Environmental & Land Use Law

Published by the Environmental and Land Use Law Section of the Washington State Bar Association

Volume 41 Number 3 November 2015

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Message from the Editors

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The November 2015 edition of the Environment and Land Use Law Section's newsletter features recurring favorites, updates on several hot topics, and a new series that we hope both new and experienced practitioners alike will enjoy. This edition includes a discussion of the implications of the Clean Power Plan and the Washington Clean Air Rule for Washington state; an analysis of the Washington Supreme Court's recent decision in *Foster v. Ecology*; a summary of recent activity related to the development of Water Quality Standards for human health; and a dissection of the significant litigation that ensued in the wake of EPA's Waters of the United States rule. In this edition, we also welcome the inaugural article in a new "practice tips" series: Land Use 101. The November issue rounds out with some familiar favorites: a land use case law update, a federal case law update, and updates from the environmental societies at two of Washington's law schools.

Greenhouse Gas Regulation in Washington: What the Clean Power Plan and Washington Clean Air Rule Mean for the State

By Ankur K. Tohan, Daniel C. Kelly-Stallings, Alyssa A. Moir, K&L Gates, LLP

The United States Environmental Protection Agency ("EPA") finalized the Clean Power Plan ("CPP") on August 3, 2015. The final rule sets state-by-state greenhouse gas ("GHG") emissions standards that all states must meet by 2030. States can comply with these standards through a combination of producing energy more efficiently, reducing energy demand, shifting away from coal-fired generation and moving toward natural gas and renewable energy, as well as encouraging state and regional policies such as renewable portfolio standards and cap-and-trade programs.[1] If it survives legal challenges from a number of states and industry players,[2] the CPP will reshape energy production nationwide. In Washington, the CPP has been embraced by Governor Jay Inslee and the Washington Department of Ecology, which recently started down its own path to limiting GHG emissions. Right now, Ecology is coming up with rules to limit GHG emissions by stationary sources.

Clean Power Plan: Structure and Approach

The Clean Power Plan capitalizes on a little-utilized section of the Clean Air Act — Section 111(d) — to create a vast new regulatory scheme governing the emissions of stationary power plants, the country's largest emitters of greenhouse gases. Under Section 111(d), the CPP aims to reduce the average greenhouse gas emissions from the nationwide power sector 32 percent from 2005 levels by 2030. The CPP does this by establishing interim and final GHG emissions goals within a unique state-by-state framework.

continued on p. 2

The CPP sets emissions reduction targets for each state based on that state's power-producing characteristics and emissions profile, and based on three "building blocks," which include: (1) improving the heat rate for existing coal-fired power plants nationwide,[3] (2) expanding use of lower-emitting natural gas power plants by changing the priority in which the regional grid operators call upon plants to supply energy, and (3) increasing renewable electricity generation from sources such as wind and solar.[4] These GHG emission-reduction targets reflect an expansive agency view of the best system of emission reduction ("BSER") for existing power plants. Under the Clean Air Act, EPA typically regulates emissions within the footprint of a facility, i.e., EPA requires "inside the fence controls" for existing sources. But with building blocks (2) and (3) under the CPP, EPA took a new approach that examined emissions across the entire electric generation and distribution system.

Under the CPP, each state has its own emissions reduction target that equates to the performance standard corresponding with that state's BSER. It is up to each state to determine how to meet its unique emissions target.[5] The CPP provides broad flexibility to states to craft their individual emissions reduction plans. For example, a state may develop its own cap-and-trade program, or it may participate in a regional emissions reduction program. There are very few limits on what states may do to meet their targets. The CPP strongly incentivizes renewable energy as another way to meet state targets. New or expanded generation from wind, utility-scale solar, and geothermal count toward compliance with CPP targets, as do new or expanded off-shore wind, distributed solar, fuel cells, biomass co-firing, waste heat, and trash-to-energy, subject to meeting eligibility criteria.[6] A significant change from the proposed rule to the final rule, particularly for the Northwest, is that new hydropower generating capacity installed post-2012 counts towards compliance.[7]

By September 2016, states will need to submit either a final plan or an initial submittal with a request for an extension until 2018.[8] They can then submit a final plan alone or in cooperation with other states. States that fail to submit timely plans or plans that are not approved by EPA will be subject to a federal implementation plan ("FIP").[9] EPA published a proposed FIP at the same time it issued the final CPP. The FIP proposes a cap-and-trade program under which EPA would establish emissions limits on either a rate-based basis[10] or a mass-based basis.[11]

The different choices in crafting the state plans under the CPP — such as a cap-and-trade program based on a rate-based standard vs. a mass-based standard — are important for state regulators and industry leaders to understand. Choices about how to comply with the CPP will drive the pace and rate of policy change as well as the on-the-ground implications for energy markets, efficiency and sustainability programs, and potential regional cooperation.

Moreover, given the interconnectedness of the national electrical grid, impacts from state plans in some states will be felt in others. For example, some states that have latent renewable potential may be able to benefit from increased demand for renewables in other states. Likewise, states that import coal power across state lines will need to closely watch state plans that will affect their import/export partners. It is also possible that states will participate in regional plans that will affect energy producers by, for example, allowing them to trade emissions credits across state lines and energy consumers by potentially normalizing rate increase burdens across larger geographical sectors.

What the Clean Power Plan Means for Washington

Washington's state-specific targets under the CPP are moderate compared to other states. Nationwide, state targets range from 771 to 1,305 pounds of CO_2-equivalent ("CO_2e") emitted per megawatt-hour.[12] Each state's goal is based on the number of coal and natural gas-fired power plants in that state.

In Washington, roughly 70 percent of our electricity comes from hydropower,[13] and we have only one coal-fired plant, which is expected to be shut down by 2025. As a result, Washington's CPP target is right in the middle of this range at 983 pounds per megawatt hour.[14]

Washington is already on track to meet its CPP target. In fact, the target is higher than the CO_2 emissions that are projected to occur without the Plan. Historically, Washington's emissions rate has been around 1,566 pounds of CO_2e per megawatt-hour.[15] By 2020, this number is expected to go down by more than half to 634 pounds, in large part due to the planned shutdown of Washington's only remaining coal-fired power plant.[16] In contrast, Washington's final goal under the CPP is 983 pounds of CO_2e per megawatt-hour, which it has until 2030 to meet. In other words, Washington will not need to take drastic new action to meet its emissions target. The state is expected to comply with the CPP simply by ensuring compliance with laws that are already on the books and carrying out plans that are already under way.

Washington State's Independent Approach: the Anticipated Washington Clean Air Rule

This is not to say Washington will stay on the sideline. Governor Jay Inslee supports the CPP, stating that "these are very achievable goals for the state of Washington."[17] But he has also directed Washington's Department of Ecology to make rules limiting even further the amount of GHGs that are emitted in-state. This effort, called the Washington Clean Air Rule (the "Rule"), is in its early stages but

is expected to go beyond what is required by the Clean Power Plan. The Rule is scheduled to be adopted in summer 2016 and to take effect shortly thereafter.[18]

What the Washington Clean Air Rule Means for Washington

While the CPP regulates only power plants, it is anticipated that the new Washington Rule will take aim at all major sources of GHG emissions in the state. This includes some power plants, but it also includes landfills that release methane, steel mills, heavy manufacturing, paper producers, chemical manufacturers, and many others. It is not, however, expected to directly regulate transportation emissions at their source by imposing new emissions standards on vehicles.

Although specifics about the Rule have not yet been developed, it is expected that the Rule will have a unique structure. It will not be a cap-and-trade scheme — Governor Inslee tried to pass cap-and-trade legislation in Olympia this year, but the proposal failed to make it out of the Democratic-controlled House or the Republican-controlled Senate.[19] Ecology therefore is unlikely to propose a cap-and-trade scheme. Instead, the Rule is likely to be a "cap-and-reduce" program. It likely will set an emissions limit for the state[20] and require individual stationary emissions sources to reduce their emissions accordingly. The Rule is unlikely to include permits, licenses, or allowances of any kind, and will probably not include the kind of centralized carbon market that is the hallmark of cap-and-trade programs in places like California. One likely approach is to mirror the Clean Power Plan's flexible framework by setting emissions limits and then letting individual emitters figure out how to reduce emissions, much like the Clean Power Plan leaves it to states to determine how to meet emissions targets.

The coming year will be a busy one for Ecology and other stakeholders. In the last week of September and throughout October, Ecology held educational webinars and outreach meetings related to the Rule.[21] In December, the public comment period will open.[22] Public hearings will follow in winter and spring, and the final rule is scheduled to arrive in summer 2016.[23]

Only the industries that emit the most are likely to be affected. Ecology has released a list of all non-transportation entities in the state[24] that are currently emitting more than 100,000 metric tons of CO_2e per year (both on average and in sporadic years), and is considering limiting GHG reduction obligations to those entities. This list includes companies in the following sectors: power plants (9), waste (6), refineries and petroleum producers (5), metals (5), pulp and paper (5), natural gas distributors (3), minerals (3), petroleum and natural gas systems (2), food production (1), manufacturing (1), and chemicals (1).[25] These industries are believed to be responsible for around 60 percent of the State's GHG emissions,[26] and will likely need to find ways to reduce their emissions when the Rule takes effect.

According to Ecology, there will be flexibility for these industries as they seek to achieve compliance with the new Rule: "Companies and organizations will have a variety of options to comply. They could reduce their carbon pollution on their own, obtain reductions from others or facilitate emission reduction projects from economic sectors or sources different than their own. We anticipate that the Rule could provide opportunities for companies to generate credits or to trade credits with other regulated companies and organizations."[27]

Ecology's approach, therefore, will not establish a carbon trading or offset system; rather, the regulated community will likely be responsible for developing mitigation approaches on a project-specific basis (e.g., trading or offsets), as well as developing a basis for calculating and verifying those mitigation efforts. This approach may spur development of a mitigation marketplace in Washington. However, until that marketplace is established, transactional costs for the regulated community may be high if Ecology does not accept mitigation proposals that rely on established carbon markets outside the state.

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1 To view the full text of the final rule, visit www.epa.gov/airquality/cpp/cpp-final-rule.pdf.

2 *See, e.g.*, Murray Energy Corp. v. Environmental Protection Agency, Case No. 14-1112, in the U.S. Court of Appeals for the District of Columbia Circuit.

3 Improving the heat rate for existing coal-fired power plants involves applying best practices (e.g., turning off unneeded pumps, using digital controls and more frequent tune-ups) and equipment upgrades that improve the efficiency with which EGUs convert fuel heat input to electricity.

4 For a detailed description of these building blocks, *see* Environmental, Land and Natural Resources Alert, *EPA Proposes Major Reductions in Greenhouse Gas Emissions from Existing Power Plants Affecting Everyone Who Produces and Uses Energy* by Cliff Rothenstein, William C. Cleveland, and John F. Spinello (June 24, 2014). Note that building block 4, energy efficiency, was not used in setting targets in the final rule, but can still be used for state compliance purposes.

5 EPA has based these targets on electricity production rather than electricity consumption, placing a comparatively larger burden on states that export power compared to states that import power.

6 *See* Clean Power Plan VIII.K.

7 Notably, EPA adjusted its BSER calculations for a handful of states to better reflect the amount of emissions in an average hydropower year (averaged between 1990 and 2012), rather than the high levels of hydropower generation in 2012 that allowed states to use less fossil fuel generation. This included Idaho, Oregon and Washington.

8 In a change from the proposed rule to the final rule, a request for a two-year extension does not require a showing that states are developing a multi-state plan.

9 To view the proposed federal plan, visit www.epa.gov/airquality/cpp/cpp-final-rule.pdf (last visited Oct. 15, 2015). Several states, including Alabama, Arkansas, Georgia, Kentucky, Louisiana, North and South Carolina, Texas, and West Virginia, have indicated that they will "just say no" to the Plan, making them potentially subject to the federal plan.

10 Rate-based limits are expressed in pounds of carbon emissions per megawatt hour of power generated by existing power plants.

11 Mass-based limits are expressed in total tons of carbon emissions produced by existing power plants in the state.

12 Clean Power Plan: State at a Glance, Washington, www3.epa.gov/airquality/cpptoolbox/washington.pdf (last visited Oct. 15, 2015).

13 *See* Renewable Energy in the 50 states: Western Region, at 29, www.acore.org/files/pdfs/states/Washington.pdf (last visited Oct. 15, 2015).

14 *Id.*

15 *Id.*

16 *Id.*

17 *Obama Clean Power Plan Demands Emissions Reductions From States*, KUOW.org, Aug. 4, 2015, http://kuow.org/post/obama-clean-power-plan-demands-emissions-reductions-states (last visited Oct. 15, 2015).

18 Washington Department of Ecology, Clean Air Rule Timeline, www.ecy.wa.gov/programs/air/rules/wac173442/1510time.html (last visited Oct. 15, 2015).

19 H.B. 1314, 64th Leg., 2015–16 Sess. (Wash. 2015).

20 It is unknown at this time what that limit will be, but it may be loosely based on a 2008 law in which the Legislature required reductions in GHG emissions to 1990 levels by 2020, a further 25 percent reduction by 2035, and a 50 percent reduction by 2050. *See id.* This law has been the subject of recent legal debate, with the Attorney General of Washington concluding on September, 1 2015, that the law does not require the Legislature to enact a GHG reduction program. *See* dougericksen.src.wastateleg.org/wp-content/uploads/sites/23/2015/09/150901AGinformalopinionGreenhouseGases.pdf. This issue may become relevant to the question of whether Ecology has authority to enact a hard cap on emissions.

21 Washington Department of Ecology, Clean Air Rule Timeline, www.ecy.wa.gov/programs/air/rules/wac173442/1510time.html (last visited Oct. 15, 2015).

22 *Id.*

23 *Id.*

24 *See* List of Entities with Greenhouse Gas Emissions Above 100,000 MT CO_2e in Washington State, Sept. 21, 2015, www.ecy.wa.gov/programs/air/rules/wac173442/ComplianceObligationList092115.pdf (last visited Oct. 15, 2015).

25 *Id.*

26 For a breakdown of the end-user sources of GHG emissions in Washington, see Department of Ecology, Washington Clean Air Rule frequently asked questions, www.ecy.wa.gov/climatechange/CarbonRuleFAQ.html (last visited Oct. 15, 2015).

27 Department of Ecology, Washington Clean Air Rule frequently asked questions, www.ecy.wa.gov/climatechange/CarbonRuleFAQ.html (last visited Oct. 15, 2015)

Land Use 101: A Quick Primer on Property Information That Law School Didn't Teach You, *aka* a Mash Note to MRSC

By Martha Wehling, Phillips Burgess, PLLC

Your first few years as a practicing attorney likely do feel much like practice, despite the three years in law school, your law clerk positions, and those two grueling months preparing for the bar exam. In addition to learning how to communicate with clients, bill your time in six minute increments, and get your pleading properly served *and* filed in time for the upcoming motion calendar, you're also faced with the daunting task of confidently translating to those clients (or your very experienced partner) the byzantine level of land use regulations they face, in plain English. This brief guide is designed to help you efficiently identify the applicable regulatory framework for a local land use issue.

A. Identify the Project Site.

Although every project will be impacted by Washington's nesting dolls of regulation (local, state, laws of general applicability, and sometimes federal), you'll always want to begin with the local jurisdiction governing the project at issue. There is now an incredible amount of information available online, but the art is knowing where to look and how to navigate the various systems that our local jurisdictions use.

I work primarily in Thurston County, where we are fortunate to have access to the "Thurston GeoData Center."[1] GeoData allows me to obtain information about a property with either the street address or the tax parcel number. With that basic information, I can identify the property owner,

an abbreviated legal description, acreage, zoning, assessment history for the last several years, structures and age, permitting jurisdiction, and critical areas and buffers. The GeoData map allows me to map some of the above and compare aerial photos over the last 20 years. *See* Figure 1, showing steep slopes and new flood zones for a residential parcel in Thurston County.

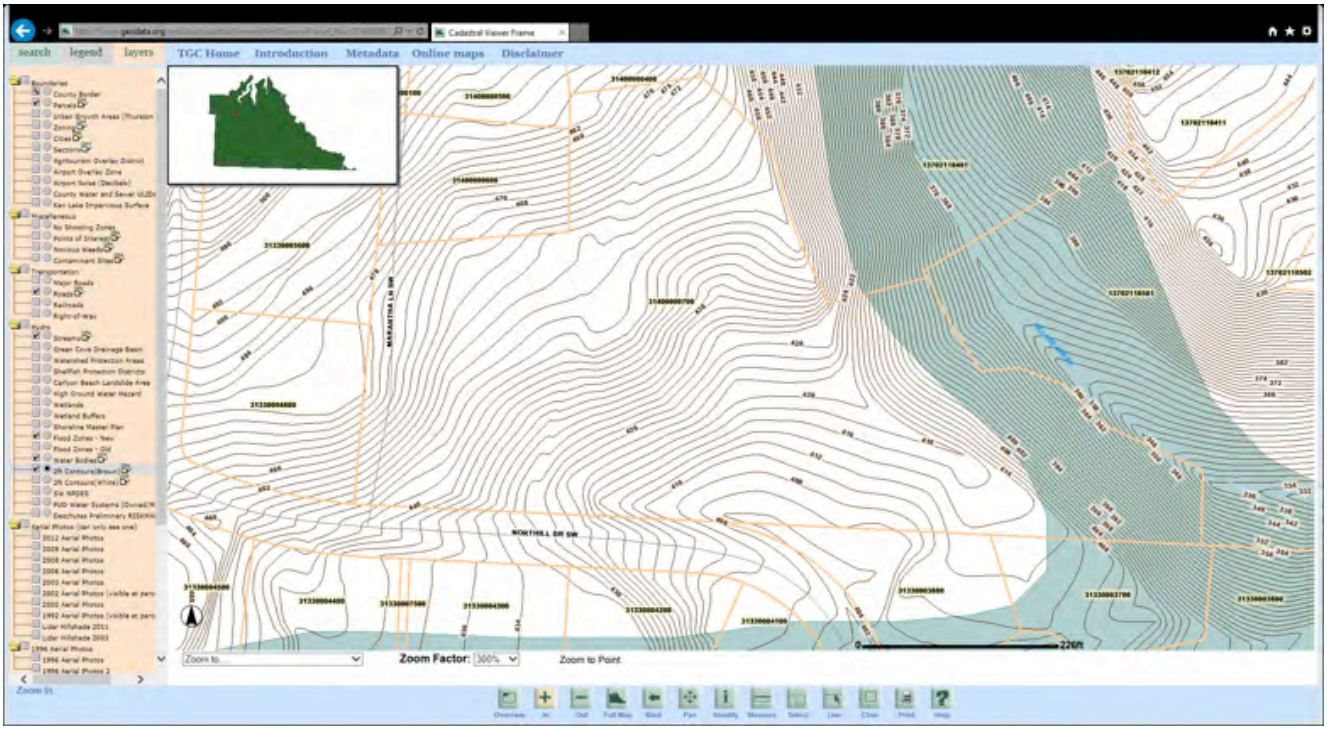

Figure 1: Thurston County GeoData map depicting 2' elevation contours and new flood zones.

Other jurisdictions have similar programs, although with varying features and ease of use.[2]

B. Find the Applicable Local Codes.

Your next step in identifying the controlling law is to identify the local jurisdiction's applicable code. There are two primary levels of local law, county codes for unincorporated areas, and municipal codes for the cities. In the example above, my parcel is within unincorporated Thurston County, so the governing local law is the Thurston County Code ("TCC").[3]

A couple miles east, a parcel would be within the City of Olympia, and governed by the Olympia Municipal Code ("OMC").[4] Navigating each jurisdiction's codes can be frustrating, because although they generally cover the same sorts of subjects (development, zoning, environmental protections), the organization of each code varies widely. For example, the zoning for my parcel in Thurston County is found in TCC Ch. 20.09A (rural residential/resource — one dwelling unit per five acres (RRR 1/5)). If that parcel was in the City of Olympia, I would find its governing regulations in OMC Ch. 18.04 (residential districts).

Switching between jurisdictions can also be challenging because of the terminology and lingo that is unique to the land use practice arena.

C. Utilize Secondary Resources, Especially MRSC.

The Municipal Research and Service Center ("MRSC") can be a godsend.[5] MRSC is basically the land use Wikipedia, only with every entry meticulously prepared by experienced lawyers rather than armchair pontificants. MRSC can get you started in the right direction, and if it is your lucky day, there will also be an article on the subject you're researching, saving you valuable time.

For example, the MRSC has a web page linking to each County's Code (which can sometimes be surprisingly hard to find using Google) and the code publisher: mrsc.org/Home/Research-Tools/Washington-County-Codes.aspx.[6]

The MRSC also has myriad articles about every land use issue you'll encounter, from environmental to planning issues. See Figure 2, topics in Planning.

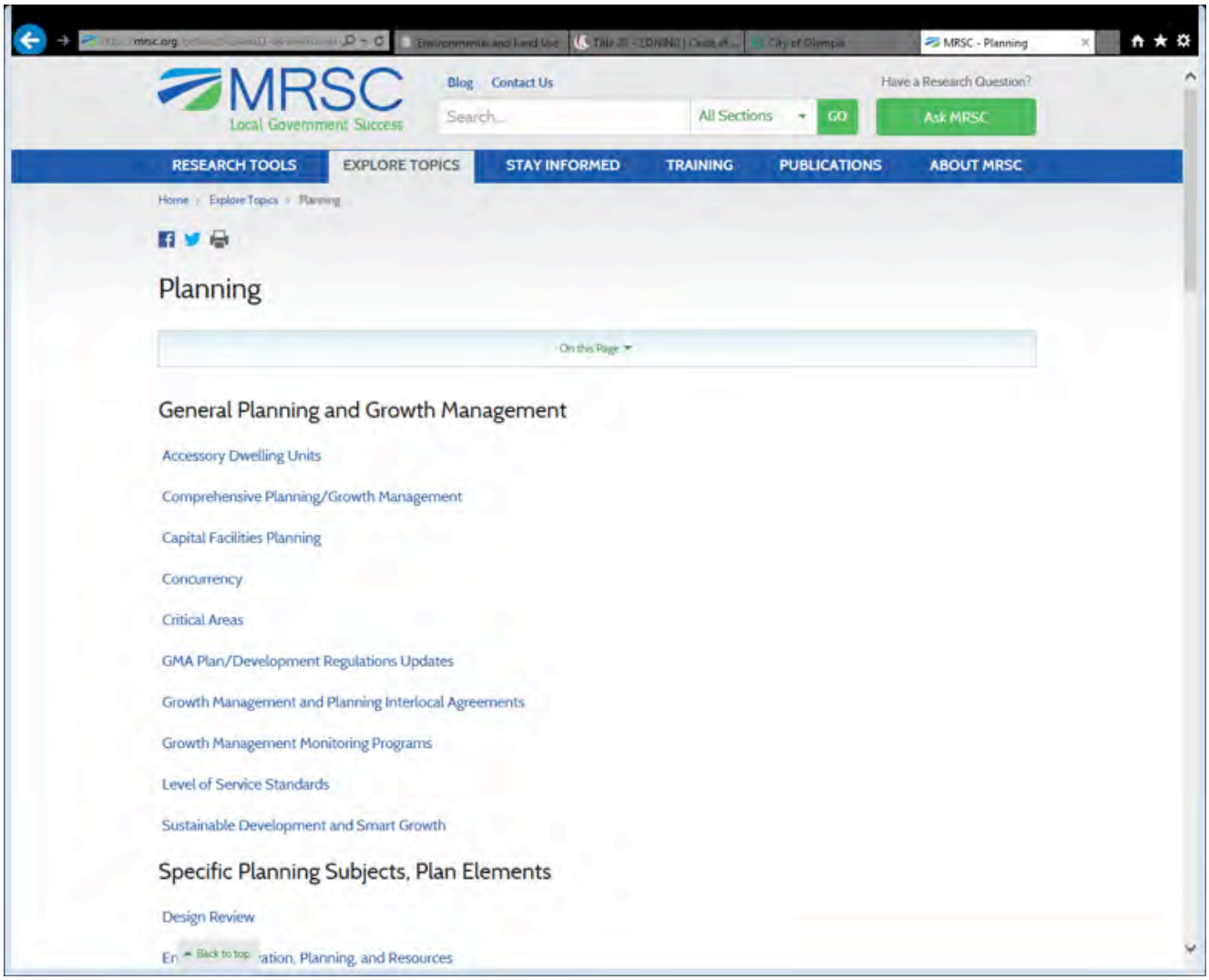

Figure 2: MRSC topics under "Planning" category.

Continuing my Thurston County parcel example, the MRSC webpage on "Critical Areas" provides me with the cites to the Growth Management Act, links to secondary handbooks and guidance on critical areas, a summary of and links to the applicable statutes and regulations, and a summary of applicable court decisions.[7]

D. Increase the Complexity by 100 fold if the Parcel has Listed Species.

As with everything in the law, regulation of listed species takes a belt and suspenders approach. A species can be listed at the state level, but not the federal, and vice versa. A local jurisdiction may vary its limitations based on those listings. While our state and federal agencies strive to make information publicly available, finding current information and status on a species' status in the regulatory program can be challenging. Two resources are particularly helpful.

First, the Washington Department of Fish and Wildlife maintains a Priority Habitats and Species ("PHS") program,[8] which allows you to work with an interactive map to create a report of the species *known* to the agency for a particular property.[9] *See* Figure 3.

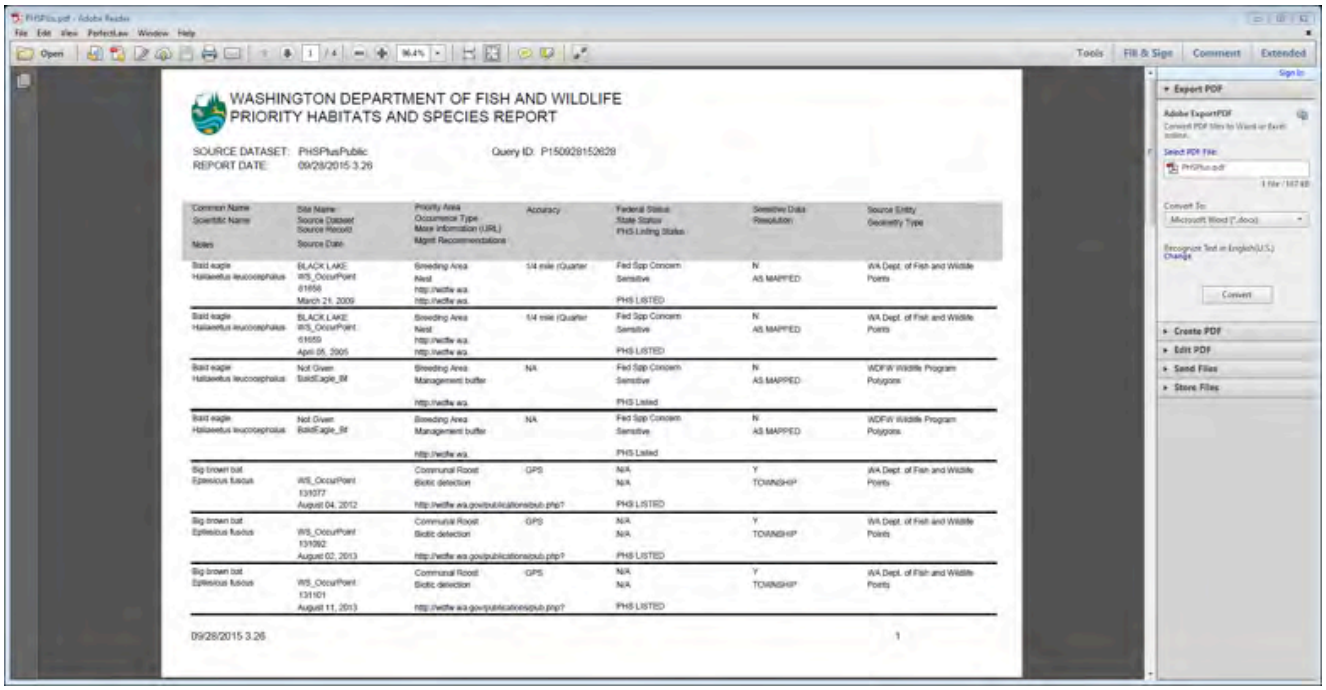

Figure 3: WDFW PHS Report.

In Figure 3, after selecting an area, PHS informs me which species are known to be present, the status of the species at the state and federal level, and the accuracy of the data.

Similarly, the United States Fish and Wildlife Service ("USFWS") maintains an interactive "Information, Planning, and Conservation" webpage ("IPaC").[10] For example, Thurston County contains 42 resources managed or regulated by the US, including 27 listed species, 13 migratory birds, 1 wildlife refuge, and wetlands.

Knowing which species are on or near your project can help you identify which agencies will be involved, and thereby the additional time to take into consideration for the project. For example, if your project is going to have any federal nexus, and contains critical habitat for a federally listed species, you will know that you need to take into account time for an Endangered Species Act Section 7 interagency consultation, even if the project is, for example, a dredge operation requiring a permit from the Army Corps of Engineers under Section 404 of the Clean Water Act. Regardless, you'll need to check your local Critical Areas Ordinance (for Thurston County, that is in TCC Title 24) for definitions and limitations.

E. Conclusion.

Although the learning curve for land use law is steep, you can take comfort in the well-worn path created by decades of attorneys that preceded you. Land use lawyers are fortunate to have a plethora of secondary resources to assist them, in addition to the wisdom of existing practitioners, some of whom actually had to look up this stuff in musty government offices.

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1 www.geodata.org/
2 Grays Harbor County Online Parcel Database: www.co.grays-harbor.wa.us/gh_Parcel/index_a1.asp; King County Parcel Viewer 2.0: www.kingcounty.gov/operations/GIS/PropResearch/ParcelViewer.aspx; Pierce County's "PublicGIS": matterhorn3.co.pierce.wa.us/publicgis/; Snohomish County Online Property Information Interactive Map: gis.snoco.org/maps/property/index.htm.
3 www.municode.com/library/wa/thurston_county/codes/code_of_ordinances.
4 www.codepublishing.com/wa/olympia/.
5 http://mrsc.org/Home.aspx.
6 The nice people at the MRSC also provide a similar page for the City Codes: http://mrsc.org/getdoc/8a63fbb0-0eb7-479b-a859-0af5962d2326/Washington-City-Codes.aspx.
7 http://mrsc.org/Home/Explore-Topics/Planning/General-Planning-and-Growth-Management/Critical-Areas.aspx.
8 http://wdfw.wa.gov/conservation/phs/.
9 http://wdfw.wa.gov/mapping/phs/disclaimer.html.
10 www.fws.gov/wafwo/species_new.html.

Growth Versus Rivers – New Developments in Water Law

Use of OCPI to Authorize Appropriations to Support Municipal and Rural Development That Impairs Minimum Instream Flows

By Jacqui Brown Miller, Cascade Pacific Law PLLC

On October 8, 2015, the Washington Supreme Court issued a 6-3 decision in *Foster v. Ecology*,[1] limiting how the Washington Department of Ecology ("Ecology") may use available legal tools to accommodate water needs for municipal and rural development while also protecting Minimum Instream Flows ("MIFs"). This decision will have statewide implications.[2]

The *Foster* case involves Ecology's approval of a new water right for the City of Yelm and the subsequent appeal filed by a small farmer in Yelm, challenging Ecology's approval and asserting that Ecology failed to adequately protect river flows in the Deschutes and Nisqually basins.

The black letter law that the Supreme Court established in *Foster* is:

1. MIF water rights no longer may be used as the source of water to support population growth. Growth and development pressures are common and not the type of extraordinary circumstance that can justify Ecology's use of the Overriding Considerations of Public Interest ("OCPI") exception in RCW 90.54.020(3)(a), the statutory provision prohibiting impairment of MIFs.
2. Out-of-stream mitigation for MIF impacts is no longer lawful — only water-for-water or in-kind mitigation is permitted.
3. Where OCPI could be used to impair MIF water rights, Ecology may authorize only temporary, not permanent, impairments.[3]

Foster builds on two Washington Supreme Court decisions, the 2013 decision in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*,[4] which for the first time limited Ecology's use of the OCPI exception, and its 2000 decision, *Postema, et al. v. Washington Pollution Control Hearings Board*.[5]

The *Swinomish* Case

Background

Swinomish involved Ecology's promulgation of an in-stream flow rule for the Skagit River System and the aftermath of this rule promulgation. The Skagit River is a huge river system — the largest in the western United States — with over 3,000 contributing tributaries, and the only river in the lower 48 states supporting all six species of Pacific salmon.[6]

In 2001, Ecology promulgated the "Skagit River Basin Instream Flow Rule" ("MIF Rule") that established regulations and MIF requirements for the Skagit River basin. Ecology did this under the authority granted to it by the state water code, Chapter 90.54 RCW, to set MIFs to protect fish, game, birds or other wildlife resource, as well as recreational and aesthetic values. The MIF Rule did not allocate noninterruptible water for new uses; rather, water for new uses was subject to being shut off when stream flows fell to or below the MIFs.[7]

In opposition to the rule, Skagit County argued the rule would effectively prevent new development that requires noninterruptible water year-round. The County sued and five years later, in 2006, the parties settled with Ecology. The settlement resulted in amendments to the MIF Rule ("Amended MIF Rule").[8]

The Amended MIF Rule established reservations of water for specified uses: 27 reservations for domestic, municipal, commercial/industrial, agricultural irrigation, and stock watering out-of-stream uses.[9] The reserved water for the new uses would not be subject to shut off, even during periods when the minimum flows established in the 2001 MIF Rule were not met.[10]

The legal difficulty with this approach is that the water code directs Ecology to retain base flows (which the Supreme Court in *Postema* equated with MIFs) sufficient for preservation of fish, wildlife, scenic, aesthetic and other environmental values, and navigation.[11]

Ecology believed the water code provided a way around this difficulty. A withdrawal of water that conflicts with base flows may occur "where it is *clear that overriding considerations of the public interest will be served*."[12] This has come to be known as the "Overriding Considerations of Public Interest" or "OCPI" exception. In promulgating the Amended MIF Rule, Ecology relied on this exception for authority to allow future reserved water withdrawals to impair MIF.[13]

To determine if the reservations qualified for the OCPI exception, Ecology devised a three-part economic balancing test. First, Ecology found the reservations would *significantly benefit important economic public interests* by allowing new withdrawals for domestic, municipal, industrial, agricultural, and stock watering to go uninterrupted when stream flows fall below MIFs. Second, Ecology found that the *impact of this on aquatic and recreational uses would be insignificant*, with small economic impacts to fisheries. Finally, Ecology concluded that *public economic benefits "clearly override" the latter potential harms*.[14]

The Swinomish Indian Tribal Community appealed the 2006 Amended MIF Rule and the rule was upheld by the Thurston County Superior Court. This decision was appealed to the Supreme Court, which overruled the trial court, holding that Ecology exceeded its statutory authority and erroneously interpreted the OCPI exception, and invalidating the Amended MIF Rule.

Supreme Court's Analysis

In striking down the rule, the Supreme Court held that the OCPI exception is "a narrow exception, not a device for wide-ranging reweighing or reallocation of water through water reservations for numerous future beneficial uses."[15]

Ecology argued that use of the OCPI exception was justified in the context of "a water management rule for a particular watershed as a whole," as opposed to individual water right applications. But the court found "no meaningful difference between water reservations that reserve water for future individual applicants to obtain the right to put the water to those beneficial uses and individual applicants who presently seek to appropriate water for the same beneficial uses, insofar as impairment of the minimum or base flows is concerned. In both instances, the result is a water right held by an individual to the detriment of the existing minimum flow water right."[16]

The Supreme Court continued, saying that using a balancing test to weigh certain societal interests against others does not create an "overriding" consideration:

> There is no question that continuing population growth is a certainty and limited water availability is a certainty. Under the balancing test, the need for potable water for rural homes is virtually assured of prevailing over environmental values. But the Water Resources Act of 1971...explicitly contemplates the value of instream resources for future populations: "Adequate water supplies are essential to meet the needs of the state's growing population and economy. At the same time *instream resources and values must be preserved and protected so that future generations can continue to enjoy them*. RCW 90.54.010(1)(a) (emphasis added)."[17]

The Supreme Court also identified a second difficulty with Ecology's use of the OCPI exception for the Skagit River Basin reserved water rights — it conflicted with the prior appropriation doctrine that applies to MIFs established by rule under *Postema v. Pollution Control Hearings Board*.[18]

The court in *Postema* established or affirmed several principles that come into play in *Swinomish*. First, when Ecology evaluates whether to issue a permit for the appropriation of groundwater, it must consider the interrelationship of the groundwater with surface waters, and determine whether surface water rights would be impaired or affected by groundwater withdrawals.[19]

Second, once an MIF rule is established, "the minimum flow constitutes an appropriation with a priority date as of the effective date of the rule establishing the minimum flow." MIFs are not "limited." Rather, they "are appropriations which cannot be impaired by subsequent withdrawals of groundwater in hydraulic continuity with the surface waters subject to the minimum flows. A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights, and RCW 90.03.290 mandates denial of an application where existing rights would be impaired."[20]

Third, RCW 90.03.290 does not differentiate between a *de minimis* or significant impairment. No impairment is allowed. If an appropriation would impair existing rights, the application must be denied.[21] "[A] proposed withdrawal of groundwater from a closed stream or lake in hydraulic continuity must be denied if it is established factually that the withdrawal will have any effect on the flow or level of the surface water."[22]

Based on *Postema*, the *Swinomish* court held that the Skagit MIF Rule is an appropriation of water with a priority date of 2001, and that reserving for future uses the very water necessary to meet MIFs would be an impairment of an existing water right, contrary to Washington's prior appropriation doctrine.[23] Thus, the reservations of water under RCW 90.54.050 must meet the same permitting requirements as any appropriation: "Ecology must affirmatively find [under RCW 90.03.290(3)] (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare.'"[24] Without the ability to find that the reservations will not impair existing rights, the reservations cannot be created.

The Foster Case

Background

While the *Swinomish* case was making its way through the courts, Ecology made a decision on a 1994 water right application submitted by the City of Yelm for a groundwater appropriation to provide municipal water supply believed necessary to meet forecasted population growth. A groundwater model was developed to predict the impact to surface water bodies from Yelm's pumping at the new proposed well. The model indicated that Yelm's new water right, if approved, would impair MIFs.[25]

Yelm's water right application has a long and nuanced history, with the Cities of Olympia and Lacey joining forces with Yelm to develop a regional approach to manage and mitigate impacts to water resources, including identified MIF impairments across affected basins. The municipalities

developed a comprehensive mitigation proposal, which included instream (water-for-water or in-kind mitigation) to cover most MIF impairments. However, even after the in-kind mitigation, "small, but modeled depletions of water in the Nisqually River watershed, as well as the depletion of water for parts of the year in the Deschutes River, and Woodland Creek, [were] not mitigated with in-kind water."[26] Having exhausted their ability to find in-kind mitigation water, the municipalities created out-of-stream (out-of-kind) mitigation to address the predicted MIF impairments.[27]

The need to mitigate these MIF impairments with out-of-kind mitigation is what led Ecology to employ the OCPI test to determine if Yelm's water right should be allowed.[28] In order to authorize the MIF impairments, Ecology relied on the OCPI exception. Ecology applied the same three-part economic balancing test that it used to allow MIF impairments in the Skagit River Basin through water reservations, which were ultimately at issue in *Swinomish*. After performing its three-part balancing test, Ecology approved Yelm's water right permit on the condition that the proposed mitigation be implemented.

Sarah Foster appealed Ecology's decision to the Pollution Control Hearings Board. In approving Ecology's use of the OCPI exception, the Pollution Control Hearings Board found "the out-of-kind mitigation provided a permanent and *net ecological benefit* to the affected streams, and was more than sufficient to offset the minor depletion of water."[29] Sarah Foster appealed again.

Supreme Court's Analysis

In *Foster*, the Supreme Court found the relevant facts to be similar to those in *Swinomish*: Ecology applied the same balancing test to conclude that the benefits of Yelm meeting future potable water demands due to population growth outweighed the impacts associated with MIF impairment.

The court rejected Ecology's use of OCPI to justify the Yelm MIF impairment for two reasons.

The court basically said, "*see Swinomish*." First, the court reiterated that RCW 90.03.290(3) allows approval of a permit application only if the proposed appropriation does "not impair existing rights," stating:

> Minimum flows are established by administrative rule and have a priority date as of the rule's adoption. These flows are not a limited water right; they function in most respects as any other water appropriation. As such, they are generally subject to our State's long-established "prior appropriation" and "first in time, first in right" approach to water law, which does not permit any impairment, even a de minimum impairment, of a senior water right. Minimum flows, do differ from other water appropriations in one respect: "withdrawals of water" that would impair a minimum flow *are* permitted, but only under the narrow OCPI exception.[30]

Thus, the court held, unless the OCPI exception has been met, Yelm's permit application must be denied.[31]

In rejecting Ecology's use of the OCPI exception, the court reapplied its *Swinomish* analysis:

> [In *Swinomish*,] we reasoned that Ecology's balancing analysis would nearly always treat beneficial uses as "overriding consideration[s] of public interest" so long as the benefits outweighed the harm resulting from impairing the minimum flows.... This conflicts with the principle that statutory exemptions are construed narrowly in order to give effect to the legislative intent underlying the general provisions. Moreover, we emphasize that the OCPI exception is "not a device for wide-ranging reweighing or reallocation of water." Ecology's use of the exception was an end-run around the normal appropriation process, conflicting with both the prior appropriation doctrine and Washington's comprehensive water statutes."[32]

The court's second reason for rejecting Ecology's reading of the OCPI rule has to do with how the water code defines "withdrawals" and "appropriations" of water. Because the OCPI exception prohibits "withdrawals" of water that would conflict with MIFs, and the water code's use of "withdraw" implies something temporary, the court held that Ecology may not use the OCPI exception to authorize permanent "appropriations" of water.[33]

In differentiating between the water code's use of "withdraw" and "appropriate," the court cited and analyzed RCW 90.03.010, RCW 90.03.550, RCW 90.03.383(3), RCW 90.03.370(4), RCW 43.83B.410(1)(a), RCW 43.83B.410(1)(a)(iii), and RCW 43.83B.410(1)(b). The court wrote:

> We hold that the OCPI exception does not allow for the permanent impairment of minimum flows. If the legislature had intended to allow Ecology to approve permanent impairment of minimum flows, it would have used the term "appropriations" in the OCPI exception. It did not. The term "withdrawals of water," however, shows a legislative intent that any impairment of minimum flows must be temporary. The plain language of the exception does not authorize Ecology to approve Yelm's permit, which, like the reservations in *Swinomish*, are permanent legal water rights that will impair established minimum flows indefinitely.[34]

The court also cast aside the elaborate mitigation plan designed to address MIF impacts. While the plan would mitigate MIF impairment by creating a net ecological benefit, wrote the court, the plan does not prevent the net loss of water resources. Although the plan may mitigate the *ecological* injury, it does not mitigate the *legal* injury (or impairment) to the senior MIF water rights.[35] The court ruled the mitigation plan does not present the sort of "extraordinary circumstances" that *Swinomish* held are required to apply the OCPI exception. Rather, the municipal water needs that underlie the mitigation are common and likely to occur frequently as strains on limited water resources increase throughout Washington.[36]

Implications for the Future

On the micro scale, the City of Yelm can probably salvage its water right application by reducing the amount of water it is requesting under its permit application. The development proposals that drove Yelm's water-demand forecasts fell through when the economy crashed in the late 2000's. It is not likely that predicted growth will occur in the timeframe originally thought. The MIF impacts from the volume of water that Yelm requested, after accounting for all of the proposed mitigation, were fairly limited. Therefore, it is probably possible to eliminate them by reducing volume of water associated with the requested water right.

On the macro scale, solutions will certainly be more difficult and complex.

It appears that when promulgating MIF rules, many in the 1980s, Ecology may not have foreseen that MIF rules someday would be used to preclude diversions of groundwater in hydraulic connectivity with surface water. This may have been, in part, because hydraulic connectivity was not well understood and because Ecology could not anticipate the *Postema* decision.

Yet, under *Postema*, any demonstration of impairment to MIFs, even a thimble-full, must foreclose the ability of groundwater for appropriation. Moreover, with advances in groundwater science and the adoption of the "steady-state" principle (that any pumped well eventually will reach a steady-state condition wherein 100 percent of the pumped water is captured from stream flow, regardless of whether this process happens in one day or over many years), more groundwater is considered to be in hydraulic connectivity with surface water, leaving municipal and rural growth to scramble for other sources of available water.

Water is a finite resource. Climate change is impacting the hydraulic cycle, including snowpack, rainfall, the ground's ability to store water, and the general thirstiness of vegetation, crops, livestock, and people. Population in Washington steadily continues to grow. Most residential water consumers, and even many industrial water consumers, take for granted that affordable and clean water will be available to them, and they possess little understanding of the behind-the-scenes costs of accomplishing this feat.

As surely as these things are true, water predictably will become ever scarcer and water conflicts will become more pitched. Ecology has, and will continue to be, relied upon to help find water for municipal and rural growth. In response to this pressure and to the limitations on allowing impairments to MIF water rights established in *Postema*, Ecology uses the OCPI exception as a pressure-release valve to accommodate municipal and rural development with what it believes to be relatively small MIF impacts. Ecology acknowledges this on its web site: "Ecology uses OCPI as a tool to approve water right permits when water availability is limited, but it appears the public benefits of approval outweigh any impacts on stream flows."[37]

The Supreme Court apparently does not, however, believe that the pressure to inflict relatively small MIF impacts will ever stop, and that the rivers and the resources that depend on them could eventually die a death of a thousand cuts. Water is life. And with the OCPI pressure-release valve now being less frequently available to Ecology, it is unclear how the agency will exercise leadership in efforts to stretch Washington's water resources to meet the needs and demands of everyone and everything for water supply.

For several years now, Ecology has convened a stakeholder workgroup dedicated to identifying rural water supply strategies. Ideas discussed on Ecology's web site include:

- Continue to establish reserves of water for domestic users in new or amended instream flow rules without making an OCPI determination.
- Establish mitigation banks.
- Require use of cisterns or other storage devices to satisfy closure periods.
- Use conservation of existing users to make water available for new users.
- Broaden mitigation options to consider the full hydrologic cycle and benefits to instream resources.
- Rely on local governments to integrate land use planning and protecting water resources.
- Statutory changes.[38]

Some of these ideas may now be foreclosed in view of *Foster's* apparent limitation on out-of-kind mitigation and permanent appropriations in association with OCPI and MIFs.

However, in-kind mitigation options that would avoid impairment by eliminating or offsetting impacts from new appropriations still seem workable in view of *Foster*. These would include pumping additional waters to streams at appropriate places

and times, groundwater infiltration, storage projects, relinquishment of existing water rights, water trusts for instream flows, and purchases or transfers of water rights.

Stay tuned 'til the last drop.

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1 Foster v. Ecology, et al., Washington Supreme Court, No. 90386-7 (October 8, 2015), available at www.courts.wa.gov/opinions/pdf/903867.pdf.
2 Court cancels water right permit for city of Yelm Ruling to guide Ecology in future water right decisions in water-short basins, Department of Ecology News Release (October 8, 2015), available at www.ecy.wa.gov/news/2015/146.html.
3 Foster.
4 178 Wn.2d 571 (2013).
5 142 Wn.2d 68 (2000).
6 Swinomish, 178 Wn.2d at 577.
7 *Id*.
8 *Id*. at 577–79.
9 WAC 173–503–073, –075.
10 Swinomish, 178 Wn.2d 571, 578.
11 RCW 90.54.020(3)(a); Swinomish, 178 Wn.2d at 578–79.
12 RCW 90.54.020(3)(a) (emphasis added).
13 Swinomish, 178 Wn.2d at 579.
14 *Id*.
15 *Id*. at 585.
16 *Id*.
17 *Id*. at 587.
18 142 Wn.2d 68, 81–82, 11 P.3d 726 (2000).
19 Postema, 142 Wn.2d 68, 81.
20 *Id*. at 81–82, 90 (internal citation omitted).
21 *Id*. at 91, 92–93.
22 *Id*. at 95 (it is noteworthy that Justice Sanders, in his *Postema* dissent, asks the question of whether impairment would be found if "as little as a thimbleful, or even a molecule, of water would be diverted from the surface flow.").
23 Swinomish, 178 Wn.2d 571, 584-85, citing Postema, 142 Wn.2d 68, 81–82.
24 Swinomish, 178 Wn.2d 571, 589 (citing Postema, 142 Wn.2d 68–79) and referencing RCW 90.03.290 (3).
25 Foster, et al. v. Dep't of Ecology, et al., PCHB No. 11-155, Finding of Fact, Conclusions of Law, and Order, 3-14 (Mar. 18, 2013), available at www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=5.
26 *Id*. at *11.
27 *Id*. at *3–14.
28 *Id*.
29 *Id*. at *23 (emphasis added).
30 Foster v. Dep't of Ecology, et al., No. 90386-7, 2015 Wash. LEXIS 1184 (Oct. 8, 2015), available at www.courts.wa.gov/opinions/pdf/903867.pdf.
31 *Id*. at *5–6.
32 *Id*. at *7.
33 *Id*. at *7–10.
34 *Id*. at *10.
35 *Id*. at *11–12.
36 *Id*. at *11.
37 Court cancels water right permit for city of Yelm Ruling to guide Ecology in future water right decisions in water-short basins, Dep't of Ecology News Release (Oct. 8, 2015), www.ecy.wa.gov/news/2015/146.html.
38 Finding Rural Domestic Water Solutions While Protecting Instream Resources, Ecology Pub. No. 15-11-007, at iii (Feb. 2015).

Recent Developments in Washington State's Human Health Criteria Applicable to Washington Waters

By Chris MacMillan, Demco Law Firm

Background

It has long been recognized that Washington's Water Quality Standards ("WQS") for human health are out-of-date and in need of revision to account for higher fish consumption rates.[1] Current standards assume Washingtonians consume 6.5 grams per day ("g/day") of fish and assign a theoretical cancer risk level of one in one million people for the assumed rate of consumption.[2] Over a year ago, Governor Jay Inslee announced a comprehensive plan that combined updated WQS with proposed legislation and funding to provide a solution that advanced the values of human, environmental and economic health.[3] Under Governor Inslee's proposal and the draft rule proposed by the Department of Ecology, Washington's WQS were updated to assume Washingtonians consumed 175 g/day but assigned a theoretical cancer risk level of one in 100,000 people.[4]

In large part, success of Governor Inslee's WQS proposal relied on the passage of a legislatively enacted toxic reduction package. That toxic reduction package, however, failed in the legislature, and on July 31, 2015, Governor Inslee directed the State Department of Ecology to reconsider its draft clean water rules and reassess options. In so directing, Inslee stated: "without this legislation we lack the necessary broad approach to protecting our water in a way that advances human, environmental and economic health. The lack of legislative action is disappointing and forces us to reassess our approach."[5]

The U.S. Environmental Protection Agency ("EPA") and Washington government officials, through numerous discussions, established an unofficial deadline of August 2015 for Washington to provide the EPA with a rule for federal review and approval.[6] If the State failed to produce a final rule by the deadline, EPA would develop and implement its own WQS.

The EPA Rule

The August deadline passed without the State submitting a rule to EPA. On September 14, 2015, EPA published a Proposed Rule revising the WQS for toxics in Washington. These standards, if adopted, are significantly more stringent than those Governor Inslee proposed. The EPA rule retains the Ecology rule's assumption that Washingtonians consume 175 g/day of fish. The EPA rule, however, assigned a theoretical cancer risk level of one in one million people for the assumed rate of consumption rather than the one in 100,000 proffered by the Governor.[7]

EPA's use of a fish consumption rate of 175 g/day is not surprising. Both Oregon and the Governor's proposal use the same rate. EPA relied upon surveys of local residents in the Pacific Northwest, including tribes and recreational anglers in making the determination that the existing rate of 6.5 g/day was not representative of the population's consumption rate. [8] EPA found that the average fish consumption rate from these surveys ranges from 63 to 214 g/day, far in excess of 6.5 g/day.[9] EPA settled on 175 g/day in part to protect the tribes that consume fish at a much higher rate than the general population.

The EPA's selection of a cancer risk level can be attributed to several factors, foremost being Washington's longstanding use of a cancer risk level of one in one million.[10] In addition, EPA considered tribal reserved rights, EPA guidance, and downstream protection.[11] It seemed particularly relevant to EPA that tribal treaties potentially require a certain level of risk — "e.g. a *de minimis* level of risk that would most reasonably approximate conditions at the time the treaties were signed and the fishing rights were reserved."[12] EPA also noted that they have historically used one in a million as the *de minimus* cancer risk level. [13] Finally, EPA reasoned that many of Washington's rivers are in the Columbia River Basin, upstream of Oregon's portion of the Columbia River and that Oregon's criteria are already based on a fish consumption rate of 175 g/day and a cancer risk level of one in one million.[14] Maintaining a consistent standard between the two states helps "provide for the attainment and maintenance of Oregon's downstream WQS as required by 40 CFR 131.10(b)."[15]

Economic Analysis

EPA estimates that 406 facilities will be affected by the rule, resulting in a total annual cost increase of approximately $13 million.[16] To arrive at this figure, EPA evaluated a sample of 17 municipal facilities using baseline permit conditions, reasonable potential to exceed human health criteria based on the proposed rule, and potential to exceed projected effluent limitations based on the last three years of effluent monitoring data.[17] In addition, EPA assumed that dischargers would pursue the least cost means of compliance with the rule. EPA annualized capital costs over 20 years using a seven percent discount rate to obtain the total annual cost for regulated facilities.

EPA's estimated cost is dramatically different from estimates presented during the State's rulemaking process. One study completed by the Association of Washington Business predicted that higher standards would cost consumers, on average, an additional $200 a month in utility bills.[18] Some industrial dischargers estimated that cost of compliance with these types of standards might be on the order of $7 billion.[19] In addition to the increased costs, some stakeholders argue that compliance with these standards is not feasible because the technology required to comply does not yet exist.

Responses to EPA's proposed WQS have been mixed. Treaty tribes are heralding the proposed rule as a positive first step to protect human health and the food on which they have always depended.[20] Conversely, cities, counties, and businesses say that the technology is not available to meet the stricter rules and they may be forced to spend billions for a standard that does little to benefit the environment or human health. One thing is clear: disconnect regarding the projected economic impact and the effectiveness of the more stringent standards figures to be central to the debate moving forward.

EPA accepted public comment until November 13, 2015 submitted to the Federal eRulemaking Portal at www.regulations.gov and identified by Docket ID No. EPA-HQ-OW-2015-0174.

Governor Inslee's Response

On October 8, 2015, in direct response to EPA's proposed rule, Governor Inslee directed the Department of Ecology to draft a new clean water rule. Inslee's new proposal aligns with EPA's rule by proposing a fish consumption rate of 175 g/day and a cancer risk rate of one in one million.[21] The key difference between the Governor's revised proposal and the EPA draft rule is his inclusion of implementation tools and a timeline to provide more flexibility for businesses to comply.[22] In addition, the Governor's proposal favors a broader toxics reduction effort, one that targets the hundreds of toxics that come from everyday products in addition to the 96 chemicals regulated by the EPA proposed rule.[23]

Governor Inslee directed the Department of Ecology to continue its collaborative approach with hopes of making the new rule available for public comment in early 2016.[24] If Washington submits final criteria to EPA for approval before EPA finalizes

the rule,[24] EPA will review and act upon the State's submission prior to any final action on the federal criteria.

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1 Doug Steding, *Washington's Efforts to Address Fish Consumption When Regulating Toxics*, Washington State Bar Environmental & Land Use Law Newsletter, Vol. 41 Number 1, February 2015, www.wsba.org/~/media/Files/Legal%20Community/Sections/ELUL/Newsletters/February%202015.ashx.
2 *Id.*
3 Inslee takes new approach to create meaningful, effective state clean water standards, Jul. 9, 2014, www.governor.wa.gov/news-media/inslee-takes-new-approach-create-meaningful-effective-state-clean-water-standards
4 *Id.*
5 *Id.*
6 *Supra* note 1, at 8.
7 Revision of Certain Federal Water Quality Criteria Applicable to Washington, Federal Register Vol. 80, No. 177, (proposed Sept. 14, 2015), *available at* www.gpo.gov/fdsys/pkg/FR-2015-09-14/pdf/2015-22592.pdf.
8 *Id.* at 55066
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *See* Castorina, Rosemary and Tracey J. Woodruff. Assessment of Potential Risk Levels Associated with the U.S. EPA Reference Values. Environmental Health Perspectives, Vol. 111, No.10, at 1318. Aug. 2003. www.ncbi.nlm.nih.gov/pmc/articles/PMC1241613/pdf/ehp0111-001318.pdf.
14 Revision of Certain Federal Water Quality Criteria Applicable to Washington, *supra* note 7, at 55068.
15 *Id.*
16 *Id.* at 55073.
17 *Id.*
18 Steding, *supra* note 1, at 7.
19 *Id.*
20 Terri Hansen, Treaty Tribes in Washington Hail EPA's Proposed Fish Consumption Rate and Water Quality Rules, Sept. 25, 2015, *available at* indiancountrytodaymedianetwork.com/2015/09/25/treaty-tribes-washington-hail-epas-proposed-fish-consumption-rate-and-water-quality-rules.
21 Inslee announces new path on water quality rule, continues work on broader toxics reduction efforts, Oct. 8, 2015, www.governor.wa.gov/news-media/inslee-announces-new-path-water-quality-rule-continues-work-broader-toxics-reduction.
22 *Id.*
23 *Id.*
24 *Id.*
24 Revision of Certain Federal Water Quality Criteria Applicable to Washington, *supra* note 7.

Clean Water Rule: Increasingly Troubled Waters

By Joanne Kalas, Riker Danzig Scherer Hyland & Perretti LLP

On June 29, 2015, the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Army Corps") published a final rule entitled "Clean Water Rule: Definition of 'Waters of the United States,'" 80 F.R. 37054-01, 33 C.F.R. 328, pursuant to authority under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et. seq.* ("Clean Water Act" or "CWA"). A more detailed description of the Clean Water Rule is available in the last edition of the WSBA Environment and Land Use Law section's newsletter.[1] After publication of the final rule, a deluge of litigation ensued, which included actions filed in a multitude of federal district courts and circuit courts of appeals across the country by states and business groups opposing the Rule's definition as too broad on a variety of theories, and by environmental groups asserting that the Rule's definition was not protective enough. Due to a question of whether a challenge to the Clean Water Rule is properly before the district court or circuit courts of appeals, many plaintiffs have filed actions simultaneously in both courts in a given jurisdiction.[2]

At the district court level, on August 27, 2015, one day before the Rule was scheduled to go into effect, a district court judge in North Dakota granted a request for a preliminary injunction to halt the Rule made by the 13 plaintiff states in that litigation.[3] The EPA and Army Corps announced that they understood the order to apply only to those states before the district court in North Dakota, which would allow the Rule to go into effect elsewhere.[4] The plaintiff states disagreed and filed a notice asserting that the order prevented the Rule from taking effect nationwide.

On September 4, 2015, after reviewing briefs filed by the parties, the district court in North Dakota issued another order clarifying that the preliminary injunction was limited to preventing the Rule from taking effect in only the 13 states of the plaintiffs in the case before it.[5] In so ruling, the district court stated that it had the competence to issue an order beyond the parties in the litigation, but chose not to do so because it deemed the record "not sufficiently complete to justify a broader application" and out of respect for "the decisions of other courts and other sovereign states."[6]

In other district courts, plaintiffs have requested preliminary injunctions to halt the rule without success. For example, the Northern District of West Virginia and the Southern District of Georgia both denied such motions because these courts determined they lacked subject matter jurisdiction,

which they deemed remains solely with the applicable circuit court of appeals.[7] The Northern District of Oklahoma stayed two cases before it (without ruling on the plaintiffs' request for a preliminary injunction) pending a decision from the U.S. Judicial Panel on Multidistrict Litigation ("MDL Panel") on whether it will consolidate all the district court cases challenging the Clean Water Rule, as requested by the federal agencies in July 2015.[8]

Puget Soundkeeper Alliance and Sierra Club filed actions in both the Sixth Circuit and the district court for the Western District of Washington, asserting that the EPA and Army Corps exceeded their authority under the Clean Water Act in promulgating the Rule by categorically excluding certain classes of water from federal jurisdiction and, thus, improperly removing them from the federal program.[9] On September 9, 2015, the Western District of Washington issued a temporary stay of the action pending the MDL Panel's decision on whether to consolidate all of the district court cases challenging the Clean Water Rule.

On October 13, 2015, the MDL Panel issued its order denying the federal agencies' request to consolidate the district court actions.[10] In doing so, it stated that consolidation of the actions "will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation," and that the varied procedural posture of the different district court cases at the present time would be "problematic" for consolidation. The MDL Panel highlighted that different district courts have ruled upon the jurisdiction question with varying outcomes, which weighed against consolidation because the transferee judge would have "to navigate potentially uncharted waters with respect to law of the case."

At the circuit court level, the MDL Panel has already consolidated in the Sixth Circuit over a dozen cases challenging the Clean Water Rule filed in roughly eight different circuit courts of appeals. Four of these consolidated cases involve 18 plaintiff states (Ohio, Michigan, Tennessee, Oklahoma, Texas, Louisiana, Mississippi, Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, and Wisconsin) that initially filed an action challenging the Rule in either the Fifth, Sixth, or Eleventh Circuits, where some have also simultaneously filed actions in one district court or another. The consolidated matters also include an action filed in the Sixth Circuit by the 13 states before the district court in North Dakota; these states simultaneously filed an action in both courts. As a result, the consolidated Sixth Circuit matters involve 31 plaintiff states that challenge the Clean Water Rule and assert, among other things, that the Rule is overly broad and unconstitutional, and that issuance of the Rule by the EPA and Army Corps is *ultra vires* and in violation of the Administrative Procedures Act.

Also in the Sixth Circuit, another seven states (Washington, New York, Connecticut, Hawaii, Massachusetts, Oregon, and Vermont) and the District of Columbia (the "District") filed a motion to intervene in the consolidated matters in support of the federal agencies and the Clean Water Rule.[11] These states and the District assert that they support the Rule "because it protects their water quality, assists them in administering water pollution programs by dispelling confusion about the Act's reach, and prevents harm to their economies by ensuring adequate regulation of waters in upstream states."[12] The Sixth Circuit granted this and other motions to intervene by various business and environmental groups either in opposition or support of the Rule. As a result, the consolidated actions before the Sixth Circuit now collectively involve 38 states and the District, as well as corporations, business groups, and environmental parties.

In September, the 18 states in the Sixth Circuit matters that were not party to the North Dakota action — thus, having no stay on the Rule as a result of the North Dakota preliminary injunction — filed a motion to dismiss their consolidated actions in the Sixth Circuit for lack of subject matter jurisdiction.[13] These 18 states now assert that the district courts alone have the authority to adjudicate their challenges to the Rule. (Again, many of these plaintiffs simultaneously filed in a district court and in a circuit court of appeals, no doubt hedging their bets regarding where jurisdiction and their challenges on the merits would ultimately be successful.)

These 18 plaintiff states also moved the Sixth Circuit to stay the Rule nationwide while it weighed on the jurisdiction issue.[14] The court acknowledges that there is a question regarding whether it has subject matter jurisdiction to rule upon the merits of the Clean Water Rule under § 1369(b)(1). Despite this, on October 9, 2015, the Sixth Circuit issued an order staying the Rule nationwide until it resolves the jurisdiction question, which it said it expects to do in a matter of weeks.

The next major act in the unfolding drama of defining "Waters of the United States" will play out in the Sixth Circuit as it decides whether or not it has jurisdiction to rule upon the merits of the Clean Water Rule, which could affect its nationwide stay of the Rule. Should the Sixth Circuit decide that it does not have jurisdiction, and that the challenges to the Rule are properly before the district courts, this would invalidate its order of stay (a point highlighted by the dissent in that decision). Should the Sixth Circuit decide that it has exclusive subject matter jurisdiction, this will further call into question the authority of the district courts that have ruled on the jurisdiction question to the opposite effect. Patchwork jurisdictional rulings across the country make it only more likely that the U.S. Supreme Court will eventually address the jurisdiction question and the substantive challenges to the Clean Water Rule.

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1 *See* Clean Water Rule: The Ebb and Flow of "Waters of the US," 41 Envtl. & Land Use Law 24 (Wash. State Bar Ass'n), Aug. 2015.

2 The question of jurisdiction surrounds the language in § 1369(b)(1) of the CWA that states that subject matter jurisdiction lies in the Circuit Court of Appeals for review of certain EPA actions. A question exists as to whether promulgating the Clean Water Rule or its effect qualify as any of the enumerated EPA actions in the statute.

3 *See* N. Dakota, et al. v. EPA, et al., No. 3:15-cv-59 (D.N.D. Aug. 27, 2015) (order granting preliminary injunction).

4 *See* N. Dakota, et al. v. EPA, et al., No. 3:15-cv-59 (D.N.D. Sept. 1, 2015) (Def.'s Resp. to Court's Order).

5 *See id.*

6 *Id.*

7 *See, e.g.,* Murray Energy Corp. v. EPA, et al., No. 1:15-cv-0110 (N.D. W.Va. Aug. 26, 2015) (order dismissing complaint for lack of jurisdiction); Georgia et al. v. EPA, et al., No. 2:15-cv-0079 (S.D. Ga. Aug. 27, 2015) (order denying preliminary injunction). The Northern District of West Virginia dismissed the complaint before it while the Southern District of Georgia merely denied the request for preliminary injunction; the plaintiff states before the latter court have appealed this decision to the 11th Circuit.

8 *See* Oklahoma ex re Pruitt v. EPA, et al., No. 15-cv-0381 (N.D. Okla. July 31, 2015) (order of stay); U.S. Chamber of Commerce, et al. v. EPA, et al., No. 15-cv-0386 (N.D. Okla. July 31, 2015) (order of stay).

9 *See* Puget Soundkeeper Alliance et al. v. McCarthy et al., No. 2:15-cv-01342 (W.D. Wash. filed Aug. 20, 2015).

10 *See* In re Clean Water Rule: Definition of "Waters of the United States," No. 3:15-cv-00059, U.S. Judicial Panel on Multidistrict Litigation (Oct. 13, 2015) (order denying transfer).

11 In re EPA and Dept. of Defense, Final Rule: "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 Published on June 29, 2015 (MCP No. 135), No. 15-3751 and related cases (6th Cir. Aug. 28, 2015) (motion to intervene).

12 *Id.* at 1–2.

13 *See* In re EPA and Dept. of Defense, Final Rule: "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015), No. 15-3799/3822/3853/3887 (6th Cir. Oct. 9, 2015) (order of stay).

14 *See id.*

Significant Recent Land Use Case Law

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

I. United States Supreme Court Decision

Local Sign Code Subject to Strict Scrutiny and Invalidated under Constitutional Free Speech Guarantees; Sweeping New Limitations on Local Sign Regulation: *Reed v. Town of Gilbert, Arizona,* 2015 WL 2473374, ___U.S.___, 135 S. Ct. 2218 (June 18, 2015).

Under constitutional free speech guarantees, "content-based" regulation is presumptively unconstitutional and may be justified only if the government proves that the regulation is "narrowly tailored" to serve "compelling government interests." In contrast, "content neutral" regulation of only the time, place, or manner of communication is subject to only minimal constitutional scrutiny and is upheld if it bears a rational relationship to any public interest. In this case, the Court expansively defined "content-based regulation" and invalidated the challenged elements of the Town's sign regulation code, reversing decisions of the federal district court and Ninth Circuit Court of Appeals.

The Good News Community Church and its pastor, Clyde Reed, whose services are held at various temporary locations, posted signs early each Saturday showing the Church name and the time and location of the next service and did not remove the signs until around midday on Sunday. The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. Unable to reach an accommodation with the Town, the Church and pastor filed suit, claiming that the Code abridged their freedom of speech.

The Town's Sign Code prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs. The most directly relevant exempt category, "Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," is more restrictively regulated than other exempt categories. No more than four such signs, limited to six square feet in size, were allowed at any time, and the signs could be displayed for no more than 12 hours before the "qualifying event" and one hour after.

The Court unanimously held that the challenged sign code violated first amendment free speech guarantees applicable to state and local government through the fourteenth amendment. The majority opinion by Justice Thomas, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alioto, and Sotomayor, broadly held that all regula-

tion based on the subject matter of speech, no matter how general, and even regulation of the "function or purpose" of speech that is not explicitly based on subject matter, is subject to strict scrutiny under the First and Fourteenth Amendments. The majority opinion emphasized that no government intent to target specific ideas, opinions, or messages is necessary to characterization of regulation as "content-based." Any regulation that directly or indirectly is based on the subject matter of the communication in any way is "content-based" and subject to strict scrutiny. Concurring opinions by Justices Breyer, Ginsburg, and Kagan argued that the ordinance should have been invalidated on the basis of a narrower interpretation of constitutional free speech guarantees.

Under the majority's holding, any regulation of signs (or other communications) based on the subject matter, including function or purpose, as opposed to only the time, place, or manner of the communication, is subject to constitutional strict scrutiny, a test that is rarely passed. It is expected that most local sign regulations will have to be extensively reviewed and revised to avoid successful legal challenge.

A concurring opinion by Justice Alito, joined by Justices Kennedy and Sotomayor, attempted to explain the kind of sign regulation that would not be "content-based under the majority opinion.

- Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which or speech or music is allowed.

II. Washington Supreme Court Decisions

Wind-Powered Energy Facilities: Limitation Periods for Judicial Appeals of Legislative Actions and Inactions by Non-GMA County. *Save Our Scenic Area v. Skamania County,* 183 Wn. 2d 455, 352 P.3d 177 (June 11, 2015).

Skamania County is a so-called non-GMA County, not required to fully plan under the Growth Management Act ("GMA"). There are 10 such counties in the state that are required only to designate critical areas and natural resource lands. They are sometimes referred to as "CARL" (Critical Area and Resource Lands) counties.

Skamania County completed natural resource but not critical area designations. For about five years, the County had a moratorium in place pending completion of critical area designations.

A large industrial wind turbine farm, known as "the Whistling Ridge Energy Project," was proposed on land that was zoned (and apparently mapped) as "unmapped," a zone that allows all uses which have not been declared a nuisance. The County approved plans for construction of the proposed energy project. In a previous action, Friends of the Columbia Gorge and Save Our Scenic Area (collectively, "SOSA") challenged the County approval. Ultimately, the Supreme Court upheld the approval, reasoning that the "unmapped" zone allowed all uses that had not been declared a nuisance.[1]

Subsequently, SOSA filed this action seeking declaratory and injunctive relief to stop construction of the wind farm, claiming that the County violated the GMA requirement to periodically review natural resource designations and the Planning Enabling Act requirement of consistency between its "unmapped" zoning and 2007 comprehensive plan. The County obtained summary judgment in superior court that the claims were not timely.

The Supreme Court reversed, holding both claims to be timely. The court held that the claims were subject to a 60-day limitation period, adopting by analogy the 60-day limitation period for petitions of noncompliance with the GMA to the Growth Management Hearings Board, which has no jurisdiction for appeals by "non-GMA" or "CARL" counties. The difficult question for the court was when the period began to run on the two claims. The court characterized the GMA claim as "failure to act" which can be brought at any time in appeals to the Board, thus holding the claim to be timely. The court explicitly recognized that there is no limitation period for commencing a failure to act claim.

Regarding the inconsistency between the zoning and comprehensive plan in violation of the Planning Enabling Act, the court held that the 60-day limitation period did not begin to run until, after years of false starts and moratoria, the County decided not to change the "unmapped zoning" in August 2012. Characterizing the County's decision to leave the five-year-old zoning in place as a final

decision, the court held that the action filed in September, 2012 was timely.

III. Washington Court of Appeals Decisions

Crude Oil Transportation Facility: EFSLA and SEPA. *Columbia Riverkeeper v. Port of Vancouver,* ___Wn. App.___, 357 P.3d 710 (August 25, 2015).

The Port of Vancouver ("Port") entered into an agreement to lease property to Tesoro Corporation and Savage Companies ("Tesoro/Savage") for construction of a crude oil transportation facility that would allow loading and unloading of crude oil from rail cars, storage of crude oil, and loading of crude oil onto marine vessels. Columbia Riverkeeper and Northwest Environmental Defense Center (collectively, "Riverkeeper") appealed a partial summary judgment dismissing their SEPA claims against the Port.

The parties agree that under a condition in the agreement, the Port cannot actually execute a lease of the property prior to certification of the facility by the state Energy Facility Site Evaluation Council ("Council"), following preparation of an environmental impact statement ("EIS"), and ultimate approval by the governor under the Energy Facility Site Location Act ("EFSLA"), Ch. 80.50 RCW. However, Riverkeeper claims that the Port violated SEPA by entering into an agreement to lease the property to Tesoro/Savage before the Council issued its EIS and by foreclosing reasonable alternatives prior to EIS preparation in violation of WAC 197-11-070(1).

The Court of Appeals disagreed with Riverkeeper, holding: (1) that the agreement to enter into the lease was exempt from SEPA review under a provision of EFSLA, not SEPA; and (2) that the agreement did not limit the choice of reasonable alternatives prior to SEPA compliance, under WAC 197-11-070(1) because the agreement was contingent on ultimate approvals by the Council and the Governor, both of whom had broad discretion that was not limited by the Port's agreement.

Significant New Limitation on Vested Rights Under the Subdivision Vesting Statute, RCW 58.17.033. *Alliance Investment Group of Ellensburg v. City of Ellensburg,* ___Wn. App.___, 358 P.3d 1227 (August 25, 2015).

Alliance Investment Group ("Alliance"), the owner of land in the City of Ellensburg zoned for light-industrial use, filed a short-plat application with the City in 2007 to divide the parcel into nine lots. The plat application indicated that the lots would be developed for business park use. However, no building permit applications were filed for structural development of the lots. The short plat application itself was processed under the subdivision, zoning, and other land use control ordinances, including the 2007 critical areas ordinance ("CAO") in effect at the time of the application, and was approved.

After the CAO was amended in 2009, Alliance requested a formal determination, called a "statement of restrictions" to confirm that future building permit applications for development on the platted lots also would be governed by the 2007 CAO and not the 2009 CAO. The City's Planning Director declined to do so and instead determined that future building permit applications would be governed by the 2009 CAO or whatever subsequent CAO was in effect at the time of any such future building permit applications.

Alliance unsuccessfully appealed the Planning Director's interpretation to the City Planning Commission and then filed a Land Use Petition Act ("LUPA") action in superior court; the court affirmed the City's interpretation. Alliance again appealed.

In the Court of Appeals, Alliance argued that under RCW 58.17.033 (the vesting statute for plat applications), the plat application and subsequent building permit applications for development on the platted lots, which had been disclosed in the plat application, should be governed by all relevant land use regulations in effect at the time of plat and subsequent building permit applications, relying on *Noble Manor Co. v. Pierce County.*[2]

Division III of the Court of Appeals disagreed, affirming the superior court and the City, holding that the short plat application vested only to the regulations governing the subdivision of the land and not regulations governing subsequent development except those addressing permissible use as the contemplated use had been disclosed in the plat application. Therefore, the court held that regulations addressing not the previously disclosed business park use but how the use would be developed, such as the CAO ordinance, were not vested by the plat application; and future building permit applications would be subject not to the 2007 CAO that governed the plat application but to any future amendments of the CAO until applications for building permits were filed.

The court's narrow interpretation of *Noble Manor* is contrary to *Westside Business Park v. Pierce County*,[3] never mentioned by the court, where a short-plat application that revealed a similar use was held to vest rights in stormwater regulations in effect at the time of plat application that subsequently changed.

If this Division III case is followed by Divisions I and II, the scope of vesting under RCW 58.17.033 in the state will be narrowed significantly.

LUPA Jurisdiction; Exhaustion of Administrative Remedies: *Klineburger v. King County Department of Development and Environmental Services Building,* 189 Wn. App. 153, 356 P.3d 223 (August 3, 2015).

Klineburgers owned property in King County ("County"), 800 feet from the Snoqualmie River near North Bend, lying within a federally mapped floodway, the area of a the river floodplain where

flood depths and velocities may reach hazardous levels. The site also lies within the river's designated channel migration zone, the area where the river's channel can be reasonably predicted to migrate over time. The County regulations divide a channel migration zone into moderate hazard and severe hazard areas. A road passes between the property and the river. The County included properties on the river side of the road in the severe hazard area and properties on Klineburgers' side of the road in the moderate hazard area.

In response to a County code-enforcement action directing Klineburgers to obtain required permits, they requested from the State Department of Ecology ("Ecology") a determination that they satisfied an exception to the general prohibition of building within a floodway. Ecology declined to recognize that the proposed construction was permissible under an exception and issued a succession of letters to the County saying that "Ecology does not recommend [approval]…."

Klineburgers appealed the County's enforcement action to the Hearing Examiner and included in that appeal their challenge of Ecology's negative recommendation regarding their proposed construction in the floodway. The Hearing Examiner denied their appeal, ruling that he lacked jurisdiction to review the findings of Ecology and noting that "the essential regulatory determinations [regarding proposed construction in a floodway] are made by the State Department of Ecology. The role of the County is limited to concurring with an affirmative recommendation from Ecology…."

Klineburgers appealed the Examiner's decision to Superior Court through the Land Use Petition Act ("LUPA"). The trial court agreed that the Examiner lacked jurisdiction over Ecology's action, but held that the superior court had jurisdiction under LUPA and that Ecology's negative recommendation was clearly erroneous. Ecology and the County appealed.

The Court of Appeals upheld the Examiner's ruling that he lacked jurisdiction to review Ecology's negative recommendation, but reversed the trial court's decision that Ecology's determination was clearly erroneous. The court held that the trial court lacked jurisdiction under LUPA for two reasons: first, because Ecology's negative determination was not a local government land use decision; and second, because Klineburgers had not exhausted an available administrative remedy to appeal Ecology's determination to the state Pollution Control Hearings Board ("PCHB"). The court held that an appeal to the PCHB was available and had to be exhausted as a prerequisite to judicial review under the Washington Administrative Procedures Act (not LUPA). The court rejected Klineburgers' argument that Ecology's determination was merely an advisory recommendation and not an appealable order. The court also held that the PCHB appeal was available even though RCW 43.21B.310(4) provides that an appealable decision "shall be identified as such and shall contain a conspicuous notice to the recipient" of the procedures for filing a PCHB appeal, and Ecology's letter failed to satisfy these statutory requirements.

Unprecedented Judicial Enforcement of Substantive SEPA Mandate: *Puget Soundkeeper Alliance v. Washington State Pollution Control Hearings Board,* ___Wn. App.___, 356 P.3d 753 (July 28, 2015).

For the first time, a Washington reported appellate court decision has recognized and enforced a substantive SEPA mandate. Since SEPA's adoption in 1971, RCW 43.21C.030(1) has provided as follows: "The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter,… ."

Environmental advocacy groups ("Puget Soundkeeper") challenged an order of the state Pollution Control Hearings Board ("PCHB") upholding a Department of Ecology condition of a wastewater discharge permit specifying that a single failed "whole effluent toxicity" ("WET") test would not violate the permit as long as the permittee would take specified subsequent measures.

Division II of the Court of Appeals reversed the PCHB, holding that the permit condition violated requirements of the state water quality statute and regulations and federal regulations, as well. The court also held that the permit condition violated SEPA's directive that to the fullest extent possible the policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies of SEPA. RCW 43.21C.030(1). The court identified two relevant SEPA policies that were transgressed by the Department of Ecology's permit condition: (1) "the responsibilities of each generation as trustee for succeeding generations," RCW 43.21C.020(2)(a); and (2) each person's "fundamental and inalienable right to a healthful environment" and each person's "responsibility to contribute to the preservation and enhancement of the environment," RCW 43.21C.020(3). The court went on to say that the Department of Ecology by "condoning violations of its own standards through this permit…has not acted in keeping with this trust."

The court's substantive SEPA decision was not necessary to the outcome because the court also held that the challenged permit condition violated the plain language of state and federal water quality laws. However, it is significant that the court chose to alternatively recognize and rely on SEPA's substantive mandate. The court's unprecedented substantive SEPA holding was strongly stated and may have far-reaching potential applications. Given the broad and vague language of the SEPA policies quoted by the court, as well as other SEPA policies in RCW 43.21C.010 and .020, virtually any gov-

ernmental action could be judicially invalidated or mandated, subject to potential constitutional limitations.

Strict Interpretation of Public Participation Requirements of GMA: *Spokane County v. Eastern Washington Growth Management Hearings Board,* 188 Wn. App. 467, 353 P.3d 680 (June 18, 2015).

Neighborhood Associations petitioned the Growth Management Hearings Board ("Growth Board") for review of a Spokane County Comprehensive Plan amendment that increased the size of the County's urban growth area ("UGA") by 4,125 acres and the population projection for 2031 from 113,541 to 121,112. The challengers claimed that the County violated the public participation requirements of the GMA by failing to inform the public that the County was considering increasing the state's 20-year population projection in the comprehensive plan along with expansion of the UGA.

The EIS prepared for the proposed Plan amendment to expand the UGA comparatively analyzed several alternative sizes of the potential expansion and concluded that all of the alternatives analyzed would be larger than necessary to accommodate the 20-year population increase projected by the state office of financial management. The EIS did not explicitly recognize that the County would have to increase the state's population projection to justify any of the UGA expansion alternatives. The County argued that the EIS adequately disclosed the possibility that the population projection would be increased as part of the amendment under consideration because the necessity of a population projection increase was implicit in the EIS conclusion that none of the alternative UGA expansions under consideration were necessary to accommodate the existing population projection.

The Growth Board disagreed that the EIS implicitly notified the public that the UGA expansion amendment might include an increase in the population projection, ruling that the County violated RCW 36.70A.035(2)(a) by not explicitly notifying the public that an increase in the Plan's existing population projection would be considered and, thus, violated GMA's public participation requirement. The Court of Appeals affirmed.

Repair of Rooftop Billboard Without Permit and In Violation of Stop-Work Order: *Total Outdoor Corporation v. City of Seattle Department of Planning and Development,* ___Wn. App.___, ___P.3d___(May 7, 2015).

The owner of a rooftop billboard that had been operated and modified under a succession of permits since 1926 dismantled and rebuilt the billboard, piece-by-piece, without obtaining a building permit and in violation of a stop-work order issued by the Seattle Department of Planning and Development ("DPD"). DPD agreed that the billboard was a legal nonconforming use and structure. And DPD and the owner apparently agreed that, as a nonconforming structure, the size of the billboard could not be expanded.

The owner argued that the deteriorating sign structure was simply replaced piece-by-piece, so the size of the billboard was not increased. DPD acknowledged that it "may or may not be true" that the size of the billboard remained the same; but because the sign was removed and reconstructed without first obtaining required DPD permits, the actual dimensions of the sign, before and after, could not be known with certainty. DPD rejected photographic evidence submitted by the owner, as unreliable, and concluded that "it is most reasonable to expect that the dimensions matched the most recent permit issued [in 1981]."

The Court of Appeals affirmed the trial court's decision that DPD's conclusion that the sign could not exceed the dimensions allowed by the 1981 permit was supported by substantial evidence and was not clearly erroneous, but reversed the trial court's decision upholding DPD's determination that the illumination of the sign was excessive, characterizing DPD's wattage limitation determination as an error of law.

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.

1 Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council, 178 Wn.2d 320, 345, 310 P.3d 780 (2013).
2 133 Wn.2d 269, 943 P.2d 1378 (1997).
3 100 Wn. App. 599, 5 P.3d 713 (2000).

Federal Case Law Update


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

CERCLA

***AmeriPride Servs. Inc. v. Texas E. Overseas Inc.*, 782 F.3d 474 (9th Cir. 2015)**

The Ninth Circuit held in *AmeriPride Servs. Inc. v. Texas E. Overseas Inc.*, that a district court is not required to apply either the *pro tanto* or proportionate share approach to allocate liability among CERCLA defendants; rather it has jurisdiction to determine the most equitable method for allocating liability among private parties to a CERCLA contribution action settlement.

Further contributing to the split among circuit courts of appeal concerning whether a district court should apply the *pro tanto* approach of the Uniform Contribution Among Tortfeasors Act, or the proportionate share approach of the Uniform Comparative Fault Act, in allocating liability among private parties to a CERCLA contribution action settlement, the Ninth Circuit vacated the district court's allocation of liability among CERCLA defendants, holding that courts have discretion to determine the most equitable method of liability allocation.

AmeriPride owned property contaminated by PCE from a dry cleaning facility operated at the site for many years. The company incurred investigation and cleanup costs, and filed a cost recovery action against prior owners of the property. Adjacent property owners and water rights holders also sued AmeriPride for contamination caused by the migrating PCE plume.

AmeriPride settled with the adjacent property owners for a total of $10.25 million, and with all but one of the other potential responsibility parties ("PRPs"), for a total of $3.25 million. The District Court approved the settlements, noting that California federal courts have adopted the proportionate share approach to determine how settlement of one or more parties should impact nonsettling parties. The remaining, nonsettling PRP moved for an order confirming the UCFA proportionate share approach should apply, and the court denied it, holding it would use equitable factors to allocate response costs between AmeriPride and the remaining defendant, reducing AmeriPride's claims only by the actual dollar value of the prior settlements (the pro tanto approach).

***Asarco v. Celanese Chem. Co.*, 792 F.3d 1203 (9th Cir. 2015)**

The Ninth Circuit held in *Asarco v. Celanese Chem. Co.*, that a judicially approved settlement agreement between private parties to a cost-recovery suit under CERCLA triggers the three-year statute of limitation under the statute. A later bankruptcy settlement with the government, which fixed the amount of cost recovery claims against Asarco at the site, did not revive the expired contribution claim.

Asarco was named as a potentially responsible party by Wickland Oil Co., which purchased Asarco's former Selby smelter site in Contra Costa, California and sought cost recovery against Asarco for cleanup of the property. Asarco settled the claims against it in 1983. In 2005, Asarco filed for bankruptcy and the State of California and Wickland's successor asserted claims for Asarco's share of environmental response costs at the Selby site. The bankruptcy court's claims settlement approved $33 million for claims against Asarco for response costs at Selby.

In 2011, Asarco filed a contribution suit against CNA Holdings LLC, the successor-owner of a subparcel of the Selby site, seeking contribution to its bankruptcy settlement. CNA sought summary judgment that the suit was time-barred because the 1989 settlement agreement covered all costs sought in the suit.

The Ninth Circuit held that the judicially approved settlement agreement started the three-year statute of limitations. It rejected Asarco's argument that it should insert a requirement that settlement include the United States, or a state, to commence the three-year statutory period. The court held that if a prior settlement addresses and allocates response costs, even if the extent of such costs are unknown at the time of settlement, the stipulation or judicial approval will likely trigger the three-year statutory bar on contribution claims.

The Ninth Circuit's decision holds significance for PRPs in a federal cleanup. The statute and regulating agencies encourage parties to resolve claims early to expedite cleanup and establish liability of the various parties. But if early settlements trigger the statute of limitations, thereby reducing the time within which parties must identify and seek cost recovery from other PRPs, that fact disincentivizes early settlement with other parties or regulating agencies.

Clean Water Act

***Ohio v. U.S. Army Corps of Engineers*, Docket. No. 15-13799 (6th Cir. Opinion, Oct. 5, 2015)**

Earlier this year, the U.S. Army Corps of Engineers ("Army Corps") and the U.S. Environmental Protection Agency ("EPA") issued the long-awaited final regulation defining "Waters of the United States" ("WOTUS"). The Army Corps and EPA apply the definition to determine whether parties seeking to fill or discharge pollution to wetlands and other water bodies must obtain federal permits.

After decades of interpretation by federal courts, including the U.S. Supreme Court, of what constitutes WOTUS, the Rule expanded federal control over several types of water bodies and provided specific criteria federal agencies could apply to determine whether the water in question met the definition. The Rule establishes federal jurisdiction over all tributaries, all waters within 100 feet of Traditional Navigable Water, Interstate Water, Territorial Sea, an impoundment of WOTUS, or a Tributary, and all waters within the 100-year floodplain and within 1,500 feet of any WOTUS listed previously. In addition to those categories, federal agencies have jurisdiction over some categories of waters if a "significant nexus" exists to Traditional Navigable Water, Interstate Water, and Territorial Seas. The identification of covered categories, and in particular the distance limits, now sweep many waters which previously did not fall under the WOTUS definition into the net of federal jurisdiction.

Several states immediately brought federal court challenges to the Rule. The Sixth Circuit Court of Appeals, in *Ohio v. U.S. Army Corps of Engineers*, Docket No. 15-13799 (6th Cir., Opinion Oct. 9, 2015), in consolidated actions, stayed the Rule, holding that the 18 states that filed a motion to stay the Rule demonstrated a substantial possibility of success in showing that the WOTUS rule contradicts the Supreme Court's ruling in *Rapanos*, and is procedurally flawed and arbitrary and capricious on the basis of the distance limits portion of the rule. The Army Corps and EPA will likely follow the agencies' December 2, 2008 Guidance 2008 until the court takes further action on the WOTUS Rule.

Clean Air Act

***Michigan v. EPA*, 135 S. Ct. 2699, 2015 WL 2473453 (2015)**

The U.S. Supreme Court struck down the mercury and air toxics standards ("MATS") for electric utility steam generating units ("EGUs").[1] In a 5-4 opinion written by Justice Scalia, the Court held that EPA improperly failed to consider costs in determining whether to regulate hazardous air pollutants emitted by electric utilities. EPA initially adopted the rule in 2000, based on a utilizing report showing that mercury emissions from EGUs are a threat to public health. After initial challenges and attempts to redefine the facilities to which the rule should apply, in 2012 the agency confirmed its determination that regulation of EGU's was necessary, and began to promulgate the standard.

State, industry, and labor groups challenged the finding that regulation was appropriate and necessary. They alleged that while EPA may have considered cost to the industry in its promulgation of the rule, it failed to do so prior to its determination that regulation itself was appropriate and necessary. The challengers alleged that the Clean Air Act requires the agency to consider cost at the initial stage, and not at a later phase of the regulatory process. EPA argued that it considered cost extensively throughout the process of its adoption of the standard, and that cost consideration analysis is woven throughout the rule's adoption. EPA noted that while implementation of the MATS rule would cost the industry $9.6 billion per year, the hazardous emission reductions value would equal $4 to 6 million, with other benefits (reduction in particulate matter and sulfur dioxide) valued between $37 to 90 billion.

Despite that fact, the Court likened EPA's later-stage consideration of cost to a person deciding it is "'appropriate' to buy a Ferrari without thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system."[2] Justice Scalia wrote that Section 112(n) of the Clean Air Act requires the EPA to at least take cost into account when making the threshold determination whether regulation is necessary and appropriate. Once it makes that determination it has discretion to decide how it will consider costs, and whether a formal cost-benefit analysis is appropriate. In so holding, the Court also held that EPA's refusal to consider cost in making that threshold determination was not a "reasonable interpretation" of the statute, and thus, not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[3]

The decision may have little practical effect, however; during the judicial review process for the MATS rule, the agency applied the standard, thereby forcing the industry to retire, upgrade, and change fuels for many facilities.

***Delaware Dep't of Nat. Res. v. EPA*, Case No. 13-1093 (D.C. Cir., Sept. 26, 2014 Order)**

The D.C. Circuit vacated an EPA rule allowing backup generators to operate without emission controls for 100 hours a year. The rule allowed industrial, medical, agricultural, oil and gas production, and power generator facilities to use stationary engines to power backup generators in order to respond to emergency energy demands without additional emission controls. The 2013 rule substantially increased the number of hours such a unit could operate — from 15 hours under the prior rule, to 100 hours.[4]

The Delaware Department of Natural Resources and Environmental Control petitioned for review and argued that the new rules would harm Delaware's ability to achieve and maintain national ambient air quality standards ("NAAQS") for both ground-level ozone and particulate matter. Further, they argued that EPA failed to analyze the associated increase in pollutants that are harmful to public health and the environment that would result from the rule change. Environmental and industry players also sought review, arguing that EPA acted outside its area of expertise in adopting the 100-hour exemption, and based on a mistaken impression that if industry used backup generators for emission controls, they would not participate in emergency electricity demand programs (the Emergency Load Response Program, or "ELRP") which could lead to grid unreliability. In other words, rather than regulating hazardous air pollutants, the environmental and industry petitioners argued that EPA was attempting to address reliability issues — authority that lies with the Federal Energy Regulatory Commission.

The court agreed with the petitioners, and vacated the rule. The court held that the 100-hour rule was based on inaccurate evidence that backup sources must be available at least 60 hours in order to allow the facility to participate in the ELRP, when that minimum does not apply to individual engines. More importantly, the court held that EPA justified its rule based on grid reliability grounds, which is "not a subject of the Clean Air Act and is not the province of EPA."[5] Therefore, the court refused to give deference to EPA's conclusion about reliability.[6]

The court noted that EPA may seek a stay of the vacatur pending further action by the Agency, but barring such a stay, generators could only operate the generators 15 hours per year without additional emission controls.

Endangered Species Act

***Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015)**

On June 17, 2015, the Ninth Circuit ruled that the U.S. Forest Service ("USFS") violated section 7 of the Endangered Species Act ("ESA") by failing to reinitiate consultation with the U.S. Fish and Wildlife Service ("FWS") regarding the impacts of a revised critical habitat designation on the Canada lynx (Lynx canadensis).[7]

The FWS listed the Canada lynx as threatened in 2000, designating 1,841 square miles of critical habitat for the species in 2006. The USFS subsequently adopted land management and permitting guidance after consultation with FWS and determining that the guidance provisions would not jeopardize the lynx. But when FWS revised the Canada Lynx critical habitat designation to add 39,000 square miles (including eleven National Forests) based on flaws in the original designation process, the Service declined to reinitiate consultation on the guidance's likelihood of causing jeopardy to the species.

An environmental group challenged the USFS's failure to consult, as a violation of the ESA, Section 7, seeking reinitiation of consultation, and injunctions on two projects that based their biological opinions on the relevant portions of the guidance.

The Ninth Circuit affirmed the district court's holding that the FWS's revised designation required the USFS to reinitiate section 7 consultation. The court declined, however, to enjoin the two projects, on the basis that the plaintiff had failed to show irreparable injury to justify the injunction relief sought. The court's adoption of that standard, based on two U.S. Supreme Court cases, overturned established Ninth Circuit precedent, and therefore the court remanded to allow plaintiff to make the showing.[8]

***United States v. CITGO*, Case No. 14-40128 (Opinion Sept. 9, 2015)**

On September 4, 2015, the Fifth Circuit in *United States v. CITGO*, Case No. 14-40128 (Opinion Sept. 9, 2015), significantly limited the application of strict criminal liability under the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C.§ 703, to only "deliberate acts done directly and intentionally to migratory birds," and not to any unintentional "taking" of migratory birds.

The MBTA prohibits the take of all listed birds, bird parts, nests, or eggs, without a permit and defines "take" to include "to pursue, hunt, shoot, wound, kill, trap, capture, or collect" listed birds. The birds killed in the CITGO case died in oil-water separator tanks without a roof. The district court held that the term "take" is ambiguous and involves more than hunting, poaching and intentional acts against migratory birds; therefore, the court held, the statute imposes strict liability on a defendant whose act "proximately caused the illegal 'taking.'"

CITGO appealed, and the Fifth Circuit reversed the district court, holding that the government must prove "at least an intention to make the bodily movement that constitutes the act which the crime requires." Therefore, the government must show that the defendant took an affirmative action, and caused the death of listed birds. The court also contrasted the definition of "take" in the Endangered Species Act, which Congress expanded well beyond the common law definition of "take" to the definition in the MBTA, concluding that the legislature intended the ESA to provide broader protection for listed species, while the MBTA specifically seeks to prevent the intentional targeting of migratory bird species.

The court joins the Eighth and Ninth Circuits in a circuit split on the breadth of criminal liability under the MBTA. Other courts have held, contrary to the Fifth, Eighth, and Ninth Circuits, that a party is strictly liable and subject to fines and imprison-

ment if the party failed to take reasonable care to prevent the death of listed birds. In light of the circuit split, the U.S. Supreme Court may address the issue.

Sage Grouse Listing Decision

On September 22, 2015, the U.S. Fish and Wildlife Service determined that the greater sage-grouse does not require Endangered Species Act listing for protection. The Service based the decision on the anticipated benefits of federal, state, private land management plans and partnerships, comprising 98 land use plans, to help conserve greater sage-grouse habitat. The Service's decision represented a significant milestone in collaboration among regulators and private interests to avoid species-listing, in light of the vast habitat range of the species and potential adverse economic effects associated with listing and critical habitat designation. The sage-grouse has faced significant population declines through its 173-million acre range. While the land use and conservation management plans are largely seen as a victory and the result of a successful negotiation to avoid listing while protecting millions of acres of habitat across public and private lands, critics on the environmental side say they lack sufficient protections for the species that listing would have provided. Conversely, private landowners critical of the deal worry that the significant limitations they agreed to in the plans may prove to have worse economic impacts than listing.[9]

***Bear Valley Mut. Water Co. v. Jewell*, No. 12-57297, 2015 WL 3894308 (9th Cir. June 25, 2015)**

The Ninth Circuit upheld the U.S. Fish and Wildlife Service's ("FWS" or "Service") rule designating critical habitat for the Santa Ana sucker fish. The FWS adopted its Final Rule in 2010, designating the sucker as threatened and designating as critical habitat thousands of acres which it had previously excluded. At the time of its adoption, FWS was also a party to the Santa Ana Sucker Conservation Program and Western Riverside County Multi-Species Habitat Conservation Plan ("MSHCP"), a plan that provided the participating agencies a 75-year permit for incidental take of 146 species, including the sucker, in exchange for its implementation of conservation measures. The Service was a party to, and approved the Conservation Plan, in 2004

FWS's subsequent Final Rule designated lands covered by the MSHCP, without cooperation with local municipalities and water districts. The municipalities and water districts sought review of the Final Rule, alleging that the service violated NEPA by failing to prepare an EIS in connection with its Final Rule, acted arbitrarily and capriciously in including lands it had previously excluded from designation, and failed to cooperate with state and local agencies concerning water resource issues.

The court flatly rejected the challengers' claim that FWS should have prepared an EIS in connection with its Final Rule, citing *Douglas County v. Babbitt*,[10] which held that the statute does not apply to critical habitat designations. The court held that while the ESA does declare a federal policy of cooperation with state and local agencies, the provision does not create an enforceable mandate.[11] The court also rejected the argument that EPA could not designate land as critical habitat, despite that the area was covered by a regional, multi-jurisdictional multiple-species habitat conservation plans.

Finally, the court held that the Service's decision to designate as critical habitat areas outside the geographical area the sucker presently occupied was not arbitrary and capricious.[12] The court noted that while the Service must generally designate areas of critical habitat within the species present range, 50 C.F.R. § 424.12(e) allows designation of areas outside the presently occupied areas where designation in the present range alone is inadequate to ensure conservation of the species.

The decision may affect the willingness of local governments and private parties to enter voluntary species conservation plans. Here, the Service successfully claimed it may ignore the regional habitat conservation plan which the challenging municipalities and private parties entered into, in part, to avoid critical habitat designation.

***Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761 (9th Cir. July 7, 2015)**

In another important Endangered Species Act ("ESA") decision, the Ninth Circuit upheld critical habitat designation for the southern population of green sturgeon. The National Marine Fisheries Service ("NMFS") issued its final rule designating critical habitat for the sturgeon, designating close to 11,500 square miles of marine habitat, 900 square miles of estuary, and hundreds of riverine miles in Washington, Oregon, and California, as critical habitat (an area totaling 8.6 million acres). Property owners and developers challenged the habitat designation for the threatened species on the basis that NMFS failed to balance the conservation benefits of designation against the economic benefits of excluding the areas from designation. The property owners argued that the ESA[13] requires NMFS to undertake such a balancing-of-benefits analysis.

The court held that after the agency considers economic impacts, the process it undertakes to determine whether to include, or exclude, lands from designation is entirely discretionary. Rather than prescribing any particular methodology or standards for exclusion decision, the statute gives the agency discretion on how and whether it will exclude areas from designation. Moreover, because the statute sets no standard, the agency's discretion to use whatever methodology it chooses is not subject to judicial review.[14] NMFS did consider eco-

nomic impacts of designation for all areas under consideration; therefore, the court rejected the appellants' argument that NMFS was required to follow any specific methodology for the inclusion or exclusion of lands within the designated area.

The court's interpretation that the agency's obligation to consider economic impacts of designation is separate from its discretionary decision whether to exclude areas from designation is significant. The Ninth Circuit's rejection of the notion that the agency must undertake any cost-benefit analysis in making exclusion determinations necessarily means that parties seeking to prove economic harm or unjustified economic burden on potentially designated property must provide such information early in the process, and seek avoiding designation altogether. In the alternative, they must work cooperatively with the agency to help insure that a cost-benefit analysis is part of the agency's review methodology. Either path likely means more uncertainty for land owners and developers in the critical habitat designation process.

NEPA

***U.S. Army Corps of Engineers v. Sierra Club*, No. 14-5205 (D.C. Cir. Sept. 29, 2015)**

In *U.S. Army Corps v. Sierra Club*, the D.C. Circuit considered the appropriate scope of environmental review that the National Environmental Policy Act ("NEPA") requires for a multi-state oil pipeline. The case concerned the Flanagan South oil pipeline, which moves crude oil more than 590 miles through the mid-west, from Illinois to Oklahoma. The land over which it passes is largely private land. Sierra Club brought suit in 2013, seeking to challenge federal regulatory approvals for the pipeline and to enjoin its construction. Sierra Club based its challenges, in large part, on its claim that the easements and approvals the federal government granted to allow the pipeline to pass over federal lands, in essence permitted the project as a whole. Therefore, the entire pipeline project was a foreseeable effect of those federal actions, requiring environmental review under NEPA for the entire pipeline. In particular, Sierra Club alleged that the Army Corps improperly analyzed impacts by region, rather than considering the cumulative impacts of the project as a whole.

The court disagreed, holding that the federal government need not conduct NEPA analysis of the entire pipeline, including portions not subject to federal control or permitting. Noting that the segments of the pipeline requiring federal agency action or approval were limited to less than five percent of its overall length, the agencies were not obligated to also analyze the construction and operation of the entire pipeline. The case highlights what will continue to challenge courts, project proponents, and opposition, alike: understanding and applying appropriate regulatory framework to increasingly large, inter-state energy projects.

Tribal Treaty Fishing Rights

***United States v. Washington*, Case No. 13-35474**

In 1970, a group of Washington tribes brought suit to clarify their Tribal Treaty fishing rights arising from the 1855 Treaty of Point Elliott, one of the Stevens Treaties, through which the Tribes ceded much of their land but reserved rights to use of land and resources, including a reservation of fishing rights at their usual and accustomed places. In that proceeding (known as the "Boldt decision") the district court enjoined most state regulation of treaty fishing and apportioned the fish harvest to allow sufficient fish for tribal needs.

In 2001, the Tribes filed a sub-proceeding, seeking federal relief on the issue whether the Tribal fishing rights carried a concomitant right to demand that fish habitat be protected, to ensure the continued existence of the fish. The issue arose because, throughout the state, old and poorly constructed culverts had created blockage of pathways anadromous fish take to upstream spawning locations. The blockages presented a significant impediment to fish, and as a result, to maintenance and recovery of fish (especially salmon) populations. In essence, the Tribes argued, the culverts cut off millions of square meters of salmon habitat and prevented Tribe members from taking fish at their usual and accustomed fishing places.

The district court held in April 2013 that the state must fix hundreds of culverts throughout the state. Following that holding, the court convened an implementation stage of the proceeding, and enjoined the State Department of Transportation to correct its most significant barriers within 17 years, and the State natural resources agencies to do so by 2016. The State of Washington appealed the district court order granting a permanent injunction. The Ninth Circuit Court of Appeals, in Seattle, WA, heard oral argument on October 16, 2015.

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Tyson Kade is Of Counsel to Van Ness Feldman LLP. He represents clients before federal agencies and state and federal courts on a broad range of matters involving natural resources, pipeline safety, and energy law. Tyson provides strategic guidance on Endangered Species Act, National Environmental Policy Act, and

Clean Water Act compliance and liability issues, advises on Magnuson-Stevens Fishery Conservation and Management Act matters, and assists with permitting for energy development and hydropower projects.

Carly Summers is an associate at Van Ness Feldman LLP. Her practice focuses on land use, environmental law, and water law. She has significant experience providing counsel on the siting and permitting of development projects; environmental and natural resource matters under the Clean Water Act, Comprehensive Environmental Response, Compensation, and Liability Act, and Washington's Model Toxics Control Act; and regularly assists clients with environmental compliance, and assessment and management of environmental liabilities.

1 Michigan v. EPA, 135 S. Ct. 2699, 2015 WL 2473453 (2015).
2 Slip. Op. at 11.
3 467 U.S. 837 (1984).
4 78 Fed. Reg. 6,674.
5 Order, at 29.
6 *Id.*
7 Cottonwood Envtl. Law Center v. U.S. Forest Serv., 789 F.3d 1075 (9th Cir. 2015).
8 *Id.* at 1089 (citing Winter v. Nat. Res. Defense Council, Inc., 555 U.S. 7 (2008), and Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010)).
9 Historic Conservation Campaign Protects Greater Sage-Grouse, U.S. Dep't of Interior, Sept. 22, 2015, available at www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse.
10 48 F.3d 1495 (9th Cir. 1995).
11 Decision, at 19–23 (Section 2(c)(2) of the ESA does not create an independent cause of action).
12 *Id.* at 34.
13 16 U.S.C. § 1533(b)(2).
14 *Id.*

Law School Reports

Update from the Seattle University Environmental Law Society

To kick off the fall semester, 15 members Seattle University's Environmental Law Society ("ELS") joined Puget Soundkeeper Alliance in a coastal cleanup project at Centennial Park.

Later in the semester, we will again join Puget Soundkeeper Alliance on their boat patrol in the Puget Sound and on the Duwamish River, where we will be monitoring industrial pollution and abnormal discharges from stormwater outflows. In October, ELS will join forces with Seattle University's Native American Law Student Association, members of the Duwamish Tribe, and a host of Seattle area community members to help clean and restore the banks of the Duwamish River during the annual Duwamish Alive Clean Up!

In the spring, ELS is planning a career panel that will provide students with insight into the various environmentally focused career paths one can choose. We will also be teaming up with the University of Washington's Environmental Law Society, Washington State Bar Association, and King County Bar Association for the annual professional development event in April. In addition, we are organizing ELS members to attend the Public Interest and Environmental Law Conference in Eugene, Oregon March 5–7, 2016. Finally, we are working to expand the number of scholarships we can offer to students participating in environmental work during the summer.

The ELS is always looking for additional ways to get involved in the community, so please do not hesitate to reach out to any of the ELS board members if you would like to collaborate or we can be of any assistance.

University of Washington School of Law – Environmental Law Society Update

The University of Washington Environmental Law Society ("ELS") is excited for the upcoming year.

For the 2015–2016 school year we have three overarching goals: promoting civic involvement of UW law students in the community through service projects and pro-bono opportunities; building bridges between UW Law and the community of environmental practitioners by providing formal and informal networking opportunities; and facilitating greater involvement of UW Law in the community of environmental scholars at the University of Washington.

Our first goal got off to a beautiful start on September 24, 2015, when ELS hosted a beach cleanup at Golden Gardens. The day was warm and sunny, and an impressive turnout of 1L and 2L students gathered an equally impressive assortment of marine debris. The day ended with a sunset and cookout.

This year's pro-bono coordinator Steve McKevett has been working with Andrea Rodgers Harris of the Western Environmental Law Center to develop a pro-bono project for the autumn and winter terms. The exact details of the project are still being developed, but it will likely involve substantial student research into the regulation of carbon dioxide as a legal avenue to combat ocean acidification. Last year's pro-bono project looked into possible Clean Water Act violations from concentrated animal feeding operations and required 1Ls to submit records requests, analyze textual records and geospatial data, and compile this information into usable reports. The project was a great success and we look forward to working with Ms. Harris again this year.

During the 2014–2015 academic year, UW Law students benefited from hearing from panels of environmental practitioners from government, public interest, and private practice. Many UW students attended the mixer at the Arctic Club, co-organized by the Seattle University School of Law. The Environmental Law Society was also thrilled to receive a $1,000 grant from King County Bar Association Environment and Land Use Law section. This generous grant was disbursed to seven law students to help defray the cost of commuting to their places of work over the summer. Pursuing our second goal of greater exchange between UW and the community of practitioners, this year's ELS co-presidents Sophia Amberson and Raz Barnea are committed to providing similar career development and networking opportunities for UW Students.

In January 2015, UW hosted the Arctic Encounters Symposium, and several ELS members benefited from volunteering at the symposium and from attending some of its plenary and breakout sessions. In November of 2015, UW will host a symposium on ocean acidification and the law. Both of this year's co-presidents are recent graduates of the University of Washington School of Marine Environmental Affairs, which has two faculty presenting at the symposium. ELS members will be encouraged to attend this symposium. The ELS co-presidents are committed to keeping the membership apprised of other environmental colloquia throughout the year and to strengthening connections between UW School of Law and the many environmental science and policy initiatives at the University of Washington.

We appreciate the Section's interest in our activities, and invite all members to reach out to us with input, advice, or project ideas that may benefit UW ELS and its members. Questions or comments can be addressed to Sophia Amberson (*amberson@uw.edu*) or Raz Barnea (*rbar18@uw.edu*).

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- Sign up for the Moderate Means Program.

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❒ Please enroll me as an active member of the Environmental and Land Use Law Section. My $35 annual dues is enclosed.

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Environmental and Land Use Law Section

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