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In This Issue

Section Report

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

There have been several developments and events in the ELUL Section over the past six months. As many of you know, Steve Jones resigned as Chair of the Executive Committee because he has moved to take a position with Holland & Hart LLP in its Salt Lake City office. We will miss Steve, and on behalf of the Executive Committee I want to thank Steve for his tremendous service to the section. As a result of Steve's departure, I, as Chair-Elect, have assumed the duties of the Chair.

It is an honor to be Chair of a section that has a very committed and involved Executive Committee, and one of the largest WSBA section memberships. The ELUL Section has maintained extensive membership benefits that include excellent and substantive section newsletters, CLE programs including the popular Midyear CLE and the December ethics CLE, and law school grant programs. The Executive Committee has also continued to explore other programs to benefit the ELUL Section membership. These include the recent creation of the Land Use & Environmental Mediation Committee (LUEMC). The LUEMC is a joint standing committee of the WSBA ADR and ELUL Sections. I urge you to look at the LUEMC web site: *http://wsba-adr.org/group/land-use-environmental-mediation-committee.* In our continued interest in law school outreach, we have been developing over the last few years the attorney and law school student social mixers that promote the interaction of law students with lawyers practicing in the land use and environmental law fields. These have been very successful, and this last Spring we had mixers in Seattle, Spokane and the Tri-Cities. I ask that when you see these mixers scheduled, you try to attend. We have also started efforts to coordinate with local bar associations on mini-CLE programs.

We had a very successful *Midyear Meeting and CLE Program* on May 3-4, 2013, at the Alderbrook Inn. We owe thanks to all the speakers, who had excellent presentations and written materials, and special thanks to the co-chairs, Kelly Wood (Phillips Wesch Burgess PLLC, Olympia), and

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Interim Editor's Message

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

Welcome to the September edition of the Newsletter. This edition is packed with substantive articles and updates on case law and administrative decisions. The first article, by Heather Burgess of Phillips Wesch Burgess PLLC, is about the proposed federal listing of the Mazama pocket gopher and the listing's potential impacts on land use permitting and future planning under the Growth Management Act. The second article, by Jennifer Addis, Ankur Tohan and Eric Laschever of K&L Gates LLP, contains an analysis of the U.S. Supreme Court's recent decision in *Decker v. Northwest Environmental Defense Center*.

These articles are followed by updates from regular contributors to the Newsletter. Richard Settle provides an update on recent land use decisions. Matthew Love and Chris Zentz examine recent federal environmental law decisions. And Kathleen Mix provides an update on decisions from the Environmental and Land Use Hearings Office. I'd like to extend my great appreciation to these authors, together with Edward McGuire and Tadas Kisielius (who provide regular updates on Growth Management Hearings Board decisions), for their unwavering dedication in delivering these updates to the ELUL Section membership.

Finally, this edition contains two excellent papers written by students in Richard Hill's (McCullough Hill Leary, PS) Land Use Planning Seminar at the University of Washington School of Law. First, Sierra McWilliams provides an analysis of zoning techniques that local jurisdictions may employ to contend with the passage of Washington Initiative 502, which legalizes marijuana for recreational use by citizens over age 21. Second, Bryan Russell presents a transit-oriented development critique of the Puget Sound Regional Council's Vision 2040 and Transportation 2040.

The next edition of this Newsletter will arrive at your inbox in just a few short months, and again will be loaded with informative articles and updates. If you have an idea for an article that you would like to share with the ELUL Section membership, do not hesitate to contact me or any mem-

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Section Report *from page 1*

Elizabeth Tellessen (Winston & Cashatt, Spokane) who spent many hours organizing and managing the CLE.

Please look on the ELUL Section website for upcoming events. The Section will be co-hosting a CLE with the ADR Section on November 4, 2013, and we are now planning the December ethics CLE. Law school outreach will commence this fall with mixers scheduled in the spring. The next *Midyear Meeting and CLE Program* is scheduled for May 1-3, 2014, at Suncadia Resort.

As a final note, we owe our appreciation to Executive Committee member Laura Kisielius for stepping in as interim editor for this edition of the newsletter. This was an unexpected job when the editor to succeed Michael O'Connell was unable to commit to this position. Laura has been incredibly committed to ensuring we publish an excellent newsletter. She has put in many hours and provided her excellent editorial skills. We hope to name a new editor in the very near future.

Interim Editor's Message *from page 1*

ber of the Editorial Board at the phone numbers or email addresses listed at the end of this Newsletter. Happy reading!

Managing Endangered Species In Washington's GMA Cities and Urban Growth Areas: Emerging Issues Raised by the Proposed Federal Listing of the Mazama Pocket Gopher as Threatened Under the Endangered Species Act[1]

By Heather Burgess

I. Introduction

On December 11, 2012, the United States Fish and Wildlife Service ("USFWS") issued a proposed rule to list four subspecies of the Mazama pocket gopher found in Thurston and Pierce Counties as threatened species under the federal Endangered Species Act ("ESA"), 16 U.S.C. Ch. 35. *See* Endangered and Threatened Wildlife and Plants: Listing Four Subspecies of Mazama Pocket Gopher and Designation of Critical Habitat, 77 Fed. Reg. 73,770 (Dec. 11, 2012). Together with the proposed listing rule, the USFWS proposed designation of 9,234 acres of critical habitat for the species on public and private lands. *Id.* at 73,798. Properties proposed for critical habitat designation include the 676-acre Olympia Airport located in the City of Tumwater and its Urban Growth Area, a 385-acre private property presently permitted for gravel mining operations in south Thurston County, and 6,345 acres of Department of Defense training areas on Joint Base Lewis-McChord. *Id.* at 73,798-73,799.

Although Washington is no stranger to controversy over ESA listed species (think northern spotted owl, marbled murrelet, and various species of salmon), if the proposed listing of the Mazama pocket gopher becomes final, it will be the first time that the USFWS has listed a species for ESA protection in the state of Washington with occupied and potential habitat within the boundaries of cities and urban growth areas specifically designated for high-density development under the state's Growth Management Act ("GMA") (chapter 36.70A RCW). The ramifications of the resulting conflict between ESA Section 9 take prohibitions, vested rights protections, and GMA planning will be significant and long-lasting. Thurston County jurisdictions and property owners are poised to face not only the short-term impact of ESA Section 9 take prohibitions precluding development of otherwise vested projects, but also the long-term impact of the listing and associated critical habitat designation on future permitting processes and GMA plans for growth and development. While the immediate impacts of the Mazama pocket gopher listing are seemingly limited to Thurston County, resolution of the resulting conflicts is likely to set precedent for how GMA jurisdictions across Washington address and manage future ESA listings in urban areas.

This article provides an overview of federal listing process for the Mazama pocket gopher to date and discusses emerging land use legal issues expected to result from the proposed listing.

II. The Proposed Federal Listing of the Mazama Pocket Gopher

A. Species Background And Distribution

The Mazama pocket gopher (*Thomomys mazama*) is a small, burrowing rodent. Washington Department of Fish and Wildlife *Draft Mazama Pocket Gopher Status Update and Recovery Plan* (January 2013) (hereafter, "WDFW Draft Status Report") at 3 (*available at http://wdfw.wa.gov/ publications/01449/*) (last visited Aug. 15, 2013). Pocket gophers live in extensive burrowing systems distinctive due to soil plugs at the tunnel entrances. *Id.* at 7. Pocket gophers are herbivores, and create their tunnel systems in order to feed on roots and plants. *Id.* at 9. Individual gophers create soil mounds on the surface in the process of turning 3-7 tons of soil per

year during their 13-18 month life span. *Id*. at 15-16.

Pocket gopher burrowing performs important ecological functions related to soil structure, chemistry, and plant life, all of which have been found to positively impact "prairie" habitats. *Id*. At the same time, the pocket gopher's burrowing activity damages lawns, gardens, utility lines, fencing, and can adversely impact agriculture and forestry operations. *Id*. at 15. Because of this damage, farmers, foresters, and private landowners have historically exterminated the pocket gopher as a pest, usually through trapping and poisoning. *Id*. Such extermination of Mazama pocket gophers has been prohibited in Washington since 2006, when the species was listed as threatened under chapter 77.15 RCW. *Id*. at 41.

While there are about 35 species and 300 subspecies of pocket gophers found across the United States, the *Thomomys mazama* species variety is found only in western Washington, western Oregon, and northern California. *Id*. at 1. Of the 15 subspecies of *Thomomys mazama*, eight are historically found only in western Washington, five only in Oregon, one only in California, and one spans the boundary between Oregon and California. 77 Fed. Reg. 73,772. Notably, of the eight subspecies of Mazama pocket gopher associated with western Washington, the proposed federal listing action applies *only* to the Olympia, Tenino, Yelm, and Roy subspecies of pocket gopher found in Thurston and Pierce Counties. 77 Fed. Reg. 73,770. The listing would exclude the Olympic, Cathlamet, and Shelton subspecies found in Clallam, Wahkiakum, and Mason Counties from ESA protection. *Id*.

Mazama pocket gophers exist across a range of soil types, but are most abundant in sandy, loamy soils with lower rock content. WDFW Draft Status Report at 22-23; *see also* 77 Fed. Reg. 73,774. Soil types associated with gopher habitat as identified in the proposed federal listing rule are found throughout Thurston County, including within the vast majority of Thurston County's cities and urban growth areas. However, current gopher occupancy and distribution throughout Thurston County is patchy. WDFW Draft Status Report at 30-34. The largest urban gopher population density in Thurston County to date has been found in the City of Tumwater, particularly in the vicinity of the Olympia Airport. *Id*. at 30-31.

B. The Federal Listing Process for the Mazama Pocket Gopher

The Washington subspecies of Mazama pocket gopher has been a federal candidate for ESA listing since 2001, when the USFWS first developed a candidate assessment for the species. 77 Fed. Reg. 73,772. In December 2002, the Center for Biological Diversity and the Northwest Ecosystem Alliance petitioned for listing of eight subspecies of Mazama pocket gopher. *Id*. The underlying premise of the proposed listing supposed ultimate extirpation of the species through loss of traditional "prairie" habitat.

In 2005, the WDFW issued a Status Report for the Mazama pocket gopher and other South Puget Sound Prairie Species. This was followed in 2006 by WDFW action to list the species as threatened under state law (chapter 77.15 RCW). Following the 2005 Status Report and associated WDFW listing action, the USFWS significantly upgraded the Listing Priority Number for the Mazama pocket gopher but continued to issue annual reviews deferring listing due to claimed higher priorities and budget constraints.

In 2007, WDFW implemented Priority Habitat and Species Management Recommendations for the Mazama Pocket Gopher. These recommendations included requirements to survey for gopher presence in certain habitats and provide for on-site mitigation at a 3:1 replacement ratio. Local jurisdictions implemented management specified in the WDFW recommendations through their critical area ordinances. Surveys of private lands which resulted from associated land use permitting processes indicated far greater gopher presence and abundance outside traditional "prairie" habitats identified in the WDFW status report.

Subsequently, in 2011, the USFWS settled long-standing multi-district ESA litigation with various environmental groups, including the Center for Biological Diversity, over compliance with listing deadlines. *See* Stipulated Settlement Agreement, *In Re Endangered Species Act Deadline Litigation*, MDL Docket No. 2165 (D.D.C. 2011). The settlement terms include a stipulated work plan for completion of listing-related actions for 251 specified species identified on the list by FY 2018. The settlement required USFWS to make an initial listing determination no later than September 30, 2012.

Following community engagement, the USFWS deferred initial action on the proposed listing by 60 days. Finally, on December 11, 2012, the USFWS issued the proposed listing rule and critical habitat designation. *See* 77 Fed. Reg. 73,770.

On April 3, 2013, the USFWS released a Draft Economic Analysis for the critical habitat designations for all South Puget Sound prairie species, including the Mazama pocket gopher, and re-opened public comment as to all issues for 30 days. *See* Endangered and Threatened Wildlife and Plants; Listing and Designation of Critical Habitat for Taylor's Checkerspot Butterfly, Streak Horned Lark, and Four Subspecies of Mazama Pocket Gopher, 78 Fed. Reg. 20,074 (Apr. 3, 2013). Public comment closed on May 3, 2013. *Id*.

Based on USFWS interpretation of the settlement agreement terms with respect to ESA statutory deadlines, final action on the proposed listing of the Mazama pocket gopher is expected to occur by September 30, 2013, the end of federal FY 2013.[2]

III. Emerging Legal Issues Resulting From the Proposed Listing

The ESA is commonly understood to regulate and limit the ability of federal agencies and activities that they authorize, fund, or carry out from jeopardizing species listed or proposed for listing. Under Section 7 of the ESA, federal agencies must "insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species … ." 16 U.S.C § 1536(a)(2). In order to satisfy this requirement, federal agencies are required to consult with USFWS or NMFS, as appropriate, "on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under … or result in the destruction or adverse modification of critical habitat proposed to be designated for such species." 16 U.S.C. § 1536(a)(4). Following consultation, preparation of a biological opinion, and modification or conditioning of the proposal (if needed to avoid jeopardy to the species), the proposed federal action or activity may be permitted under the ESA's incidental take authority. 16 U.S.C. § 1536(b)(3).

In the case of the Mazama pocket gopher, the proposed listing rule identifies examples of "activities conducted, regulated, or funded by federal agencies that may affect limited species or their habitat" for purposes of Section 7 compliance to include the following:

(1) Military training activities and operations conducted in or adjacent to occupied or suitable habitat on DOD lands;

(2) Activities with a Federal nexus that include vegetation management such as burning, mechanical treatment, and/or application of herbicides/pesticides on Federal, State, or private lands;

(3) **Ground-disturbing activities** regulated, funded, or conducted by Federal agencies **in or adjacent to occupied and/or suitable habitat** ….

77 Fed. Reg. 73,791 (emphasis added). The third category of example activities presents the most likely area of federal "nexus" for Section 7 purposes for the Mazama pocket gopher given its present occupancy and range, and will immediately impact activities commonly regulated and/or funded by federal agencies, such as public works projects, in Thurston County.

A. The Clash Between Vested Development Rights and Compliance with Section 9 Take Prohibitions at the Project Level

What the Mazama pocket gopher listing process has revealed as less commonly understood, however – perhaps because of our history and experience with GMA critical areas regulation – are the significant restrictions on private, non-federal nexus activities under Section 9 of the ESA that will result from federal listing of the Mazama pocket gopher. It is these Section 9 take prohibitions which are likely to dramatically extend the reach and impact of the Mazama pocket gopher listing across Thurston County, and which therefore pose the most potential for both immediate conflict and development of precedent for future listing actions.

1. ESA Section 9 Take Prohibitions

Section 9 of the ESA makes it unlawful for "any person" to "take" any threatened or endangered species of fish or wildlife, or for any person "to attempt to commit, solicit another person to commit, or cause to be committed" any such "take." 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. §§ 17.21, 17.31. To "take" under the ESA means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Federal regulations implementing the ESA expand the definition of "harm" to include significant habitat modification or degradation that "actually kills or injures…wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.31. Violations of the ESA can result in significant civil and criminal fines and penalties, including imprisonment. 16 U.S.C. § 1540. The ESA also allows citizen suits "to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof …." 16 U.S.C. § 1540(g). ESA citizen suits under this provision allow recovery of attorneys' fees and litigation costs. *Id.*

In addition to direct take prohibitions, the proposed listing rule for the Mazama pocket gopher specifies a non-exhaustive list of activities that "could result in a violation of section 9 of the Act," including the following:

- Unauthorized modification of the soil profiles or the vegetation components on sites known to be occupied by the four Thurston/Pierce subspecies of Mazama pocket gopher;
- Unauthorized utilization of trapping or poisoning techniques in areas occupied by the four Thurston/Pierce subspecies of Mazama pocket gopher;
- Intentional harassment or removal of pocket gophers; and
- When conducted over large areas, removal of forage habitat over large areas by burning or other means i.e. the area of removal is so large that gophers can't access foraging habitat from the center of the area.

77 Fed. Reg. 73,791.

The proposed rule contains limited proposed exemptions to Section 9 take prohibitions for certain airport, single-family residential, and agricultural activities, including the following:

- Airport restoration and maintenance activities, such as weed and grass removal;
- Limited construction activity within existing single-family residential developments (placement of above-ground fencing, garden plots, children's play equipment, residential dog kennels, and storage sheds and carports on block or above-ground footings, less than 100 square feet); and
- Normal farming or ranching activities (however, "normal" for this purpose excludes use of heavy equipment and limits exempt planting, harvest, crop rotation, or disking activity to between November 1 and February 28).

77 Fed. Reg. 73,792 and 73,809.

2. Potential Liability of Developers, Landowners, and Local Permitting Authorities Under Section 9 of the ESA

Based on the plain language of Section 9 of the ESA prohibiting "take" of listed species, it is apparent that clearing, grading, construction, tilling, disking, or similar activity causing earth disturbance to occupied gopher habitat outside the scope of the above limited exemptions will be prohibited on private property without appropriate federal review and permitting under the ESA should the proposed listing of the Mazama pocket gopher become final. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. §§ 17.21, 17.31.

More importantly, unlike local critical areas regulations under the GMA, the federal supremacy clause dictates that ESA Section 9 take prohibitions will apply to activity on private property regardless of whether the activity causing the taking of a listed species is existing, ongoing, or part of a development project otherwise vested under state law prior to the effective date of any final listing of the Mazama pocket gopher. *See* U.S. Const., Art. VI, Cl. 2. Courts considering the issue have soundly rejected challenges to similar ESA prohibitions on private property in other states on Commerce Clause grounds, even where, as here, the regulated species is found in only one state or county. *See, e.g.*, *Rancho Viejo v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (280-home project in San Diego County impacting listed species of toad); *National Ass'n of Homebuilders v. Babbit*, 949 F. Supp. 1 (1996) (D.D.C. 1996) (hospital and road construction in San Bernardino County impacting listed species of fly). The *Rancho Viejo* case also illustrates that arguments challenging federal control of local land use regulation resulting from ESA Section 9 prohibitions have been, at least to date, unpersuasive:

> Finally, Rancho Viejo draws our attention to *Morrison*'s declaration that "[t]he Constitution requires a distinction between what is truly national and what is truly local." 529 U.S. at 617-18, 120 S.Ct. at 1754. Plaintiff argues that the ESA represents an unlawful assertion of congressional power over local land use decisions, which it describes as an area of traditional state regulation. The ESA, however, does not constitute a general regulation of land use. Far from encroaching upon territory that has traditionally been the domain of state and local government, the ESA represents a national response to a specific problem of 'truly national' concern.

Rancho Viejo, 323 F.3d at 1078-79.

In addition to private landowner liability, local government agencies that issue permits, even for previously approved and otherwise vested projects impacting gopher habitat, face potential liability under Section 9 of the ESA, including citizen suit, for permitting activities that can reasonably be expected to cause the direct take of a protected species. *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). This result is not unprecedented in Washington; in an unpublished opinion, the Western District of Washington found the Washington State Department of Natural Resources liable under this "proximate cause" theory for authorizing take by third parties of listed northern spotted owls through issuance of state forest practices permits. *Seattle Audubon v. Sutherland*, CV06-1608MJP, 2007 WL 1300964 (W.D. Wash. 2007) (unpub. op.).

Although establishing causation can present standing issues to plaintiffs bringing citizen suits against government entities under the ESA because liability must be "fairly traceable" to the challenged state or local action (*see Nat'l Audubon Soc'y, Inc. v. Davis,* 307 F.3d 835, 849 (9th Cir. 2002)), there seems to be little question in the case of the Mazama pocket gopher that a local government issuing permits for clearing, grading, and construction activity in occupied Mazama pocket gopher habitat will cause an unauthorized take. Indeed, in many cases, vested projects impacting gopher habitat with approved Habitat Management Plans in place consistent with current WDFW Priority Habitat and Species Management Recommendations in Thurston County will result in take in conjunction with construction activity, as state guidance to date has called for on-site habitat mitigation provided on only a portion of the site intended to mitigate these impacts, and does not mandate complete avoidance of impacts. The proposed federal listing rule for the Mazama pocket gopher does not sanction or exempt these previously approved projects using state sanctioned mitigation methods.

3. Methods to Prevent Section 9 Liability and Mitigate Listing Impacts to Private Land Use and Development

Private property owners facing potential liability under Section 9 upon final listing of the Mazama pocket gopher have some options to mitigate or avoid liability and/or project delay, uncertainty, and additional cost that will result from compliance with federal permit processes should the proposed listing rule become final. In the development context, the primary means to avoid Section 9 liability is, if possible, to permit *and* complete all earth-disturbing construction activity for currently vested projects *before* the listing rule becomes final. If permitting and completing projects by the anticipated listing deadline is not feasible, property owners can seek approval from USFWS for an incidental take permit as part of an individual Habitat Conservation Plan for their project or property. For some agricultural activities, property owners may also be eligible to secure protection from adverse impacts of the listing under a Safe Harbor Agreement. *See generally* 16 U.S.C. § 1539. Unfortunately, unlike WDFW Priority Habitat and Species Management Recommendations for the Mazama pocket gopher, USFWS mitigation standards and sequencing that will be required to secure approval of Habitat Conservation Plans are currently unknown. Landscape-level management tools, such as mitigation banking for urban sites consistent with the WDFW Draft Status Report and Recovery Plan for the species, are in discussion, but remain many years from effective implementation.

Going forward, Thurston County and USFWS have begun to develop a Habitat Conservation Plan for unincorporated Thurston County, which, upon adoption and approval, will authorize incidental take under the ESA of the Mazama pocket gopher and other "prairie" species which are proposed and/or are candidates for federal listing for regulated activities in unincorporated Thurston County. USFWS and Thurston County have completed the scoping phase of federal and state environmental review for the Habitat Conservation Plan process. *See* Environmental Impact Statement: Proposed Puget Sound Prairie Habitat Conservation Plan, Thurston County, WA, 78 Fed. Reg. 17,224 (Mar. 20, 2013). Thurston County officials have indicated they expect the Habitat Conservation Plan process to take between three and five years to fully complete. No other Thurston County jurisdiction is currently engaged in a Habitat Conservation Plan development process.

For additional information on Habitat Conservation Plans and Safe Harbor Agreements and associated processes and procedures, see the USFWS website at *http://www.fws.gov/endangered/what-we-do/hcp-overview.html* for Habitat Conservation Plans, and at *http://www.fws.gov/endangered/landowners/safe-harbor-agreements.html* for Safe Harbor Agreements (last visited Aug. 15, 2013).

4. Potential Impacts to Local Government Permit Processes Resulting From Listing

In the absence of an approved individual or jurisdiction-wide USFWS Habitat Conservation Plan authorizing individual take for specific projects and activities, Thurston County jurisdictions are expected to implement a combination of screening mechanisms and interim permitting requirements should the proposed listing become final in an effort to avoid ESA liability associated with potential take. While these mechanisms and requirements will certainly vary by jurisdiction and have yet to be noticed or implemented, experience and comments from various officials suggest we should expect these measures to include one or more of the following:

- Supplemental screening/gopher survey for projects with both known and potential gopher habitat prior to issuance of permits, which will likely be determined by soil type tied to the federal rule;
- Proof of federal review and incidental take permitting of projects with previously and newly identified gopher habitat and impacts;
- Stop work orders for ongoing, yet incomplete, projects involving earth disturbance for both known and potential gopher habitat to allow for supplemental screening and potential federal review;
- Moratoria on issuance of permits and land use approvals involving or potentially involving earth disturbance in known and potential gopher habitat pending development of interim processing procedures and requirements.

B. Implications of Federal Listing of the Mazama Pocket Gopher for Future Growth Management Act Planning and Compliance

Should the proposed listing become final, other significant, and unanswered, questions about its long-term impacts to land use planning, particularly with respect to cities and urban growth areas, will remain to be answered. Both WDFW and USFWS extensively discuss the disappearance of the Mazama pocket gopher (and other South Puget Sound "prairie") habitat as the result of the conversion of Thurston County's historic prairie to other uses, particularly since the mid-1940s. WDFW Draft Status Report at 19, 23-24; 77 Fed. Reg. 73,777. These other uses include military training, residential development, commercial development, and agriculture, most of which were developed in close proximity to what is now Interstate 5. *Id*. These former "prairies" – while surely once filled not only with gophers, but with other flora and fauna – are now filled with people, including the cities of Lacey, Yelm, Tumwater, and Tenino, each of which is mandated under the GMA to accommodate its allocated population growth. *See* WAC 365-196-300

and -325. Recently updated Thurston County planning estimates require the cities and urban growth areas (UGAs) to accommodate another 100,000 residents between now and 2035, or 73% of County's projected growth. *See* Thurston Regional Planning Council, Population Forecast Allocations, Thurston County Cities and UGAs 2010-2035, *available at* http://www.trpc.org/data/Pages/popfore.aspx (last visited Aug. 15, 2013).

Thurston County jurisdictions must now balance substantial prior investment in infrastructure and their mandate to accommodate growth with obligations to protect potentially substantial amounts of designed federal critical habitat and potential occupied gopher habitat resulting from the federal listing within their borders, as the GMA expressly requires them to do. *See* WAC 365-190-080 (Critical Areas); WAC 365-196-830 (Protection of Critical Areas); WAC 365-190-130 (Fish and Wildlife Habitat Conservation Areas); WAC 365-196-730 (Federal Authorities). This balancing will likely lead to major plan revisions in future required GMA update cycles, including changes to urban growth boundaries, significant downzoning, and reduction in buildable lands - with associated impact and cost to Thurston County and its citizens for decades to come.

Heather Burgess is a founding partner of Phillips Wesch Burgess PLLC, a boutique real estate and land use firm in Olympia, and advises development clients on land use matters in jurisdictions across the state of Washington. Prior to founding Phillips Wesch Burgess in January 2012, Heather was a partner at Eisenhower Carlson PLLC in Tacoma and an associate at Perkins Coie LLP's Seattle and Olympia offices. Heather also served for thirteen years on active duty with the United States Army, six as a Judge Advocate, and continues to serve as a Judge Advocate in the Washington Army National Guard. Heather is a graduate of the Un\iversity of Washington School of Law (1998, with honors) and Harvard College (1991, cum laude).

1 This article is adapted from written materials that the author originally prepared for and presented at the WSBA Environmental and Land Use Law Section Mid-Year on May 2-3, 2013.

2 In March 2013, community leaders submitted a written request to U.S. Fish and Wildlife Service Director Daniel Ashe seeking a six-month extension of listing timelines pursuant to 16 U.S.C. § 1533(b)(6)(B)(i) to allow time for ongoing genetic study necessary to resolve taxonomic uncertainty about subspecies to be completed. As of August 15, 2013, the USFWS had not yet responded to or acted upon the extension request.

Running Off Roads: How the U.S. Supreme Court Upheld the EPA Exemption for Logging Roads from NPDES Requirements



By Jennifer Addis, Ankur Tohan, and Eric Laschever

Since its enactment in 1972, the jurisdictional scope of the Clean Water Act (CWA) has repeatedly been challenged. In its 2013 session, the United States Supreme Court wrote the latest chapter in the Act's jurisdictional history in *Decker v. Northwest Environmental Defense Center (NEDC)*, 133 S. Ct. 1326, 1330 (2013). In *Decker*, the Court in a 7-1 decision reversed the Ninth Circuit Court of Appeals and upheld EPA's exemption from CWA regulation of stormwater discharges from logging roads. Part I of this article briefly summarizes the evolution of the regulatory treatment of logging road discharges. Part II examines the *Decker* decision; and Part III reviews EPA's recent rulemaking undertaken on the eve of oral argument for the *Decker* case before the Supreme Court. Finally, this article discusses Washington state regulations that continue to impose obligations for logging roads in the state, even in the absence of a permitting requirement.

I. The CWA and Logging Road Discharges

The CWA prohibits point source[1] discharges of pollutants to navigable waters.[2] As enacted, the CWA exempted from this prohibition only those discharges covered by a permit under the National Pollutant Discharge Elimination System (NPDES).[3] Almost immediately, EPA attempted to manage its administrative burden by adopting rules to exclude certain discharges (e.g., silvicultural activity), or by simply ignoring others (e.g., stormwater). Each of these strategies became litigation fodder.

A. The Silvicultural Exemption

In a 1973 rule making, EPA sought to exempt several categories of discharges from the NPDES permitting requirement, including discharges from silvicultural activities.[4] EPA reasoned that the pollution problems caused by silvicultural activities were "minor in relation to the administrative problem of processing vast numbers" of individual permits.[5]

The Natural Resources Defense Council successfully challenged these regulations.[6] The D.C. Circuit Court of Appeals agreed with the district court that the EPA has no "authority to exempt categories of point sources from the [NPDES] permit requirements …" and an NPDES permit was the only

means by which point source discharges could be permissible.[7]

Before the D.C. Circuit court ruled, EPA revised its regulations to characterize certain silvicultural discharges as non-point sources of pollution.[8] The agency stated that "most water pollution related to silvicultural acitivities is nonpoint in nature."[9] This new regulation – known as the "Silvicultural Rule" – defines a "Silvicultural Point Source" as "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States."[10] Excluded from the definition were "non-point source silvicultural activities such as … harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff."[11] Under this rule, discharge from any facility that is a silvicultural point source must have an NPDES permit, unless some other legal provision exempts it from coverage.

B. Stormwater Discharges Under the CWA

Although many stormwater discharges occur through discrete conveyances, the EPA did not initially regulate such discharges under the NPDES program. Following litigation in the mid-1980s, Congress amended the CWA in 1987 to address stormwater discharges.[12] Specifically, Congress created a "phased" system for stormwater permitting.[13] This phased system required NPDES permits for the most significant sources of stormwater pollution (Phase I), but allowed EPA to regulate other stormwater discharges on a case-by-case basis (Phase II). Through the amendment, Congress exempted "discharges composed entirely of stormwater"; but it regulated stormwater discharges "associated with industrial activity."[14]

EPA adopted a regulation defining discharges associated with industrial activity.[15] The version of that regulation in effect at the time of the *Decker* lawsuit, referred to here as the "Industrial Stormwater Rule," defines discharges from an industrial activity as

> any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122.[16]

The regulation also specified that "[f]acilities classified as Standard Industrial Classification[] 24" are deemed to be engaging in "industrial activity" under the regulation.[17] Standard Industrial Classification (SIC) 24 includes the logging industry, defined as "[e]stablishments primarily engaged in cutting timber or in producing … primary forest or wood raw materials."[18] Although by its language the regulation could be read rather broadly to cover any discharges related to logging activity—including discharges from logging roads—EPA in practice interpreted the rule to exclude silvicultural discharges.[19]

Thus, by 1990, EPA had excluded discharges from logging roads from CWA regulation by declaring such discharges "non-point" sources and by exempting such discharges from the NPDES permitting requirement, in practice and intent if not by clear regulatory directive.

II. *Decker v. NEDC*

In *Decker*, plaintiff Northwest Environmental Defense Center (NEDC) challenged the EPA's longstanding practice of exempting logging roads discharges from NPDES permitting requirements. The district court rejected the challenge, concluding that, under the Silvicultural Rule, stormwater discharges associated with logging roads are nonpoint sources unregulated by the CWA.[20] The Ninth Circuit Court of Appeals reversed, reasoning that the EPA has misconstrued the CWA and its authority under the statute.[21] NEDC's challenge, and the district and Ninth Circuit courts' decisions, raised questions about EPA's authority to interpret the CWA and to interpret its own regulations. The Supreme Court answered only the latter question in its opinion.

A. The Ninth Circuit Opinion

On appeal to the Ninth Circuit, the court focused on whether EPA's regulations properly interpreted the CWA. In particular, the court reviewed the CWA's definition of "point source" and history of EPA's Silvicultural Rule and the Industrial Stormwater Rule.[22] The court concluded that EPA's regulations were inconsistent with the CWA and, therefore, that NPDES permits are required for runoff from logging roads.[23] While the court acknowledged EPA's administrative burden, the court emphasized that EPA does not have the authority to categorically exempt discharges otherwise included in the CWA definition of "point source."[24]

B. Petition for Certiorari

After the Ninth Circuit court's ruling, two different parties petitioned the U.S. Supreme Court for review of the case on September 13, 2011: Doug Decker, the Oregon State Forester, and Georgia-Pacific West, Inc. In May 2012, at the invitation of the Court, the Solicitor General filed a brief, which argued that the Court should not grant certiorari. The Solicitor General argued that although the Ninth Circuit court erred by failing to defer to EPA's interpretations of its own regulations, no conflict existed between the courts of appeal and, to the extent the Ninth Circuit decision would create an administrative burden, the EPA was in the process of adopting a new rule that would resolve the issue.[25]

Nonetheless, the Supreme Court granted certiorari on June 25, 2012.

C. The EPA Rulemaking

After the Ninth Circuit's decision, EPA announced its intent to revise its Industrial Stormwater Rule to clarify that an NPDES permit is not required for stormwater discharges from logging roads.[26] EPA published its final revisions to the Industrial Stormwater Rule on November 30, 2012.[27] The Supreme Court heard oral arguments on *Decker* the following Monday.[28]

The final rule clarified that silvicultural stormwater discharges are "associated with industrial activity" if the activity falls under the heading of SIC 2411 (i.e., rock crushing, gravel washing, log sorting, and log storage).[29] Under the new rule, discharges unrelated to SIC 2411 do not require an NPDES permit.

D. The U.S. Supreme Court Case

1. The Majority Opinion

Writing for a 7-1 majority, Justice Kennedy focused on whether the Industrial Stormwater Rule reasonably could be read to exempt stormwater discharges from logging roads from NPDES permitting requirements. Before addressing this substantive issue, however, Justice Kennedy evaluated whether the EPA's amended Industrial Stormwater Rule rendered the case moot.

The majority concluded that the amended rule did not moot the case because the petitioner may continue to be liable under the old rule.[30] The Court emphasized, therefore, that its decision applies only to the old Industrial Stormwater Rule; it passed no judgment on EPA's new rule.[31]

The majority analyzed the reasonableness of EPA's interpretation of the old Industrial Stormwater Rule.[32] Specifically, the Court considered whether the definition of discharges "associated with industrial activity" included channeled runoff from logging roads.[33] NEDC contended that the old Industrial Stormwater Rule required a permit for logging road discharges because logging falls within those "categories of facilities considered to be engaging in 'industrial activity'" under 40 C.F.R. § 122.26(b)(14). Among other categories, the rule listed "[f]acilities classified as Standard Industrial Classifications 24 … ."[34] NEDC argued that, because SIC 24 includes "logging," that activity falls within the category of industries that require an NPDES permit.[35]

EPA countered that the old Industrial Stormwater Rule referenced SIC 24 to regulate "traditional industrial sources like sawmills."[36] Furthermore, the agency argued references to "facilities" in EPA regulations and the SIC's reference to "establishments" were meant to cover industrial sites more permanent than logging operations.[37] The Supreme Court – siding with EPA – noted that the old Industrial Stormwater Rule defined discharges associated with industrial activity as those coming "from any conveyance that is used for collecting and conveying storm water and that is *directly related to manufacturing, processing or raw materials storage areas at an industrial plant*."[38] Given this description, the Court felt it was reasonable for EPA to conclude that stormwater conveyed from a logging road is unrelated to "manufacturing, processing, or raw materials storage areas," or to operations at an "industrial plant."[39]

In reaching its decision, the Court emphasized that the agency's interpretation did not need to be the only—or even best—reading of the regulation; rather, the interpretation merely must be reasonable.[40] This substantial deference is due under the reasoning of *Auer v. Robbins*, 519 U.S. 452, 461 (1997), according to which a reviewing court will accede to an agency's interpretation of its own regulation, so long as that interpretation is reasonable. The Court further emphasized that *Auer* deference is due because the agency has maintained over time its view that stormwater discharges from logging roads do not require an NPDES permit. Under this broad authority, the EPA thus was within its authority to interpret the Industrial Stormwater Rule as exempting logging roads from NPDES permitting requirements.

2. The Concurrence and Dissent

In separately written concurring and dissenting opinions, Justices Roberts and Alito on the one hand, and Justice Scalia on the other, raised concerns about the wisdom of the principle of *Auer* deference. Justices Roberts and Alito briefly noted that, although they believe the principle is ripe for reconsideration, they prefer to await a case in which those issues are argued thoroughly by the parties (here, the parties traded dueling footnotes on the issue).[41]

Justice Scalia, by contrast, dissented with respect to the Court's upholding of the EPA's reading of the Industrial Stormwater Rule.[42] Observing the lack of any "persuasive justification for *Auer* deference," he stated that this case offered an excellent opportunity to reject the principle of *Auer* deference. Though it did not provide thorough briefing, NEDC did raise the issue and asked the Court to reconsider *Auer*. Moreover, unlike previous cases in which the Court has reaffirmed the *Auer* doctrine, the EPA's interpretation of its Industrial Stormwater Rule was not the "fairest" reading of the regulation.[43] In particular, Justice Scalia emphasized the apparent violation of the rule of separation of powers inherent in *Auer* deference; a law should not be interpreted by the same entity that created it.[44] Given these fundamental problems with the concept, Scalia advocates doing away with the principle of *Auer* deference.[45]

Justice Scalia's rejection of the *Auer* principle, combined with Justices Roberts' and Alito's apparent willingness to reconsider the doctrine, suggests

that the Court might accept review of a case that directly raises issue of *Auer*'s continued viability. However, with only three justices sharing distaste for *Auer*, the import of these separate opinions forecast no clear shift in the Court's approach to agency deference.

III. Lessons and Implications – The CWA's "Point Source" Definition

The *Decker* majority opinion is most notable for what it failed to do: answer the fundamental question of whether logging roads are point sources under the CWA. In fact, the Court expressly declined to address the issue, noting that because EPA "permissibly construed" the old Industrial Stormwater Rule, there was no need to decide whether channeled stormwater runoff from logging roads required a permit.[46] Because the majority decision expressly applies only to the pre-amendment version of the Industrial Stormwater Rule, the case's immediate impact is limited to those persons who had active claims against them under the old rule. Thus, the opinion has little impact on current logging operations.

Nevertheless, the Court's deference to EPA's interpretation of the old Industrial Stormwater Rule arguably broadens the agency's authority to exempt other discharges from the CWA definition of "point source." Other courts are already adopting the Court's language regarding the reasonableness of EPA's interpretation.[47] The message most strongly received from *Decker* is that EPA is to be given considerable latitude in crafting and interpreting in own regulations with respect to the CWA.

In addition, NEDC has not yet conceded that the Supreme Court resolved the question of whether logging roads require permits under the CWA. When it decided *Decker*, the Court also remanded the case to the Ninth Circuit for proceedings consistent with the opinion.[48] On April 22, 2013, NEDC moved the Ninth Circuit Court of Appeals to reaffirm its previous holding that "pipes, ditches, and channels along logging roads are point sources under the [CWA]."[49] NEDC argues that, because the Supreme Court did not reach that question and instead reversed the Ninth Circuit only on the basis of that court's interpretation of the Industrial Stormwater Rule, the Ninth Circuit should reinstate its holding on the point source question.[50] NEDC also suggests that the Ninth Circuit should direct the district court to consider the new Industrial Stormwater Rule on remand, a step the Supreme Court was unwilling to take.[51] Consequently, despite the Supreme Court ruling, forestry operations remain vulnerable to NPDES permitting requirements.

In Congress, legislation was introduced on May 16, 2013, in both the House and Senate that would prevent EPA from requiring NPDES permits for logging road runoff. The bills were introduced by a bipartisan group of senators and representatives from Oregon, Idaho, and Washington. The bills, entitled the "Silviculture Regulatory Consistency Act," would amend the CWA to clarify that no NPDES permits are required for silvicultural activities. However, the U.S. Government bill-tracking website gives the bill only a 28 percent chance of getting out of committee, and zero chance of being enacted into law.

IV. State Regulations Continue to Apply

Regardless of the federal obligations ultimately imposed on logging road operators, Washington state regulations continue to impose obligations related to stormwater runoff. Under Washington's Forest Practices Act and implementing rules, rules on the construction and maintenance of forest roads address stormwater runoff to protect water quality and riparian habitats.[52] In addition, the State Forest Practices Board published the Forest Practices Board Manual, which includes best management practices for a variety of forest practices, including road construction and maintenance.[53]

V. Conclusion

In its opinion overturning the Ninth Circuit Court of Appeals' decision, the U.S. Supreme Court granted EPA broad discretion in creating and interpreting its regulations implementing the CWA. This opinion may have significant implications for how future courts interpret agency regulations. However, the opinion did not resolve the ultimate question of whether stormwater runoff from logging roads is a point source subject to NPDES permitting under the CWA. Thus, the future of NPDES permitting for logging roads remains uncertain. In the meantime, however, forest operators remain obligated to comply with existing Washington state regulations of forest roads.

1 "Point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).
2 *Id.* § 1311(a).
3 *Id.* § 1342.
4 40 Fed. Reg. 18,000 (July 5, 1973).
5 *Id.* at 18,000.
6 *Natural Res. Defense Council, Inc. v. Train*, 396 F. Supp. 1393 (D.D.C. 1975); *Natural Res. Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).
7 *Id.*
8 41 Fed. Reg. 24709 (Jun. 18, 1976).
9 41 Fed. Reg. 6281, 6282 (Feb. 12, 1976) (proposed rules).
10 40 C.F.R. § 122.27(b)(1).
11 *Id.*
12 Pub. L. No. 100–4, 101 Stat. 7 (1987).
13 33 U.S.C. § 1342(p).
14 *Id.* § 1342(p)(1) & (2)(B).
15 40 C.F.R. § 122.26(b)(14).

16 40 C.F.R. § 122.26(b)(14) (2006), first published in 55 Fed. Reg. 48,063 (Nov. 16, 1990).

17 *Id.* § 122.26(b)(14)(ii).

18 Dept. of Labor, Standard Industrial Classifications Manual, *available at http://www.osha.gov/pls/imis/sic_manual.html*.

19 *See, e.g.*, NPDES Permit Application Regulations for Stormwater Discharges (the final Industrial Stormwater Rule), 55 Fed. Reg. 47990, 48008 (Nov. 16, 1990).

20 *NEDC v. Brown*, 476 F. Supp. 2d 1188, 1197-98 (D. Or. 2007).

21 *NEDC v. Brown*, 640 F.3d 1063 (9th Cir. 2011).

22 *Id.*

23 *Id.* at 1080, 1085.

24 *Id.* at 1086.

25 Br. for the U.S., at 14.

26 77 Fed. Reg. 30473 (May 23, 2012).

27 77 Fed. Reg. 72970.

28 At oral argument, Chief Justice Roberts interrupted the Petitioners' argument early on, commenting "Well, before we get into that, congratulations to your clients … [for] getting almost all of the relief they're looking for under the new rule issued on Friday … and thank you for calling it to our attention." The justices went on to question why the new rule did not moot the entire case.

29 77 Fed. Reg. 72970.

30 *Id.* at 1335–36.

31 *Id.* at 1335.

32 *Id.* at 1336.

33 *Id.*

34 40 C.F.R. § 122.26(b)(14)(ii).

35 *Decker*, 133 S. Ct. at 1336.

36 *Id.*

37 *Id.*

38 *Id.* at 1337 (quoting 40 C.F.R. § 122.26(b)(14) (2006)) (emphasis added).

39 *Id.*

40 *Decker*, 133 S.Ct. at 1337.

41 *Id.* at 1338–39.

42 *Id.* at 1339.

43 *Id.*

44 *Id.* at 1341–42.

45 In the absence of such deference, Justice Scalia reasons that the Industrial Stormwater Rule and Silvicultural Rule, when read together with the relevant portions of the CWA, fairly must be read to say that stormwater discharge channeled from logging roads are point sources under the statute. *Id.* at 1343–44.

46 Justice Scalia's dissent was the only view on this question. *Id.* at 1343–44.

47 *See, e.g.*, *Ecological Rights Found. v. Pac. Gas and Elec. Co.*, 713 F.3d 502, 513 (9th Cir. 2013) (in resolving the question whether runoff associated with utility poles is "associated with industrial activity," stating that "it is reasonable to conclude that EPA did not intend to include individual residential and commercial wooden utility poles in that definition").

48 *Decker*, 133 S. Ct. at 1338. As of August 21, 2013, the Ninth Circuit had not ruled on this motion.

49 NEDC Mot. for Entry of Order, at 9.

50 *Id.* at 9–10.

51 *Id.* at 8. On August 30, 2013, the Ninth Circuit issued its order on remand from the U.S. Supreme Court. In its order, the court complied with NEDC's request and reaffirmed its holding that "when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a 'discernable, confined and discrete conveyance' of pollutants, and there is therefore a discharge from a point source." *NEDC. v. Decker*, Case No. 07-35266, Order (quoting *Brown*, 640 F.3d at 1070-71). The court emphasized that the Supreme Court did not disturb this holding.

52 WAC 222-24-010. The State Forest Practices Rules instruct forest operators how to design, locate, construct, and maintain their forest roads. Roads should be located to avoid natural drainage channels, channel migration zones, or other sensitive areas, and in planning road locations, forest operators should minimize stream crossings and adopt design techniques that minimize sediment delivery to state waters. WAC 222-24-020. When constructing forest roads, soils must be stabilized, culverts and channels should be cleared, and correct drainage should be ensured. WAC 222-24-030. Importantly, roads should not be constructed when moisture or soil conditions are such that excessive erosion or soil movement is likely. *Id.* Detailed regulations also apply to the construction of water crossing structures such as bridges and culverts (WAC 222-24-040), and road surfaces must be maintained to ensure proper drainage, to divert stormwater onto stable portions of the forest floor, and to minimize erosion or sediment delivery to state waters. WAC 222-24-052. All of these rules are intended to ensure that water quality standards are met and local wildlife habitats are kept healthy.

53 *See* Forest Practices Board Manual, Section 3. The Forest Practices Board Manual's Section 3 offers more detailed guidance on road design, location, construction, and maintenance, as well as on road abandonment. In particular, the Manual offers best management practices for each phase of construction and maintenance, to minimize runoff water and sediment delivery to state waters. Manual, § 3, at B3-2. All large forest landowners must prepare Road Maintenance and Abandonment Plans, which provide a framework for preventing potential or actual damage to public resources. *Id.* This Manual, along with the Forest Practices Rules it implements, creates significant obligations for the forest landowner to ensure that state water resources remain protected.

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Significant Recent Land Use Case Law

By Richard L. Settle, Foster Pepper PLLC

I. United States Supreme Court

Temporary Flooding Caused by Government Agency May Be a Taking. *Arkansas Game and Fish Comm'n v. United States,* 133 S. Ct. 511 (December 4, 2012).

The Supreme Court, in a unanimous opinion authored by Justice Ginsburg, rejected the Federal Circuit's conclusion that flooding caused by the Corps of Engineers water releases from a dam did not result in a taking because it eventually stopped which "at most created tort liability." The Court held that flood damage caused by government may be a taking:

> We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a taking. *See Loretto,* 458 U.S., at 435, n.12 (temporary physical invasions should be assessed by case-specific factual inquiry); *Tahoe-Sierra,* 535 U.S., at 342 (duration of regulatory restriction is a factor for a court to consider); *National Bd. of YMCA v. United States,* 395 U.S. 85, 93 (1969)("temporary, unplanned occupation" of building by troops under exigent circumstances is not a taking).

Arkansas Game and Fish Comm'n, 133 S. Ct. at 522. The Court remanded the case to the Federal Circuit for further consideration.

II. Washington Supreme Court Decisions

Supreme Court Addresses Nuisance and Inverse Condemnation Claims Based on Electromagnetic Field of Power Substation; LUPA Challenge of Variance for Substation Was Not a Prerequisite for Inverse Condemnation Action. *Lakey v. Puget Sound Energy, Inc.,* 176 Wn.2d 909, 296 P.3d 860 (March 7, 2013).

Puget Sound Energy, Inc. (PSE) built a new electrical substation on a site in the City of Kirkland where a smaller PSE substation had been located for over 50 years. A variance was required for the new substation and was granted by the City Hearing Examiner and upheld in an administrative appeal by Homeowners bordering the site. The variance was not legally challenged under the Land Use Petition Act (LUPA). Homeowners sued PSE, claiming that the substation's electromagnetic field (EMF) was a nuisance because it unreasonably interfered with the use and enjoyment of their property. Subsequently, Homeowners amended their complaint to join the City as a defendant, claiming that the City's decision to grant the variance for the new substation constituted inverse condemnation of their property.

The Supreme Court held that PSE's generation of EMFs did not constitute a nuisance as a matter of law because no reasonable juror could find that the harm to Homeowners outweighs the social utility of PSE's conduct. The court reasoned that PSE's new larger substation was not an unreasonable use of its property because the facility was necessary to provide electrical power that is essential to modern life and serves the very neighbors who complain. Moreover, the substation was appropriate to the "character of the neighborhood" because the site had been used as a substation for over 50 years and provided an essential service to neighboring residents, schools, and businesses.

Regarding the inverse condemnation claim against the City, the court rejected the threshold argument that a LUPA action challenging the City's decision granting the variance was a prerequisite to bringing an inverse condemnation action. Homeowners were not seeking judicial reversal of the height, setback, or buffer variances. Rather, Homeowners were seeking compensation for the City's decision to allow the development of the substation on the site and, therefore, the inevitable exposure of neighboring properties to EMFs. The court distinguished previous cases that had required LUPA challenges as prerequisites to maintaining various actions.

Turning to the merits of the inverse condemnation claim, the court rejected the proposition that the City's granting of the variance for the new substation rendered the City liable for the inverse condemnation of property owned by third parties as a result of EMF exposure, affirming summary judgment in favor of the City.

The court also extensively discussed evidentiary issues related to the superior court's exclusion of Homeowners' expert testimony regarding harmful consequences of exposure to EMFs. While the court held that exclusion of the testimony based upon the rule of *Frye v. United States,* 54 App. D.C. 46, 293 F. 1013 (1923), was erroneous, the exclusion was nevertheless affirmed under the ER 702 "helpfulness" to trier of fact requirement.

Supreme Court Unanimously Decided That Court of Appeals Violated Rules of Appellate Procedure and *Res Judicata* Doctrine by Deciding Issues Regarding Annexations of Land Redesignated from Agricultural Resource to Urban Growth Area That Had Been Decided by the Superior Court and Were Not Appealed. *Clark County v. Western Washington Growth Management Hearings Board,* 177 Wn.2d 136, 298 P.3d 704 (March 21, 2013).

In 2007, Clark County redesignated a number of parcels of land that had been designated as agricultural land of long term commercial significance (ALLTCS) to Urban Growth Area (UGA). In November 2007, several parties appealed to the Western Washington Growth Management Hearings Board (Growth Board), challenging the redesignation of various parcels. Before the petition to the Growth Board had been decided, the cities of Camas and Ridgefield began proceedings to annex several parcels of land subject to the challenged redesignations in December 2007 and January 2008. In April 2008, the annexations were finalized. The Petitioner in the ongoing Growth Board appeal did not appeal the annexations, and none of the parties brought the annexations to the attention of the Board.

In May 2008, the Growth Board issued its final decision and order, deciding that Clark County was not in compliance with the Growth Management Act (GMA), specifically ruling that a number of the redesignations, including the redesignations of land annexed by the cities, violated GMA requirements and were "invalid" because they would substantially interfere with the fulfillment of GMA goals. The Board still was unaware of the annexations. Clark County and others petitioned for review of the Board's decision in superior court. Following stipulations, the superior court entered orders reversing the Board's decision regarding all of the redesignated parcels that had been annexed and some other parcels, as well.

Petitioners appealed the superior court's order, but the appeal was limited to redesignated parcels of land that had not been annexed. When the court ordered supplemental briefing regarding issues related to the annexed lands, the Petitioners explained that all issues related to the annexed lands "were not encompassed in their petition of appeal," that they "did not…intend to seek review related to those areas…which were annexed," and "did not include argument related thereto in their briefing." Nevertheless, the Court of Appeals ordered additional briefing regarding the authority underlying the annexations. The Petitioners again noted that they had not challenged the annexations in superior court.

In April 2011, the Court of Appeals issued its decision in *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.,* 161 Wn. App. 204, 254 P.3d 862 (2011). While acknowledging that the parties had argued that the validity of the annexations was not appealed and was not properly before it, the Court of Appeals reasoned that "issues related to the annexations directly impact our ability to resolve pending issues…raised in this appeal." The Court of Appeals framed the issue as "what effect, if any, the annexations had on the Growth Board's jurisdiction to determine GMA compliance for the annexed parcels. The court concluded that "challenged county legislative actions pending review are not final and no party may act in reliance on them," and thus the annexations "did not deprive the Growth Board of jurisdiction over the challenge to the County's decisions relating to these parcels."

Based on the Rules of Appellate Procedure and *res judicata* doctrine, the Supreme Court reversed the rulings related to the annexed lands and vacated the portion of the Court of Appeals' decision reversing the superior court's unchallenged rulings. The court reasoned that review of separate and distinct claims that have not been raised on appeal is prohibited in order to promote finality, judicial economy, predictability, private settlement of disputes, and vigorous advocacy. Justices Stephens and Wiggins filed a concurring opinion stating that they preferred to base the decision on mootness to avoid limiting the discretion appellate courts have under the Rules of Appellate Procedure to determine the issues that may be decided on appeal.

III. Washington Court of Appeals Decisions

State Greenhouse Gas Reduction Requirements Inapplicable to Puget Sound Regional Council Regional Transportation Plan; Nonproject EIS for Regional Transportation Plan Adequately Assessed Greenhouse Gas Emissions Impacts for Reasonable Alternatives and Potential Measures to Mitigate Such Impacts Under the Rule of Reason and the Substantial Weight that Must Be Accorded to PSRC Determinations. *Cascade Bicycle Club v. Puget Sound Regional Council,* 2013 WL 3864302 (Wash. App. Div.1) (July 22, 2013).

This was the first reported Washington court decision addressing (1) the applicability of state greenhouse gas emissions reduction requirements in RCW 70.235.020(1)(a), and (2) the adequacy of an Environmental Impact Statement (EIS) under the State Environmental Policy Act (SEPA) in assessing the impacts of greenhouse gas (GHG) emissions of a reasonable range of alternatives to a proposed

nonproject action and potential means of mitigating such impacts.

The Cascade Bicycle Club, Futurewise, and the Sierra Club (Cascade) challenged the Puget Sound Regional Council's (PSRC) regional transportation plan (RTP) and EIS. Amicus briefs were filed in support of PSRC by the state Departments of Ecology, Commerce, and Transportation, and in support of Cascade by the Snoqualmie Indian Tribe and Tahoma Audubon Society.

Division 1 of the Court of Appeals held (1) that the PSRC RTP was not subject to the statewide GHG reduction requirements of RCW 70.235.020(1)(a) because they were intended to apply only to GHG emissions by state agency operations, including buildings and vehicles, to demonstrate the feasibility of such reductions, and were not imposed on other agency actions, such as PSRC's adoption of the RTP, declining to decide whether PSRC was even subject to the requirements of RCW 70.235.020(1)(a); and (2) that PSRC's EIS for the RTP was not required to specifically analyze whether the policies of the RTP would achieve the inapplicable statutory GHG reduction requirements, and that the EIS adequately assessed the GHG impacts of a reasonable range of alternatives to the proposed RTP and potential means of mitigating such impacts.

The court's decision on the adequacy of the EIS addressed only GHG emissions and not so-called "adaptation" or "vulnerability" impacts based upon potential future environmental conditions that may be caused by climate change.

State GHG Reduction Requirements Inapplicable to PSRC's Proposed RTP

In reaching the conclusion that the state GHG reduction requirements of RCW 70.235.020(1)(a) apply only to state government *operations*, the court stressed the statement of legislative intent:

> The legislature finds that in chapter 14, Laws of 2008, the legislature established greenhouse gas reduction limits for Washington state, including a reduction of overall emissions by 2020 to emission levels in 1990, a reduction by 2035 to levels twenty-five percent below 1990 levels, and by 2050 a further reduction below 1990 levels. Based upon estimated 2006 emissions levels in Washington, this will require a reduction from present emission levels of over twenty-five percent in the next eleven years. The legislature further finds that state government activities are a significant source of emissions, and that state government should meet targets for reducing emissions from its buildings, vehicles, and all operations that demonstrate that these reductions are achievable, cost-effective, and will help to promote innovative energy efficiency technologies and practices.

2008 Wash. Laws, ch. 519, §1.

On this basis, the court decided that the statutory GHG reduction requirements applied only to state operations and not other state agency actions and did not require "a future development plan adopted for a discrete region of the state, which addresses nonoperational government action and the public's transportation activities, [to] comply with statewide greenhouse gas emission standards." The court also reasoned that nothing in the statute required sector-specific, region-specific, or agency-specific proportional reductions of GHG emissions and observed that GHG emissions have many sources while PSRC's jurisdiction related only to the emissions of on-road vehicles and only to vehicle miles traveled by on-road vehicles and not to increasing the use of clean fuels and vehicles. The court rejected Cascade's argument that even if the statute did not apply, PSRC had "independently committed itself to compliance" with the state GHG reduction requirements, reasoning that PSRC's multicounty planning policies in VISION 2040 did not create a legal obligation to comply with the otherwise inapplicable statutory requirements.

Adequacy of EIS for PSRC's Regional Transportation Plan

Cascade contended that PSRC's adoption of the RTP (T2040) violated SEPA because the EIS prepared for T2040 failed to (1) identify the extent of T2040's violation of the statutory GHG emissions reductions requirements, (2) disclose T2040's inconsistency with the multicounty planning policies of VISION 2040, and (3) develop alternatives to the proposed T2040 and mitigation measures that would comply with the statutory GHG reduction requirements.

The court prefaced its analysis of the EIS adequacy issues by stressing the extent of PSRC's discretion under SEPA's broad, flexible "rule of reason" governing EIS adequacy, PSRC's additional discretion and flexibility pertaining to a nonproject EIS, and SEPA's mandate that substantial weight be accorded to agency determinations of EIS adequacy under RCW 43.21C.090. Under these deferential standards of review, the court concluded that the EIS was adequate.

The court noted that Cascade's EIS adequacy challenge was "limited to PSRC's failure to disclose an alleged statutory violation." However, because the court had concluded that the statute was inapplicable to PSRC's RTP, the court reasoned that there was no statutory violation to disclose, rejecting the basis for Cascade's EIS inadequacy claim. The court also noted that chapter 70.235 RCW did not amend SEPA.

The court went on to reject a number of subsidiary arguments, concluding that the EIS adequately assessed the GHG impacts of a reasonable range of alternatives and identified sufficient potential means of mitigating the identified impacts, emphasizing that especially flexible standards apply

to nonproject EISs and that more detailed environmental review would be developed, as appropriate, for future transportation projects.

Vested Rights, GMA, and SEPA: Development Permit Application Established Vested Rights in Development Regulations Even Though Growth Management Hearings Board (Growth Board) Later Ruled that the County's Adoption of the Regulations was Noncompliant with SEPA. *Town of Woodway v. Snohomish County and BSRE Point Wells, LP,* 172 Wn. App. 643, 291 P.3d 278 (January 7, 2013), *rev. granted, 177 Wn.2d 1008 (June 4, 2013)*.

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

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

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

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

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

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

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

On April 25, 2011, the Growth Board issued a final decision and order, ruling that the challenged comprehensive plan and development regulations were noncompliant with certain provisions of the GMA and violated SEPA. The Growth Board also issued a determination of "invalidity" under the GMA for the comprehensive plan but not the development regulation enactments. The noncompliant provisions were remanded to the County for compliance with GMA and SEPA.

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

The dispositive question before Division 1 of the Court of Appeals was "whether, under the GMA, a landowner's development permit application vests to a local jurisdiction's land use comprehensive plan provisions and development regulations at the time a complete application is filed, despite a Growth Board's subsequent determination that the jurisdiction did not fully comply with SEPA's procedural requirements in its enactment of those plan provisions and regulations."

After an exceptionally thorough discussion of the issue, relevant legislative history, and secondary authorities, the court held that BSRE's permit applications remained vested in the urban center plan designation and development regulations notwithstanding the Board's subsequent ruling that the County's enactments violated SEPA.

Woodway and SRB contended that non-GMA SEPA cases, holding that actions taken in violation of SEPA's procedural requirements are *ultra vires* and void, were controlling. They argued that vested rights could not be obtained in void regulations. The court disagreed, reasoning that the GMA amendments adopted in 1995 and 1997, after extensive review by a legislative task force and study commission, were controlling and explicitly provide that vested rights are unaffected by subsequent Growth Board determinations of noncompliance or even "invalidity." Noting that the Growth Boards never have issued an "invalidity" order based on SEPA noncompliance, the court explained that even if an invalidity order had been issued in this case, it would have precluded vesting only prospectively

and would not have affected BSRE's rights that had already vested.

LUPA, Zoning, and SEPA: Permit for Rock Crushing Use Unauthorized by Zoning Ordinance Invalidated; Open Record Hearing Required for Administrative SEPA Appeal; Reuse of SEPA Checklist Upheld. *Ellensburg Cement Products, Inc. v. Kittitas County,* 171 Wn. App. 691, 287 P.3d 718 (2012).

Gibson owned an 84-acre site in Kittitas County, designated Rural and zoned Agricultural-20. In 1997, his predecessor had obtained a conditional use permit (CUP) from the County for gravel extraction on a 13.4-acre portion of the site. At some point after Gibson acquired the property, he expanded gravel extraction beyond these 13.4 acres to other parcels comprising the site. In August 2008, the State Department of Natural Resources (DNR) issued a stop work order, apparently because a surface mining permit had not been obtained from DNR. In April 2009, a court issued a notice of violation for unauthorized excavation and/or rock crushing on the Gibson property. Apparently no further action was taken by DNR or the County regarding these violations.

In October 2008, Gibson applied for a surface mining permit from DNR covering 60 acres of the site even though the 1997 County CUP authorized mining on only 13.4 acres. DNR reviewed a SEPA checklist submitted by Gibson, issued a determination of nonsignificance (DNS), and granted a surface mining permit for 60 acres of the site in December 2008. No appeal of the DNS or DNR permit was filed.

In June 2010, Gibson submitted a CUP application for rock crushing, screening, washing operations and temporary concrete and asphalt plants on the site. Apparently, the application was construed by the County, over the objection of challenger Ellensburg Cement Products, Inc. (ECP), as a request to expand gravel extraction beyond the 13.4 acres covered by the 1997 CUP to be coextensive with the 60 acres included in the DNR permit. In September 2010, Gibson amended the application to delete gravel washing operations and the temporary concrete and asphalt plants. Gibson also submitted an altered version of the 2008 DNR SEPA Checklist. The County issued a SEPA DNS and granted the proposed CUP for expansion of gravel extraction and a rock-crushing operation.

ECP administratively appealed the DNS and CUP to the County Board of Adjustment (BOA). The BOA, in accordance with amended County Code procedures, provided only a closed record proceeding on the SEPA DNS appeal in which no oral argument, no testimony or cross-examination, and no presentation of any evidence beyond the existing record were allowed. The SEPA appeal was conducted entirely through written submissions. ECP objected to these procedural limitations. An open record hearing was conducted by the BOA on the CUP appeal.

ECP argued in the BOA appeals that the CUP was unlawful because rock-crushing was not permitted by the zoning code and that SEPA was violated because (1) the existing DNR checklist was improperly used for the CUP proposal and (2) there was not sufficient threshold review of environmental impacts as a result of the County's procedures allowing only a closed-record appeal on the existing administrative record.

The BOA denied both appeals, upholding the DNS and CUP. ECP filed a LUPA action challenging the BOA's decisions. The BOA decisions were upheld by the Kittitas County Superior Court. Division 3 of the Court of Appeals reversed the BOA's decisions on both the CUP and SEPA appeals.

The CUP was invalidated because the zoning code did not allow rock crushing as a permitted or conditional use in the Agriculture-20 zone. After an extensive analysis of the relevant language in the zoning code, the court concluded that applicable code provisions unambiguously did not allow rock crushing on the site and, thus, there was no basis for deference to the interpretations of the BOA.

The BOA decision upholding SEPA compliance was reversed because the court concluded that an open-record hearing was required by RCW 36.70B.060, in light of the definitions of "closed record appeal" in RCW 36.70B.020(1) and WAC 197-11-721 as "an administrative appeal on the record…*following an open record hearing*…" (emphasis added). In addition to its analysis of relevant statutory provisions, the court noted that limitation of an available administrative SEPA appeal to a closed record appeal on the existing administrative record was inconsistent with the requirement that "the record of a negative threshold determination…must demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." "The determination must be based upon information reasonably sufficient to determine the environmental impacts of a proposal." The court also reasoned that, as a practical matter, a closed record appeal cannot be meaningful without a preceding open record hearing.

The court disagreed with ECP's argument that the existing DNR checklist was improperly used by the County for the proposed CUP. While the DNR checklist was merely copied and revised, without formal adoption, incorporation by reference, or filing a SEPA addendum containing the revisions, the Court upheld the County's use of the existing checklist because SEPA encourages the combining of environmental documents, WAC 197-11-640, and authorizes agencies to "use an environmental checklist whenever it would assist in their planning and decision making," WAC 197-11-315(3). In addition, under LUPA, RCW 36.70C.130(1)(a), and

SEPA case law, harmless procedural error may not be the basis for reversal of government action.

GMA: County's Plan Amendment of Five-Acre Parcel from Low-Density to High-Density Residential Did Not Require Review and Update of Plan's Capital Facilities Element and Was Not Internally Inconsistent with Plan Policies; Growth Board Did Not Abuse Discretion by Denying Dismissal of Petition for Failure to Serve County Auditor. *Spokane County v. Eastern Washington Growth Management Hearings Board,* 173 Wn. App. 310, 293 P.3d 1248 (January 31, 2013).

Headwaters Development Group LLC and Red Maple Investment Group LLC (Headwaters) owned a five-acre parcel of land in the Wandermere area of Spokane County, a short distance from the Wandermere golf course and immediately west of an approved subdivision of 330 single-family residences known as Stone Horse Bluff. The parcel is within the County's urban growth area (UGA).

In March 2009, Headwaters submitted an application requesting the County to change the parcel's comprehensive plan designation and zoning classification from low-density residential (LDR) to high-density residential (HDR) during the County's annual comprehensive plan amendment process. Headwater's purpose in requesting the map amendment was to accommodate potential future development of a 120-unit apartment complex.

The planning staff report on the proposed plan amendment noted that no comments from service providers had been received indicating unavailability of services at the site. The report also noted that the property to the west was designated as an Urban Activity Center by the comprehensive plan, zoned Regional Commercial, and was developing as a shopping center. The report observed that if the zoning and plan designation of the parcel was changed to HDR, it would be developable for a larger variety of housing types and prices, provide affordable housing, permit compact residential and mixed-use development, and allow for residential uses in business zones—all goals or policies of the urban land use and housing elements of the plan.

According to the report, zoning to the north, south, and east was LDR, with single-family residences and duplexes to the south and north and the recently approved Stone Horse Bluff residential subdivision to the east. The report opined that the type of multifamily development contemplated by Headwaters is typically regarded as an appropriate transition from high-intensity commercial uses to low-intensity uses such as single family neighborhoods.

Recognizing that the only existing access to the parcel was Dakota Street, a local access street less than a mile long with no sidewalks, and that the potential 120-unit apartment complex would cause a projected increase of 960 to 1,050 vehicle trips per day, the report noted that "[w]hen a specific project is proposed, the County Engineering Department will require the applicant to submit a detailed traffic analysis so that a determination can be made as to what the appropriate mitigation measures may be."

The Planning Commission recommended denial based on potential traffic issues while recognizing the appropriateness of the multifamily designation as a transitional use. The Board of County Commissioners nevertheless approved the amendment based on the appropriateness of the proposed designation as a transitional use and explicitly recognized that traffic issues would be properly addressed under the concurrency provisions of the County Code.

Neighbors and property owners opposed to the amendment filed a petition for review with the Eastern Washington Growth Management Hearings Board. They served copies of the petition on the County's prosecuting attorney and on the lawyer who had represented Headwaters before the county commissioners. They did not serve a copy on the county auditor. Headwaters was granted leave to intervene in the Growth Board proceeding, and, along with the County promptly moved to dismiss based on petitioners' failure to timely serve the county auditor. The Growth Board denied the motion, holding that while service on the auditor was required by the Board's rules, the requirement was not jurisdictional, and the Board found substantial compliance and no prejudice to the County.

On the merits, the Growth Board ruled that the comprehensive plan map amendment violated the GMA because (1) it was inconsistent with several plan goals and polices and (2) the map amendment was not accompanied by contemporaneous review and revision of the plan's capital facilities and transportation elements to address the timing and financing of additional facilities that would be needed as a result of future development allowed by the map amendment. In addition to concluding that the challenged amendment was noncompliant with GMA requirements, the Board issued an order of invalidity.

The County and Headwaters obtained judicial review of the Board's decision under the Administrative Procedure Act, Ch. 34.05 RCW. Spokane County Superior Court reversed, ruling the Board erred by denying dismissal of the petition for failure to serve the county auditor and, on the merits, by concluding that the map amendment was inconsistent with plan policies and goals and was required to be accompanied by review and revisions of the plan's capital facilities and transportation elements.

Division 3 of the Court of Appeals reversed the Growth Board's decision on the merits, upholding the County's comprehensive plan amendment, and affirmed the Board's denial of dismissal for failure to serve the county auditor.

In accordance with a long line of GMA case law, the court recognized the tension between local land use policy-making authority and GMA goals and requirements potentially constraining that authority, repeating the fundamental principle established and frequently reaffirmed by the Supreme Court that the GMA was the product of intense legislative controversy and compromise and contains no provision for liberal construction of its requirements. The court stressed the unique standard of review requiring Growth Board deference to the policy choices of local government as long as they are not clearly erroneous under specific GMA goals and requirements and quoted GMA's "numerous provisions which tend to show that local jurisdictions have broad discretion in adapting the requirements of the GMA to local realities," quoting *Quadrant Corp.,* 154 Wn.2d 224, 236 (2009), including RCW 36.70A.3201 ("the ultimate burden and responsibility for planning, harmonizing the planning goals of the chapter, and implementing a county's or city's future rests with that community").

On the basis of these principles, the court recognized that "'deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies, in general.' *Quadrant Corp.,* 154 Wn.2d at 238, 110 P.3d 1132. Accordingly, "a [growth] board's ruling that fails to apply this 'more deferential standard of review' to a county's action is not entitled to deference [on appeal]." *Id*.

The Growth Board had decided that the comprehensive plan map amendment from LDR to HDR was inconsistent with various plan goals and policies and, thus, rendered the plan internally inconsistent in violation of the GMA. The court disagreed, holding that the Board's findings of inconsistency were not supported by substantial evidence. Recognizing the many policies relevant to the location of multifamily residential development, the court doubted that all of them would have been optimized in any location because local plan goals and policies, just as GMA's statutory goals, are often mutually competitive and not listed in order of priority. The court reasoned that the weighing of competing goals and policies is a fundamental planning responsibility of local governments; as long as they are considered and weighed, a local government plan amendment that substantially serves some goals and policies may not be invalidated because arguably others are not advanced. While the plan map amendment designating the disputed five acres for high-density multifamily use arguably was not close enough to a major arterial, under one relevant policy, it was reasonably close, and, unquestionably served the policy of locating such uses near commercial areas since a major shopping center was adjacent.

The Growth Board's primary reason for concluding the amendment made the plan internally inconsistent was more specific and would have sweeping consequences. The Board ruled that an amendment of a plan map must be accompanied by review and appropriate amendments of all other elements of the plan related to providing adequate transportation and other public facilities to serve future development. The County had argued that the map amendment merely made future development allowable. While specific development projects potentially would be proposed in the future, such proposed projects would be subject to GMA's transportation concurrency mandate and numerous conditions and mitigation measures tailored to the specific development proposals. The Growth Board rejected the County's position, ruling that public facility planning must occur whenever the plan map is amended well before specific development is actually proposed.

The court agreed with the County, holding that the Board had exceeded its authority because neither the amendment opponents nor the Growth Board identified any GMA requirement specifically requiring amendment of all other relevant plan elements every time the plan map is amended. Absent violation of any specific GMA requirement, the court held that County discretion prevailed, and the Board had no sufficient basis for finding noncompliance and ordering invalidity. In addition to being beyond the Board's statutory authority, the court noted that the Board's mandate requiring resolution of all issues at the planning stage would be impractical guesswork given the inability to predict what development actually would be proposed in the future. The court also observed that the Board's position was inconsistent with the GMA requirement that transportation concurrency be determined at the project development stage, as well as the requirements of the project permit process of Ch. 36.70B RCW.

The court upheld the Board's ruling denying dismissal for the petitioners' failure to serve the county auditor. While the language of the Board's rules made service on the auditor mandatory ("shall"), other language made dismissal for failure to meet this requirement permissive ("may"). Therefore, the court held that the failure to dismiss was reviewable only for abuse of discretion, and the County had not argued that the Board abused its discretion.

LUPA: Damages Not Recoverable Under Any of Several Theories for Delay in Obtaining Rezone that Was Ordered by the Superior Court and Not Appealed by the County; Application for Site-Specific Rezone Is Not a Sufficient Basis for Recovery of Damages under RCW 64.40.020 or 42 U.S.C. § 1983. *Manna Funding v. Kittitas County,* 173 Wn. App. 879, 295 P.3d 1197 (February 28, 2013).

Manna Funding, LLC (Manna) applied for a rezone of its 100-acre parcel of land, north of the City of Roslyn and east of State Route 903 in Kittitas County, from "Forest and Range 20" (FR-20) to "Rural 3" (R-3). The requested rezone would allow a reduction in lot sizes from 20 acres to 3 acres per residential unit. Manna specifically noted in its application that it was seeking only a zoning map amendment and not proposing any specific development.

Manna applied for the rezone in 2007. After a negative Planning Commission recommendation, the Board of County Commissioners (Board) denied the rezone, concluding that the County's criteria for rezone were not met. Manna challenged the denial in a LUPA action, and the superior court reversed the Board's decision, remanding the application for new hearings before the Planning Commission and the Board and instructing the Board to make detailed findings of fact to support its conclusions. The superior court specifically instructed the Board to make findings explaining *why* the proposed rezone did not meet the rezone criteria that the Board had concluded were not satisfied. The court explained in detail what it meant by "detailed findings."

After the new hearings, the Board again denied the rezone, concluding that the rezone criteria were not met. Manna brought a second LUPA action, challenging the denial and seeking damages under RCW 64.40.020 and 42 U.S.C. § 1983. In 2009, the superior court again reversed the Board, observing that the Board had failed to follow the court's instructions to enter detailed findings supporting its conclusions. The court ruled that substantial evidence conclusively satisfied Manna's burden of showing that the rezone criteria were satisfied, remanding the application to the County with instructions to grant the rezone. The County did not appeal and granted the rezone of Manna's land to R-3.

Apparently while the damage claims remained unresolved, Manna amended its complaint in 2011, adding claims for tortious interference with a business expectancy and tortious delay. The superior court granted summary judgment to the County on all of the damage claims and awarded attorney fees to the County under RCW 64.40.020(2).

The Court of Appeals upheld the summary judgment for the County on all of the damages actions.

The court held that damages were not recoverable under RCW 64.40.020 because a prerequisite to recovery for delay under that statute is an "application for a permit" and an application for a site-specific rezone is not an "application for a permit" under RCW 64.40.020. The court recognized the confusion generated by the essentially identical language of RCW 64.40.020 and LUPA and that no reported Washington court decision had addressed the issue of whether an application for a site-specific rezone is potentially subject to RCW 64.40.020. However, the court relied on specific legislative history indicating the legislature's understanding that liability for denying rezones would not be available under RCW 64.40.020. The court agreed with Manna that an application for a rezone is an "application for a permit" under LUPA, RCW 36.70C.020(2), nevertheless concluding that an application for a rezone is not an "application for a permit" under RCW 64.40.020.

Nor were damages recoverable under the federal civil rights statute, 42 U.S.C. § 1983. Manna did not have a federally protected property right because an application for a rezone does not vest rights in the proposed new zone. Such vested rights, the court reasoned, did not arise until the rezone was granted. Since the County acted promptly to rezone the property within two weeks of the superior court's order, the court held that no action was available under 42 U.S.C. § 1983.

In the actions for tortious interference with a business expectancy and tortious delay, the lower court's ruling for the County was upheld because, as Manna consistently acknowledged, it never had proposed any development project and was seeking only a rezone of its land. The court noted that the County granted the rezone within two weeks of the superior court's order directing the County to do so. Manna did not provide evidence of interference with any business relationship as a result of the delay. The court explained and distinguished Washington cases in which damages had been awarded under these theories.

However, the court reversed the award of attorney fees to the County, because the fees had not been limited to those incurred in defending against the action under RCW 64.40.020, and remanded for recalculation and reduction of the fees.

LUPA: Rezone From Office Zone Allowing Height of 35 Feet to Office Zone Allowing Height of 150 Feet Satisfied Rezone Criteria and Was Not Inconsistent with Comprehensive Plan. *Chinn v. City of Spokane,* 173 Wn. App. 89, 293 P.3d 401 (January 23, 2013).

West Central Development, LLC (West Central) applied for a rezone from an office zone with a maximum height of 35 feet to an office zone with a maximum height of 150 feet in the City of Spokane adjacent to the County Courthouse. The rezone ultimately was approved by the City Council.

Brad Chinn (Chinn) brought a LUPA action, and the superior court reversed the rezone, ruling that the City Council had erroneously interpreted the rezone criteria of the City Code. West Central appealed. However, under LUPA doctrine and Divi-

sion 2 General Order 2010-1, Chinn, who brought the LUPA action challenging the rezone, remained the "virtual appellant" before the Court of Appeals and still had the burden of proving that the City Council erred. Chinn argued, as he had in superior court, that the rezone violated the rezone criteria in the City Code and was inconsistent with the City Comprehensive Plan.

The Court of Appeals affirmed the City Council, reversing the superior court. The court deferred to the City Council's interpretation of its own ordinances and the equivalent interpretation of the Hearing Examiner, the highest City official with fact-finding authority regarding the rezone. Since an ordinance authorized raising the height in the office zone to 150 feet through a rezone, it was within the discretion of the City Council to grant the rezone.

The court also concluded that the rezone was not inconsistent with two comprehensive plan policies. One policy encouraged "taller" office buildings "up to three stories" in the area to provide a focal point for the neighborhood. The second policy encouraged the highest office buildings to be located in other specified areas of downtown Spokane. The court reasoned that the plan policies used precatory language and did not bar office buildings with a height of 150 feet in the proposed area. Moreover, the court noted, even if the comprehensive plan policies were mandatory rather than precatory and were in conflict with the City's zoning regulations, such conflicts must be resolved in favor of specific zoning regulations under Washington law.

LUPA: County's Condition Imposed on a Special Use Permit for a Recreational Vehicle (RV) Park, Limiting Occupancy to 180 Days in Any Calendar Year, Was Within County's Authority, Supported by Substantial Evidence, Not Clearly Erroneous or Arbitrary; Attorney Fees Awarded to County. *Schlotfeldt v. Benton County,* 172 Wn. App. 888, 292 P.3d 807 (January 22, 2013).

The County Board of Adjustment granted Schlotfeldts a special use permit (SUP) for an RV park subject to the condition that RVs may not stay in the park for more than 180 days in any calendar year period. Schlotfeldts brought a LUPA action, contending the length-of-stay limitation was an erroneous interpretation of the law, not supported by substantial evidence, a clearly erroneous application of law to the facts, and arbitrary. The superior court upheld the condition, and Schlotfeldts appealed.

Division 3 of the Court of Appeals affirmed the Board of Adjustment. The court held that the County had ample authority to impose the condition under its own ordinance, to ensure compatibility with surrounding uses, and under state case law recognizing that the power to grant a special permit carries with it authority to impose conditions designed to implement the purposes of the permit requirement. The imposition of the condition, based on the finding of fact that RVs designed for recreational use and temporary living cause adverse consequences to surrounding uses when they become permanent dwellings, was held to be supported by substantial evidence and neither clearly erroneous nor arbitrary.

The court awarded the County its attorney fees on appeal under RCW 4.84.370 because the County, after granting the permit, prevailed in the superior court and Court of Appeals.

LUPA: Permit for Additional Church Parking Did Not Violate Zoning Code; Administrative Permit Decision by City Planner Did Not Violate Zoning Code or Appearance of Fairness Doctrine. *Families of Manito v. City of Spokane,* 172 Wn. App. 727, 291 P.3d 930 (January 10, 2013).

St. Mark's Lutheran Church (Church) applied for a conditional use permit (CUP) from the City of Spokane to increase the number of parking spaces serving the Church from the existing 87 to the maximum number allowed by the zoning code. What that maximum number of spaces was changed as interpretations of the code changed through the administrative process and subsequent appeal to the City Hearing Examiner. The Hearing Examiner's decision approved an increase of 14 spaces to a total of 101, some of which would be located on adjacent property owned by the Church, and required extensive additional mitigation of impacts of the new parking spaces on neighboring residences. Several neighboring property owners, Friends of Manito (Manito), appealed the Hearing Examiner's decision under the Land Use Petition Act (LUPA). Division 3 of the Court of Appeals upheld the Hearing Examiner's decision, reversing, in part, and affirming, in part, the Superior Court.

The zoning code limited church parking to one space per 60 square feet of the "main assembly area." The City planner who administered the permit application and the Hearing Examiner ultimately included the square footage of the choir area, sanctuary, and fellowship hall in the "main assembly area" in calculating the allowable number of parking spaces. Manito contended that only the sanctuary should have been included. Manito also argued that the Hearing Examiner should have imposed additional mitigating conditions on the CUP. The court, applying LUPA's relevant standards of review, upheld the Hearing Examiner's interpretation of the zoning code and resulting calculation of the number of parking spaces allowed. The mitigating conditions added by the Hearing Examiner were upheld, as well.

Manito also argued that procedural errors were committed by the Hearing Examiner because the Church was allowed to change its application, increasing the number of parking spaces, changing the location of some spaces to reduce impact on adjacent residences and adding additional landscape

buffering, traffic-calming, and other mitigation measures. Manito argued that such changes could be made only through a new permit application. The court disagreed, holding that the changes allowed by the Hearing Examiner and incorporated into the final decision were within the Examiner's authority, under the City Code, "to modify the decision being appealed."

Finally, Manito argued that the City planner who administered the permit application violated the City Code provision assigning such permit decisions to the Planning Director and the appearance of fairness doctrine. The court rejected the argument that only the Planning Director had authority to make the initial permit decision because the Code broadly authorized the Director to delegate such decision-making authority.

The court also rejected the argument that the appearance of fairness doctrine was violated because the City planner made the initial permit decision administratively without a quasi-judicial hearing. The court reasoned, in the alternative, that: (1) the Code did not require a quasi-judicial hearing for the permit decision, (2) under Washington law, administrative permit decisions are subject only to an "actual" unfairness standard and not the appearance of fairness doctrine because of the practical necessity of ex parte contacts between interested parties and permit administrators, and (3) even if the appearance of fairness doctrine required a quasi-judicial hearing, such a hearing was available and did occur in the appeal to the Hearing Examiner.

Apparently, the Church did not assert limitations on local land use regulatory powers under state or federal constitutional protections of religious exercise or the federal Religious Land Use and Institutionalized Persons Act.

Actions for Damages and Inverse Condemnation Compensation Against WSDOT for Harm to Property by Flooding, Allegedly Worsened by Bridge Design, Dismissed under Statute of Limitations and Subsequent Purchaser Rule. *Wolfe v. State of Washington Department of Transportation,* 173 Wn. App. 302, 293 P.3d 1244 (January 29, 2013).

Charles and Janice Wolfe and John and Dee Anttonen (Wolfe) appealed the superior court's summary judgment and dismissal with prejudice of their nuisance, negligence, and inverse condemnation claims against the Washington State Department of Transportation (WSDOT) based on the design of a bridge constructed by WSDOT across the Naselle River. Division 2 of the Court of Appeals affirmed the dismissal, holding that the subsequent purchaser rule and the statute of limitations precluded Wolfe's private causes of action against WSDOT.

Wolfe's negligence claim for installing piers at an angle to the river's current was subject to a two-year statute of limitations for claims of negligent injury to real property. Wolfe argued that summary judgment was erroneous because there were contested issues of fact regarding the cause of the erosion of the properties and the prerequisites to the applicability of the 'public duty' doctrine. The court disagreed because even assuming WSDOT had a duty to Wolfe and the erosion was caused by the bridge design, the action was not commenced within the two-year limitations period.

Wolfe's inverse condemnation claim was dismissed under the subsequent purchaser rule that bars recovery for a taking by a party who purchased property subsequent to the taking even though the government action causing the taking was ongoing. The subsequent purchaser may recover for a taking only on the basis of some new government action. In this case, the taking claim was based on WSDOT action, the construction of the bridge allegedly causing erosion of Wolfe's property by diverting the flow of the river. The construction of the bridge and resulting taking occurred before Wolfe's purchase of the property. Under the subsequent purchaser rule, it is assumed that a purchaser of property with knowledge of devaluation of property as a result of a government taking paid commensurately less for the property to reflect such devaluation. The court upheld the dismissal on this basis, as well.

Subject Matter Jurisdiction for Injury to Real Property Limited to County Where Land Is Situated. *Ralph v. State of Washington Department of Natural Resources*, 171 Wn. App. 262, 286 P.3d 992 (October 15, 2012).

In December 2007, heavy rains caused the Chehalis River to overflow its banks causing widespread flooding in Lewis County. The properties of William Ralph (Ralph) and William Forth (Forth) were damaged by the floods. In 2010, Forth sued the Department of Natural Resources, Weyerhaeuser Company, and Green Diamond Resources Company (collectively DNR) in King County Superior Court claiming negligence, trespass, tortious interference with contractual relations and business expectancy, conversion, inverse condemnation, unlawful agency action, and violations of the Shoreline Management Act and the State Environmental Policy Act. Forth sought injunctive and declaratory relief as well as damages. In 2011, Ralph filed a nearly identical lawsuit in King County Superior Court. Ralph and Forth asserted that DNR's deficient forest practices made their lands unstable and, as a result, during the 2007 storm, debris from landslides originating on DNR land flowed into the Chehalis River, displacing water and flooding the river basin.

DNR moved to dismiss both actions, arguing that King County Superior Court lacked subject matter jurisdiction under RCW 4.12.010, which requires claims for injury to real property to be brought in the county where the property is located. Ralph and Forth responded that RCW 4.12.010 concerns only venue, not jurisdiction. In the alternative, they claimed that their causes of action were transitory, not local, and not subject to RCW

4.12.010. The superior court dismissed both cases without prejudice for lack of subject matter jurisdiction. Ralph and Forth filed appeals that were consolidated by Division 1 of the Court of Appeals.

The court acknowledged the conflicting case law relevant to the issue, concluding that *Snyder v. Ingram,* 24 Wn.2d 401, 409, 165 P.2d 82 (1946), would have to be overruled to reverse the superior court's dismissal without prejudice. The court concluded that while the Supreme Court may overrule *Snyder* and similar holdings, the Court of Appeals may not.

Federal Environmental Law Update

By Matthew A. Love and Chris D. Zentz, Van Ness Feldman GordonDerr, LLP; Michael Withy[1]

I. National Environmental Policy Act ("NEPA")

***Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836 (9th Cir. 2013).**

In *Great Old Broads for Wilderness v. Kimbell*, the U.S. Court of Appeals for the Ninth Circuit upheld the U.S. Forest Service's ("USFS") final environmental impact statement ("FEIS") and record of decision ("ROD") regarding repairs to a wilderness area road. The Great Old Broads for Wilderness claimed that, by combining various alternatives that were individually analyzed in the FEIS to develop a selected alternative, the USFS failed to analyze the dramatically changed environmental impacts of the selected alternative in a Supplemental EIS ("SEIS") and, therefore, the FEIS and ROD violated NEPA.

Under NEPA, an agency must prepare an EIS for any proposed federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). The EIS must consider "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." *Id.* at § 4332(2)(C)(i)-(ii). Further, the EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). If, after this process, an "agency makes substantial changes in the proposed action that are relevant to environmental concerns," the agency must prepare an SEIS. 40 C.F.R. § 1502.9(c). In considering the terms "substantial changes" and "environmental concerns," the Ninth Circuit has stated that "supplementation is not required when two requirements are satisfied: (1) the new alternative is a minor variation of one of the alternatives discussed in the draft EIS, and (2) the new alternative is qualitatively within the spectrum of alternatives that were discussed in the draft [EIS]." *Russel Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1044 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2439 (2012) (internal quotations omitted).

In finding that the USFS's FEIS and ROD did not violate NEPA, the court held that the selected alternative was primarily comprised of elements from other alternatives analyzed in the FEIS and, therefore, "the [USFS] could reasonably determine that the combination was within the spectrum of previously analyzed alternatives." *Great Old Broads*, 709 F.3d at 854 (internal quotations omitted). In its reasoning, the court noted that, "Great Old Broads points to no specific changes that it deems not adequately analyzed in the [FEIS]." *Id.* The court also reasoned that, although Great Old Broads argued that an SEIS is required whenever a proposed project constitutes "a different configuration" of previously analyzed elements, an SEIS was not required.

***Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013).**

In *Ctr. for Biological Diversity v. Salazar*, the U.S. Court of Appeals for the Ninth Circuit held that the Bureau of Land Management ("BLM") did not violate NEPA when it failed to supplement an environmental impact statement ("EIS") for a proposed mining project when the mine owner sought to restart operations after a 17-year hiatus. BLM prepared an EIS in 1988 in connection with approval of the mining company's plan of operations. The appellants, a group of environmentalists and Indian tribes, brought suit claiming that, among other things, the EIS was stale and outdated, necessitating the preparation of an SEIS.

Under NEPA, a federal agency must prepare an environmental analysis prior to taking any "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Thus, NEPA is triggered when there is a new, proposed "major federal action." *See* 40 C.F.R. § 1502.5. An agency must supplement its EIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns" or "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i)-(ii); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004).

Appellants argued that BLM's subsequent actions—including the issuance of a gravel permit, requiring the mining company to obtain a new air quality permit, and approving the mining company's updated reclamation bond—were each prerequisites to restarting the mine and, thus, were "major federal actions" triggering NEPA's EIS supplementation requirements. *Ctr. for Biological Diversity*, 706 F.3d at 1094. However, the court disagreed. Address-

ing the appellants' argument regarding obtaining a new air quality control permit, the court concluded that, although BLM's requirement that the mine owner obtain a new air quality control permit was potentially a "major Federal action" that would require additional NEPA analysis, this requirement did not affect the validity or completeness of the 1988 EIS and BLM approval of the mining plan of operations. *Id*. at 1095. With regard to the updated reclamation bond argument, the court stated that "[i]n requiring an update to the reclamation bond, BLM merely reviewed the cost of reclamation based on the provisions of the 1988 plan of operations and determined, after crunching some numbers, that the amount of reclamation bond should be increased in accordance with newly-applicable regulations." *Id*. at 1096. Regarding appellants' gravel permit argument, the court noted that, under BLM's regulations, extraction of gravel "in amounts not exceeding 50,000 cubic yards or disturbing more than 5 acres" is entitled to a categorical exclusion from full NEPA analysis. *Id*. (citations omitted). As a result, the court concluded that "[BLM] appropriately found that issuance of the gravel permit fell into a categorical exclusion and adequately explained why the permit had no cumulatively significant environmental effects preventing application of the categorical exclusion." *Id*. at 1097.

***Alaska Survival v. Surface Transp. Board*, 705 F.3d 1073 (9th Cir. 2013).**

The U.S. Court of Appeals for the Ninth Circuit, in *Alaska Survival v. Surface Transp. Board*, upheld a decision by the Surface Transportation Board ("STB") to grant an exemption from the Interstate Commerce Commission Termination Act ("ICCTA") authorizing the Alaska Railroad Corporation ("ARRC") to construct a rail line extension between Port MacKenzie and Wasilla, Alaska. Prior to granting the exemption, the STB prepared an FEIS with a preferred alternative that included the construction of an access road alongside the rail line and mitigation measures designed to reduce the environmental impact of the rail line and access road. The court determined that the STB's decision to grant an exemption did not violate NEPA and rejected petitioners' arguments that the STB: (1) adopted an unreasonable purpose and need statement; (2) refused to consider an alternative route without an access road; and (3) inadequately assessed the project's adverse effect on wetlands.

"For any proposed major federal action, NEPA requires the agency to prepare an [EIS]." *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2004). An EIS must include a purpose and need statement, which must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. A purpose and need statement will fail if it unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained. *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010). NEPA also requires the EIS to describe and analyze every reasonable alternative within the range dictated by the nature and scope of the proposal. *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998). However, "[t]he EIS need not consider an infinite range of alternatives, only reasonable or feasible ones." *Carmel-By-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Additionally, the EIS must contain a discussion of possible mitigation measures "in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Id*. at 1154 (internal quotations omitted).

The court upheld the STB's decision and rejected the petitioners' arguments. First, in rejecting the petitioners' purpose and need statement argument, the court concluded that, "[the] Statement of Purpose and Need reasonably defined the objectives of the project in light of both the applicant's objectives and the agency's statutory authorization." *Alaska Survival*, 705 F.3d at 1086. Second, the court rejected petitioners' argument that the STB impermissibly refused to consider an alternative without an adjacent access road. The court reasoned that, "[petitioners] merely contend but do not show that a no-access-road alternative is a feasible option that should have been considered by the STB… Without evidence to the contrary, we defer to the STB's technical expertise regarding modern railroad construction." *Id*. at 1087. Finally, the court rejected petitioners' third argument regarding the consideration of impacts on wetlands and potential mitigation measures. In upholding the STB's EIS, the court noted that the methodology used to delineate the wetlands was in accordance with the Army Corps of Engineers manual and reasoned that, "Although [National Marine Fisheries Service] and [Environment Protection Agency] expressed concern with the wetlands delineation and the information on the functions of wetlands, the record does not show that the STB's reliance on this methodology was arbitrary and capricious…. As long as the agency engages in a reasonably thorough discussion, we do not require unanimity of opinion among agencies." *Id*. at 1088 (internal quotations omitted).

II. Endangered Species Act ("ESA")

***In re: Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 709 F.3d 1 (D.C. Cir. 2013).**

In *In re: Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, the U.S. Court of Appeals for the D.C. Circuit upheld the Fish and Wildlife Service's ("FWS") listing of the polar bear as a "threatened" species under the ESA based on projected habitat loss due to climate change. Appellants, including industry groups and environmental organizations, argued that FWS's listing decision

ignored or misinterpreted the record before it and failed to articulate the grounds for its decision. Specifically, the appellants argued that: (1) FWS failed to adequately explain each step in its decisionmaking process, particularly in linking habitat loss to a risk of future extinction; (2) FWS erred by issuing a single, range-wide determination; (3) FWS relied on defective population models; (4) FWS misapplied the term "likely" when it determined that the species was likely to become endangered; (5) FWS erred in selecting a period of 45 years as the "foreseeable future"; (6) FWS failed to "take into account" Canada's polar bear conservation efforts; and (7) FWS violated Section 4(i) of the ESA by failing to give an adequate response to the comments submitted by the State of Alaska regarding the listing decision. The court concluded that FWS's listing decision was not arbitrary and capricious.

Under the ESA, "the term endangered species means any species which is in danger of extinction throughout all or a significant portion of its range…." 16 U.S.C. § 1532(6). In contrast, "threatened species" means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id*. at § 1532(20). The ESA allows an "interested person" to petition the appropriate agency for the listing of any species. *Id*. at § 1533(b)(3)(A). Upon receiving such a petition, the agency "determine[s] whether [the] species is an endangered species or a threatened species because of *any* of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence." *Id*. at § 1533(a)(1).

The court considered each of the appellants' arguments before concluding that FWS had properly listed the polar bear as a "threatened species" under the ESA. The court rejected appellants' argument that the FWS failed to adequately explain how the predicted decrease in sea ice habitat would likely lead to a dramatic polar bear population decline over the course of the next 45 years. The court concluded that "[a]ppellants' claim fails because FWS clearly explained how the anticipated habitat loss renders this particular species likely to become endangered. The agency considered and explained how the loss of sea ice harms the polar bear." *In re: Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 709 F.3d at 9. The court also rejected appellants' argument that FWS inappropriately relied upon the Intergovernmental Panel on Climate Change's ("IPCC") definition of "likely," when considering whether it was "likely" that the polar bear would become an endangered species. The IPCC defines likely as "67-to-90 percent certainty." *Id*. at 14. Specifically, the court reasoned that, "[FWS] reasonably explains that the agency interpreted the statutory reference to 'likely' as having its 'ordinary meaning' or 'dictionary definition.' … FWS essentially argues that there is nothing in the [Polar Bear] Listing Rule to indicate that the agency bound itself to the IPCC definition and thus meant to conclude that 'likely' means 69-to-90 percent certainty. We agree." *Id*. at 14-15. Similarly, the court reasoned that the FWS properly considered whether the polar bear was likely to become endangered in the "foreseeable" future. Regarding the appellants' "foreseeable future" argument, the court concluded that FWS's method of defining "foreseeable future" was reasonable. In so holding, the court cited FWS's explanation in its reasoning that, "[t]he timeframe over which the best available scientific data allows us to reliably assess the effect of threats on the species is the critical component for determining the foreseeable future." *Id*. at 15.

***Center for Biological Diversity v. U.S. Bureau of Land Mgmt*., 698 F.3d 1101 (9th Cir. 2012).**

In *Center for Biological Diversity v. U.S. Bureau of Land Management*, the U.S. Court of Appeals for the Ninth Circuit invalidated a Biological Opinion ("Bi-Op") for the Ruby Pipeline Project ("Project"), which included construction of a large, natural gas pipeline through federal land. The Bi-Op was prepared by FWS and concluded that the Project would not jeopardize threatened or endangered species and would not adversely modify their critical habitat. The petitioners, environmental groups and an Indian tribe, challenged FWS's Bi-Op on the grounds that: (1) the Bi-Op's "no jeopardy" and "no adverse modification" determination relied on protective measures set forth in a conservation plan not enforceable under the ESA; (2) the Bi-Op did not take into account the potential impacts of withdrawing substantial groundwater; (3) the Incidental Take Statement ("ITS") miscalculated the number of fish to be killed; and (4) the ITS placed no limit on the number of eggs and fry of threatened cutthroat trout to be taken during construction.

Under Section 7 of the ESA, a federal agency must "insure that any action authorized, funded, or carried out by such agency… is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). If a federal agency's implementation or approval of a "major constructive activity" would be likely to have an adverse impact on listed species or critical habitat, the agency must initiate consultation with the appropriate wildlife agency. 50 C.F.R. § 402.12. If FWS concludes that jeopardy or adverse modification is likely, then any take resulting from the proposed action is subject to Section 9 liability (unless otherwise authorized under the ESA). *Sierra Club v. Babbitt*, 65 F.3d 1502, 1505 (9th Cir. 1995) (citations omitted). Consultation results in a biological

opinion, which includes a finding that either (1) the proposed action will cause jeopardy to listed species or their critical habitat, or (2) the proposed action will result in no jeopardy or only incidental take, whereby an incidental take statement will be included and shield the action agency from "take" liability under Section 9. 40 C.F.R. § 402.14(i).

The court held that FWS's basis for issuing a "no jeopardy" finding in the biological opinion was arbitrary and capricious because it relied in part on a Conservation Action Plan ("CAP") that was not part of the project design and consultation process. The CAP was the result of a Memorandum of Agreement entered into by FWS and Ruby Pipeline L.L.C. As a result, the CAP measures were not included in the scope of action for which ESA consultation occurred and, therefore, they were not enforceable under the ESA. As such, the court concluded that the Biological Opinion's "no jeopardy" finding was improper because it relied on the CAP's projected benefits without considering the CAP measures effects on the proposed action. Specifically, the court reasoned that, "[C]ategorizing the CAP measures as private actions that produce only cumulative effects removes them from the purview of the ESA, thereby eliminating the procedural protections of section 7 and circumscribing the enforcement authority of the FWS." *Ctr. for Biological Diversity*, 698 F.3d at 1116.

In contrast, when conservation measures are incorporated into the project design and form a part of the action agency's Section 7 consultation process, enforcement measures are available to FWS if the proposed project is subsequently modified in a way that would have adverse effects on listed species. *Id*. at 1114-15 (citing *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir.1987)). Therefore, said the court, "We now hold what was implicit in *Marsh* and *Selkirk* and is dictated by the statutory scheme: a conservation agreement entered into by the action agency to mitigate the impact of a contemplated action on listed species must be enforceable *under the ESA* to factor into the FWS's [Bi-Op] as to whether [an] action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." *Id*. at 1117.

III. Clean Water Act ("CWA")

***Decker v. Northwest Envtl. Defense Ctr.*, 133 S.Ct. 1326 (March 20, 2013).**

In *Decker v. Northwest Envtl. Defense Ctr.*, the Supreme Court overturned the Ninth Circuit Court of Appeals' decision that required logging companies to obtain a National Pollutant Discharge Elimination System ("NPDES") permit since the logging companies were responsible for maintaining ditches, culverts, and channels that conveyed stormwater runoff containing high amounts of sediment, which can be harmful to fish. The petitioners, the State Forester of Oregon and a timber company, sought review by the Supreme Court of whether an NPDES permit was required for such logging stormwater runoff under the CWA.

The CWA requires that individuals, corporations, and governments obtain an NPDES permit before discharging pollution from any point source into the navigable waters of the U.S. 33 U.S.C. §§ 1311(a), 1362(12). The CWA defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well … from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Id*. at § 1362(14). Additionally, EPA has issued regulations, including the "Silvicultural Rule," which states that "[A] silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States…" 40 C.F.R. § 122.27(b)(1). Under this Silvicultural Rule, any discharge from a logging-related source that qualifies as a point source requires an NPDES permit unless some other federal statutory provision exempts it.

One such exemption clarifies that "discharges composed entirely of stormwater" are exempt from the NPDES permitting scheme. 33 U.S.C. § 1342(p)(1). However, this general "stormwater exemption" does not apply to all stormwater discharges because Congress directed EPA to continue to require permits for stormwater discharges "associated with industrial activity." *Id*. at § 1342(p)(2)(B). The CWA does not define "associated with industrial activity;" however, EPA issued the Industrial Stormwater Rule, which defined "associated with industrial activity" as "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant… For categories of industries identified in this section, the term includes … storm water discharges from … immediate access roads … used or traveled by carriers of raw materials, manufactured products, waste materials, or by-products used or created by the facility …." 40 C.F.R. § 122.26(b)(14).

The Supreme Court overturned the Ninth Circuit Court of Appeals and found that EPA's interpretation of the Industrial Stormwater Rule is afforded deference. In reasoning to this conclusion, the Court noted that, "Under the [CWA], petitioners were required to secure NPDES permits for the discharges of channeled stormwater runoff only if the discharges were 'associated with industrial activity,' as that statutory term is defined in the … Industrial Stormwater Rule. Otherwise, the discharges fall within the [CWA's] general exemption of 'discharges composed entirely of stormwater' from

the NPDES permitting scheme." *Decker*, 133 S.Ct. at 1336 (citations omitted). After considering both parties' arguments about the appropriate meaning of the phrase "associated with industrial activity," the Court found that, "Taken together, the regulation's references to 'facilities,' 'establishments,' 'manufacturing,' 'processing,' and an 'industrial plant' leave open the rational interpretation that the regulation extends only to traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities." *Id*. at 1337. As a result, the Court ruled in favor of EPA's interpretation of the Industrial Stormwater Rule, particularly since, as the Court further reasoned, "there is no indication that its current view is a change from prior practice or a *post hoc* justification adopted in response to litigation." *Id*.

***Los Angeles County Flood Control Dist. v. Natural Res. Def. Council*, 133 S.Ct. 710 (Jan. 8, 2013).**[2]

In *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.*, the United States Supreme Court unanimously held that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the CWA. The Court reversed a U.S. Court of Appeals for the Ninth Circuit decision holding that pre-polluted water originating from a navigable river and passing through a "man-made construction" into the natural river below is a "discharge of a pollutant" under the CWA. The Los Angeles Flood Control District ("District") operates a "municipal separate storm sewer system" ("MS4"), a complex flood-control and storm-sewer conveyance system used to collect and channel stormwater runoff originating from upstream municipalities, which is subject to the NPDES permit program. Water passing through the MS4 contains levels of pollutants exceeding those authorized by the NPDES permit. Natural Resources Defense Council, Inc. commenced a citizen suit under Section 505 of the CWA, alleging that water passing through the MS4 contains pollutant levels exceeding the limits allowed by the NPDES permit.

The CWA prohibits "the discharge of any pollutant by any person" unless done in compliance with some provision of the CWA. 33 U.S.C. § 1311(a). One permissible method to discharge a pollutant is by obtaining a permit under the NPDES permit program. *Id*. at § 1342. Generally, the NPDES permit program requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the waters of the United States. *Id*. The CWA defines the "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id*. at § 1362(12). Additionally, the CWA defines a "point source" as "any discernible, confined and discrete conveyance," such as a pipe, ditch, channel, or tunnel, "from which pollutants are or may be discharged." *Id*. at § 1362(14).

Here, the Supreme Court determined that this case involved the direct application of its prior decision in *Fla. Water Management Dist. v. Miccosukee Tribe*. 541 U.S. 95 (2004) ("*Miccosukee*"). There, the Court found that pumping polluted water from one part of a water body into another part of the same body is not a discharge of pollutants under the CWA. In this case, the Court held that, under its prior decision in *Miccosukee*, "[the] flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA." *Los Angeles County Flood Control Dist.*, 133 S.Ct. at 713. The Court based its decision in *Miccosukee* on the plain language of the CWA, which defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id*. In this case, therefore, no pollutants are added to the water when the water simply flows from one portion of the water body to another through a concrete channel. As a result, the court reversed the Ninth Circuit's decision as inconsistent with the Court's holding in *Miccosukee*. *Id*.

***Virginia Dep't of Transp. v. EPA*, No. 1:12-CV-775, 2013 WL 53741 (E.D. Va. Jan. 3, 2013).**

In *Va. Dep't of Transp. v. EPA*, the U.S. District Court for the Eastern District of Virginia concluded that the Environmental Protection Agency ("EPA") exceeded its statutory authority under the CWA when it sought to regulate sediment discharges into a river by limiting stormwater runoff flows. EPA established a Total Maximum Daily Load ("TMDL") for Accotink Creek in Fairfax County, Virginia, which imposed a volumetric limit on the flow rate of stormwater into the creek. The Virginia Department of Transportation alleged that the CWA does not allow the EPA to regulate the level of sediment pollution in Accotink Creek by establishing a TMDL for the flow of stormwater into the creek, which is not a pollutant under the CWA.

Under the CWA, states must identify "designated uses" for each body of water within their borders, as well as "water quality criteria" sufficient to support those uses. 33 U.S.C. § 1313(c)(2)(A). The EPA evaluates the uses and criteria developed by the states, and either approves them or proposes and promulgates its own set of standards. *Id*. at § 1313(c)(3). Once the standards are in place, each state is required to maintain a list – also subject to approval or modification by the EPA – of its waterbodies that are "impaired" because they do not meet their respective water quality criteria. *Id*. at § 1313(d)(1)(A). For each waterbody on the impaired list, the state is required to establish a set of TMDLs sufficient to restore compliance with its water quality criteria. *Id*. at § 1313(d)(1)(C). Each TMDL establishes the maximum amount of a pollutant that may be added to the waterbody daily from all

sources (runoff, point sources, etc.). EPA is required to publish a list of pollutants suitable for maximum daily load measurement and EPA has determined that all pollutants listed at 33 U.S.C. § 1362(6) are suitable for TMDLs. *Id*. at § 1314(a)(2)(D); *Total Maximum Daily Loads Under Clean Water Act*, 43 Fed. Reg. 60,662. Additionally, EPA can approve or modify TMDLs proposed by the states, as it sees fit. *Id*. at § 1313(d)(2).

The court, applying *Chevron*, concluded that the CWA did not grant EPA the authority to regulate a nonpollutant, even though it was a proxy for sediment pollution in Accotink Creek. Specifically, the court reasoned that, "EPA is charged with establishing TMDLs for the appropriate pollutants; that does not give them authority to regulate nonpollutants." *Va. Dep't of Transp*., 2013 WL 53741, at *3. Further, the court also noted that "[EPA] may not regulate something over which it has no statutorily granted power – annual loads or nonpollutants – as a proxy for something over which it *is* granted power – daily loads or pollutants." *Id*. (emphasis in original). As a result, the court held that "EPA is authorized to set TMDLs to regulate pollutants, and pollutants are carefully defined. Stormwater runoff is not a pollutant, so EPA is not authorized to regulate it via TMDL. Claiming that stormwater maximum load is a surrogate for sediment, which is a pollutant and therefore regulable, does not bring stormwater within the ambit of EPA's TMDL authority." *Id*. at *5.

IV. Clean Air Act ("CAA")

***Resisting Envtl. Destruction on Indigenous Lands ("REDOIL") v. EPA*, 704 F.3d 743 (9th Cir. 2012).**

The U.S. Court of Appeals for the Ninth Circuit, in *REDOIL v. EPA*, denied various environmental groups' challenges to two air permits issued by the EPA under the CAA, which were issued for exploratory drilling operations in the Arctic Ocean by a drillship and its associated fleet of support vessels. The petitioners sought review of two aspects of the air permits: (1) the determination that support vessels, unlike the drillship itself, do not require the best available control technology ("BACT") to control emissions; and (2) the exemption of the area within a 500-meter radius of the drillship from ambient air quality standards.

The CAA establishes a comprehensive program to protect and enhance air quality by limiting emissions from both stationary industrial sources and mobile sources. 42 U.S.C. § 7401 *et seq*. Under the Prevention of Significant Deterioration ("PSD") program, "[n]o major emitting facility" "may be constructed" without a conforming permit. 42 U.S.C. § 7475(a)(1). "Major emitting facility" is defined, in part, as a "stationary source[] of air pollutants" with the potential to emit certain threshold levels of specified air pollutants subject to regulation. 42 U.S.C. § 7479(1). To obtain a PSD permit, a facility must, among other things, satisfy the requirement that "the proposed facility is subject to the [BACT] for each pollutant subject to regulation" emitted from such a facility. 42 U.S.C. § 7475(a)(4). Following a 1990 CAA amendment, the EPA was given jurisdiction to regulate Outer Continental Shelf ("OCS") sources "located offshore of the States along the Pacific, Arctic and Atlantic Coasts" and certain areas of the Gulf Coast, meaning such OCS sources were subject to the PSD program and its associated BACT requirement. 42 U.S.C. § 7627. To achieve the goals of the PSD program, Congress directed the EPA to "establish requirements" so that OCS sources would attain and maintain ambient air quality standards and comply with the PSD program. *Id*.

Under § 7627, the term "OCS source" means "any equipment, activity, or facility" that "(i) emits or has the potential to emit any air pollutant, (ii) is regulated or authorized under the Outer Continental Shelf Lands Act [("OCSLA"), 43 U.S.C. § 1331 et seq.], and (iii) is located on the [OCS] or in or on waters above the [OCS]." 42 U.S.C. § 7627(a)(4)(C). The statutory definition of "OCS source" additionally directs that, "[f]or purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source." ("Direct Emissions Clause"). 42 U.S.C. § 7627(a)(4)(C)(iii). Significantly, jurisdiction under OCSLA extends only to "the subsoil and seabed of the [OCS] and … all installations and other devices permanently or temporarily attached to the seabed." 43 U.S.C. § 1333(a)(1). In its regulations, the EPA incorporated sections (i), (ii) and (iii) of the statutory definition of "OCS source" and added that it would include vessels only when "(1) [p]ermanently or temporarily attached to the seabed," or "(2) [p]hysically attached to an OCS facility, in which case only the stationary sources aspects of the vessels will be regulated." 40 C.F.R. § 55.2.

Applying *Chevron*, the court concluded that the CAA's PSD program, and its associated application of BACT to stationary sources, was ambiguous when considering whether BACT should be applied to both the drillship, which is stationary and attached to the seafloor, and the support vessels, which are not always attached to the drillship. Specifically, the court noted that "[support] vessels that are not 'permanently or temporarily attached to the seabed,' or '[p]hysically attached to an OCS facility,' are not 'regulated or authorized under the [OCSLA]' and thus cannot be an OCS source under the statute or under the EPA's regulatory definition." *REDOIL*, 704 F.3d at 750 (quotations in original). Additionally, the court considered the "OCS source" definition, including the Direct Emissions Clause, and concluded that "[the] [Direct Emissions Clause] maintains a distinction between an OCS source, to

which all PSD requirements apply, and vessels servicing an OCS source, to which unspecified requirements apply because their emissions must be considered direct emissions from the OCS source." *Id*. Under *Chevron* step two, the court concluded that the EAB's interpretation of the CAA was reasonable. Specifically, the court stated that, "Having determined that, under OCSLA, it could not regulate vessels other than drillships and vessels attached to the drillship as 'OCS sources,' the EPA explained that emissions from the associated fleet are accounted for by including vessel emissions in the 'potential to emit.'" *Id*. at 752. As result, the court concluded that "This interpretation gives meaning to the [Direct Emission Clause]—by including the associated fleet's emissions 'while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source' toward the drillship itself—while respecting the limitations imposed by the definition of OCS source." *Id*.

***Am. Petroleum Inst. v. EPA*, 706 F.3d 474 (D.C. Cir. 2013).**

In *Am. Petroleum Inst. v. EPA*, the U.S. Court of Appeals for the D.C. Circuit vacated a portion of the Renewable Fuel Standard ("RFS") program, which was added to the CAA to encourage the production of advanced biofuels such as cellulosic biofuel. In January of 2012, EPA reduced the projected volume of cellulosic biofuel to a level different than the estimate provided by the Energy Information Administration ("EIA") and, in doing so, reasoned that uncertainty regarding the technological ability to produce the volume contemplated must be balanced against "promoting growth in the industry." The petitioner, the American Petroleum Institute, which represented the interests of biofuel refineries, claimed that EPA's projections for biofuel volume, and its methodology for establishing such projections, violated the CAA's statutory requirements.

Under the CAA's RFS program, EPA must promulgate regulations to ensure that transportation fuel sold or introduced into commerce in the 48 contiguous U.S. states contains an increasing measure of renewable fuel through 2022. 42 U.S.C. § 7545(o)(2). The CAA provides yearly "applicable volume" requirements not only for renewable fuel but also for a subclass known as "advanced biofuels," which produce lower greenhouse gas emissions than conventional renewable fuels such as corn-based ethanol. *Id*. at §§ 7545(o)(1)(B), 7545(o)(2)(B). The "applicable volume" for a particular fuel determines how much of that fuel refiners, importers and blenders must purchase each year in order to comply with the RFS program. *Id*. at § 7545(o)(3)(B). Recognizing that certain technology for producing such fuels may not yet exist, Congress also provided for the possibility that actual production would fall short of the stated requirements. *Id*. at § 7545(o)(7)(D)(i). This section calls for EPA to make a determination of the "projected volume of cellulosic biofuel production" for each calendar year, which is to be "based on" an estimate of the EIA. *Id*. When the projection is less than the mandated volume, the EPA Administrator is to "reduce the applicable volume of cellulosic biofuel… to the projected volume." *Id*. at §§ 7545(o)(3)(B), 7545(o)(7)(D)(i). The CAA also provides that, in the event of such a reduction, the EPA Administrator "may also reduce the applicable volume of renewable fuel and advance biofuels" required for that year. *Id*. at § 7545(o)(7)(D)(i).

In challenging the projected volume set by the EPA, the petitioner claimed that: (1) EPA's 2012 projection for cellulosic biofuel violated the CAA since it did not follow the EIA's estimate; and (2) the methodology used to prepare EPA's estimate was biased towards overstatement. *Am. Petroleum Inst.*, 706 F.3d at 478. In rejecting the petitioner's first argument, the court reasoned that "[t]he statute called first for EIA to supply an estimate of the amount of cellulosic biofuel to be sold… then for EPA to 'determine' the obligation 'based on' that estimate…. Plainly Congress didn't contemplate slavish adherence by EPA to the EIA estimate; had it so intended, it could have skipped the EPA 'determination' altogether." *Id*. In turning to petitioner's second claim, the court held that "EPA is correct that one of Congress's stated purposes in establishing the current RFS program was to 'increase the production of clean renewable fuels….' But that general mandate does not mean that every constitutive element of the RFS program should be understood to individually advance a technology-forcing agenda, at least where the text [of the CAA] does not support such a reading." *Id*. at 479 (citations omitted). As a result, the court concluded, "[we] agree with API that EPA's 2012 projection of cellulosic biofuel production was in excess of the agency's statutory authority. We accordingly vacate that aspect of the 2012 RFS rule and remand for further proceedings consistent with this opinion." *Id*. at 481.

V. Tribal Fishing Rights

***U.S. v. Washington*, Case No. CV 709-9213, Document 752 (W.D. WA., March 29, 2013).**[3]

On March 29th, the U.S. District Court for the Western District of Washington issued a permanent injunction requiring certain State of Washington ("State") agencies to provide and maintain fish passage for salmon at numerous culverts under State-owned roads. *United States v. Washington*, Case No. 70-9213 (W.D. Wash., Mar. 29, 2013). The court imposed the injunction as a remedy following its 2007 declaratory order, finding that the State has built and operates stream culverts that block fish passage to and from the Tribes' usual and accustomed fishing places, and these culverts deprive the Tribes of the fishing rights reserved by the Stevens Treaties. The court concluded that issuing the injunction will ensure that the State acts "expeditiously"

in correcting the barrier culverts, and will provide salmon with access to approximately 1,000 miles of additional stream habitat.

In 2001, the Western Washington Treaty Tribes, along with the United States, initiated this matter as a subproceeding in the longstanding *United States v. Washington* litigation. This litigation, which has been ongoing since 1970, involves determining the scope of the Tribes' treaty fishing right. The relevant treaties (commonly referred to as the Stevens Treaties) were negotiated by the federal government in the 1860s. In general, the original lawsuit involved three key issues: (1) whether the treaties' fishing clause entitles the Tribes to a specific allocation of fish; (2) if such an allocation is required, whether hatchery-bred fish are included in the allocation; and (3) whether the right of taking fish incorporates the right to have treaty fish protected from environmental degradation. After these issues were bifurcated, the Tribes, in Phase I of the litigation, successfully established that the treaties provided them with a right to take up to 50 percent of the "harvestable" fish. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

In Phase II of the *United States v. Washington* litigation, the court considered the reserved hatchery and environmental issues. In 1980, the district court considered the environmental component and held that "implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoilation." *United States v. Washington*, 506 F. Supp. 187, 190 (W.D. Wash. 1980). On review, the Ninth Circuit rejected the "environmental servitude" created by the district court, but recognized that the State and Tribes must take reasonable steps to preserve and enhance fishery resources. *United States v. Washington*, 694 F.2d 1374, 1389 (9th Cir. 1982). Subsequently, the Ninth Circuit, rehearing the issue *en banc*, vacated the district court's order as being "imprecise in definition and uncertain in dimension." *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985). While rejecting the imposition of a broad "environmental servitude," the court left open the possibility that a specific duty may exist depending upon the facts of a particular case for its definition and articulation. *Id*.

Sixteen years later, in this subproceeding, the Tribes requested a declaratory judgment establishing: (1) that the Stevens Treaties impose a duty on the State to refrain from diminishing the number of fish passing through, to or from the Tribes' usual and accustomed fishing grounds by construction and/or maintenance of culverts; and (2) that the State had violated, and continues to violate, the duty owed to the Tribes under the Stevens Treaties. In addition, the Tribes requested an injunction preventing the State from constructing or maintaining any culverts that may impact salmon and requiring the State to identify within 18 months all culverts which impact salmon and to repair or replace the identified culverts within five years. The district court has limited the scope of the subproceeding to include only culverts blocking fish passage under State-owned roads.

On August 23, 2007, the court issued a declaratory order holding that "[the] right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest." The court concluded that the Tribes' promise to cede their land in exchange for the right to take fish carried the implied promise that the government would not take actions that would significantly degrade the resource. As such, the court held that the Stevens Treaties impose a duty upon the State to refrain from building or maintaining culverts in such a way as to block the passage of fish upstream or down, to or from, the Tribes' usual and accustomed fishing places. The court specifically noted that "[t]his is not a broad 'environmental servitude' or the imposition of an affirmative duty to take all possible steps to protect fish runs … but rather a narrow directive to refrain from impeding fish runs in one specific manner."

In granting the Tribes' request for a permanent injunction, the court mandated that the State expedite its process of repairing and replacing fish-blocking culverts in order to replenish salmon migration to and from spawning grounds. In discussing the magnitude of the injury, the court observed that "[t]he Tribes and their individual members have been harmed economically, socially, educationally, and culturally by the greatly reduced salmon harvests that have resulted from State-created or State-maintained fish passage barriers." Furthermore, the court also determined that this injury is ongoing, monetary damages would not adequately compensate the Tribes and their individual members, and that equity favors requiring the State to keep the promises upon which the Tribes relied when they ceded significant tracts of land under the Treaties. Finally, the court noted that commercial, recreational, and Tribal fishermen will benefit from the increased production of salmon, and the general public will benefit from salmon habitat restoration.

In the injunction accompanying the court's decision, the court granted the Tribes' requested relief and established deadlines for correcting fish-blocking culverts located under state-owned roads. Specifically, the court mandated that:

(1) Within six months, the State prepare a current list of all barrier culverts within the Case Area (which the court previously defined as that portion of the State that is west of the Cascade Mountains and north of the Columbia River drainage area);

(2 By October 31, 2016, the Washington Department of Fish and Wildlife, Department of

Natural Resources, and State Parks provide for fish passage at each listed barrier culvert;

(3 Within 17 years, Washington State Department of Transportation ("WSDOT") provide for fish passage at each listed barrier culvert that has 200 lineal meters or more of upstream salmon habitat; and

(4 WSDOT provide for fish passage at each listed barrier culvert that has less than 200 lineal meters of upstream salmon habitat at the end of the culvert's useful life, or sooner as part of a highway project.

In addition, the court identified three options to achieve fish passage which, in order of preference, are: (1) avoid the need for the road to cross the stream; (2) a full span bridge; and (3) a stream simulation culvert. Finally, the court required the identified State agencies to monitor and evaluate their implementation of the injunction, and take reasonable steps to maintain their culverts to prevent the development of fish barriers and to protect salmon habitat.

VI. Federal Energy Regulatory Commission ("FERC")

***Power Site Reservations Fee Group*, Declaratory Order, 142 FERC ¶ 61,196 (March 21, 2013).**[4]

On March 21, 2013, FERC granted a petition for declaratory order and announced that it will no longer assess annual charges for non-federal lands at licensed hydropower projects that are subject to a federal "power site reservation" established under Section 24 of the Federal Power Act (FPA). FERC's ruling will result in significant reductions in federal land use annual charges for numerous hydropower projects, particularly in Alaska and other locations in the West.

Under Section 10(e)(1) of the FPA, FERC collects several categories of annual charges from hydropower project licensees, including fees for the "use, enjoyment, and occupancy" of federal lands. 16 U.S.C. § 803(e). In the early 1980s, FERC started including in these annual charges fees for lands that had passed from federal ownership, but that were subject to a power site reservation. *Power Site Reservations Fee Group* at ¶ 4. In its March 21 declaratory order, FERC maintained its view that a power site reservation established under FPA Section 24 is a federal property right and that its long-standing practice of assessing annual charges for licensees' use of lands subject to such a reservation is not unlawful. *Id*. at ¶ 6.

In granting the petition for a declaratory order, FERC reasoned that a power site reservation, which reserves the right of the United States or its licensees to enter and use the lands for hydropower power development, is a federal property right. On that basis, FERC assessed the same annual charge for these non-federal lands as lands held by the United States in fee. Although several hydropower licensees over the years urged FERC to change its policy, which inequitably assessed an annual charge on lands owned by the licensee, until its March 21 declaratory order, FERC resisted these efforts. The coalition's argument persuaded FERC that assessing a fee for the use of lands that hydropower licensees have acquired for purposes of hydropower development is inequitable. *Id*. at ¶ 7. FERC observed that "licensees have given valuable consideration to obtain fee ownership of federal lands, and have done so for the development of hydropower, the very purpose for which the power site reservation was created." *Id*. As a result of FERC's March 21 declaratory order, hydropower licensees whose projects occupy non-federal lands subject to a federal power site reservation have the opportunity to reduce their annual charges bills from FERC.

***Annual Charges for Use of Gov't Lands*, Order No. 774, 142 FERC ¶ 61,045 (Jan. 17, 2013).**[5]

On January 17, 2013, FERC issued Order No. 774, a final rule revising the way FERC calculates annual charges for hydropower licensees' use of federal lands. In February 2009, FERC issued a final rule—without prior notice or opportunity for comment—adopting USFS's new fees schedule, and then issued bills to hydropower licensees according to the new schedule. *Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands*, FERC Stats. & Regs. ¶ 31,288 (2009); 74 FR 8184 (Feb. 24, 2009). A coalition of licensees challenged FERC's 2009 final rule and, in January 2011, the D.C. Circuit in *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222 (D.C. Cir. 2011), vacated the rule. Following the D.C. Circuit's ruling, FERC issued a Notice of Proposed Rulemaking in November 2011, which proposed a new methodology for assessing federal land use annual charges. *Annual Charges for the Use of Government Lands*, FERC Stats. & Regs ¶ 32,684; 137 FERC ¶ 61,139 (2011). While FERC's proposed rule, like the prior vacated rule, relied heavily on BLM's 2008 methodology, it included several significant changes that resulted in significantly lower fees than would have resulted from FERC's 2009 final rule.

Section 10(e)(1) of the Federal Power Act ("FPA") requires FERC to establish "reasonable" annual charges for hydropower licensees' use and occupancy of federal lands. 16 U.S.C. § 803(e). In 1987, FERC adopted a methodology for computing these charges that had been developed by USFS for assessing fees for linear rights-of-way on USFS-managed lands. *Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges*, Order No. 469, FERC Stats. & Regs. ¶ 30,741, at 30,584 (1987). From 1987 through 2008, FERC annually updated its fees schedule to adjust for inflation. At the end of 2008, however, BLM ad-

opted a new methodology for calculating its fees for linear rights-of-way on BLM-managed lands, which included substantially higher land value estimates based on agricultural land values from the National Agricultural Statistics Service's Census of Agriculture ("NASS Census"). USFS then adopted the new BLM rule for its assessment of land use fees for linear rights-of-way on USFS-managed lands. *See* Fee Schedule for Linear Rights-of-Way Authorized on National Forest System Lands, 73 Fed. Reg. 66,591 (Nov. 10, 2008).

FERC's Order No. 774, like BLM's 2008 methodology, uses four components to calculate annual federal land use fees: per-acre land value; an encumbrance factor (the extent to which the hydropower project precludes other uses of the federal lands); a rate of return; and an inflation factor. *Order No. 774* at ¶ 28. FERC, like BLM, will use the per-acre average agricultural land values found in the NASS Census. These values will be adjusted downward on a state-by-state basis to eliminate added land value attributable to irrigation, and further reduced by 7 percent to reflect the absence of buildings on the land. FERC adopted an encumbrance factor of 50 percent, a rate of return of 5.77 percent, and an annual inflation adjustment to be updated every 10 years. FERC departed from the BLM method in one significant aspect: Instead of adopting BLM's approach of assigning each county in the United States to one of 13 fee "zones," with all counties in the zone assigned the same per-acre rate, FERC's final rule employs a more precise approach of calculating the annual charge based on the actual average land value for the county in which each hydropower project is located, as set forth in the NASS Census. *See id.* at ¶ 36, *et seq*. In addition, FERC decided to end its long-standing practice of doubling the per-acre charge for federal lands within hydropower projects that are used for purposes other than transmission. *Id.* at ¶ 53. FERC reasoned that because the land values under its final rule are based on the NASS Census land values for particular counties or geographic areas, and the 50 percent encumbrance factor already accounts for the degree of encumbrance caused by hydropower facilities on the land, it is no longer necessary to double the fee for lands that are used for purposes other than transmission. *Id.*

1 Michael Withy is a recent graduate of Seattle University School of Law and has interests in environmental, land use, and natural resources law. Michael currently works at the Garden City Group, Inc.

2 A more detailed analysis of this case can be found at: *http://www.vnf.com/news-alerts-786.html.*

3 A more detailed summary can be found at: *http://www.vnf.com/news-alerts-830.html*.

4 A more detailed analysis of this order can be found at: *http://www.vnf.com/news-alerts-823.html.*

5 A more detailed analysis of this case can be found at: *http://www.vnf.com/news-alerts-805.html.*

Decisions of the Pollution Control Hearings Board and Shorelines Hearings Board

By Kathleen Mix, Chair, Pollution Control Hearings Board and Shoreline Hearings Board

***Kaiser Aluminum Washington, LLC v. Spokane Regional Clean Air Agency*, PCHB Case No. 11-100 (Order Granting Partial Summary Judgment, June 11, 2012; Findings of Fact, Conclusions of Law, and Order, October 11, 2012).**

Kaiser Aluminum Washington, LLC (Kaiser) challenged a $21,900 penalty issued by the Spokane Regional Clean Air Agency (SRCAA) for failing to comply with all quarterly audit procedures for two melting furnaces (melters) at its aluminum sheet and plate rolling mill located in Spokane Valley, Washington. Each melter has an exhaust stack. The exhaust stacks are monitored continuously for opacity by a continuous opacity monitor (COM) on each exhaust stack.

SRCAA asserted that when Kaiser's Air Operating Permit was revised on November 15, 2010, it imposed quarterly audit checks all 11 COMs operated by Kaiser, and maintenance of a calibration error of three percent or less pursuant to 40 C.F.R. Part 60, Appendix B, Performance Specification 1 (1998) (PS-1). The testing methodology in PS-1 contains detailed protocols. It requires using three calibration attenuators, and a total of five nonconsecutive readings for each attenuator (3 by 5 protocol) to ensure that a calibration of three percent or less is maintained. SRCAA insists that this testing is necessary because there is no emission control technology on the melters, and the COMs are the only continuous indicator of the proper operation of the melters.

Kaiser insisted it never understood that it was required to do quarterly audits of its COMs using a 3 by 5 protocol, because the PS-1 language normally only applies to a one-time field audit performance, after initial installation of the COMs. Kaiser's testing employed a single run for each attenuator (3 by 1) instead of five runs for each attenuator (3 by 5). The Board reviewed numerous documents and correspondence between the parties. A majority of the Board concluded that Kaiser should have been using the 3 by 5 testing protocol, but also concluded that the lack of clarity in the documents provided by SRCAA understandably created confusion by Kaiser. A majority of the Board granted summary judgment in favor of SRCAA regarding whether a violation occurred. One Board member dissented on the basis that there were disputed issues of ma-

terial fact that should have precluded the granting of summary judgment.

The hearing on the merits was limited to the reasonableness of the penalty. The Board concluded that a substantial reduction in the amount of the penalty was warranted because of the justifiable confusion by Kaiser on what SRCAA expected for testing the COMs, the good faith actions of Kaiser, and the lack of a public health risk. The penalty amount was reduced from $21,900 to $10,000.

***BNSF Railway Company and Pacific Rail Services, LLC v. State of Washington, Department of Ecology*, PCHB Case No. 11-150 (Order on Summary Judgment, December 4, 2012).**

Pacific Rail Services was covered under the Industrial Stormwater General Permit (ISGP), and during 2011 triggered Level Three Corrective Actions. Pacific Rail applied to Ecology for a waiver from the requirement to implement Level Three Corrective Actions and for an extension of time to implement those requirements. Pacific Rail's waiver request relied on development of a site-specific water quality criteria for copper and use of a mixing zone for copper, zinc and turbidity, to conclude that its discharges would not violate water quality standards or lead to a violation of those standards. Ecology issued an Administrative Order granting the time extension request but denying the waiver request. Pacific Rail and BNSF, which assumed coverage under the ISGP, appealed.

On summary judgment, the Board held that the Administrative Order, issued under the authority of RCW 90.48.120, was within the Board's jurisdiction as set forth in RCW 43.21B.110(1)(b). The Board rejected appellants' assertion that the waiver request was automatically approved after 60 days, concluding that Ecology must take affirmative action on waiver and time extension requests under the ISGP, consistent with earlier Board decisions to that effect. The Board granted summary judgment to Ecology on its decision to deny the waiver request, finding that it was not unreasonable for Ecology to deny the request for a site-specific water quality standard, due to the time and expense required of the state for rulemaking and obtaining approval from EPA. The Board also concluded that it was not unreasonable for Ecology to reject Pacific Rail's use of a mixing zone when there was no evidence that the mixing zone analysis complied with the requirements of WAC 173-201A-400.

***BNSF Railway Company v. State of Washington, Department of Ecology and Puget Soundkeeper Alliance, Intervenor,* PCHB Case No. 11-152 (Order Granting Summary Judgment to Puget Soundkeeper Alliance and Ecology, October 24, 2012).**

BNSF Railway (BNSF) triggered a requirement to implement corrective actions under the 2008 Industrial Stormwater General Permit (ISGP). BNSF did not timely request a waiver of that obligation under the terms of the permit, nor did it install the necessary stormwater treatment best management practices required by permit conditions. Subsequently, Ecology reissued a new and updated ISGP in 2010. The new permit required permittees to implement any applicable corrective actions that had been required under the previous ISGP. In June 2011 BNSF sought a waiver or extension of time to address the 2008 benchmark violations and to implement corrective actions triggered in 2008. In August 2011 Ecology denied BNSF's request, by letter from the Water Quality Section Program Manager. BNSF did not appeal that letter to the PCHB, but rather, through its attorney, continued to discuss BNSF's obligations with Ecology staff. Finally, in November 2011, BNSF filed an appeal of a follow-up letter sent by Ecology staff, which reiterated the earlier correspondence and further explained Ecology's position that BNSF had a continuing obligation to address the 2008 benchmark violations, and a continuing obligation to implement corrective actions under the terms of the previous, and current, ISGP.

The Board held that it lacked jurisdiction over the appeal, as there was no timely appeal of any appealable decision or order by Ecology. The Board concluded that the letter BNSF sought to appeal (November 2011) was not a final determination of the rights and obligations of BNSF under either version of the ISGP, nor was it an appealable permit action under RCW 43.21B.110(1). The Board concluded that the letter was explanatory in nature, and did not order BNSF to complete corrective actions. The Board relied on earlier cases to explain that a party cannot simply define the point at which they believe a discussion with the agency is complete for purposes of taking an appeal, and assumes a large risk in doing so. The Board granted summary judgment to Ecology, and intervenor Puget Soundkeeper Alliance.

***Wm. Dickson Co. v. State of Washington, Department of Ecology,* PCHB Case No. 11-163 (Order on Summary Judgment, October 2, 2012).**

Staff from Pierce County Public Works observed the discharge of turbid water from a pipe into Swan Creek on two separate days. On the second day, they took turbidimeter readings of the discharge, as well as samples of the Creek upstream and downstream of the discharge. It was determined that the discharge was from water being pumped from a pit at the Wm. Dickson Co. Mine, which is covered by the Sand and Gravel General Permit. When employees of the Mine were notified of the discharge, the pump was turned off. Pierce County staff provided information regarding their observations and sampling to Ecology. Dickson also notified Ecology of its discharge on the second day. Ecology, concluding that Dickson violated four separate conditions of the Permit on two separate days, issued Dickson a $24,000 penalty. Ruling on cross motions

for summary judgment, the Board found that Ecology proved four of the violations and reduced the penalty to $15,000.

This case was appealed to Pierce County Superior Court; Case No. 12-2-13976-3.

***Mark Blackwood v. State of Washington, Department of Ecology,* PCHB Case No. 11-185 (Findings of Fact, Conclusions of Law, and Order, October 18, 2012; Amended Findings of Fact, Conclusions of Law, and Order, October 25, 2012; Order Denying Reconsideration, November 7, 2012).**

Ecology issued Mr. Blackwood a $17,000 penalty for discharging pollution to waters of the state and failing to comply with the requirements of an immediate action order. Mr. Blackwood appealed the penalty. At the hearing, Ecology proved that there were discharges from Mr. Blackwood's farm into waters of the state on three separate occasions, and that such discharges contained fecal coliform bacteria far in excess of the state water quality standard of 200 FC bacteria for 100 milliliters of water. Ecology also proved that, prior to issuance of the penalty, Mr. Blackwood had not installed best management practices needed to address his discharges into waters of the state. Mr. Blackwood provided evidence that subsequent to the issuance of the penalty he had completed some projects on his farm intended to reduce the entry of fecal coliform into runoff from his farm. Based on the evidence presented, the Board reduced the penalty to $16,000.

***Monica Hunt v. State of Washington, Department of Ecology,* PCHB Case No. 12-022 (Order on Summary Judgment (as Amended on reconsideration), November 29, 2012).**

Appellant challenged Ecology's notice of violation, penalty ($16,000), and order for a restoration plan along Manastash Creek. Ecology's actions were based on a finding that there had been a discharge of pollutants into Manastash Creek caused by Appellant's grading, vegetation cutting, and other activities in the riparian corridor of the creek. The Appellant asserted that she needed to conduct maintenance activities on an irrigation return flow ditch that flowed through Appellant's land and the riparian corridor, and which ultimately discharged into Manastash Creek. Ecology argued the ditch was a side channel of Manastash Creek and was "water of the state" as defined in RCW 90.48.020, and that the disruption of soils and removal of vegetation would result in increased temperature and turbidity in the Creek.

The Board found that the ditch was a water of the state, but was not a side channel of Manastash creek. The Board further found that while the Appellant could take action to maintain the ditch, her activities went well beyond reasonable and normal maintenance, and such activities caused or would tend to cause the discharge of pollution in Manastash Creek in violation of RCW 90.48.080. Based on mitigating circumstances, the Board reduced the penalty to $750 and remanded the case back to Ecology to reconsider the restoration plan because of recent flooding and resulting changes to the flow of Manastash Creek.

This case was appealed to Kittitas County Superior Court; Case No. 12-2-00390-7.

***KLB Construction, Inc. v. State of Washington, Department of Ecology,* PCHB Case No. 12-083 (Order Denying Summary Judgment, January 11, 2013; Findings of Fact, Conclusions of Law, and Order, February 25, 2013).**

The King County Facilities Management Division (King County) applied for coverage under the Construction Stormwater General Permit (CSGP) for refurbishing of the East Lake Sammamish Trail Project. King County then contracted with KLB Construction (KLB) to undertake the project. The CSGP requires the permittee to install sediment control measures to minimize the discharge of pollutants from a construction site, including those best management practices (BMP) necessary before grading and initial site work. A silt fence is one such BMP. Ecology inspected the Trail Project on two occasions in the summer of 2012. On the first occasion the silt fence BMP was not installed properly or continuously, and end-of-day temporary BMPs were not in place in spots. When a second site inspection a month later revealed similar deficiencies, Ecology issued a penalty of $1,500 to King County.

King County tendered defense of the penalty to KLB under the terms of the contract between the parties. KLB appealed the penalty to the Board, but King County did not. Ecology moved for summary judgment, asserting that KLB lacked standing to appeal the penalty. The Board denied the motion, concluding that KLB had demonstrated it would suffer injury or harm should the penalty be upheld. The Board noted other decisions where the Board had upheld Ecology's authority to penalize the operator at a construction site where another entity was the CSGP permittee, and that there has been confusion as to which entity must be on the CSGP application, and who should be held liable under chapter 90.48 RCW. The Board was reluctant to deny standing under such circumstances. The case proceeded to hearing.

KLB, as contractor at the site, employed a certified erosion and sediment control lead (CESCL) for the project, and conducted daily inspections of the site. KLB made repairs to the silt fence the same day as the Ecology inspection. KLB and the County had a contingency fund in place to address erosion control at the site, and used the funds to address compliance with the CSGP.

The Board reduced the penalty to $250. The Board concluded that while there were admittedly violations of the CSGP, they were minor in nature and appeared intermittent, resulting from occasion-

al oversight, rather than willful or knowing actions. Neither KLB nor the County had a prior relevant history of violations or enforcement action. Finally, KLB had been prompt and thorough in its response to Ecology concerns about the integrity of BMPs.

***Microsoft-Yes, Toxic Air Pollution-No (MYTAPN) v. State of Washington, Department of Ecology, Yahoo! Inc., and Yahoo! Data Center, and Patricia Martin, Intervenor*, PCHB Case No. 11-067 (Order on Summary Judgment, November 15, 2012; Order Denying Reconsideration, December 14, 2012).**

Microsoft-Yes; Toxic Air Pollution-No (MYTAPN) appealed a Notice of Construction Approval Order (Approval Order) issued by the Washington State Department of Ecology (Ecology) authorizing Yahoo! Inc. and Yahoo! Data Center (Yahoo!) to install and operate 10 additional diesel generators at its data center in Quincy, Washington. The diesel generators are used to provide back-up power for the data center in case of power outages. The data center already has 13 generators permitted, but because the data center is expanding, it needs additional back-up power and therefore additional generators.

MYTAPN is a group in Quincy, Washington that is concerned about air quality from diesel generators. Ecology and Yahoo! moved for summary judgment on 12 legal issues from the Pre-Hearing Order, and requested that the appeal be dismissed. The motions were supported by five detailed expert declarations and thorough legal arguments. MYTAPN's response, in contrast, was not supported by any expert declaration and the legal arguments were conclusory in nature. In some instances, MYTAPN made no response at all to an issue addressed in the motion, and the Board concluded that the issue has been abandoned. The motions in this case addressed issues of significant technical and legal complexity, and the burden was on MYTAPN to respond with affidavits or other documents, preferably by qualified expert(s), of sufficient probity to create a genuine issue of fact, or to support their legal argument. The Board concluded that MYTAPN had failed to meet its burden, and granted summary judgment to respondents on all issues.

MYTAPN filed a petition for reconsideration, which the Board denied.

This case was appealed to Grant County Superior Court; Case No. 13-2-00046-2.

***Microsoft-Yes, Toxic Air Pollution-No (MYTAPN) v. State of Washington, Department of Ecology, Intergate Quincy, LLC, and Patricia Martin, Intervenor*, PCHB Case No. 11-134 (Order Granting Summary Judgment to Respondents, February 7, 2013).**

Microsoft-Yes; Toxic Air Pollution-No (MYTAPN) appealed a Notice of Construction Approval Order (Approval Order) issued by the Washington State Department of Ecology (Ecology) authorizing Intergate Quincy LLC (Intergate) to install and operate 44 diesel generators at the Intergate-Quincy Data Center in Quincy, Washington. The generators provide emergency backup power to support data center functions in the case of power interruptions. Intergate anticipates that up to eight independent tenants will occupy the Intergate-Quincy Data Center.

MYTAPN is a citizens group in Quincy, Washington that is concerned about air quality from diesel generators. Ecology and Intergate moved for summary judgment on all issues from the Pre-Hearing Order, and requested that the appeal be dismissed. Ecology and Intergate supported their motions with a total of eight expert declarations, and extensive and comprehensive briefing. MYTAPN's response, on the other hand, was not supported by any expert declaration or other reliable factual evidence to counter respondents' experts. Some of MYTAPN's legal arguments were repetitive of arguments made in their prior appeals of similar approvals for other installation and operation of diesel generators for data centers in Quincy. *See MYTAPN v. Ecology and Microsoft*, PCHB No. 10-162 (Order on Summary Judgment, Sept. 22, 2011) (Microsoft Summary Judgment); *MYTAPN v. Ecology and Microsoft*, PCHB No. 10-162 (July 25, 2012) (Microsoft Final Decision); *MYTAPN v. Ecology and Yahoo!,* PCHB No. 11-067 (Order on Summary Judgment, Nov. 15, 2012) (Yahoo! Summary Judgment). These arguments had already been rejected by the Board in those cases. Many of MYTAPN's arguments raised new issues that had not been identified in the prehearing order, which controls the issues for hearing. Other arguments were conclusory or speculative in nature, and/or completely and convincingly refuted by respondents in their replies. The Board concluded that Ecology and Intergate had met their burden to show that there were no genuine issues of material fact and that they were entitled to judgment as a matter of law. In response, MYTAPN had failed to meet its burden by setting forth specific facts which sufficiently rebutted Ecology and Intergate's contentions and disclosed the existence of a genuine issue as to a material fact. Therefore, the Board granted summary judgment to respondents on all issues, and dismissed MYTAPN's appeal. MYTAPN filed a petition for reconsideration, which the Board denied on March 21, 2013.

***Joanne Lennox v. State of Washington, Department of Natural Resources, Northwest Aggregates and Longview Timber Corp.*, PCHB Case No. 12-038 (Order on Summary Judgment, December 6, 2012).**

Joanne Lennox (Lennox) filed an appeal with the PCHB challenging the Department of Natural

Resources (DNR) approval of a Forest Practices Application issued to Northwest Aggregates (NWA) and Longview Timber Corporation (Longview) which permitted replacement of two damaged culverts that allow water to flow under Everett Lake Road in Skagit County. The only issue in the case was whether DNR can grant a forest practice application where no road maintenance and abandonment plan (RMAP) has been filed as required by WAC 222-24-051. In this case the landowner was not required to conduct an RMAP because it is not a large forest landowner, but a large forest landowner maintains an easement across the forest property to access other property. DNR moved for summary judgment, joined by NWA and Longview. While the case was technically moot at the time of the summary judgment motion, the Board concluded that the appeal raised questions of continuing and substantial public interest, and therefore decided to issue a decision on the merits of the controversy.

The core of the dispute between the parties was whether a large forest landowner that used the Everett Lake Road (Longview) by way of an easement was required to prepare an RMAP, when the underlying small landowner was not required to do so. The Board concluded that the forest practices rules did not require that an RMAP be submitted in this situation. Because the application at issue did not involve timber harvest or salvage, no RMAP was required of NWA. Longview, as an easement holder, did not meet the definition of forest landowner. Even if there were a large landowner that owned the land underlying this approved forest practices application, an RMAP would still not have been required because large forest landowners submittals of RMAPs are not triggered by the submittal of a forest practices application. For these reasons, the Board granted summary judgment to the respondents, and dismissed the appeal.

This case was appealed to Skagit County Superior Court; Case No. 13-2-00038-8.

***Robert Strahm v. State of Washington, Department of Natural Resources*, PCHB Case Nos. 11-045 & 11-068 (Order Granting Summary Judgment, October 29, 2012).**

Robert Strahm filed two separate appeals with the PCHB challenging two decisions issued by the Department of Natural Resources (DNR) with respect to the clearing and development of his property. The Appellant contracted with a company to harvest the timber on his parcel of approximately five acres located in Snohomish County. The harvest occurred without a forest practices application being filed with DNR.

After harvesting the timber, Mr. Strahm intended to use the site for residential and agricultural purposes. He pulled stumps, cleared and graded portions of the parcel, constructed a shed, and constructed a road that connected his parcel with a neighboring street. He later began construction of his home and planted fruit trees on portions of the parcel where the timber was harvested.

DNR concluded that Mr. Strahm's parcel was forest land and that the harvest activity was beyond the scope of activity that would have been exempt from a forest practices application or notification, and also constituted "conversion activities" under the Forest Practices Rules. DNR issued a Notice to Comply and a Notice of Conversion to a Nonforestry Use based upon its investigation, which resulted in these appeals to the Board.

The PCHB rejected the Appellant's claim that the land was not forest land because it did not contain a merchantable stand of timber. Although pathogenic fungi were found in different areas of the property, expert testimony established that specific management practices would allow successful commercial reforestation of the property. The Board also rejected the Appellant's claim that the agricultural zoning designation removed the property from coverage under the Forest Practices Act. Finally, the Board rejected the Appellant's contention that Snohomish County had jurisdiction over conversion-related forest practices within the County because the steps required for DNR's delegation of this authority to the County had not taken place. The Board concluded that the harvest of the timber required a forest practices application or notification, and the failure to obtain a forest practices permit means that DNR properly issued the Notice of Conversion.

When a local government receives a notice of conversion from DNR, RCW 76.09.460 imposes a six-year development moratorium, which can be lifted by the local government if the landowner obtains all necessary permits, complies with the State Environmental Policy Act (SEPA), and is in full compliance with local law. RCW 76.09.460 also requires compliance with any outstanding final orders or decisions by DNR before the moratorium may be lifted. DNR issued a Notice to Comply based upon the Forest Practices Act's requirement to reforest a harvested area with a commercial tree species within three years of the harvest.

Snohomish County subsequently issued a Land Disturbing Activity Permit, which DNR found would lift the moratorium except for that portion of the property where the fruit trees are located. The Board agreed with DNR that until Snohomish County issues a document to the Appellant indicating that the area where the fruit trees are located has been converted from forest land, the area is still considered forest land. Because the area is still forest land, the Forest Practices Act imposes a requirement to reforest the area with a commercial tree species within three years. The Board granted summary judgment to DNR.

This case was appealed to Snohomish County Superior Court; Case No. 12-2-09358-8.

***Raymond A. Clough, Jr. v. State of Washington, Department of Ecology and Chuck Covert, Aeronautical Management, Inc.*, PCHB Case No. 12-064 (Order Dismissing Appeal, December 5, 2012).**

Appellant challenged an NPDES Construction Stormwater Permit (Permit) issued to the City of Dalles and Aeronautical Management Inc. (collectively "applicants") for the expansion of the City of Dalles and Klickitat County airport. Upon revisiting the site and considering a notice of termination filed by the applicants, Ecology terminated coverage of the Permit based on findings that the construction would not result in discharges to waters of the state, and the construction was now completed. The Board thereafter granted summary judgment and dismissed the appeal as moot. The Board found there was no effective or practical relief that could be granted, and any decision regarding the Permit would be at best advisory.

***Jeffrey Haley v. City of Mercer Island, MJD Properties, LLC and John Pugh*, SHB Case No. 12-006 (Order Granting Motion to Dismiss, October 25, 2012).**

The City issued a substantial development permit to MJD Properties LLC for construction of a residential dock and boat lift. Haley appealed, asserting that a member of the LLC owned a separate property on which there was a shoreline violation. Haley asserted that the City should not have issued the permit until the alleged shoreline violation on the other parcel had been corrected. The City and MJD filed motions to dismiss. Considering the motions as requests for summary judgment, the Board found that the appeal did not challenge the permit that was appealed. Rather, the sole focus of the appeal was the alleged illegal structure on a separate property. Granting summary judgment to the respondents, the Board concluded that absent a challenge to the permit under appeal, it lacked jurisdiction.

This case was appealed to King County Superior Court; Case No. 12-2-37345-1 SEA.

***Snoqualmie Valley Preservation Alliance, Steve Keller, and Janet Keller v. King County and John Tomlinson, Tall Chief, Inc.*, SHB Case No. 12-007 (Order on Summary Judgment, December 31, 2012; Order Denying Petitioners' Motion for Reconsideration, February 4, 2013).**

Petitioners appealed the issuance of a substantial development permit (SDP) by King County for a proposed development that is partially within the floodplain of the Snoqualmie River. Petitioners challenged the sufficiency of the permit application, alleged that a new SEPA threshold determination was required due to changes in the proposal, and asserted that King County's current stormwater design ordinance applied. On cross motions for summary judgment, the Board concluded that the application was sufficient but petitioners could raise the issue of view impacts at the hearing on the merits, that the changes to the project did not trigger the requirement to prepare a new SEPA determination, and that, because King County had not incorporated the stormwater design ordinance into its Shoreline Master Program, it did not apply to the SDP. Based on petitioners' withdrawal of their remaining issue, the Board cancelled the hearing on the merits. Petitioners moved for reconsideration of the Board's summary judgment ruling. The Board denied the motion.

***Sara Foster and Kerri Goodwin, Kelly Van Dusen, Melody Rae, Don Schmidt, Sandra Parent, Patricia Richker, Diane D'Acuti, Bobye Caine, Ram Jeyaraman, Margie and Jess Maillard v. Ecology and the City of Yelm*, PCHB Case No. 11-155 (Order Granting Partial Summary Judgment, March 18, 2013; Findings of Fact, Conclusions of Law, and Order, March 18, 2013).**

Appellant challenged a new water right permit issued for the City of Yelm. The Board found that the new well would not impair the Appellant's water right. The Board also upheld the City's new water right, even though there would be some small reductions in stream flows for water bodies with minimum instream flows or that were closed basins. The Board agreed with Ecology that it was appropriate to invoke the overriding consideration of public interest (OCPI) provision of RCW 90.54.020(3)(a) to permit the water right application based upon the stringent criteria utilized by Ecology. The Board held that use of the OCPI exception would not be sustainable were it based merely on the need to serve additional population with increased water supplies, nor where the mitigation offered was frail in comparison to the effects on instream flows and closures. However, in this case there was a net ecological benefit to the streams and rivers, and the modeled depletions were small, while the value of the mitigation was high. The Board also discussed several other factors that provided additional benefit in this case, justifying use of OCPI.

***Darin Barry/Robin Hood Village Resort v. Department of Ecology*, SHB Case No. 12-008 (Findings of Fact, Conclusions of Law, and Order, March 14, 2013).**

Ecology issued a penalty to Darin Barry, owner of Robin Hood Resort on Hood Canal, for placement of four recreational park trailers (RPTs) intended for short-term vacation rentals on a waterfront lot on Hood Canal. The lot has historically been used for recreational vehicle parking and tent camping since before the date of the Shoreline Management Act (SMA).

Barry did not contest the amount of the penalty. The only issue before the Board was whether the placement of the RPTs required shoreline permits under the SMA and the local shoreline master

plan (SMP). Following an evidentiary hearing and a site visit, the Board concluded that the placement of the RPTs constituted "development" and, based on the fair market value of the RPTs, was a "substantial" development under the definitions of the SMA. The Board also concluded that even if the placement of the RPTs was not a substantial development, a shoreline conditional use permit (CUP) was still required for use of the RPTs as short-term vacation rentals. The Board rejected Barry's contention that the use was grandfathered. While recreational vehicle parking is a grandfathered use, the Board concluded that the permanent placement of the RPTs on the lot for vacation rentals constituted a change in use and therefore required a CUP. Because shoreline permits were required, the Board affirmed Ecology's penalty.

***Joseph and Rozita Yousefian v. City of Mercer Island and Islander Properties, LLC*, SHB Case No. S12-010 (Findings of Fact, Conclusions of Law, and Order, March 27, 2013).**

The City of Mercer Island approved Islander Properties, LLC's application for a substantial development permit (SDP) for the removal of an existing residential pier, and the building of two new residential piers, each 68 feet in length. The Yousefians, who are the adjacent neighbors, opposed the approval on the basis that the permit negatively affected access to their dock. The Yousefians conceded that the proposed piers met all of the requirements of the Mercer Island Shoreline Master Program, including a 35-foot set-back requirement between docks. The Board concluded, after an evidentiary hearing, that the approved piers presented no hazard to public navigation on Lake Washington. The Board went on to conclude that to the extent any balancing of ingress and egress issues between neighboring piers is required under the SMA, the City has already done that balancing through the requirement for a 35-foot set-back from adjacent moorage facilities. Islander's approved proposal complied with this set-back. While other designs and configurations of the Islander's piers could better facilitate the Yousefians' access to their pier, the Yousefians did not provide the Board with any legal authority to require that Islander implement a different design for the convenience of its neighbor. The Board affirmed the City's approval of the SDP.

***MYTAPN v. Ecology; Dell Marketing LP and Patricia Martin, Intervenor*, PCHB Case No. 11-135 (Order Granting Summary Judgment to Respondents, April 12, 2013).**

Microsoft-Yes; Toxic Air Pollution-No (MYTAPN) appealed a Notice of Construction Approval Order (Approval Order) issued by the Washington State Department of Ecology (Ecology) authorizing Dell Marketing LP (Dell) to install and operate 28 diesel generators at its data center in Quincy, Washington. The diesel generators are used to provide back-up power for the data center in case of power interruptions.

MYTAPN is a group in Quincy, Washington that is concerned about impacts to air quality from diesel generators installed at various data centers that are being located or expanded in the Quincy area. MYTAPN has appealed four other approvals of notices of construction. In the first of the other four appeals, which involved a Notice of Construction issued to Microsoft, the appeal went to a full evidentiary hearing. Following the hearing, the Board upheld the approval order with additional conditions. The subsequent appeals were dismissed on summary judgment.

In this appeal, Ecology and Dell moved for summary judgment on 16 legal issues from the Pre-Hearing Order. The motions were supported by multiple, detailed expert declarations and thorough legal arguments. MYTAPN's response, in contrast, was not supported by any expert declaration and the legal arguments were conclusory in nature. Many of MYTAPN's arguments raised issues that had not been identified in the pre-hearing order, or had already been addressed by the Board in the prior data center cases. The Board held that many of MYTAPN's arguments were conclusory or speculative in nature, and/or were completely and convincingly refuted by respondents in their replies. The motions in this case addressed issues of significant technical and legal complexity, and the burden was on MYTAPN to respond with affidavits or other documents, preferably by qualified expert(s), of sufficient probity to create a genuine issue of fact, or to support their legal argument. The Board concluded that MYTAPN had failed to meet its burden, and granted summary judgment to respondents on all issues.

Tactics for "Zoning Away" Marijuana Retailers After Washington I-502

By Sierra McWilliams

I. Introduction

On November 6, 2012, Washington state voters passed Washington Initiative 502 (I-502), legalizing marijuana for recreational use by citizens over age 21.[1] The immediate response was both euphoric and bitter; proponents celebrated by smoking joints at a party underneath the Space Needle while the police resignedly looked on. Opponents lashed out on blogs. After the initial furor died down, the state and local bureaucracies began the long grind to figure out how this citizen-produced initiative was going to be converted into reality. This is no small order. Marijuana is a product that has always been grown or imported illegally. One purchased it by going to a cousin's friend's landlord's house and pretending to be friends before delicately inquiring into the availability of some marijuana, or by sidling up to a random person standing at the right place on the right street. How do we transmute this network-based "culture" into an above-board, taxed and regulated market? The answer is, slowly and piecemeal.

Social conflict always arises when a majority of state citizens vote for a measure but a large proportion are still reticent, or approve the measure in theory but do not want its effects anywhere near their home; the Not In My Backyard effect. One of the most effective means of opposing unwanted laws on a local level is through zoning measures. The legalization of recreational marijuana use is exactly the sort of upheaval in law that was destined to lead to a zoning battle.

The stated intent of the initiative is to:

> "...[S]top treating adult marijuana use as a crime and try a new approach that:
>
> (1) Allows law enforcement resources to be focused on violent and property crimes;
>
> (2) Generates new state and local tax revenue for education, health care, research, and substance abuse prevention; and
>
> (3) Takes marijuana out of the hands of illegal drug organizations and brings it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol.[2]

The initiative created the licensed positions of marijuana "producer," "processor," and "retailer," stipulating that each of these activities—from growing to packaging to selling marijuana—must take place completely within Washington state.[3] Also included are sections directing the creation of regulations and an amendment to the state Driving Under the Influence statute to make driving with a blood THC level of 5.00 or higher the legal equivalent of having a blood alcohol level of .08.[4] Washington state had authorized the use of marijuana for medical purposes since 1998,[5] as had several other states, but this was the first time that any state moved beyond making an exception to the federal ban on marijuana to outright ignoring it.

The path to legalization has been rocky all over the country. Municipal governments in several states have utilized a broad variety of land use planning tactics to deny the entry of "medical marijuana" dispensaries to their cities, most notably in California, which has faced a torrent of zoning disputes between marijuana dispensary owners and local zoning boards in the last few years.

In Washington, governmental bodies have also taken zoning actions against medical marijuana dispensaries, actions they are continuing to take against state-licensed marijuana stores under the new laws created by I-502. The City of Kent banned medical marijuana dispensaries completely, claiming it had the right and obligation to do so in order to avoid conflict with federal law.[6] In August of 2012, the federal Drug Enforcement Agency (DEA) sent letters to 26 dispensaries within 1,000 feet of school zones ordering them to close or face federal prosecution.[7] Other jurisdictions, like Spokane, are putting together maps of all the possible retailer locations, with an eye to making sure they don't disproportionately affect a few neighborhoods in the city.[8]

City/County	Current Response
Kent	Maintaining "Federal Preemption" Argument.[9]
Kirkland	Adopted a "Wait and see posture."[10]
Everett	Provisionally accepting that they may have to allow a few retailers.[11]
Bellingham	One-year emergency moratorium enacted on July 1, 2013, in order to have time to analyze zoning issues.[12]
Pierce County	Adopted temporary moratorium until (1) State Liquor Control Board puts regulations into effect and (2) County puts zoning laws into effect.[13]
Olympia	One-year moratorium placed into effect on May 7, 2013.[14]
Seattle	Drafting zoning laws.
Puyallup	Considering 60-day moratorium while setting up city regulations.[15]
Spokane	Waiting for Liquor Control Board to finalize regulations before setting up its own.[16]
Cheney	Moratorium in place.[17]

In order to avoid excessive \litigation, it would be wise for municipalities and prospective marijuana retailers to look at the history of this zoning issue, as well as the legal validity of various zoning actions, to determine which battles are worth the risk on both sides. The exclusionary tactics I will overview are those of nuisance, preemption, aggressive enforcement of "minimum distance" permit regulations, and local option laws.

II. Anti-Marijuana Retailer Zoning Measures

A. Moratoria and Interim Zoning: "Can we just put this off indefinitely?"

As evidenced by the chart of city and county responses above, many localities have passed moratoria putting a freeze on zoning or issuance of business licenses to marijuana retailers. The cities have the power to adopt moratoria and interim zoning measures, but there are limits. A city may put a moratorium in place for six months or, "up to one year if a work plan is developed for related studies providing for such a longer period."[18] This period may be extended for six months at a time as long as there is a public hearing and findings of fact prior to each six-month renewal.[19] This begs the question: Can a local government simply keep extending the moratorium? The short answer is no.

The Washington Supreme Court addressed this matter in 2007 with *Biggers v. Bainbridge Island*, striking down the city's three years of "rolling moratorium" on the issuance of shoreline building permits.[20] Justice Chambers made it plain in his concurrence that, "Passing annual, rolling moratoria reflects a disregard for those within its geographical limits who wish to fully enjoy the use and benefits of the property they own and the need of individuals to engage in their own critical planning."[21] It is very unlikely that any city or county will be able to indefinitely extend a moratorium on marijuana retailers.

B. Treating Marijuana Stores as a "Nuisance"

Municipalities have a tradition of running business they don't like out of town on the basis of "nuisance." Claims of nuisance have been used against sex industries, brick-making factories, and gun ranges – anything that could conceivably irritate its neighbors. In Washington, local governments receive their authority to regulate nuisances from a broad delegation of the state police power in Article XI, § 11 of the Washington State Constitution[22] as well as the state zoning enabling acts.[23]

There are three ways a local government could designate a marijuana retailer a nuisance: (1) As a private nuisance, based on the individual store's effects on the local area,[24] (2) as a nuisance *per se*, claiming that the business conflicts with local zoning law,[25] or (3) as a public nuisance, banning all marijuana retailers from an area by claiming the business type itself is a nuisance "which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal."[26] To do this, the local governmental body must have a reasonable zoning concern behind the ban. The decision will not be upheld in court if the ordinance is unreasonable or arbitrary, or based on a board member's financial interests or personal preferences.[27]

1. Private Nuisance

A private nuisance is an "'unreasonable' activity on the defendant's land that 'substantially' or 'unreasonably' interferes with the plaintiff's use of land."[28] As applied to this situation, this means that in order to make a case for "private nuisance" a neighbor of a marijuana retail store would have to bring the suit, claiming that the external effects of the store "interfere" with their property rights and enjoyment. This is not a very efficient tactic, as (1) the neighbors would have to wait for the store to establish and make a nuisance of itself, (2) in order to have standing the plaintiff must be a private party, rather than the local government, and (3) this will not stop other marijuana retailers in the area, as a private nuisance is determined based on the facts of the individual case and the outcome may differ greatly in similar cases.

2. Nuisance *per se*

"Nuisance *per se*" is the concept that a governmental body may declare a practice to be an inherent nuisance by statute or ordinance, thus effectively making it illegal.[29] Once again, California has battled over the legality of this action in a medical marijuana setting. In *City of Claremont v. Kruse*, the state's second district appellate court held that Claremont could declare dispensaries a nuisance *per se* because, "Claremont's Land Use and Development Code expressly prohibits any use that is not specifically enumerated therein or that cannot easily be categorized as an enumerated use."[30] In short, the city was able to exclude any land use that it did not choose to place on its list of enumerated uses. Conversely, the fourth district California appellate court in *City of Lake Forest v. Evergreen Holistic Collective* found this approach completely invalid because the ban contradicted state law that authorized medical marijuana dispensaries as a legitimate business.[31] The issue reached the California Supreme Court in May of this year, with the ruling in *City of Riverside v. Inland Patients* that the city had the ability to place a ban on medical marijuana facilities. The facts in this case are very different from those of Washington, however. As the California court noted, "The [Compassionate Use Act] and the [Medical Marijuana Program] create no all-encompassing scheme for the control and regulation of marijuana for medicinal use.[32]

Washington law is somewhere in the middle of these stances. In Washington, a nuisance *per*

se is a thing forbidden by statute or ordinance, but our courts have not established that a thing *permitted* by statute or ordinance may not still be found a nuisance *per se* in certain situations.[33] RCW 35.22.280(30) delegates to First Class cities the power "To declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist."[34] This sounds like a comprehensive power, but the cases disputing the law have largely involved cities declaring businesses as nuisances upon proof of illegal conduct, rather than sweepingly declaring a certain type of business a nuisance in and of itself. This originates from a foundational Washington case *Hardin v. Olympic Portland Cement Co.*, which held, "A lawful business is never a nuisance *per se*, but may become a nuisance by reason of circumstances."[35] Also, Washington has RCW 7.48.160: "Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance." Because of this, a marijuana retailer operating within Washington law should not be subjected to a charge of being a nuisance *per se*.

A model example of the Washington interpretation of nuisance *per se* is *Heesan Corp v. City of Lakewood,* in which Lakewood defined as a nuisance "[a]ny adult cabaret operated, conducted, or maintained in violation of this chapter or any law of the City of Lakewood or the State of Washington."[36] The court upheld Lakewood's authority to shut down a cabaret after the city determined that dancers were performing sexual acts and accepting tips, in violation of state and local law.[37]

The one case in which a Washington city attempted to exclude a class of businesses was in *City of Spokane v. J-R Distributors, Inc*. Spokane passed a municipal "moral nuisance" ordinance outlawing "lewd or obscene publications and films and the places where they are sold or exhibited."[38] The Supreme Court of Washington overturned the ordinance not on the basis that it declared as nuisance *per se* a class of businesses permitted by state law, but on the grounds that the ordinance attempted to dictate rules of evidence that conflicted with Washington civil rules, as well as creating injunction procedures which conflicted with the Revised Code of Washington.[39]

So, in Washington state, it is unlikely, but still an open question, whether a municipality may simply declare marijuana retailers a nuisance *per se*. One possible scenario would be a municipality attempting to declare marijuana stores nuisances *per se* based on violation of federal illegal drug law. This will be discussed further in the section on federal preemption.

3. Public Nuisance

RCW 7.48.130 defines a public nuisance as "one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal."[40] The difference between a public nuisance and a nuisance *per se* is that a municipal determination of public nuisance does not depend upon the pre-existence of a zoning regulation banning the business. A public nuisance may be caused either by a violation of law, or may be a private nuisance "pervasive" enough that it affects the greater community.[41] Decrease in property values alone is not grounds enough for a finding of public nuisance.[42] Any local government attempting to exclude individual (or all) marijuana retailers as public nuisances would have to establish findings showing that the stores have an actual detrimental effect on their surroundings, such as an "increase in crime, theft, vagary, and robberies as non-resident individuals travel into the city to purchase marijuana…" a fear of which led the residents of Santa Monica, California to place a moratorium on dispensaries.[43]

This is usually not too difficult. As long as a local government has some reasonable basis for its decision and the activity being banned has no constitutional protections courts will generally defer to the legislative decision, or to any administrative decision interpreting the regulation.[44]

However, this deference may be offset by state public policy as codified by 1-502. Section (2) of the initiative directs the liquor control board to establish criteria to determine the maximum number of retail outlets that may be licensed per county in order to achieve, "The provision of adequate access to licensed sources of useable marijuana and marijuana-infused products *to discourage purchases from the illegal market*."[45] The State of Washington could claim a state interest in choking off the illegal marijuana market strong enough to overcome city and county determinations of nuisance. This differs from cases such as those involving adult bookstores and noxious material production because the state has a statutorily defined interest in having *enough* retail outlets in existence to counteract the proliferation of illegal private sales. Secondly, the state has the intent to generate "new state and local tax revenue for education, health care, research, and substance abuse prevention."[46] If legal retailers have no place to set up shop the system falls apart and the beneficial effects of undercutting illegal suppliers and raising tax revenue from the legalization of marijuana are foiled.

C. "Preemption by Federal Law" Claim: "The federal government *says* we can't, even though they aren't actually doing anything about it."

One regulatory tactic that has already made its way to Washington State is the banning of marijuana facilities on the basis of conflict with federal law. The City of Kent in June of 2012 outlawed medical marijuana dispensaries. The city claimed it had the right and obligation to do so because the state allowance of marijuana dispensaries conflicted with the federal criminalization of marijuana under the

Controlled Substances Act.[47] A King County Superior Court judge upheld this stance in October 2012, validating the ban, and the case is awaiting appeal.[48] On December 7, 2012, the Supreme Court Commissioner lifted the injunction on Kent's single operating medical dispensary while the case awaited appeal. The Commissioner found that there was a debatable issue and the hardship the injunction caused Mr. Tsang, the dispensary owner, was more severe than the hardship to the city.[49] In July of 2013, the city stated it is upholding the ban against recreational marijuana as well as medical marijuana, citing the same reasons of federal conflict.[50]

Federal preemption is codified in the Supremacy Clause of the United States Constitution, which states that "[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[51] In effect this means if a federal law and a state law conflict, the federal law triumphs.

There are four ways for a state law to violate the Supremacy Clause: by field or express preemption, by direct conflict, or by creating an obstacle to the purposes of Congress.[52] The case for express or field preemption of marijuana regulation is weak because Congress inserted a statutory preemption provision in the Controlled Substance Act (CSA) foregoing anything but conflict or obstacle preemption.[53]

Conflict preemption is slightly more of a grey area, but not as much as one would think, as this constitutional provision may be read very narrowly. In the 2009 case of *Wyeth v. Levine,* the Supreme Court affirmed that there is no automatic preemption when a state merely permits what the federal government prohibits; conflict only exists when state and federal laws direct you to take two conflicting actions such as in this case, where the state mandates the use of marijuana while the federal government bans it.[54]

The most difficult preemption hurdle for zoning decisions under I-502 is proving the state law does not stand "as an obstacle to the accomplishment of the full purposes and objectives of Congress."[55] Courts have rationalized medical marijuana statutes as policy-driven minor exceptions to federal criminalization of marijuana, such as when a California appellate court claimed that medical marijuana program identification cards did not conflict with federal law because "The purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices."[56] If the CSA's purpose is to combat recreational drug use, a state statute that legalizes recreational marijuana and provides state-licensed distribution centers for it could definitely be considered obstructive to the federal purpose of combating Schedule I drug use.

On the other hand, if the federal purpose is framed as combating the detrimental secondary effects of illegal drug operations by criminal organizations,[57] the state take-over of the illegal drug niche could be perceived as non-obstructive to the federal purpose. Again, the outcome depends on the federal government's stance on the issue. Will the federal government bring suit against Washington? We *still* do not know.

One defense the state will likely raise to a preemption claim will be that the marijuana activities under I-502 are purely intra-state in nature. The reasoning is that if the activity being regulated is intrastate the federal government should not be able to use the Commerce Clause to reach in and regulate the action of the individuals following state marijuana laws. This stance is likely to fail in any court. The Supreme Court firmly established in 1942 with the holding of *Wickard v. Filburn* that purely local wheat growth and consumption could be reached by the Commerce Clause as long as it exerted a substantial effect on interstate commerce; by itself, or by several individuals undergoing the same activity in the aggregate.[58] This concept was applied to defendant California medical marijuana growers in *Gonzalez v. Raich*:

> Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce….When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class.[59]

The *Raich* Court made this finding in spite of the weakening of the Commerce Clause powers from the 1995 and 2000 rulings in *United States v. Lopez*[60] and *United States v. Morrison*[61] and the Court will likely continue to hold to its same reasoning in marijuana cases. Proponents of marijuana legalization have a greater chance of success in the political realm than the legal one.

D. Aggressive Use of "Minimum Distance" Regulations: "Is everywhere in this town within 1,000 feet of a school?"

The restrictions that will strike down the majority of proposed sites for marijuana retailers are imbedded in the structure of I-502 itself: "minimum distance" rules that ban a marijuana retailer from operating within 1,000 feet of certain child-related uses, and administrative deference to city and county objections to permit renewals. The first concern is the state limitation on marijuana store locations:

> (8) The state liquor control board shall not issue a license for any premises within one thousand feet of the perimeter of the grounds of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library, or any game arcade admission to which is not

restricted to persons aged twenty-one years or older.[62]

These limitations led dedicated marijuana legalization advocate Ben Livingston to map out the zones where marijuana retailer stores are not permitted by state law in King County. The result is a jumbled mass of overlapping circles:

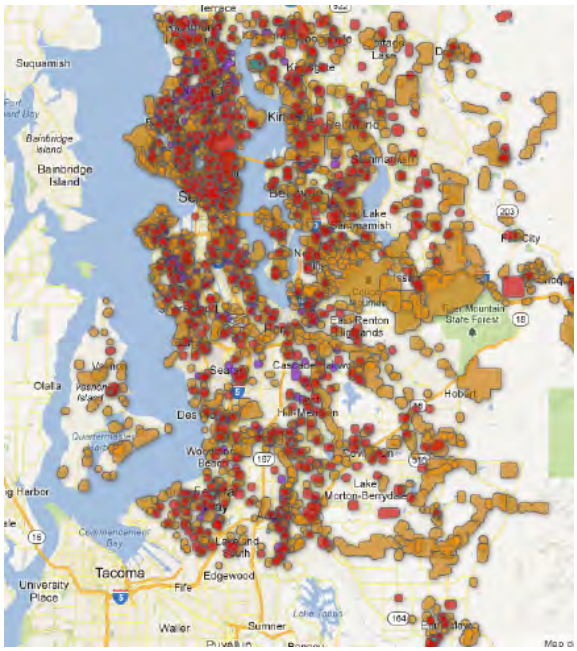

Fig. - Center for Legal Cannabis Zoning Map (November 26, 2012)
http://www.tokeofthetown.com/2012/11/with_legal_marijuana_near_zoning_concerns_research.php.

This map raises the question of whether a state regulation that may *effectively* disallow marijuana retailers from setting up a business in an entire county as a side effect of minimum-distance regulations violates the retailer's right to set up a business. This argument is unlikely to succeed. In the Supreme Court case *Renton v. Playtime Theatres, Inc.*[63] a purveyor of adult films raised this "zoned-out by minimum distance regulations" argument. Even with the higher scrutiny afforded a business at least nominally protected by First Amendment freedom of expression, this argument was denied.[64] Also, the DEA has been enforcing this minimum distance rule,[65] so it is unlikely to be a simple matter of requesting a license and hoping no one notices your retail store is within a school zone.

A further question is raised, however: If a retailer establishes itself in a storefront, and a distance-restricted facility such as a school, childcare center, or library later establishes itself within the 1,000 foot radius of the retailer, is the retailer "pushed out"?

E. I-502 Deference to City Licensing Objections: "Can we shoot them down one by one?"

The second concern created by the text of I-502 is the deference to municipal/county objections. This could raise hurdles for retailers applying for a store license. Initially, when a retailer submits a license request, the liquor control board will provide notice of the requested license to the executive officer of the city, town or county.[66] The city then has 20 days to submit written objections, which can lead to a denial of license.[67] The retailer may request a hearing at which the court will require the state liquor control board to defend its decision.[68] However, the regulation contains a strong deference to a city's objections:

> In determining whether to grant or deny a license or renewal of any license, the state liquor control board shall give substantial weight to objections from an incorporated city or town or county legislative authority based upon chronic illegal activity associated with the applicant's operations of the premises proposed to be licensed…or the conduct of the applicant's patrons inside or outside the licensed premises....[69]

It might be advisable for a citizen intending to apply for a license to speak with the local community before submitting an application to feel out the situation and take advantage of any opportunities to compromise.

F. Local Option Laws: "Can we vote it out of our city?"

Another tool for shutting marijuana retailers out of specific towns or counties is by creating a "local option law." A Pierce County Commissioner brought up this possibility during hearings in Olympia on August 6th of this year.[70] Really, the most surprising thing is that more people have not been clamoring for a local option law, considering the history and purpose of local option laws in general.

Local option laws were created during the period before and after Prohibition to help the country deal with an extreme difference of opinion on the morality and effects of alcohol on communities.[71] To execute a local option law, the state legislature creates a fully formed law stating, for example, that the issuing of liquor licenses is prohibited within the state *unless* a county should vote to have the law not apply to them. Individual counties will then vote a simple yes or no, whether to adopt the law or not.[72] Initially, this was attacked as an unconstitutional delegation of state legislative authority, but early in the 20th century, courts in several states made the determination that this was a constitutional exercise of legislative power.[73] Over the years, the use of local options has slowly begun to seem like a good idea to people in other aspects of state legislation such as taxation, whether livestock should be allowed to roam at large,[74] and whether gambling machines should be permitted.[75]

Washington has codified the availability of local options regarding alcohol sales under Title 66, Alcoholic Beverage Control.[76] Basically, any unit

(city, town, or unincorporated portions of a county) may hold an election to abstain from the sale of alcohol within its borders. The only prerequisite to holding an election is that a party must submit a petition in support signed by at least 30 percent of the voting population.[77]

However, the liquor control board could not simply insert a local option law into the regulations it is currently drafting—state legislators would have to pass the local option law and codify it in the Revised Code of Washington in order for it to be available as an I-502-blocking tool.

III. Summary

Although several moratoria have been passed by different municipalities freezing the issuance of marijuana retailer business permits, this is not a permanent way to address the state legalization of marijuana.

It is very possible that private citizens will be able to successfully prosecute a private nuisance case against any marijuana store engaging in obnoxious activity or with customers outside engaging in illegal public marijuana smoking in public. Municipalities and counties will have less success attempting to ban marijuana retail stores on the grounds of nuisance *per se* or public nuisance because of Washington state laws and cases prohibiting legislatively declaring a lawfully operated business a nuisance without specific cause.

The claim that federal law preempts state marijuana legalization will likely be overturned in state court; however, there are too many factors (such as how the federal government will ultimately pursue the legal marijuana issue) to predict the ultimate outcome of this conflict between state and federal marijuana laws.

In the short term, the most difficult issue for aspiring marijuana retailers to overcome will likely be the "minimum distance" regulations mandating a distance of 1,000 feet from schools and parks. Space will be found, though, and after these stores gain a foothold it will be very difficult to regress back to a world where marijuana is once again an illegal drug.

Local option laws are a viable legal alternative if the state remains divided geographically in its stance on the sale of recreational marijuana.

1 I-502, § 1.

2 *Id*. at § 1.

3 *Id*. at § 2(t), (u), (w).

4 *Id*. at § 31(2)(c)(i).

5 Chapter 69.51A RCW (Medical Cannabis (Formerly Medical Marijuana)).

6 Steve Elliott, *With Legal Marijuana Near, Zoning Concerns Researcher* (Nov. 26, 2012), *http://www.tokeofthetown.com/2012/11/with_legal_marijuana_near_zoning_concerns_research.php*.

7 Jonathan Martin, *Seattle pot dispensaries finding business climate no longer sunny* (Sept. 5, 2012, 9:04PM), *http://seattletimes.com/html/localnews/2019077879_dispensaries06m.html*.

8 Jonathan Brunt, *City draws map of pot areas* (Feb. 13, 2013), *http://www.spokesman.com/stories/2013/feb/13/city-draws-map-of-pot-areas/*.

9 Steve Hunter, *Kent won't allow recreational marijuana business* (July 18, 2013, 12:15pm), *http://www.kentreporter.com/news/216042891.html*.

10 Raechel Dawson, *Kirkland Council votes to keep state marijuana business zone laws, no additional regulations* (Aug. 15, 2013, 9:36am), *http://www.kirklandreporter.com/news/219612741.html#*.

11 *Where Can You Grow, Process and Sell Recreational Marijuana Legally in Everett?* (July 27, 2013), *http://myeverettnews.com/tag/i-502-everett/*.

12 John Stark, *Bellingham imposes interim limits on marijuana businesses* (July 3, 2013), *http://www.kentucky.com/2013/07/03/2702963/bellingham-imposes-interim-limits.html*.

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15 Kari Plog, *Puyallup City Council to discuss temporary ban on recreational marijuana* (Aug. 12, 2013), *http://www.thenewstribune.com/2013/08/12/2726926/puyallup-city-council-pot.html*.

16 Thomas Clouse, *City of Spokane mulling I-502 implementation* (Dec. 13, 2012), *http://www.spokesman.com/stories/2012/dec/13/city-mulling-i-502-implementation/*.

17 *Id*.

18 RCW 36.70A.390, 35A.63.220, 35.63.200.

19 *Id*.

20 *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 703, 169 P.3d 14 (2007).

21 *Id*.

22 W.A. Const. art. XI, § 11.

23 Chapter 36.70 RCW.

24 RCW 7.48.150.

25 William B. Stoebuck & John W. Weaver, *Washington Practice Series, Real Estate: Property Law,* 17 Wash. § 10.3 (2d ed. 2012).

26 RCW 7.48.130.

27 Skye L. Daley, *The Gray Zone in the Power of Local Municipalities: Where Zoning Authority Clashes with State Law*, 5 J. Bus. Entrepreneurship & L. 215, 227 (2012).

28 *See* W. Stoebuck & D. Whitman, *Law of Property* § 7.2 (3d ed. 2000).

29 17 Wash. Prac., Real Estate § 10.3 (2d ed.)

30 *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1164-65 (2009).

31 *City of Lake Forest v. Evergreen Holistic Collective,* 138 Cal. Rptr. 3d 332, 337 (2012), as modified (Mar. 29, 2012), *review granted and opinion superseded*, 275 P.3d 1266 (Cal. 2012).

32 *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 757, 300 P.3d 494, 509 (2013).

33 17 *Wash. Prac., Real Estate* § 10.3 (2d ed.).

34 RCW 35.22.280.

35 *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 325, 154 P. 450 (1916).

36 Lakewood Municipal Code (LMC) 5.16.100(A).

37 *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 351, 75 P.3d 1003 (2003).

38 *City of Spokane v. J-R Distributors, Inc.*, 90 Wn.2d 722, 724, 585 P.2d 784 (1978).

39 *Id*. at 730-31.

40 RCW 7.48.130.

41 17 *Wash. Prac., Real Estate* § 10.3 (2d ed.).

42 *State ex rel. Warner v. Hayes Inv. Corp*. 13 Wn.2d 306, 125 P.2d 262 (1942).

43 DeShawn McQueen, *Santa Monica Medical Marijuana Dispensary Moratorium in Effect* (Oct. 8, 2012), *http://recoverynowtv.com/breaking-news/item/santa-monica-medical-marijuana-dispensary-moratorium-in-effect*.

44 *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 440, 836 P.2d 235 (1992).

45 I-502, § 10(2)(c).

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48 Steve Hunter, *Judge upholds Kent's ban on medical marijuana collective gardens* (October 10, 2012, 10:45AM), *http://www.kentreporter.com/news/173533721.html*.

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51 U.S. Const., Art. VI, cl. 2.

52 1 Cal. Affirmative Def. § 7:19 (2012 ed.).

53 21 U.S.C. § 903 ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.").

54 *Wyeth v. Levine*, 555 U.S. 555, 573 (2009) ("Impossibility pre-emption is a demanding defense. On the record before us, Wyeth has failed to demonstrate that it was impossible for it to comply with both federal and state requirements.").

55 *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 248 (1984).

56 *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 826, 81 Cal.Rptr.3d 461 (2008) (quoting *Gonzales v. Oregon,* 546 U.S. 243, 270–272 (2006)).

57 David W. Ogden, Deputy Attorney General, *Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, Oct. 19, 2009 ("Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels.").

58 *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

59 *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (citations omitted).

60 *United States v. Lopez,* 514 U.S. 549 (1995).

61 *United States v. Morrison,* 529 U.S. 598 (2000).

62 I-502, § 6(8).

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65 Jonathan Martin, *Seattle pot dispensaries finding business climate no longer sunny* (Sept. 5, 2012, 9:04PM), *http://seattletimes.com/html/localnews/2019077879_dispensaries06m.html*.

66 I-502, § 6(7)(a).

67 *Id*. at § 6(7)(b).

68 *Id*. at § 6(7)(c).

69 *Id*. at § 6(9).

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72 12B *Tex. Jur. 3d Constitutional Law* § 110 (describing the process).

73 48 *C.J.S. Intoxicating Liquors* § 57.

74 Tex. Agric. Code Ann. § 143.024 (West).

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77 *Id*.

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Roles of the Road: A "Transit-Oriented Development" Critique of the Puget Sound Regional Council's Vision 2040 and Transportation 2040

By Bryan Russell

Introduction

After two years of dating, Ani and I decided to move in together. Ani is from Everett, was living in Everett, and working in Mukilteo. I am from Tacoma, was living in the Seattle neighborhood of Wallingford, and attending the University of Washington School of Law. We began to search for our new, shared home, driven by logistics. Ani would continue to work in Mukilteo and I had one more year of law school. Ani needed quick freeway access for an easy commute; I needed buses, because parking at UW is notoriously expensive. We were excited, of course, but one central question loomed: Where?

Compromising, we narrowed our focus to a few mid-way points: Ash Way Park & Ride, Mountlake Terrace Park & Ride, and the Lynnwood Transit Center. Ash Way had little housing within walking distance. Across the street from Ash Way, Newberry Square was an attractive option, complete with ground story retail and restaurants. But despite four buses connecting Ash Way to UW, Newberry Square was simply outside our budget. Mountlake Terrace proved to be logistically unpalatable. First, only two buses go to UW and only during commuter hours. Second, affordable housing was about one mile away so I would have to drive to the Park & Ride and time my arrival just right in order to catch one of the few buses. Third, Ani's commute would have been considerably longer. Mountlake Terrace Park & Ride seemed designed for suburban drivers avoiding traffic into downtown—it was not a fit. This left the Lynnwood Transit Center.

Across the street from the Lynnwood Transit Center, Ani and I moved into Cambridge Apartments. The Lynnwood Transit Center has five buses connecting it to the University District, four of which go directly into campus and the fifth runs from 9:00 a.m. to midnight. Freeway access is similarly great, especially when using the carpool exits and onramps. Our one-bedroom apartment costs less than $1,000 per month. When I lived in Wallingford, the Metro number 44 bus was frequently late, too full for new riders, or simply did not show up as scheduled. In contrast, Sound Transit's busses consistently arrive on time, their seats recline, and they make few stops. Transit dictated where Ani and I chose to live and then, to my pleasant surprise, better transit improved our quality of life. With this idea in mind—that transit immediately impacts the quality of people's lives—I decided to examine Puget Sound Regional Council's Vision 2040 and Transportation 2040 through a Transit-Oriented Development lens.

I. Overview of the Puget Sound Regional Council, Vision 2040, Transportation 2040, and Transit-Oriented Development

A. Puget Sound Regional Council

The Puget Sound Regional Council (PSRC) is "a regional planning agency with specific responsibilities under federal and state law for transportation planning, economic development and growth management…[,] addressing issues that go beyond the boundaries of any individual city or county."[1] PSRC serves as the region's Metropolitan Planning Organization and Regional Transportation Planning Organization. In fulfilling these roles, PSRC has specific, statutory obligations under federal law—namely the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which superseded the Intermodal Surface Transportation Efficiency Act and the Transportation Efficiency Act for the 21st Century, and the Clean Air Act—as well as state law—including Washington's State Environmental Policy Act and its Growth Management Act.[2] "[A]s the agency responsible for meeting the Growth Management Act requirement for multicounty planning," the Puget Sound Regional Assembly[3] has formally adopted Vision 2040 and Transportation 2040.[4]

B. Vision 2040

Vision 2040 is "[t]he Growth Management, Environmental, Economic, and Transportation Strategy for the Central Puget Sound Region."[5] PSRC estimates that Central Puget Sound's population will grow from 3,583,000 in 2007 to 4,988,000 in 2040.[6] This population increase will inevitably result in greater density and development. Through Vision 2040 and the planning process, PSRC is attempting to manage, facilitate, and channel this growth. Through multicounty planning, Vision 2040 embraces a series of overarching goals in regards to the environment, development patterns, housing, the economy, public services, and transportation.[7] Vision 2040's regional growth strategy "is a description of a preferred pattern of urbanization that has been designed to minimize environmental impacts, support economic prosperity, promote adequate and affordable housing, improve mobility, and make efficient use of existing infrastructure."[8] In accord with Washington's Growth Management Act, Vision 2040 seeks to channel future growth into existing urban centers, thereby protecting rural areas and natural resources from sprawl.[9] "Centers are locations characterized by compact, pedestrian-oriented development, with a mix of different office,

commercial, civic, entertainment, and residential uses."[10] Such centers are the focus of Transportation 2040 and, in part, Transit-Oriented Development.

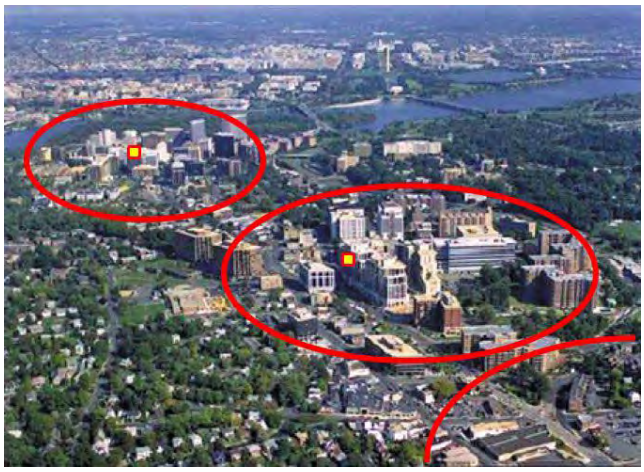
C. Transportation 2040

"[B]uilt upon the foundation of VISION 2040," Transportation 2040 focuses on congestion and mobility, environment, and funding to identify four major categories of strategic investment: (1) preservation, maintenance, and operations, (2) safety and security, (3) efficiency, and (4) strategic capacity.[11] Of these four categories, strategic capacity is particularly future-oriented. By 2040, population is expected to increase by more than one million people in the Central Puget Sound region, "boost[ing] demand for travel within and through the region by about 40 percent."[12] Towards increasing regional employment, "[a]dequate transportation is one key to sustaining an economic edge."[13] In response to projected need, "Transportation 2040 recognizes that strategic capacity expansion in transit, roadway, ferry and nonmotorized facilities is also needed, particularly in centers and between centers."[14] Like Vision 2040, Transportation 2040 focuses on centers but also on connecting centers to each other, including "[c]ontinuing to implement a high-capacity transit system along logical corridors that connect regional growth centers."[15]

D. Transit-Oriented Development

Transit-Oriented Development (TOD) is "development that is centered around and coordinated with a transit station in its use and design."[16] Infrastructurally, TOD is nodular, with each transit station being connected, in some way, to every other transit station. The Center for Transit-Oriented Development further defines TOD as "a type of community development that includes a mixture of housing, office, retail and/or other commercial development and amenities integrated into a walkable neighborhood and located within a half-mile of quality public transportation."[17] Thus, TOD posits that a nodular transportation network with each node providing access to areas of mixed land use is the most effective means of developing a healthy, sustainable, and economically prosperous urban landscape.

TOD both observes and predicts that transit hubs foster denser development; economically, increased access to transit breeds increased demand on adjacent land. TOD further presumes that this increased demand will be for a variety of uses, resulting in a mixed-use, walkable, urban environment. In this way, TOD serves as a reactive and prospective model for centralized planning. Reactively, TOD encourages planners to first locate dense, mixed land use which already exists and then place transit centers at those locations. Simplistically, this is the "if you build high-capacity transit, they will use it" aspect of TOD. Prospectively, TOD encourages planners to fully utilize existing transit hubs by zoning for and facilitating mixed use development adjacent to those hubs. This is the "if there is access to high-capacity transit, it will develop" aspect of TOD. These assumptions are effectively summarized pictorially:



"Aerial view of growth patterns in Arlington County. High density, mixed use development is concentrated within ¼–½ mile from the Rosslyn, Court House and Clarendon Metro stations (shown in red), with limited density outside that area. This photograph is taken from the United States Environmental Protection Agency website describing Arlington's award for overall excellence in smart growth in 2002 — the first ever granted by the agency." *http://commons.wikimedia.org/wiki/File:ArlingtonTODimage3.jpg.*

With each yellow dot in the picture representing a transit station, this picture demonstrates precisely how TOD is nodular and encourages focalized growth.

E. Seattle Department of Transportation Findings on Implementing TOD

The Seattle Department of Transportation conducted its own analysis of whether other TOD projects have been successful in terms of economic growth, access to affordable housing, environmental impact, and fostering the use of high-capacity transit. Specifically, Seattle was gathering information on how to best implement its link light rail system.[18] Seattle found that the following factors fostered effective TOD:

- **Transit Station Improvements:** "All types of station areas benefit, but the greatest results come when station area planning is carried out through comprehensive plans that utilize a combination of zoning, public improvements, development financing packages, and effective marketing programs…."[19] Station improvements are even more effective when the surrounding community is involved in the process and designing the result. Further, a well-developed site can serve as a "Successful Demonstration Project" to other developers and jurisdictions.
- **Walkability:** Shopping centers, "third space" restaurants and cafes, "zoning that requires rain protection," and the like allow transit

stations to be points of reference and meeting places.

- **Parking:** By limiting parking near transit stations, and at destinations, use of public transportation is encouraged. However, "[s]urface parking lots around stations can provide opportunities for future development, as the land becomes marketable for higher uses."[20] Thus, allowing limited parking at the outset, instead of large parking structures, has been an effective strategy for tiered growth.
- **Zoning:** Beyond zoning for higher densities and transit-oriented development, planning bodies can create "interim development standards to prevent undesirable land uses before station area plans were developed."[21] For TOD investment to occur, zoning needs to be flexible, responsive to market pressures, and streamlined, including expedited development review and a "fast-track" for permit approvals.[22]
- **Joint Development:** "Redevelopment agencies have helped transit-oriented development in Oakland, Sacramento, San Diego, San Francisco, and Portland, both with land assembly and financing."[23] Additionally, the public sector can provide community centers, day care, and beautification efforts in order to spur private development and investment near transit stations.

Seattle's findings provide a useful thematic framework for determining whether PSRC's Vision 2040 and Transportation 2040 satisfy a TOD critique.

II. Do Vision 2040 and Transportation 2040 Survive a Transit-Oriented Development Critique?

TOD has two requirements, one formative and one substantive. In form, TOD consists of interconnected transit centers which provide access to high-capacity public transportation. Substantively, TOD effectively utilizes these transit centers through mixed land use. Beyond these two requirements, the factors regarding implementation from the Seattle DOT can help determine the relative likelihood of success of implementation. PSRC's Vision 2040 and Transportation 2040 describe a centralized plan for nodular transit focusing on concentrated, mixed-use development, implemented through viable, practical strategies.

A. Nodular Transit

Vision 2040 and Transportation 2040 are nodular through their focus on centers and, more specifically, Regional Growth Centers. Centers are the backbone of Vision 2040's plan for regional transit. "By developing a highly efficient transportation system linking major centers, the region can take significant steps to reduce the rate of growth in vehicle miles traveled, while accommodating a growing population and an increase in jobs."[24] Similarly, Vision 2040 designates five metropolitan cities and fourteen core cities as having Regional Growth Centers, which "should receive priority in regional and local investments…."[25] Without reservations, PSRC maintains that "[m]ajor regional investments for transportation and other infrastructure should be prioritized for these locations."[26] Further, both Vision 2040 and Transportation 2040 envision a "multimodal transportation system" so that different types of transit can be accessed at single points, enabling easy transfers and compounding access.[27] The focus on centers and connecting centers is clearly congruent with TOD.

B. Mixed Use

In regards to mixed-use planning, PSRC's Vision 2040 and Transportation 2040 also withstand a TOD critique, namely, through its definition of centers and advocating for "complete streets." There is a clear emphasis on "creating mixed-use central places and vibrant communities connected by an efficient transportation system."[28]

Centers are defined as "locations characterized by compact, pedestrian-oriented development, with a mix of different office, commercial, civic, entertainment, and residential uses." Transportation 2040 outwardly embraces the idea of "transit-oriented communities."[29] For example, "Transportation 2040 recommends the region and local jurisdictions develop land use and zoning policies to support transit-oriented development associated with water-borne transportation."[30] Reifying the utility of centers, PSRC encourages local jurisdictions to improve access and mobility for such centers by creating "complete streets."

"Complete streets are designed and operated to enable safe and convenient access for all road users, while accommodating the movement of freight and goods."[31] Much like mixed land use, complete streets allow for use by a variety of stakeholders—pedestrians, bikers, motorists, freight transit, etc. Such streets, in combination with bicycle/walking paths, greatly increase access and safety for the full spectrum on transit options.

Although not explicitly, Vision 2040 and Transportation 2040 acknowledge that centers and adjacent avenues of transit must be developed concurrently. In that both the recommendations for land use, street improvements, and paths support a true variety of uses, Vision 2040 and Transportation 2040 foster TOD.

C. Implementation

Vision 2040 and Transportation 2040 both acknowledge the benefits of and embrace TOD. Vision 2040 states that "[t]hese land use strategies, which support transit-oriented development, can relieve pressure on regional transportation systems…."[32]

Similarly, "Transportation 2040 encourages transit-oriented development because of the probable impact it could have on the future success of regional high-capacity transit investments."[33] The PSRC recognizes the major hurdles to TOD and enumerates a variety of strategies for overcoming them.

The main hurdles to TOD in the Central Puget Sound area are Transit-Supportive Densities and Funding. "[N]ational research has shown that residential densities exceeding 7 or 8 homes per gross acre support efficient and reliable local transit service."[34] To this end, Vision 2040 recommends that densities near transit stations reach 10 to 20 dwelling units per gross acre near transit stations, and exceed 15 to 20 homes per acre for areas near high-capacity transit. Funding is also a major obstacle to realizing Vision 2040 and Transportation 2040—especially with the decrease in funds provided by the gas tax. Transportation 2040 admits to "rel[ying] on traditional funding sources in the early years of the plan."

PSRC lists multiple strategies for overcoming these hurdles, including retrofitting to create higher density and variable pricing for Transit. Towards retrofitting, there is recognition that brownfields (industrial sites which are contaminated with pollutants) and greyfields (abandoned or under-utilized commercial property surrounded by an unneeded expanse of parking) require repurposing. Local jurisdictions are encouraged to clean up brownfields and explore joint ventures for re-zoning and re-developing greyfields. For funding, PSRC lists numerous ideas, many of which are based on usage: "user fees, which could include high-occupancy toll (HOT) lanes, facility and bridge tolls, highway system tolls, vehicle miles traveled (VMT) charges, and other pricing approaches that replace the gas tax and further fund and manage the transportation system."[35] Strategies for encouraging use of transit include limiting the supply of parking, "providing bus passes to workers, encouraging telecommuting, and facilitating vanpooling…."[36] The PSRC has brainstormed and aggregated many useful ideas for local jurisdictions and presented those ideas in the context of its multi-county plan.

D. The Limits of Multi-County Planning

While Vision 2040 and Transportation 2040 withstand a TOD critique, inherent problems to multi-county planning remain, constraining PSRC. Recognizing its limitations, the PSRC states that "[t]he Regional Growth Strategy is intended to *guide* and *coordinate* the region's cities and towns as they periodically update local residential and employment growth targets … and amend their local comprehensive plans."[37] The PSRC's true power is its review process.

> The Regional Council has established a process for the review of local, countywide, and transit agency plans guided by: (1) the consistency provisions in the Growth Management Act, (2) state requirements for establishing common regional guidelines and principles for evaluating transportation-related provisions in local comprehensive plans, and (3) directives for coordination in the Regional Council's Interlocal Agreement and Framework Plan.[38]

But this review process rules out more direct action.

The PSRC cannot directly address land use, concurrency requirements, or combat annexation creep. Regarding land use planning, "[l]ocal jurisdictions are ultimately responsible for facilitating the development of a more compact urban region."[39] For concurrency, the idea that infrastructure should be commensurate with developments, "local governments have a significant amount of flexibility…."[40] The Regional Council is again limited. Lastly, the PSRC can seemingly do little to combat annexation creep,[41] either the slow expansion of Urban Growth Areas (UGAs) through annexation of more and more adjacent land or that counties will allow isolated pockets of UGA footholds to establish themselves as "[n]ew fully contained communities" under RCW 36.70A.350. "In rural areas, transportation capacity expansion is limited and contingent on having local land use provisions in place to prevent unplanned growth."[42] But the PSRC will likely be unable to prevent many such incidents of sprawl.

These limitations aside, PSRC's greatest strengths are its ability to monitor and review. Fulfilling these roles, PSRC intends to track "Implementation Measures" and "Performance Measures" for whether member jurisdictions are consistently and effectively breathing life into Vision 2040. "Implementation monitoring assesses whether we are doing what we said we would do. Performance monitoring assesses whether we are achieving the desired results."[43] There is a requirement that jurisdictions with Regional Growth Centers prepare a plan for review by PSRC within four years of being designated as a center.[44] Having a plan for such centers, and review by a multi-county planning body, is certainly a step in the right direction. The plan becomes the starting point for future conversation and action.

III. Conclusion

One year ago, I celebrated the New Year with my friend Ralph in Tokyo, Japan. The transit system there absolutely inspired envy. Beyond the sheer volume of high-capacity transit options, each transit station seemed to serve as a community hub: Harajuku station exits to Meiji Shrine, Ueno station is across the street from Tokyo's major zoo and many adjacent museums, and Akihabara station has become synonymous with anime and neon lights. Transit itself seemed to create a "connection with place [which] enhances a sense of belonging to

and caring for a community…."[45] But Tokyo is not unique in this way. Central Puget Sound has this same diversity of neighborhood charm—whether it is the Ballard Locks, Tacoma's museums, Everett's waterfront, or Columbia City's downtown.

Writing this paper—and riding the 855 directly from Lynnwood to UW—has diminished my envy of Tokyo. We are already nodular and using high-capacity transit. And I believe that Vision 2040 and Transportation 2040 not only survive a TOD critique but provide our region with a viable framework for preserving and expanding on what we already are. I am hopeful that this region will succeed in "focus[ing] growth within already urbanized areas to create walkable, compact, and transit-oriented communities that maintain [their] unique local character."[46]

1 Puget Sound Regional Council, *http://www.psrc.org/about/faq* (last visited Nov. 11, 2012).

2 Vision 2040 at ii, available at *http://www.psrc.org/growth/vision2040/pub/vision2040-document/*.

3 Puget Sound Regional Council, *http://www.psrc.org/about/faq* (last visited Nov. 11, 2012) ("PSRC is governed by a General Assembly and an Executive Board. Each member of PSRC is a voting member of the General Assembly, which meets at least annually to vote on major decisions, establish the budget, and elect new officers. The Executive Board is chaired by the PSRC President, meets monthly, and serves as the governing board. Both the General Assembly and Executive Board use weighted votes based on population to make decisions.").

4 Vision 2040 at iii.

5 *Id.* at i.

6 *Id.* at vii; Puget Sound Regional Council, *http://www.psrc.org/data/regionalprofile/regionalprofile-pop* (last visited Nov. 11, 2012).

7 Vision 2040 at xi.

8 *Id.* at 13.

9 *Id.*

10 *Id.* at 14.

11 Transportation 2040, Exec. Summary at 7, available at *http://www.psrc.org/transportation/t2040/t2040-pubs/final-draft-transportation-2040/*.

12 Transportation 2040, Exec. Summary at 3.

13 *Id.*

14 *Id.* at 20.

15 *Id.* at 66.

16 Seattle Department of Transportation, *Policy, Planning, & Major Projects, Station Area Planning: Transit-Oriented Development Case Studies*, Intro. at 1, available at *http://www.seattle.gov/transportation/ppmp_sap_todstudies.htm* (last visited Oct. 22, 2012), *hereafter* SDOT.

17 Center for Transit-Oriented Development, *http://ctod.org/faqs.php* (last visited Oct. 23, 2012).

18 SDOT, Summary at 1 ("The cases selected provide valuable insights that will help the City ensure that station area plans meet the City's goals and avoid the mistakes that have limited transit-oriented development elsewhere.").

19 *Id.* at 4.

20 *Id.* at 6.

21 *Id.*

22 *Id.*

23 *Id.* at 8.

24 Vision 2040 at 47.

25 *Id.* at 14

26 *Id.* at 48.

27 *Id.* at xi.

28 *Id.* at 45.

29 Transportation 2040 at 10.

30 *Id.* at 11.

31 Vision 2040 at 82.

32 *Id.* at 81.

33 Transportation 2040 at 65.

34 Vision 2040 at 81.

35 Transportation 2040, Exec. Summary at 8.

36 *Id.* at 19.

37 Vision 2040 at 17 (emphasis added).

38 *Id.* at 98.

39 Transportation 2040 at 19.

40 Vision 2040 at 61.

41 *Id.* at 25.

42 *Id.* at 84.

43 *Id.* at 100.

44 *Id.* at 98.

45 *Id.* at 57.

46 *Id.* at 45.

Bryan Russell is a recent graduate of University of Washington's School of Law, where he enjoyed his work on the Washington Journal of Law, Technology, and Arts, Moot Court Honor Board, and the Entrepreneurial Law Clinic. This September, he begins a two-year clerkship with the Honorable Judge George Fearing of Washington's Court of Appeals, Division III. After clerking, Bryan hopes to practice business law with an emphasis on intellectual property and licensing.

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