, Arizona entered into early settlement agreements with the Arizona Department of Environmental Quality (“ADEQ”). ADEQ then initiated a case against those defendants and, shortly thereafter, filed public notice of its intent to enter into consent decrees and sought judicial approval of the terms of the proposed settlements.

Under Section 107(a) of CERCLA, the federal government or a state can sue responsible parties for “all costs of removal or remedial action incurred by the United States Government or a State ... not inconsistent with the [EPA’s] [N]ational [C]ontingency [P]lan.” 42 U.S.C. § 9607(a)(4)(A). Through CERCLA, Congress also sought to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation. *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013). Consistent with this objective, Section 113(f)(2) provides that a party who has re-

solved its CERCLA liability through a judicially approved consent decree “shall not be liable [to other responsible parties] for claims for contribution regarding matters addressed in the settlement.” 42 U.S.C. § 9613(f)(2). In order to approve a CERCLA consent decree, a district court must find that the agreement is “based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each [potentially responsible party] has done.” *United States v. Charter Int'l Oil Co.*, 83 F.3d 510, 521 (1st Cir. 1996).

Citing its precedent, the Ninth Circuit concluded that the district court failed to properly analyze the terms of the proposed settlement agreements. The court stated that “*Montrose* requires that the district court gauge the adequacy of settlement amounts to be paid by settling [parties] by engaging in a comparative analysis.” *Arizona*, 761 F.3d at 1012 (citing *U.S. v. Montrose Chem. Corp. of Cal.*, 50 F.3d 741 (9th Cir. 1995)). The Ninth Circuit found that “nowhere in the district court’s opinion [was] there an analysis comparing each party’s estimated liability with its settlement amount, or an explanation of why the settlements [were] ‘fair, reasonable, and consistent with CERCLA’s objectives.’” *Id.* Thus, the court concluded that the district court could not “[a]bdicat[e] its responsibility to independently determine that the agreements are ‘fair, reasonable, and consistent with CERCLA’s objectives’ ... by deferring to the ADEQ’s judgment that the agreements satisfy *Montrose*.” *Id.* at 1014–15.

## V. Resource Conservation and Recovery Act (“RCRA”)

*Center for Comm. Action v. BNSF Railway Co.*, 764 F.3d 1019 (9th Cir. 2014).

In *Center for Comm. Action v. BNSF Railway Co.*, the U.S. Court of Appeals for the Ninth Circuit held that the defendants’ emission of diesel particulate matter from their railroad operations did not constitute a disposal of solid waste under RCRA. The plaintiffs argued that diesel particulate matter emitted from BNSF trains and other heavy-duty vehicles was a risk to the health of individuals living near rail yards in California.

RCRA’s citizen-suit provision authorizes private persons to sue “any person ... who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B). “Disposal” is defined as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or dis-

charged into any waters, including ground waters.” 42 U.S.C. § 6903(3).

In affirming the district court, the Ninth Circuit concluded that defendants were not “disposing” of any solid waste under RCRA. *Center for Comm. Action*, 764 F.3d at 1024–24. The court stated that “[b]y its terms, ‘disposal’ includes only conduct that results in the placement of solid waste ‘into or on any land or water.’” *Id.* Accordingly, the Ninth Circuit concluded that “‘disposal’ occurs where the solid waste is *first* placed ‘into or on any land or water’ and is *thereafter* ‘emitted into the air.’” *Id.* (emphasis in original). Because the diesel particulate matter was first emitted to the air, before returning to land or water, the court found that emission of the diesel particulate matter could not be considered a disposal within the terms of RCRA. *Id.* Further, because the defendants had not disposed of anything as that term is defined in RCRA, the Ninth Circuit explicitly declined to reach the issue of whether diesel particulate matter should be considered a “solid waste” under RCRA. *Id.* at 1030.

## VI. Federal Energy Regulatory Commission (“FERC”)

*Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084 (9th Cir. 2014)

In *Columbia Riverkeeper v. U.S. Coast Guard*, the U.S. Court of Appeals for the Ninth Circuit concluded that a letter of recommendation (“LOR”) from the U.S. Coast Guard (“USCG”) regarding the suitability of the Columbia River for vessel traffic associated with a proposed liquefied natural gas (“LNG”) terminal did not qualify as a reviewable final agency action or order.

Under the Energy Policy Act of 2005 (“EPAAct”), FERC is the “lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the [National Environmental Policy Act (“NEPA”)]” for LNG facilities. 15 U.S.C. § 717n(b)(1). On December 22, 2008, the USCG issued a Navigation and Vessel Inspection Circular, which stated that LORs do not constitute “a permitting action and must not impose requirements or conditions mandated by the Coast Guard.” NVIC 05-08. As a result, the USCG determined that the issuance of LORs do not require compliance with NEPA. *Id.* Furthermore, in the Coast Guard Authorization Act of 2010, Congress only required the USCG to “make a recommendation” to FERC as to the suitability of a waterway for LNG marine traffic. Pub.L. No. 111-281, § 813, 124 Stat. 2905, 2999.

On petition for review, the Ninth Circuit dismissed plaintiffs’ claims based upon the statutory text defining the scope of its jurisdiction. *See* 15 U.S.C. § 717r(d)(1). While noting that neither the statute nor the courts have previously interpreted “order or action” in the context of this statute, the Ninth Circuit noted that the U.S. Supreme Court

has established a strong presumption that “judicial review will be available only when agency action becomes final.” *Columbia Riverkeeper*, 761 F.3d at 1091–92 (citing *Bell v. New Jersey*, 461 U.S. 773, 778 (1983)). The Ninth Circuit stated that “Congress contemplated that an order or action reviewable under § 717r(d)(1) would be: (1) a final agency action or order (2) issuing, conditioning or denying (3) an agency determination (of a sort analogous to a permit) that has the legal effect of granting or denying permission to take some action.” *Id.* at 1093. Accordingly, the Ninth Circuit concluded that the USCG’s LOR was not a final agency action or order that was reviewable in the courts. *Id.* at 1094–95. Instead, the LOR would be reviewable to the extent any of the recommendations were or were not adopted by FERC in its final order. *Id.* at 1097.

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## Decisions of the Growth Management Hearings Board, Fall 2014



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

*The cases shown below represent substantive decisions of the Growth Management Hearings Board from August 1 to October 31, 2014. The synopsis of each case provides key concepts and holdings from the case.*

### ***Hood Canal Sand & Gravel, et al v. Jefferson County and WA Dept. of Ecology, GMHB-Western Region Case No. 14-2-0008c. (Order on Dispositive Motion, Sept. 5, 2014)***

With this consolidated case, Petitioners challenge Jefferson County’s Shoreline Master Program (SMP). Pursuant to RCW 36.70A.280 and RCW 90.58.190, the Growth Board has review authority for appeals of SMPs for GMA planning jurisdictions. The issue on dispositive motion sought clarification from Ecology of the applicable evidentiary standard of review the Board would utilize when a SMP includes shorelines of statewide significance. Citing to RCW 90.58.190(2), the Board concluded that to the extent the petitioners challenge provisions relating to shorelines of statewide significance, they must meet the clear and convincing standard of proof. In making this holding, the Board noted that although the County’s SMP failed to distinguish between shorelines and shorelines of statewide significance, the status of a shoreline depends on where it fits under the criteria of RCW 90.58.030, not how it is distinguished in a SMP.

### ***Rehberg et al v. Pierce County, GMHB-Central Puget Sound Region Case No. 13-3-0010. Order Finding Compliance, Aug. 4, 2014)***

In its earlier Final Decision and Order, the Growth Board ruled that provisions of the challenged ordinance allowing electronic message boards in the non-community plan rural areas were not in compliance with the rural character provisions of the County’s Comprehensive Plan. In their objections to compliance, petitioners raised two issues outside the scope of the Board’s remand. First, petitioners had never asserted that the original deletion of the sign prohibition within the Upper Nisqually Valley Community Plan violated the GMA. As such, the petitioners could not now raise that issue during the compliance proceedings. The second issue related to the County’s Density and Dimension Tables for agricultural resource lands and rural farm lands, for which petitioners asserted the change was not required by the Board’s remand. The Board reminded the petitioners that a remand

order does not dictate the manner in which a jurisdiction must bring its legislation into compliance with the GMA and, therefore, the GMA does not prohibit the county from adopting new regulations at the same time as making changes to comply with a remand order.

***BD Lawson Partners LP and BD Villager Partners LP v. City of Black Diamond*, GMHB-Central Puget Sound Region Case No. 14-3-0007. (Order of Dismissal, Aug. 18, 2014)**

In this continuing dispute over the development of the petitioners' master plan developments, the City commissioned a study regarding improvements to general government facilities necessary to accommodate the projected growth for the purpose of establishing mitigation fee rates. At completion of this study, the City adopted a Governmental Facilities Plan by ordinance so as to include the plan as one of the initial steps towards adoption of a mitigation fee. Petitioners asserted this ordinance amounted to a *de facto* amendment of the City's Comprehensive Plan. In finding that the ordinance was not a *de facto* amendment, the Board set forth the three principles it looks at when considering whether an action is or is not a *de facto* amendment. The principles considered are: (1) the explicit language of the action is not dispositive, (2) what is the actual legal effect of the action, and (3) whether the actual legal effect requires a particular legislative result.

***Koontz Coalition v. City of Seattle*, GMHB-Central Puget Sound Region Case No. 14-3-0005. (Final Decision and Order, Aug. 19, 2014)**

This case pertains to the City of Seattle's affordable housing incentive program for both residential and commercial development. The issue involved Seattle's fee-in-lieu bonus provisions of the program, which increased the fee without increasing the associated development bonuses. Seattle's apparent attempt with this enactment was to have developers actually build affordable housing as opposing to just paying a fee. RCW 36.70A.540 establishes requirements for affordable housing programs, which the petitioner asserted Seattle violated because it had "expanded" the program. The Board disagreed, first stating that the use of "expanded" within RCW 36.70A.540 related to the geographic scope of the program. The Board went on to find that the increased fee did not expand the program compared to the square footage required for a bonus, nor did the inflation adjustment result in an expansion. In addition, the Board found no inconsistency between the adopted incentive program and applicable goals of the City's Comprehensive Plan.

***Neighborhood Alliance of Spokane County v. Spokane County*, GMHB-Eastern Washington Region Case No. 14-1-0002. (Final Decision and Order, Sept. 23, 2014)**

This case involves levels of service standards (LOS) for police protection and parks and recreation. The case also questions Spokane County's modification of a policy related to the extension of urban services within rural areas. Petitioners asserted that the County's newly adopted LOS could not be used to forecast future needs. Interestingly, Spokane County did not directly respond to the issues. Rather it acknowledged that the Board would likely find it non-compliant so the County proposed either an extension for briefing or a remand. The Board fully analyzed the issues based on the relevant RCW and WAC provisions, concluding that the new LOS standards were not only non-compliant with the GMA's goals and requirements but incompatible with the County's comprehensive plan and the county-wide planning policies. As to the extension of urban services within rural areas, it was a single policy that was determined to be inconsistent. This policy was undoubtedly adopted in response to the expansion of urban growth areas the Board had previously found noncompliant and, for which the County's resolution was to retract the expansion but only after development had vested. According to the Board, this policy would have the effect of allowing the extension and connection of urban facilities to development in rural areas and on natural resource lands that are not allowed by the County's comprehensive plan. The Board entered a Determination of Invalidity in regard to the policy permitting urban services extensions. The Board did find in the County's favor in regard to the frequency of updates to the capital facilities plan.

***Blair, et al v. City of Monroe*, GMHB-Central Puget Sound Region Case No. 14-3-0006c. (Final Decision and Order, Aug. 26, 2014, corrected Sept. 19, 2014)**

This case represents the Board's first issuance of a Determination of Invalidity based on SEPA. The City of Monroe rezoned 43 acres of undeveloped land from open space to commercial use at its eastern boundary. The property is encumbered in part by wetlands, the Skykomish River floodplain, a slough/stream, and native growth protective easements. While the Board's decision discusses the consistency of this rezone with various goals and requirements of the GMA and the City's Shoreline Master Program (SMP), the primary issue in this case is the petitioners' appeal of the City's Non-Project Final Environmental Impact Statement (FEIS). Issues raised were typical SEPA appeal issues—lack of alternatives and inadequate assessment of impacts. The Board found the FEIS inadequate. The Board stated that the alternatives were lacking, holding that "without a properly framed set of alternatives, the City's non-project environmen-

tal review simply fails to provide decision makers with the information to make an informed choice about the land use designation.” Specifically, the FEIS lacked a full discussion of an alternative based on existing conditions, the “no action” alternative. The Board concluded this was essential for assessing impacts of the three development alternatives discussed. In addition, the Board concluded that the FEIS failed to assess the full development of the site—all 43 acres and not just the developable portion. The Board, relying on its previous holdings in *Davidson Serles v. City of Kirkland*, stated that although “non-compliance with SEPA does not automatically equate to frustration of the GMA” the rezoned property was largely within critical areas and/or shorelines. Given these characteristics, the Board invalidated the rezone ordinance based on noncompliance with SEPA, not noncompliance with the GMA.

***Futurewise v. Benton County*, GMHB-Eastern Washington Region Case No. 14-1-0003. (Final Decision and Order, Oct. 15, 2014)**

Benton County expanded the City of Kennewick’s urban growth area (UGA) by 1,263 acres of agricultural land so as to allow for additional industrial lands within the UGA. Thus, two primary issues were before the Board—the expansion of the UGA and the de-designation of resource lands. RCW 36.70A.1301, enacted in 2012 and set to expire in December 2015, permits a city in eastern Washington to request the amendment of a UGA for the purpose of increasing industrial land. The Board emphasized that such a request must be based on an actual “documented need for additional industrial land to serve their planned population growth.” Kennewick had not demonstrated a need; rather, the increase was tied to a comprehensive plan policy that increased industrially-zoned land by 15 percent of the total city land. The problem was that this 15 percent increase was not linked to per capita needs but was based on speculative assumptions of future demands. The Board also found that the completed development proposal and phased master plan required by RCW 36.70A.130(2)(d) was not satisfied by the City of Kennewick’s submittal. The Board noted that RCW 36.70A.1301 does not negate other provisions of the GMA, including the need for consistency with the GMA’s goals and requirements, such as RCW 36.70A.110 Urban Growth Areas, and the County comprehensive plan. In regard to the de-designation of agricultural lands, the Board found that the land continued to meet the criteria for agricultural designation (WAC 365-190-050) and that “the desired economic opportunity does not trump GMA resource conservation criteria.” In addition, the Board noted that an area-wide assessment (WAC 365-190-050) related to the de-designation had not been done by Benton County. The Board declined to issue a Determination of Invalidity.

***Dragonslayer Inc., Clark County, et al v. City of La Center*, GMHB-Western Washington Region Case No. 14-2-0003c. (Final Decision and Order Aug. 11, 2014)**

The City of La Center amended its comprehensive plan and development regulations to allow for the extension of a sewer line outside of its UGA. The sewer line was intended to serve agriculturally-zoned land for which the Cowlitz Tribe was seeking trust status and intended to build a casino resort along with supporting tribal structures on the parcel. Clark County first argued the City’s action was inconsistent with CPPs that discourage sprawl and leapfrog development. The City asserted its action represented a competing vision; it did not thwart the CPPs (the test for inconsistency). The Board noted that the County’s CPPs are binding on La Center and serve as a framework for consistency between county and city comprehensive plan. Because La Center’s newly adopted policies would allow sewer extension and urban development to occur beyond the UGA, the policies were in direct conflict with the CPPs. The Board also clarified that while the land was agricultural, La Center’s action may facilitate the future de-designation of agricultural land (a potential GMA violation), and it did not actually de-designate the land. As to the sewer line, the Board relied on RCW 36.70A.110(4) and the Supreme Court’s 2002 holding in *Thurston County v. Cooper Point Association* along with various GMHB holdings, and held that the proposed sewer extension would enter a rural area, would facilitate urban development, and was not necessary due to health or environmental concerns. Then, citing to the Court of Appeal’s 2011 decision related to this same land, the Board held that regardless of the incomplete designation of the land as trust land, the end result of La Center’s amendments was to allow for the extension of urban services to a non-urban area in a way that would encourage urban development. The other main issues, SEPA compliance including the adequacy of the FEIS, the incorporation of existing documents, and the extent of review for non-project actions, were dismissed by the Board.

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## Decisions of the Pollution Control Hearings Board and Shorelines Hearings Board, Winter 2014



By Kathy Mix, Director/Member of the Pollution Control Hearings Board and Shoreline Hearings Board

***Electro, Inc. v. Ecology*, PCHB Case No. 14-007 (Findings of Fact, Conclusions of Law and Order on Re-**

**mand, Aug. 25, 2014)**

This case involved a penalty for noncompliance with the Industrial Stormwater General NPDES Permit. The Board affirmed a \$2,000 penalty issued by Ecology to a heavy equipment and component manufacturer, Electro, Inc., for the company's failure to consistently monitor and report stormwater discharges, perform and maintain records of facility inspections, and prepare a functional and up-to-date Stormwater Pollution Prevention Plan (SWPPP) as required by the Industrial Stormwater General NPDES Permit. In particular, the Board found the company's practice of sampling stormwater only when a discharge occurred on the single day of the week in which the part-time employee assigned happened to be present insufficient for purposes of permit compliance. The Board considered these multiple violations to be serious given the company's history of noncompliance. Such noncompliance had spanned more than six years and had resulted in a 2007 Administrative Order, with which the company had never fully complied.

***The Tulalip Tribes v. Snohomish County, Ecology, and Thomas and Kjersti Lane*, SHB Case No. 14-007 (Findings of Fact, Conclusions of Law and Order, Sept. 29, 2014)**

The Tulalip Tribes appealed Snohomish County's approval of a shoreline variance issued to Thomas and Kjersti Lane for the rebuilding of a house located on the Possession Sound and within the exterior boundary of the Tulalip reservation. The proposal involved the complete tear down of an existing one-story house and basement, which were located outside of the 35-foot shoreline setback but within the 150-foot critical area marine buffer. In its place, the Lanes planned to build a four-story 31-foot-high replacement house with a ground floor footprint that was 694 square feet larger than the existing house. As mitigation for the expansion, the Lanes proposed to reduce the existing impervious surface in the marine buffer and plant native vegetation.

This case was the first appeal the Board had faced under the new Snohomish County Shoreline Master Program (SCSMP). The Lanes did not dispute

that a shoreline variance permit was required under the SCSMP. The Board concluded that the approval failed to meet the requirements for the issuance of a shoreline variance because the Lanes already had reasonable residential use of their property without the rebuilding and expansion of the existing house. The Board reversed the variance that had been approved by the County.

***Friends of the San Juans v. San Juan County and 1281 & 1657 Yacht Haven LLC*, SHB Case No. 14-008 (Findings of Fact, Conclusions of Law and Order, Oct. 17, 2014)**

This case was the third appeal in a series of cases related to permits sought for construction of bulkheads along the same pocket beach on San Juan Island. In this appeal, the Board denied a shoreline substantial development permit (SSDP or permit) for a new bulkhead proposed by the southernmost property owners along the pocket beach. At issue in each case was whether a proposed section of bulkhead met the San Juan County Shoreline Master Program's (County SMP) threshold criteria for permitting a nonexempt bulkhead (requiring a demonstrated need to protect an established upland use from serious erosion or another listed condition, with nonstructural stabilization efforts having been shown to be ineffective), and whether environmental impacts would result that would be inconsistent with the Shoreline Management Act (SMA) or County SMP. The different uses and orientation of each property along the beach made each case unique, and resulted in different decisions from the Shoreline Board. *See also Woodman v. San Juan County*, SHB No. 08-032 (2009) and *FOSJ v. Woodman*, SHB No. 13-015 (2014).

The County Hearing Examiner had approved the permit. Friends of the San Juans (FOSJ) appealed to the Board. On appeal, the Board looked at the specific features of the property and found the property was not subject to serious erosion or instability. The property was largely sheltered from predominant storm waves given its orientation on the beach, and only isolated erosion had occurred at the toe of its bank. Foundational bedrock under laid the bluff, erosion-resistant glacial till comprised the bluff, and dense and mature vegetation covered its slope. The Board was persuaded that evidence of historic landslides ("scarps") along the slope did not indicate uncharacteristic instability, but reflected erosion typical for a marine bluff. Episodic events like landslides had been included in assessing the bluff's long-term average annual rate of erosion, which experts on both sides had agreed was slow. It would take nearly 600 years for intermittent recession of the bank to reach the edge of the existing house on the property. Because the slope had been assumed unstable, with hard armoring necessary, the Board also found that nonstructural alternatives had not been shown to be ineffective. FOSJ thus met its burden to show the County's threshold

criteria for permitting a new nonexempt bulkhead were not met.

In addition, the Board concluded that environmental impacts inconsistent with the SMA and County SMP would result from bulkheading of the shoreline, based on expert testimony and the body of science assessing impacts from other hard armored sites. The nearly vertical rockery proposed, which would extend in two tiers from the toe to the crest of the 25-foot bluff, would be larger than most bulkheads. The large bulkhead would remove most of the vegetation along the slope, and would impede the contribution of sediment from the bluff to the beach. The Board was persuaded that longer-term beach starvation would occur, or that there would be interference with the natural shoreline processes, inconsistent with the SMP. The Board was also persuaded that impacts to the microclimate and other habitat functions of the nearshore and beach environment would likely result, affecting the suitability of the beach and nearshore environment as a habitat and food source for surf smelt and juvenile salmon.

Finally, the proposed location on a shoreline of statewide significance warranted special consideration under the SMA. The marine environment at this location provided particularly important habitat for forage fish spawning and salmon recovery efforts. The Board ultimately concluded that “[t]he lack of an established need for armoring a shoreline that is experiencing slow erosion typical for a marine bluff, combined with the adverse and longer-term impacts likely to result from the proposed bulkhead, counsel for denying the permit in this case.”

## Significant Recent Land Use Case Law



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

### I. Washington Supreme Court Decisions

**LUPA; Procedural Due Process; Resolution of Conflict between COA Divisions on Recovery of Attorney Fees under RCW 4.84.370. *Durland v. San Juan County*, \_\_\_Wn.2d\_\_\_, 340 P.3d 191 (Dec. 11, 2014).**

In this important case, the Supreme Court explained at length the requirement that a challenger of a governmental land use regulatory decision, under LUPA and 42 U.S.C. §1983, must have a property entitled to constitutional due process protection and unanimously held that the challenger did not have a constitutionally protected property right in his private views of the water. The Court also resolved the conflict among divisions of the Court of Appeals regarding the right to recover attorney fees under RCW 4.84.370 where a successful litigant prevails on procedural grounds rather than on the merits. In a concurring opinion, three justices disagreed with the majority's reasoning on the attorney fees issue.

Neighbors (*Durland*), in two separate LUPA actions (*Durland I* and *II*), challenged a building permit issued by San Juan County for the addition of a second story to a garage owned by Heinmiller and Stameisen (Heinmiller) on Deer Harbor, Orcas Island. The Supreme Court consolidated, reviewed, and affirmed the two Court of Appeals decisions upholding the building permit.

The building permit was issued to Heinmiller by the County on November 1, 2011. The County Code does not require public notice when issuing building permits, and *Durland* was unaware that the permit had been issued until 34 days later, December 5, 2011. The County Code provided for an administrative appeal of the building permit to the County Hearing Examiner within 21 days of issuance. *Durland* objected to the building permit for the garage expansion because its increased height would adversely affect views of the water and ability to enjoy the shoreline.

#### ***Durland I***

*Durland* initially declined to file an administrative appeal and instead brought a LUPA action in superior court seeking invalidation of the building permit asserting that the permit violated shoreline and zoning regulations. The LUPA petition was dismissed by the superior court for three reasons: failure to exhaust administrative remedies; lack of jurisdiction because there was no final land use de-

cision by the County; and failure to file the petition within LUPA's 21-day appeal period.

The Court of Appeals affirmed, as did the Supreme Court, finding it necessary to decide only (1) that there was no final land use decision, and, thus, no superior court jurisdiction under LUPA, because Durland had failed to file an available administrative appeal and (2) that Durland lacked standing and the superior court lacked jurisdiction under LUPA, RCW 36.70C.060(2)(d), because Durland failed to exhaust administrative remedies. Durland argued that his failure to exhaust was excused by an equitable exception to the exhaustion requirement either because he had no notice of the permit prior to the appeal deadline or because an administrative appeal would have been futile. The Court disagreed, holding that there is no basis in the language of LUPA for any exception to the strict exhaustion requirement and noting that the legislature can create such exceptions if it wishes.

### Durland II

After initially failing to file an administrative appeal, Durland subsequently did so. The County Hearing Examiner dismissed the appeal as untimely. Durland then filed a second LUPA petition challenging the Examiner's dismissal and including a 42 U.S.C. § 1983 claim, asserting that the Examiner's decision and the County's failure to provide neighbors with notice of the permit decision, coupled with strict application of the 21-day appeal period, violated his constitutional right to procedural due process. The superior court summarily dismissed this second LUPA petition and granted the County's motion for summary judgment on the §1983 claim. The Court of Appeals and Supreme Court affirmed.

The Supreme Court stressed that Durland must have had a constitutionally protected property right in order to maintain his constitutional claim of deprivation of property without due process of law. After extensive analysis of the statutes and regulations governing the building permit for Heinmiller's proposed garage expansion, the Court concluded that these laws did not contain mandatory, specific, carefully circumscribed provisions requiring the County to deny the permit to protect private views of the water. Thus, the Court held that Durland's mere interest in his view of the water was not entitled to constitutional protection, distinguishing *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006).

### Award of Attorney Fees under RCW 4.84.370

For the first time, the Supreme Court addressed a longstanding conflict among divisions of the Court of Appeals regarding the right of private and local government land use litigants to recover attorney fees under RCW 4.84.370. The divisions were in conflict regarding whether a litigant must prevail on the merits, as opposed to procedurally, in order to recover attorney fees. The conflicting rules

did not distinguish between recovery by private litigants under subsection (1) of the statute and local government litigants under subsection (2). One rule awarded attorney fees to both categories of litigants regardless of whether they prevailed on procedural or substantive grounds, while the other rule awarded attorney fees to both categories only if they prevailed on the merits.

The Supreme Court reconciled the conflict by applying one of the competing rules to subsection (1) of the statute and the other rule to subsection (2). Thus, according to the Court's new interpretation of RCW 4.84.370, under subsection (1) private parties who win on any grounds are entitled to recover their attorney fees, while under subsection (2) local governments must win on the merits.

In a lengthy concurring opinion, three justices agreed with the majority's decision affirming the building permit and awarding attorney fees to Heinmiller but disagreed with the majority's interpretation of RCW 4.84.370 to apply different rules for private and local government litigants.

### A Use of Land is Not a Nuisance Per Se Solely Because of Failure to Obtain a Required Permit. *Moore v. Steve's Outboard Service and Mason County*, \_\_\_Wn.2d\_\_\_, 339 P.3d 169 (Dec. 11, 2014).

Steve Love has operated Steve's Outboard Service ("SOS") since 1994 in his home and several outbuildings on his property across SR 106 from the south shore of Hood Canal near Belfair. Neighbors (Moore) who live on the waterfront across the Highway from SOS brought a lawsuit claiming, among other things, that the smoke, fumes, and traffic associated with SOS constituted a private nuisance.

The trial court entered detailed findings that the alleged noise, smoke, fumes, and traffic related to the business did not injure the plaintiffs' property, unreasonably detract from Moore's enjoyment of their property, or cause cognizable damages, and dismissed the case. The Court of Appeals reversed in part, concluding that the operation of SOS would have been a nuisance per se if required land use permits had not been obtained and remanding to superior court for a determination of whether SOS had failed to obtain required permits.

The Supreme Court reversed the Court of Appeals and reinstated the trial court's dismissal, holding that "the failure to obtain a permit does not transform a use of land into a nuisance per se unless the legislature has specifically so declared or the courts of this state have specifically so found. Neither is the case here."

**GMA Vested Rights and SEPA: Vested Rights to Develop Urban Center under Snohomish County Comprehensive Plan Policies and Development Regulations Were Not Lost When Growth Management Hearings Board Held They Were Adopted in Violation of SEPA. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 322 P.3d 1219 (April 10, 2014).**

BSRE Point Wells LP (“BSRE”) owns a 61-acre site on Puget Sound at Point Wells in unincorporated Snohomish County, just north of the King County border. Topographically, the site lies between the waters of Puget Sound to the west and steep bluffs to the east. Vehicular access is limited to two-lane Richmond Beach Road that runs through a residential neighborhood of the City of Shoreline terminating at Point Wells. The Town of Woodway is northeast of the BSRE property.

During the past century, the Point Wells site has accommodated a petroleum terminal, a tank farm, and an asphalt plant.

In 2007, BSRE requested redesignation of the site in the Snohomish County Comprehensive Plan Map from industrial to “urban center” to allow redevelopment of the property with urban residential and commercial uses. In 2009, the County redesignated the site to “urban center.”

The Town of Woodway and City of Shoreline, along with a neighborhood group, Save Richmond Beach (“SRB”), petitioned the Growth Management Hearings Board (“Growth Board”) for review of the comprehensive plan amendment asserting violations of the Growth Management Act (“GMA”) and State Environmental Policy Act (“SEPA”).

In 2010, the County implemented the plan amendment by adopting new and amended development regulations, rezoning the site to “urban center” to allow mixed-use development. The County relied on the final supplemental environmental impact statement prepared prior to the 2009 comprehensive plan amendments as SEPA review for the 2010 amendments of applicable development regulations. Woodway, Shoreline, and SRB petitioned the Growth Board for review of the development regulations, claiming violations of GMA and SEPA requirements. The Board consolidated this petition for review with the earlier one challenging the comprehensive plan amendments.

In early 2011, following the Growth Board hearing but before issuance of a final decision and order, BSRE applied to the County for a number of development permits: a master permit application for a preliminary short plat; a land disturbing activity permit; a shoreline substantial development permit; an urban center development permit; a site (development) plan; another land disturbing activity permit; and a commercial building permit.

By March 2011, the County had published notices for two installments of the various permit applications.

**Growth Board Decision**

On April 25, 2011, the Growth Board issued a final decision and order, ruling that the challenged comprehensive plan and development regulation amendments were noncompliant with GMA requirements and violated SEPA because the County’s impact statement analyzed only a no-action alternative. The Board also issued a determination of “invalidity” under the GMA for the comprehensive plan but not the development regulation amendments. The noncompliant provisions were remanded to the County for compliance with GMA and SEPA.

Later in 2011, Woodway and SRB filed actions in superior court seeking (1) declaratory judgment that BSRE’s permit applications had not vested rights in the County’s urban center comprehensive plan designation and development regulations in effect at the time the complete applications were filed and (2) an injunction barring the County from processing the applications until the County had achieved GMA and SEPA compliance on all of the remanded enactments. The superior court granted the relief requested by Woodway and SRB. The County and BSRE appealed.

**Court of Appeals Decision**

The *dispositive* question before Division I of the Court of Appeals was “whether, under the GMA, a landowner’s development permit application vests to a local jurisdiction’s land use comprehensive plan provisions and development regulations at the time a complete application is filed, despite a Growth Board’s subsequent determination that the jurisdiction did not fully comply with SEPA’s procedural requirements in its enactment of those plan provisions and regulations.”

After a thorough analysis of the issue and exposition of relevant legislative history and secondary authorities, the Court of Appeals held that BSRE’s permit applications remained vested in the urban center plan designation and development regulations notwithstanding the Board’s subsequent ruling that the County’s enactments violated SEPA. *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, 291 P.3d 278 (2013). The Supreme Court granted review.

**Supreme Court Decision**

Woodway and SRB contended that non-GMA SEPA case law, holding that actions taken in violation of SEPA’s procedural requirements are *ultra vires* and void, were controlling. They argued that vested rights could not be obtained in regulations that subsequently became void as a result of the Growth Board’s determination of SEPA noncompliance. They argued broadly that vested rights law may be used only as a “shield” from regulatory vacillation and not as a “sword.”

In a 6-3 decision, the Supreme Court disagreed with the development opponents and affirmed the

Court of Appeals on the basis of the plain language of applicable GMA provisions. The majority opinion, authored by Justice Owens, stressed the plain language of applicable GMA provisions that had been reaffirmed and clarified by the legislature in amendments adopted in 1995 and 1997, after extensive review by a legislative task force and study commission. The Court focused on the unambiguous language of these provisions, explicitly providing that vested rights are unaffected by subsequent Growth Board determinations of noncompliance or even “invalidity,” and the Supreme Court’s consistent recognition of the Growth Board’s narrowly limited remedial authority.

The dissenting justices, emphasizing their broad policy concerns and stressing the lack of harmony among GMA’s vesting provisions, other GMA provisions, and SEPA, would have held that the vested status of BSRE’s applications was lost as a result of the Growth Board’s subsequent determination of SEPA noncompliance.

**Substantive SEPA Mitigation Conditions May Be Specified in Development Agreement; SEPA Substantive Mitigation Conditions Are Limited by the Nexus and Proportionality Requirements of *Nollan* and *Dolan*. *Cedar River Water and Sewer District v. King County*, 178 Wn.2d 763, 315 P.3d 1065 (2013).**

Over a decade ago, King County urgently needed an additional wastewater treatment facility because existing treatment plants were near capacity. Locating a site for the proposed new facility was very difficult and entailed many years of negotiation and several separate lawsuits. Finally, Snohomish County agreed to let King County build the treatment plant in south Snohomish County. As part of the settlement, King County agreed to provide an extensive mitigation package for the local communities that would have been adversely affected by the facility. Capital funding for the plant came mainly from the sale of bonds that were primarily secured by sewage treatment fees and capacity charges imposed on new sewage hookups. Two local utility districts that contract with King County for sewage treatment sued the County, arguing that the mitigation package was excessive and to that extent could not lawfully be recouped from the utility districts. In a lengthy opinion, the Court largely upheld the County’s authority to recoup the costs of the mitigation measures.

Relevant to SEPA, the Court held that substantive mitigation requirements could be specified and required through a development agreement under RCW 36.70B.170 et seq. While acknowledging that SEPA substantive mitigation requirements, like all regulation of property, were potentially limited by constitutional nexus and proportionality requirements established by the United States Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 677 (1987),

and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 304 (1994), the Court held that there was sufficient evidence in the record to satisfy these requirements.

## II. Washington Court of Appeals Decisions

**Court of Appeals Ordered Publication of Decision Upholding Growth Board’s Ruling that Ferry County was Again Noncompliant with GMA Requirements by Enacting a Critical Areas Ordinance that Failed to Include Best Available Science (“BAS”) and Departed from BAS without Providing Reasonable Justification. *Ferry County v. Growth Management Hearings Board*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (Dec. 11, 2014).**

This previously unpublished, very lengthy decision provides a comprehensive summary of GMA law on the requirements to include BAS in adopting critical area comprehensive plan policies and regulations and to provide reasonable justifications for departures from BAS in the policy and regulatory choices made. The Court acknowledged the severe compliance difficulties of geographically large, sparsely populated counties, but held that such difficulties do not excuse noncompliance with statewide GMA requirements. While agreeing that the Growth Board committed some errors, the Court concluded they were harmless and upheld the Board’s noncompliance order.

The Court recognized that the GMA requirement to “include” BAS did not require that the included BAS be substantively followed in the policy and regulatory choices made as long as reasonable justifications for departures from BAS are provided. However, the Court also acknowledged that “[w]hat constitutes a sufficiently reasoned process for departing from BAS is poorly defined in GMA jurisprudence.” The Court cited the *Swinomish Tribal Community*, 161 Wn.2d at 431, as an example of reasonable justification for departing from BAS. In that case, the included BAS called for restoration of habitats that no longer existed. There, the Supreme Court upheld Skagit County’s justification for departing from BAS because the GMA does not require counties to enhance or restore critical habitat areas, but only to protect them from further degradation. Ferry County’s reasons for departing from BAS—that most of the County’s land is owned by federal and state governments with their own rigorous habitat protection programs and that BAS-supported policies and regulations would have and adverse impact on the County’s depressed economy—were held not to be reasonable justifications.

**Disputed Amendment of Binding Site Plan Was not Subject to Arbitration Clause in Development Agreement. *Naumes, Inc. v. City of Chelan*, \_\_\_ Wn. App. \_\_\_, 339 P.3d 504 (Dec. 11, 2014).**

Developer Naumes, Inc. (“Naumes”) entered into a development agreement with the City gov-

erning Apple Blossom Center, a proposed industrial and commercial project. In 2003, the City approved a planned development rezone and general binding site plan (“GBSP”) for Naumes’ property. In 2012, Naumes submitted a specific binding site plan (“SBSP”) for a particular lot showing a road plan deviating from the GBSP. The City denied the SBSP because it failed to conform to the GBSP. After a previous administrative appeal of the City’s denial and judicial review, Naumes brought a second lawsuit contending that the validity of the City’s denial of the SBSP was subject to the arbitration clause of the development agreement. The trial court denied Naumes’ request for an order compelling arbitration.

The Court of Appeals affirmed, holding that the City’s denial of the SBSP was not subject to the arbitration clause of the development agreement. While acknowledging Washington’s strong public policy favoring arbitration, the court nevertheless reasoned that the arbitration clause of the development agreement was limited to disputes under existing regulations, not to whether amendments to the regulations must be amended to accommodate the proposed development; that arbitration cannot take the place of required public participation processes for modification of the GBSP; and that LUPA would be the exclusive means of obtaining judicial review of the City’s decision on the application to modify the GBSP.

**Application for Shoreline Permit for Part of Large Mixed-Use Development Did Not Vest Rights in Zoning. *Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn.App. 191, 334 P.3d 1143 (Aug. 25, 2014).**

A recent vesting decision by the Court of Appeals, *Potala Village Kirkland, LLC v. City of Kirkland*, is attracting media attention, and some accounts have suggested that the decision makes a major change in Washington vested rights law. The actual holding in the case does not appear to significantly change existing law.

Washington vested rights (“vesting”) law is a complex and nationally unique body of legal doctrine that determines how a proponent of real estate development may obtain the right to be governed by current regulations and be immune from changes in the regulations. Vesting doctrine determines what must be done to obtain vested rights in existing regulations, the nature and extent of the regulations that are covered by the vesting, and limitations on the vested rights obtained.

In the *Kirkland* case, the developer proposed a major mixed-use development in a Neighborhood Business (BN) zone. A small portion of the proposed project was in the City’s shoreline jurisdiction, requiring a shoreline substantial development permit (SSDP). A SSDP application was filed, determined to be complete, and eventually granted by the City.

After the SSDP application was filed but before the developer had submitted an application for a building permit or other approval, the City adopted an emergency development moratorium in the BN zone in response to neighborhood concerns about the scale and residential density of the project. The moratorium temporarily precluded the issuance of permits in the BN zone. The moratorium subsequently was extended several times. The validity of the moratorium was not at issue in the case. Before the moratorium expired, the City amended the regulations for the BN zone so that they limited the proposed development to 60 residential units instead of the 143 units proposed.

The developer argued that it obtained vested rights in the BN zone regulations as they existed at the time of the SSDP application. The City argued that the SSDP application vested the developer’s rights only in the current shoreline regulations and not the BN zone regulations. So the issue was not whether the developer obtained vested rights by filing the SSDP application, but whether the vested rights extended only to the applicable shoreline regulations and not the BN zone regulations that governed most of the project.

Existing court-made vesting law had recognized that applications for shoreline, grading, conditional use, and septic system permits vested rights in the regulations governing such permits. Subsequently, 1987 legislation provided that complete applications for building permits and plat approvals vested applicants’ rights to be governed by the “zoning or other land use control ordinances in effect” on the date of the applications. RCW 19.27.095(1); RCW 58.17.033(1).

The Court of Appeals held that the SSDP application may have vested rights in the shoreline regulations applicable to a small part of the project but did not vest rights in the zoning regulations that were changed to greatly reduce the scale of the project. The court reasoned that under the above vesting statutes, only a building permit or plat approval application could have vested rights in the zoning regulations. The court did not actually decide whether the SSDP application vested rights in the shoreline regulations because the City apparently conceded such vesting, and that issue was not before the Court.

The Court of Appeals holding is not a surprise, but the court devoted a major part of its opinion to questioning the vitality of older court-made rules holding that applications for shoreline, conditional use, grading, and septic system permits vested rights in the regulations governing those permits, in light of the subsequent 1987 legislation. However, the court expressly declined to decide whether the court-made vesting law remained in effect. The court also recognized that local governments have discretion to provide for vesting even where state law does not require it.

**Club Shooting Range Exceeded Nonconforming Use Rights, Engaged in Development of Range Facilities Without Obtaining Required Regulatory Permits, and, as Operated, Constituted a Public Nuisance. *Kitsap County v. Kitsap Rifle and Revolver Club*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (Oct. 28, 2014).**

The Kitsap Rifle and Revolver Club (“Club”) has operated a shooting range on the site since it was founded for “sport and national defense” in 1926. In 1993, the County adopted an ordinance limiting the location of shooting ranges. The County conceded that the Club’s shooting range activities on the site became a lawful nonconforming use as of 1993.

In 1993, the Club operated mainly on weekends and only during daylight hours, and rapid-fire shooting, use of automatic weapons, and discharge of cannons “occurred infrequently.” Subsequently, the Club’s use of the property changed, allowing shooting between 7 a.m. and 10 p.m., seven days a week and frequent, regularly scheduled shooting practices and competitions. Loud, rapid-fire shooting occurred as early as 7 a.m. and as late as 10 p.m. Fully automatic weapons were regularly used on the range and exploding targets and cannons were allowed. Commercial use of the Club also increased, including private for-profit companies using the range for a variety of firearms courses and small arms training exercises for military personnel.

After extensive analysis of nonconforming use law, focusing on the distinction between unlawful “expansion” and lawful “intensification” of nonconforming uses, and public nuisance law, the court affirmed the trial court’s rulings that (1) the Club’s commercial uses of the range and “dramatically increased noise levels” constituted an impermissible expansion of the nonconforming use; (2) the Club’s development of additional facilities on the range violated various County land use permitting requirements; and (3) the excessive noise, unsafe conditions, and unpermitted development work constituted a public nuisance.

The court reversed the trial court’s ruling that increased hours of operation constituted an unlawful expansion of the nonconforming use.

The court also reversed the trial court’s remedial ruling terminating the Club’s nonconforming use rights, reasoning that only the expansions of the nonconforming use rights were unlawful, and vacated the trial court’s injunction against use of the property as a shooting range.

The court affirmed the trial court injunction against activities of the Club exceeding the scope of its nonconforming use rights in order to abate the public nuisance and remanded to the trial court for determination of the appropriate remedy for the Club’s unlawful expansion of its nonconforming use and permitting violations.

**Zoning Enforcement Citations Vacated Because City’s Ordinance, Which did not Allow Evidence of Nonconforming Use in Hearing on Citations, Violated Procedural Due Process. *Tyko Johnson v. City of Seattle*, 335 Wn. App. 1027, \_\_\_ P.3d \_\_\_ (Oct. 13, 2014).**

For years, Johnson and the City of Seattle had contested the lawfulness of parking more than three vehicles on Johnson’s single-family lot. In opposition to three citations he had received, Johnson argued, among other things, that he had a nonconforming use right to park more than three vehicles on his lot. Ultimately, he applied to the Director for, and obtained, a formal determination that he had the right to a legal nonconforming use to park the cars. However, in an appeal of the citations before the hearing examiner, the City’s zoning enforcement procedures did not allow Johnson to argue that he had the right to park more than three cars on his lot as a legal nonconforming use even though the City had formally determined that he had such a right.

The Court of Appeals vacated the citations, holding that the City’s enforcement scheme, which precluded the introduction of evidence of the nonconforming use, violated procedural due process and that Johnson’s action for damages against the City may proceed.

**City Zoning Prohibition of Medical Marijuana “Collective Gardens” in All Zoning Districts Did Not Violate a 2011 Amendment of the State Medical Use of Cannabis Act, RCW Ch. 69.51, as Extensively Vetoed by Governor. *Cannabis Action Coalition v. City of Kent*, 180 Wn. App. 455, 322 P.3d 1246 (March 31, 2014).**

In 2011, the legislature enacted ESSSB 5073, extensively amending the State Medical Use of Cannabis Act (“MUCA”), RCW Ch.69.51. The amendments, among other things, established a state-run registry system for qualified patients and providers. The legislation required the State Department of Health, in cooperation with the Department of Agriculture, to “adopt rules for the creation, implementation, maintenance, and timely upgrading of a secure and confidential registration system.” ESSSB 5073 s. 901. Registration was optional for qualifying patients. *Id.* The legislation also allowed qualifying patients to establish collective gardens for the purpose of growing medical marijuana for personal use. While purporting to legalize medical marijuana for registered patients and providers, the legislation authorized local municipalities to impose zoning requirements on licensed dispensers as long as they would not preclude the possibility of siting such facilities within their respective jurisdictions.

After the amendments were passed by both houses of the legislature and sent to the governor for her signature, she received a letter from United States Attorneys for the Eastern and Western

Districts of Washington advising that state employees who conducted activities mandated by the legislation would be subject to civil fines, criminal prosecution, and forfeiture of any property used to facilitate violation of the federal Controlled Substances Act.

The governor proceeded to veto all sections of the legislation that might have subjected state employees to federal charges—36 sections that purported to establish a state registry. The governor left intact sections that did not create or were not wholly dependent on the creation of a state registry.

Following the governor's extensive vetoes and official veto message, the City of Kent adopted a zoning ordinance amendment that defined "collective gardens" and prohibited them in all zoning districts, thereby banning collective gardens in the city.

An organization and several individuals ("Challengers") brought a declaratory judgment action challenging the ordinance. Challengers claimed that ESSSB 5073 legalized collective gardens and Kent's prohibition of collective gardens was, therefore, in conflict with state law and invalid. In response, the City sought an injunction against the individual challengers not to violate the zoning ordinance.

The superior court ruled in favor of the City, dismissing Challengers' claims and granting injunctive relief to the City.

The Court of Appeals affirmed, holding that neither the plain language of the legislation nor the governor's intent, as expressed in her veto message, supported the conclusion that collective gardens were legalized. The Challengers argued that MUCA, as amended and partially vetoed, allowed qualifying patients to participate in collective gardens. The City argued that the original language of the amendments purporting to authorize collective gardens depended on state registration of participating patients, and, as a result of the Governor's veto, the state registry did not exist; and without a state registry, collective gardens were not legalized and remained illegal.

The court declined to go beyond the plain language of the amendments that survived the governor's veto, and held that the legislation did not legalize collective gardens. Thus, the court concluded that the City's zoning ordinance prohibition of collective gardens was consistent with the state law prohibition of collective gardens.

**GMA: Growth Management Hearings Board Compliance Order Overturned, Requiring County GMA Compliance Actions to Compensate for Vested Rights Obtained in Subsequently Invalidated Urban Growth Area Expansion. *Miotke v. Spokane County*, 181 Wn. App. 369, 325 P.3d 434 (May 20, 2014).**

In a case of first impression, the Court of Appeals reversed a Growth Management Hearings

Board ("Growth Board") compliance order. The Growth Board previously invalidated a County Urban Growth Area ("UGA") expansion and ordered the County to comply with GMA goals and requirements. The County repealed the UGA expansion, and the Growth Board ruled that the County achieved compliance by doing so.

Opponents of the UGA expansion challenged the Growth Board's compliance determination because vested rights to develop in the expanded UGA had been obtained that would not be affected by the repeal of the UGA expansion. The court agreed with the challengers that because of the vested rights that had been obtained, repeal of the UGA expansion was not sufficient to neutralize the effect of the consummation of vested urban development outside the UGA. The court reasoned that GMA's statutory vesting provisions protected property owners and developers from changes in GMA plans and development regulations subsequent to vesting, but did not insulate the County from the obligation to take other remedial actions to offset the effects of urban development outside of the UGA.

### III. Federal District Court Decision

**City of Seattle Violated Federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") by Imposing upon Bishop Blanchet High School Regulatory Requirements for Installation of 70-foot Athletic Field Light Poles that Were Not Imposed Upon Public Schools in the City. *Catholic Archbishop of Seattle v. City of Seattle*, 28 F.Supp.3d 1163 (W.D.Wash. June 20, 2014).**

The City of Seattle ("City") zoning code provided a Special Exception process that was used by two public high schools in the city to install lighting poles on athletic fields that exceeded zoning height limits for lighting in residential zones. However, the City did not allow Bishop Blanchet High School to seek permission to install 70-foot athletic light poles in a single-family residential zone under the same Special Use process. Instead, the City required Bishop Blanchet High School to first obtain a variance which was denied in an administrative appeal filed by neighbors.

The court ruled that the City violated RLUIPA by subjecting Bishop Blanchet High School, a religious institution, to regulatory requirements on less-than-equal terms as those applied to similarly-situated public high schools.

*Richard L. Settle, Professor of Law at Seattle University (formerly University of Puget Sound) School of Law from 1972 to 2002, now is Professor of Law Emeritus at the Law School, teaching and lecturing in land use, environmental, administrative, and property law on an occasional basis. He has been of counsel with Foster Pepper PLLC since 1985 and continues to actively practice land use, environmental, administrative, and municipal law, representing a wide variety of clients, consulting with*



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

## Law School Reports

### Seattle University School of Law Environmental Law Society Update

By Samuel VanFleet, President, Environmental Law Society

This semester our members have been active in the Seattle community. A group of ELS members went on a trip with the Puget Soundkeeper Alliance on their boat patrol in the Puget Sound and on the Duwamish, monitoring industrial pollution and abnormal discharges from stormwater outflows. In October, ELS volunteers joined members of the Duwamish Tribe to clean and restore the banks of the Duwamish River during the annual Duwamish Alive Clean Up.

The ELS has also been active on campus bringing environmental issues to the student body. Our main on-campus event was a screening of *The Strong People*, a documentary that chronicles the removal of two dams from the Elwha River and showcases the tremendous impact that the river has on the Lower Elwha Klallam Tribe.

We are currently planning events for spring semester, including our marquee event—the Public Interest and Environmental Law Conference in Eugene, Washington, to which we hope to take around 24 members this year.

### University of Washington, Environmental Law Society Update – Fall 2014

By Andrew Fuller, Co-President, Environmental Law Society

The Environmental Law Society of the University of Washington (“ELS”) had an active fall. Members have engaged in a service project, worked on a significant pro bono campaign, expanded our leadership positions, and connected with one another while exploring the Cascades during a day hike.

To kick off the school year, ELS members and incoming first-year students participated in a service project at Alki Beach Park. More than a dozen students assisted in a beach cleanup hosted by the Puget Soundkeeper Alliance. The students collected garbage on the popular beach, documenting the amount and type of trash as part of International Coastal Cleanup Day efforts.

The ELS pro bono team is currently working on an environmental enforcement campaign designed to prevent the contamination of ground and surface waters in Washington from pollution generated by Concentrated Animal Feeding Operations, known as factory farms. This project helps to keep students motivated throughout their first year of law school

while giving them a way to directly participate in environmental advocacy and gain hands-on legal experience. Sixteen first year students are participating this fall, with assistance from three second-year leaders. Many thanks to our supervising attorney Andrea Rodgers Harris, Of Counsel to the Western Environmental Law Center, for her supervision on this project.

ELS members, pictured below, took a much needed break from classes on Veteran's Day to enjoy a beautiful, sunny morning hike to Annette Lake. Hikes like this, in addition to other events planned throughout the year, are a great way for ELS members to connect with one another as well as attorneys, alumni, faculty, and practitioners throughout the Seattle area. If you are interested in participating in ELS events, please join our email list by sending a request to [envirlawsociety@uw.edu](mailto:envirlawsociety@uw.edu).



In an effort to build continuity and prolong institutional memory, ELS has expanded the number of leadership positions within the organization for incoming 1L students. This expansion has already paid off in additional programming for our membership and will allow us to work more efficiently in the future.

We will continue to provide networking, educational opportunities, and advice for students throughout 2015. Some upcoming events include hosting a talk with an Assistant City Attorney for the City of Seattle who works in the environmental section, an event for students to discuss summer opportunities in environmental law, and a networking event.

We welcome input, advice, and project suggestions that may benefit UW ELS and its members. Questions or comments about ELS can be addressed to Chrissy Elles ([caelles@uw.edu](mailto:caelles@uw.edu)) or Andrew S. Fuller ([shopandy@uw.edu](mailto:shopandy@uw.edu)).

## ELUL Section Grants Funded the Award of Two Law Student Summer Fellowships

By Kristie Elliott

The ELUL Section provides yearly grant funding to the respective environmental law societies at the University of Washington ("UW"), Seattle University ("SU"), and Gonzaga University ("Gonzaga") Schools of Law. Past ELUL grants have funded student participation at the Pace National Environmental Law Moot Court Competition, the award of fellowships for otherwise-unpaid summer positions in environmental and land use law, and other worthy student endeavors in defined academic pursuits. Grants provided in 2014, for example, funded the award of two summer fellowships.

Andrew D. Woods, 2015 J.D. candidate and recipient of Gonzaga's Mike Chappell Environmental Law Fellowship, advanced his legal skills this summer while supporting Clean Water Act citizen suits. He identified legal issues, drafted legal notices, and participated in settlement negotiations. Says Andrew: "My experience this summer ... only further solidified my interest and understanding in the practice area. As I reach my graduation date this May, I am confident that I now have the skills and experience to further explore and work in environmental law and environmental policy."

Jacob A. Blair, 2016 J.D. candidate and recipient of SU's Matthew Henson Environmental Law Fellowship, advanced his skills while supporting worker health and safety concerns related to Hanford cleanup. He assessed the potential success of whistleblower claims, prepared legal memoranda, conducted a client interview and participated in client meetings, and drafted discovery requests and settlement agreements. Says Jacob, "I was able to reinforce many of the fundamental principles I learned during my first-year coursework ... My experience ... was so rewarding that I have continued to volunteer beyond the summer position."

For more information regarding ELUL Section grant funding, please contact Kristie Elliott at (360) 664-9179 or [kristie.elliott@eluh.wa.gov](mailto:kristie.elliott@eluh.wa.gov).



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- Sign up for the Moderate Means Program.

## Environmental and Land Use Law Section Membership Form

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