RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. COASTAL ZONE MANAGEMENT ACT AND NATIONAL ENVIRONMENTAL POLICY ACT

Akiak Native Community v. United States Postal Service, 213 F.3d 1140 (9th Cir. 2000)

Eight Alaska Native communities sought to enjoin the United States Postal Service from using surface hovercraft instead of fixed-wing aircraft to deliver nonpriority mail to remote Alaskan villages. The communities accused the Postal Service of violating both the Coastal Zone Management Act (CZMA) and the National Environmental Policy Act (NEPA) in its approval of the controversial Hovercraft Demonstration Project (Hovercraft Project). The communities appealed from the district court's grant of summary judgment in favor of the Postal Service.

The court began its analysis by considering the communities' allegations of CZMA violations. Under CZMA, a coastal development project must be consistent with state and local coastal management programs to the "maximum extent practicable." Pursuant to CZMA, the Alaska Division of Governmental Coordination (ADGC) issued a determination that the Hovercraft Project was consistent with state and local programs. The court sought a compelling reason to overrule the ADGC's Consistency Determination, and found none of the communities' reasons "compelling."

The communities' first reason for overturning the Consistency Determination was that the Postal Service initiated its project prematurely. CZMA requires a delay of ninety days from when a consistency determination is sent to the state before a project may be commenced. The court referred to the governing regulations and found that a ninety-day interval is compulsory, unless "both the federal agency and the state agency agree to an alternative notification schedule." The court concluded that the Postal Service's assertion and offer of evidence of a sixty-day agreement between the two parties was valid, and therefore, nullified the ninety-day requirement.

Next, the communities charged that Postal Service actions in implementing the Hovercraft Project were not compatible with ADGC's Consistency Determination. In particular, the Postal Service allegedly did not comply with the conditions outlined in the Determination. The court, however, found clear evidence of a Draft Monitoring Plan submitted by the Postal Service, as required by the

Consistency Determination. This satisfied the charge that the Postal Service ignored the conditions outlined in ADGC's Consistency Determination.

The communities next argued that the Postal Service's project commenced before the state issued its Final Consistency Response. The court found that Alaska had issued its Preliminary Consistency Response to the Postal Service before the Postal Service began its project. The court rationalized that the Postal Service relied upon the preliminary finding of consistency with Alaska law, which in turn was consistent with the Final Consistency Determination. Because the result was a mutual agreement of consistency between the federal and state agencies, the court refused to find the communities argument "compelling."

The court then moved on to consider the communities' NEPA allegations. The plaintiffs brought three specific charges against the Postal Service under NEPA. First, the communities argued that the Postal Service's analysis of environmental impacts was improperly conducted. Second, they argued that the Postal Service failed to include an adequate discussion of mitigation measures in its Environmental Assessment. Finally, the communities asserted that the Postal Service did not properly evaluate potential alternatives to the proposed Hovercraft Project.

In regard to the Postal Service's lack of environmental impact analysis, the communities challenged the Postal Service's "Finding of No Significant Impact" (FONSI). The communities accused the Postal Service of preparing a FONSI in order to be relieved of the need to prepare an Environmental Impact Statement before beginning the Hovercraft Project. The court found that the communities did not meet the required standard necessary to upset the Postal Service's determination of a FONSI. In order to be successful, the court required that the communities show that the Postal Service failed to "articulate a rational connection between the facts found and the conclusions made." The communities asserted two reasons as to why the rational connection was not made. First, the communities stated that the Postal Service had insufficient information to conclude that the project's impact would be insignificant. Secondly, they pointed out that the United States Fish and Wildlife Service (FWS), an agency with expertise in environmental concerns, disagreed with the Postal Service's Environmental Assessment conclusions. Because the FWS disagreed with the Postal Service's assessment, the Alaskan communities concluded that the Postal Service's study was inadequate.

In support of their charge that the Postal Service possessed inadequate information on which to base the FONSI, the communities cited numerous uses of the words "could" or "may" when referring to potential impacts. The communities viewed this uncertainty as an admittance of insufficient data on which to make a FONSI. The court disagreed. Instead, it found that although a few questions remained unanswered in the Environmental Assessment, the agency did not rely too heavily on potential, instead of actual, impacts. The court decided that the use of these words did not imply that questions remained as to the possibility of these effects.

Secondly, the court addressed the Postal Service's disregard for FWS comments to the initial Environmental Assessment. The court pointed out that NEPA only requires the responsible agency to consider other agencies' concerns, address them, and then explain why it found them unpersuasive. The Postal Service was not responsible for deferring to the FWS conclusions. Additionally, the court downplayed the disagreement between the two agencies. The court pointed out that the FWS only suggested further study of waterfowl disturbances if those disruptions would occur on a long-term basis. Because the Postal Service found that the waterfowl disturbances would occur for only two years, the FWS agreed that further study was probably not needed. Because of these reasons, the court found that the Postal Service's FONSI conclusion was appropriate.

The communities also argued that the Environmental Assessment did not discuss potential mitigation measures when evaluating the Hovercraft Project. The court reminded the plaintiffs of *Robertson v. Methow Valley Citizens Council*, in which the Supreme Court ruled that a NEPA analysis does not require a detailed outline of mitigation measures to counter adverse environmental impacts. Furthermore, the court relied on the NEPA statute itself, which does not require a discussion of mitigation strategies in an Environmental Assessment. Such a discussion is only required in an Environmental Impact Statement.

Finally, the communities contended that the Postal Service did not adequately consider alternatives when evaluating the Hovercraft Project. The communities alleged that the Postal Service completed an inadequate evaluation of the "no-action" alternative, and that the Environmental Assessment failed to consider a reasonable range of alternatives. The court found both of these arguments without merit.

Concerning the "no-action" alternative, the court ruled that the Postal Service did, in fact, consider the option. The court sided with

the Postal Service by agreeing that the "no-action" alternative was to maintain the status quo. The status quo consisted of the use of fixed-wing aircraft that the Postal Service already utilized. The court rejected the communities' assertion that "no-action" required baseline studies of the environment without consideration of even the fixed-wing aircraft. The court stated that because the project's goal to deliver mail to remote villages was not at issue, there was no need to differentiate "no-action" from "no change."

The court also found that an adequate range of alternatives had been considered by the Postal Service in assessing its project. The court cited *Trout Unlimited v. Morton*, stating, "The range of alternatives that must be considered need not extend beyond those reasonably related to the purposes of the project." The court explained that since the goal of the Hovercraft Project was to improve the current method of mail delivery, there was no need to step backwards and consider alternatives that were known for their inefficiency, such as trucks and boats. Therefore, the court concluded that the Postal Service considered a reasonable range of alternatives that were applicable to the Postal Service's objectives.

Susan Armstrong

II. NATIONAL ENVIRONMENTAL POLICY ACT

Heartwood, Inc. v. United States Forest Service, 2000 WL 1538645 (7th Cir. 2000)

Jim Benson and Mark Donham (collectively "Heartwood") brought suit against the United States Forest Service (Service) for adopting a "rule excluding certain classes of Service action from procedural safeguards designed to determine the environmental impact of those actions." Heartwood asserted that the Service violated the National Environmental Policy Act (NEPA), the Administrative Procedures Act (APA) and certain Council on Environmental Quality (CEQ) regulations by not conducting an Environmental Assessment (EA) on new Categorical Exclusions (CE's), not seeking an Environmental Impact Statement (EIS) and issuing a finding of no significant environmental impact. The Service maintained that NEPA did not require it to conduct an EA or an EIS when creating procedures for the identification of CEs. After considering the district court's summary judgment in favor of the Service, the United States Court of Appeals for the Seventh Circuit held that "because neither NEPA nor the APA requires the Service to

perform an EA or an EIS before promulgating its procedures for creating CEs," the judgment of the district court should be affirmed.

In its petition, Heartwood requested judicial review of a certain set of CEs for timber harvests on Service land, which were promulgated by the Service pursuant to NEPA and the APA. By claiming that certain CEQ regulations had been violated, Heartwood specifically asserted that the Service:

> (1) failed to conduct an EA on the proposed CE procedures and instead issued a Finding of No Significant Impact (FONSI) for the CE procedures (or alternatively, failed to conduct a more extensive EIS once it was known that a FONSI was not appropriate);
> (2) failed to "address or consider extraordinary circumstances before issuing the CEs;" and
> (3) utilized a "case-by-case" CE procedure in part in an attempt to avoid NEPA requirements.

The Service countered with a statement which explained that "based on experience and environmental analysis," the CEs would "not significantly affect the quality of the human environment, individually or cumulatively," and should be "excluded from documentation in an EIS or an EA."

The court first addressed the issue of whether or not Heartwood had standing to sue. The Service claimed that Heartwood "failed to establish that they suffered a cognizable injury." The court applied the recent United States Supreme Court holding in *Friends of the Earth v. Laidlaw Environmental Services*, which states that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values for the area will be lessened by the challenged activity.'" The court also compared the facts of the instant case to *Rhodes v. Johnson*, in which it held that plaintiffs had standing due to their status as users of the natural resource who would be adversely affected. Finding nothing to distinguish *Rhodes* from the instant case, the court applied the standard articulated in *Friends of the Earth*, compared the facts to *Rhodes*, and concluded that Heartwood qualified as a user of the forest and thus had standing.

The Service also argued that Heartwood's claims implicated only a procedural right. The court rejected this argument by stating that because Heartwood was not allowed to participate in the process of determining the CEs, their ability to use and enjoy Service land was affected. The court reasoned that this injury could have been "lessened or avoided" if an EA or an EIS had been performed because

the new CEs would have been made known to Heartwood during the EA/EIS process.

The court next addressed the issue of ripeness. The Service maintained that "only when a specific project is authorized at a specific National Forest pursuant to a categorical exclusion will a challenge to that categorical exclusion be ripe for judicial resolution." To analyze this issue, the court revisited *Sierra Club v. Marita*, in which it held that "a plaintiff clearly has standing to sue where there is a concrete injury underlying the procedural default even if the plan [is] not implemented immediately." Applying this rationale to the present case, the court held that Heartwood did not need to wait to challenge a specific project since it opposed an overall plan.

Finally, the court turned to the merits of the case. Heartwood asserted a very simple argument: "that the Service violated NEPA by failing to prepare an EA to analyze the effects of its CE rules." The Service argued that "when it established the CE rules, it was adopting an agency procedure, not instituting a 'federal action' to which NEPA's EA and EIS regulations apply." The Service further contended that it "complied with CEQ's NEPA regulations by consulting with the CEQ during development of the CEs and by obtaining proper CEQ review."

It is the duty of CEQ to administer NEPA and "promulgate regulations related to NEPA which are binding on federal agencies." CEQ rules require "agencies to establish implementing procedures that facilitate the evaluation of management decisions and the environmental effects of proposed federal agency actions. Under these guidelines, an agency must identify those actions which normally require an EIS."

The court then focused the issue narrowly: can the promulgation of CE rules, in this instance, be considered a major federal action? The court quoted the district court's assessment that

> [t]he adoption of a list of categories is not implementation of a specific policy or statutory program, nor a plan for action in any sense of the phrase . . . to propose that such a document be prepared for types (categories) of actions that do not concern a specific proposed action in a specific location seems beyond the Court's comprehension.

The court agreed that an EA would have been meaningless because "it would have come prior to the adoption of the individual CEs." Further, the court found that the Service would be unable to provide "an accurate analysis of the potential environmental consequences posed by the exclusion of the different CEs."

Relying on the Supreme Court's *Marsh v. Oregon National Resources Council* decision, the court noted that the standard of review when examining an agency's decision under NEPA is especially narrow. The court then held that the Service had not violated NEPA or the APA and surmised that "[t]he Service action creating CEs looks more like an implementing procedure than a federal action of the type contemplated in 42 U.S.C. § 4332(2)(c)." The court then quoted the CEQ definition of "major federal action," which provides that major federal actions include "actions with effects that may be major and which are potentially subject to federal control and responsibility . . . . Actions include new and continuing activities . . . new or revised agency rules, regulations, plans, policies or procedures; and legislative proposals." Distinguishing the promulgation of new CEs from these categories, the court found that the creation of new CEs was simply an agency procedure for which an EA or EIS had been deemed unnecessary by the CEQ rule stating that "agency procedures" include "specific criteria for and identification of those typical classes of action . . . which normally do not require either an environmental impact statement or an environmental assessment." Therefore, the court reasoned, the creation of new CEs is an agency procedure. The court stated, "[T]he CEs are not proposed actions, they are categories of actions for which an EA or an EIS has been deemed unnecessary" by CEQ rules.

The thrust of Heartwood's claim was that the promulgation of new CE rules falls into one of the categories of major federal action listed in 40 C.F.R. § 1508.18, which includes "[a]doption of official policy, such as rules and regulations, and interpretations adopted pursuant to the APA, 5 U.S.C. § 551, *et seq.*" Applying the definition of "major federal action" and the regulation listing its categories, the court disagreed with Heartwood and stated that the new CE rules did not fall into any of the "major federal action" categories.

Further, the court held that the CEQ rule that requires agencies to establish "agency procedures" that include "specific criteria for and identification of those typical classes of action . . . which normally do not require either an environmental impact statement or an environmental assessment," was applicable. The Service deemed the procedure for new CEs to be subject to this rule, thus no EA or EIS was required. The court adopted this argument and quoted CEQ's own definition of a CE, which provides that a CE is "a category of actions found to have no significant impact on the environment 'in procedures adopted by a Federal agency in implementation of these regulations.'" Because CEQ does not mandate that agencies conduct

an EA before classifying an action as a CE, the court declared that it must "give great deference to the CEQ's interpretation of its own regulations."

The court noted that "agencies are authorized under NEPA to create their own procedures and to utilize CEs in order to 'make a threshold determination as to which actions normally have a significant effect on the environment.'" It further noted that the Service issued a statement in its notice adopting the new policy and procedure regarding categorical exclusions: "[b]ased on experience and environmental analysis, the implementation of the revised Forest Service environmental policy and procedures will not significantly affect the quality of the human environment, individually or cumulatively. Therefore, this action is categorically excluded from documentation in an environmental impact statement or an environmental assessment." This statement, the court reasoned, was persuasive in that it did not indicate that the CE rule would authorize any activity or commit any resource to a project that might impact the environment. Heartwood unsuccessfully countered this argument by asserting that conducting an EA is the appropriate "way to determine whether or not" the CE rule "will significantly affect the quality of the environment."

In making its decision, the court relied on the power of the CEQ "to review an agency's procedures for identifying classes of activity that will be categorically excluded from EA and EIS requirements." "The court was satisfied that CEQ considered the Service's rules for identifying CEs as procedures" and found that an EA or EIS was not required. The court refused to question the judgment of CEQ and denied Heartwood's petition.

Matthew Beam

III. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Carson Harbor Village, Ltd. v. Unocal Corp., 2000 WL 1290337 (9th Cir. 2000)

The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) provides that certain categories of "Potentially Responsible Parties" (PRPs) may be subject to liability under the statute. One such PRP is "any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." In that portion

of the statute, the term that has given courts the most trouble is "disposal." Indeed, there is a circuit split on the issue of whether the definition of disposal includes "passive" migration of hazardous waste (i.e., where waste that was previously dumped on the property "seeps," "spills," or "leaks" during an owner's time of ownership).[1] Adding to the split, the Ninth Circuit holds in *Carson Harbor* that the CERCLA definition of disposal does include passive migration.

CERCLA provides that the term "disposal" is defined in the Resource Conservation and Recovery Act (RCRA). RCRA provides that "disposal" is

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Here, the court reasoned that this definition must include passive migration based on three main points:

> (1) Three of the terms listed in the definition of disposal have "well-recognized passive meanings."
> (2) In the context of RCRA, the statute from which the definition of disposal is derived, the Fourth Circuit has "squarely rejected the 'strained reading' that would limit disposal to active conduct."
> (3) Including passive migration in the definition of disposal is consistent with the purpose of CERCLA.

The court first held that a substance may "discharge," "spill," or "leak," without "active human participation." Because the definition of disposal "plainly" includes terms that may be passive in nature, the court argued that giving disposal a passive connotation is consistent with the RCRA definition.

Next, the court reasoned that in *United States v. Waste Industries Inc.*, the Fourth Circuit refused to construe "disposal" as purely active. Further, the court noted that in its own decisions, it has adopted a broad interpretation of disposal as it applies to CERCLA cleanup cases. For example, in *Kaiser Aluminum & Chemical Co. v. Catellus Development*, the court held that because of CERCLA's "overall remedial purpose," "disposal" should be construed broadly so as to include actions taking place subsequent to the initial

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1. *See* United States v. 150 Acres of Land, 204 F.3d 698, 705-06 (6th Cir. 2000) (holding that disposal must be "active"); ABB Indus. Sys. Inc. v. Prime Technology Inc., 120 F.3d 351, 357-59 (2d Cir. 1997) (using "active" definition of disposal); United States v. CDMG Realty Co., 96 F.3d 706, 713-18 (3d Cir. 1996) (using "active" definition); Nurad, Inc. v. William Hooper & Sons Co., 966 F.2d 837, 844-46 (4th Cir. 1992) (ratifying the concept of passive disposal).

contamination of the property (e.g., release of substances during "landfill excavations and fillings").

Finally, the court argued that a passive disposal definition conforms with the purpose and structure of CERCLA. The court pointed out that CERCLA's PRP categories are broad, "sweeping in parties who may have done nothing affirmatively to contribute to contamination at a site and forcing them to disprove causation as an affirmative defense." This strict liability scheme, reasoned the court, is intentionally broad in order to "create a mechanism for prompt cleanup." Further, the court noted that "culpability" plays no role in establishing CERCLA liability. To the contrary, liability is triggered only by ownership at the time of disposal, not by any measure of responsibility for the disposal. Thus, according to the court, a passive definition of disposal brings in as many PRPs as possible—a strategy that is entirely consistent with the underlying structure of the statute.

The court noted that those in favor of an active definition of disposal often point to certain inconsistencies in applying a passive definition to CERCLA cases. As an illustration of the majority position, the court cited the Third Circuit's *United States v. CDMG Realty Co.* opinion. First, the *CDMG* court reasoned that the words "leak" and "spill" in the RCRA definition must be read in the context of the surrounding words, which clearly have an active connotation, requiring some affirmative human activity. Next, *CDMG* reasoned that accepting a passive definition would essentially make "disposal" synonymous with "release," which "Congress explicitly defined to include not only 'disposal' but terms typically used to describe passive migration such as 'leaching.'" According to the Third Circuit, giving disposal a passive meaning would therefore contradict the intention of Congress, since Congress apparently knows how to include passive terms when it intends to do so. Next, the *CDMG* court argued that permitting a passive definition would effectively abolish the innocent landowner defense, "since no one could show that he or she acquired the property 'after disposal.'" Finally, the *CDMG* court argued that a passive definition would bring prior owners, who had no idea their land was contaminated, into the realm of CERCLA liability. According to the *CDMG* court, this would run contrary to CERCLA's intent to "force polluters to pay the costs associated with their pollution."

The *Carson Harbor* court met the arguments of the "active disposal" camp by arguing that a narrow definition of disposal conflicts with the principle that "remedial statutes are to be broadly construed to effectuate their statutory purposes." In addition, the

court rejected the notion that the innocent landowner defense depends upon an active construction of "disposal." The court argued that the defense applies on its face "if the property 'was acquired after the disposal or placement of the hazardous substances.'" The court reasoned that the "placement" alternative operates in addition to, rather than as a reiteration of, the "disposal" alternative. Therefore, the defense would still apply to innocent landowners who acquired the property after "placement."

The court further noted that an active theory embodies its own inconsistencies. First, an active definition of disposal would create sharp distinctions between current and past owners/operators. As the court pointed out, current owners are liable for contamination regardless of fault. In contrast, under an active definition, prior owners would be protected from liability as long as any disposal during their ownership was passive, whether they were aware of the disposal or not. Thus, a prior owner who knew that hazardous substances were seeping onto the land during twenty years of ownership could conceivably be immune from CERCLA liability under an active definition. The court reasoned that similar inconsistencies would exist between different types of prior owners under an active theory. For example, prior owners during a passive disposal period would be immune even if they allowed known pollution to remain, or failed to conduct a reasonable environmental evaluation of the property. On the other hand, prior owners with no responsibility for the disposal would be exposed to liability simply because they owned the property at the time of an active disposal. Such inconsistencies, according to the Ninth Circuit, do not conform to the far-reaching liability scheme of CERCLA.

Amanda Ropp Blystone

IV. CLEAN AIR ACT

United States v. Toyota Motor Corp., 117 F. Supp. 2d 34 (D.D.C. 2000)

Section 203(a)(1) of the Clean Air Act (CAA) prohibits automobile manufacturers from selling, introducing or delivering into commerce, or importing into the United States any new motor vehicles or component engines that are not covered by a certificate of conformity issued pursuant to Environmental Protection Agency (EPA) regulations. This certificate of conformity is a necessary prerequisite for an automobile manufacturer to sell vehicles to the

public. Any auto manufacturer seeking to sell in the United States must submit to the EPA a "certificate application" for each class of new motor vehicles or new motor vehicle engines in order to obtain the necessary certificate of conformity. In the above referenced case, the government filed suit against Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc., and Toyota Technical Center, U.S.A., Inc. (collectively "Toyota") for allegedly violating section 203(a)(1) by importing and selling into the United States approximately 2.2 million vehicles that were materially different from the vehicles described in Toyota's certificate applications and in the correlating certificates of conformity issued by the EPA.

At issue are the descriptions of the vehicles' onboard diagnostic (OBD) systems contained in Toyota's certificates of conformity. OBD systems are designed to monitor, control and record all emissions released by the vehicles' engines. Pursuant to the 1990 amendments to the CAA, EPA regulations require the installation of OBD systems on all new motor vehicles, including all light duty vehicles and trucks for model year 1994 and later. The regulations further mandate manufacturers to equip all new vehicles with a malfunction indicator light (MIL) that would alert vehicle owners to a malfunction in the emission system. As an alternative to compliance with EPA regulations, an automobile manufacturer can instead demonstrate compliance with California's OBD regulations, otherwise known as "OBD II" requirements, and thereby satisfy federal standards. This alternative "deemed to comply" rule was promulgated so as to ease the initial burden of compliance with the new federal regulations on manufacturers by allowing them to develop and install one system that would meet all nationwide standards.

Toyota chose to comply with the EPA's alternative "deemed to comply" rule for its vehicles dated model years 1996 through 1998. In July 1995, the California Air Resources Board (CARB), the state agency charged with enforcing OBD II regulations, approved Toyota's OBD II system descriptions for its model year 1996 vehicles. After the CARB issued its approval, Toyota submitted its applications for certificates of conformity to the EPA, which then issued a separate certificate for each engine "family." The certificates expressly covered "only those new motor vehicle engines which conform, in all material respects, to the design specifications that applied to those vehicles or engines described in the documentation required" by federal regulations.

Pursuant to the OBD II regulations, the CARB performed "confirmatory testing" of Toyota's diagnostic systems in July 1997 in

order to determine whether Toyota complied with the malfunction criteria identified in its certifications. Subsequent to this testing, the CARB Executive Officer informed Toyota Technical Center that certain engine families for model years 1996 through 1998 did not conform to OBD II requirements. In September 1998, the CARB ordered the recall of approximately 337,700 vehicles manufactured and certified for sale in California. Toyota's appeal of the recall order is currently pending before the full CARB. The United States filed the above-referenced lawsuit in July 1999, while a hearing was being held on the CARB's recall order before an administrative law judge from the California Office of Administrative Hearings.

In the present case, Toyota moved to dismiss or stay the government's case on three separate abstention grounds. First, Toyota invoked the doctrine of primary jurisdiction. The doctrine of primary jurisdiction applies whenever a court has proper jurisdiction over a claim, but chooses to defer adjudication of the claim because it "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body" and it would therefore be appropriate for the court to refer the claim to the administrative body for its opinion. Toyota argued that the doctrine of primary jurisdiction was applicable in the present suit because the core issue to be resolved in the federal lawsuit was the same issue pending before the CARB; namely, whether the OBD systems in Toyota vehicles comply with California's OBD II requirements. Since resolution of this issue required the interpretation of complex state regulations, Toyota argued that the Court should defer to the CARB for its initial decision. Additionally, Toyota argued that the doctrine of primary jurisdiction is particularly germane where, as in the present case, the unresolved issue is already pending before a state agency, there are numerous technical and scientific questions involved, and there is a risk of inconsistent state and federal orders.

In response, the United States District Court for the District of Columbia rejected Toyota's argument that the issues involved in this present lawsuit are essentially similar to the issues pending before the CARB. The court noted that the matter pending before the full CARB was the potential recall of 337,700 Toyota vehicles for alleged violations of California's OBD II requirements. By comparison, the government's lawsuit alleges Toyota violated federal law, specifically section 203(a)(1) of the CAA, by importing and selling 2.2 million vehicles that were not covered by the EPA-issued certificates of conformity. Furthermore, the court noted that while California's OBD

II requirements may operate as the controlling federal standards in this case, since Toyota chose to proceed under the "deemed to comply" rule, Toyota's liability under federal law was a completely separate issue.

The court did, however, acknowledge the substantial overlap between the issues in the federal lawsuit and in the CARB proceeding, noting that Toyota's compliance with California's OBD II regulations could still be relevant. Toyota, for example, could assert the issue of compliance with the OBD II regulations in order to "challenge the relief sought or to mitigate the statutory penalties" after liability had been established. Despite the overlap, the court declined to defer its adjudication of the present suit to the CARB, determining that the overlapping issues were not, as required under the doctrine of primary jurisdiction, necessarily within the "special competence" of the CARB. The court noted that, under the CAA, the authority to regulate motor vehicle emissions is exclusively that of the federal government, and aside from one narrow exception, the CAA preempts all state regulations. While the EPA did provide manufacturers with the option of complying with California's OBD II requirements in lieu of the federal requirements, the "deemed to comply" rule was only a "surrogate" for the federal standards. At no time, the court stated, did the EPA abdicate its authority to apply and enforce OBD II standards itself. Thus the CARB was not vested with the "special competence" to resolve questions involving OBD II requirements when they arise under a federal context. Therefore, the court determined that there were no grounds to invoke the doctrine of primary jurisdiction.

Toyota further asserted that the "deemed to comply" rule should be held to require the EPA to defer to CARB decisionmaking in interpreting OBD II requirements so as to ensure that conflicting decisions are not issued from both agencies. The court characterized Toyota's concern over a clash of regulatory regimes as "overstated." First, the major purpose of the "deemed to comply" rule was to ease the compliance burden on manufacturers by enabling them to implement one OBD system nationwide. The court believed that this purpose of administrative convenience would not be jeopardized by the EPA's independent assessment and review of various vehicles' compliance with the OBD II regulations. Second, the court pointed out that since the EPA had assisted the CARB in developing its OBD II standards, and independently reviewed those standards to ensure that they were consistent with the purposes of the CAA, it is hardly

likely that the EPA would misconstrue or misapply the OBD II requirements.

Finally, the court noted that to accept the proposition that the EPA and the federal courts should suspend every action raising OBD II issues until the CARB could render its opinion would seriously obstruct enforcement actions under the CAA. Additionally, such a rule would force the EPA to delay nationwide enforcement actions while the CARB decided OBD II-related issues for a comparatively minor number of vehicles. In the present case, only 337,700 or fifteen percent of the 2.2 million vehicles at issue were sold or offered for sale in California. Such an abdication of power would be inconsistent with the very purposes of the CAA, which grants the federal government almost "complete and exclusive authority to regulate motor vehicle emissions."

Similarly, the court rejected Toyota's invocation of two other abstention doctrines—the Burford abstention doctrine and the Colorado River abstention doctrine—as grounds for dismissal. Under the Burford abstention doctrine, a federal court may choose to abstain from exercising federal jurisdiction if the case before it involves "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the results in this case" or if federal adjudication "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." The court found the Burford doctrine inapplicable in the present case because the issue was not an "essentially local" problem in which California's interests predominate. The court reiterated that the federal government in the present case was alleging massive nationwide violations of the CAA, and further, under section 203(a)(1), Toyota's liability was not dependent on its alleged violations of California's OBD II regulations. Nor did the EPA, as discussed above, relinquish any of its enforcement authority by its adoption of the "deemed to comply" rule.

Finally, the court rejected Toyota's argument that this case should be dismissed pursuant to the Colorado River abstention doctrine, which applies when a federal and state court exercise concurrent jurisdiction over an issue. Although the court acknowledged that the federal government commenced its suit long after the CARB's proceeding, the court concluded that the presence of substantial federal law issues and the significant differences between the two proceedings outweighed any countervailing reasons to defer to the ongoing CARB proceeding. Critical to the court's decision was again the magnitude of the nationwide violations Toyota allegedly

committed, and that different sovereign parties and remedies were at issue between the federal lawsuit and the CARB proceeding. Ultimately, the court concluded that application of the Colorado River abstention doctrine would be inappropriate where, as here, the significant differences between the two actions would mean that a final decision by the CARB would not be likely to resolve all of the claims presented in the federal suit.

Jennifer Daehn

V. NATIONAL FOREST MANAGEMENT ACT

Sierra Club v. Peterson, 2000 WL 1357506 (5th Cir. 2000)

This decision marks the culmination of fifteen years of litigation between environmental groups, including the Sierra Club, and the United States Forest Service. The environmental groups alleged, inter alia, that the Forest Service's even-aged timber management, as practiced in Texas national forests, violated the National Forest Management Act (NFMA).

In 1985, the environmental groups sought a preliminary injunction in the United States District Court for the Eastern District of Texas to halt all timber cutting in five Texas wilderness areas. The focus of that proceeding was the effectiveness of the Forest Service's method of "even-aged timber management" in the Texas forests. This timber management scheme was employed by the Forest Service in an attempt to control spread of the Southern Pine beetle, which posed a substantial threat to pine trees in the Texas wilderness areas. Such even-aged methods entail cutting all or most all of the trees in the same stand and at the same time, resulting in the creation of stands in which trees essentially of the same age grow together. Such even-aged practices are permitted under the NFMA if the Forest Service determines that such techniques are "appropriate."

Here, the court noted that "[t]he NFMA does not provide for judicial review of Forest Service decisions, and therefore the general review provisions of the Administrative Procedure Act (APA) apply by default." Section 704 of the APA limits judicial review to "final agency action." The district court's jurisdiction was premised on its conclusion that the environmental groups had indeed challenged a final agency action. Rather than any specific timber policy or activity engaged in by the Forest Service, the district court identified the requisite final agency action as the general practices of the Service in

permitting even-aged management in Texas forests. The district court then concluded on the merits that the Forest Service had violated its duties under the NFMA to "protect resources and to monitor and inventory." The district court did not, however, enjoin all even-aged cutting because, as it stated, "[a]n injunction halting all cutting could lead to irreparable losses far in excess of those that will occur if the government's cutting program continues." The district court did issue a partial injunction mandating that the Forest Service strictly follow its own guidelines in executing its even-aged management. The Forest Service did not comply with these guidelines, which are designed in part to prevent unnecessary and excessive harm to other trees and wildlife in the area. Specifically, in addition to the pine trees, other hardwoods (including oaks, dogwoods, gums, and others) were being cut. Because the beetles only attacked the pine trees, it was unnecessary to cut the hardwoods, and consequently, directly contravened the Forest Service's own guidelines.

The Forest Service appealed. The Fifth Circuit panel affirmed the district court's enjoining of the Forest Service in following its own regulations with respect to protecting key resources in the areas. In addition, it found that the Forest Service's decision not to follow its own regulations was indeed "adjudication" and final agency action for purposes of section 704 of the APA. Consequently, the court determined it had jurisdiction to review the Forest Service's failure to act with respect to alleged on-the-ground violations of the NFMA and its regulations.

However, in September of 2000, the case was reviewed en banc by the Fifth Circuit. The sole issue on review was whether the environmental groups had limited their challenge to specific and identifiable Forest Service actions. Because the en banc panel determined that they did not, and thus that the district court exceeded its jurisdiction, the court vacated and remanded the prior ruling.

Quoting the United States Supreme Court's *Bennett v. Spear* decision, the court noted, "[f]inal agency actions are actions which (1) 'mark the consummation of the agency's decisionmaking process,' and (2) 'by which rights or obligations have been determined, or from which legal consequences will flow.'" The agency action must be "'an identifiable action or event.'"

In reaching its decision that no final Forest Service action was at issue, the Fifth Circuit relied on the Supreme Court's holding in *Lujan v. National Wildlife Federation*. In that case, the plaintiff challenged the Secretary of the Interior's entire "land withdrawal review program," which covered the Bureau of Land Management's (BLM's)

activities in complying with the Federal Land Policy and Management Act (FLPMA). There, the Court found that the plaintiff's action failed because no particular final agency action was challenged. The Court was concerned that instead of challenging a specific BLM policy or action, the plaintiff merely challenged the general policies of that agency; policies that are ongoing and perpetually evolving. Here, the Fifth Circuit stated that the *Lujan* decision made clear that the prohibition against judicial review of nonfinal agency action "is motivated by institutional limits on courts which constrain our review to narrow and concrete actual controversies." The court noted that this prohibition is mindful of the due respect afforded to administrative agencies and their ability to make expert decisions on complex issues for which they were specifically created. The Fifth Circuit then stated that the environmental groups' challenge in the present case was exactly the type of general challenge the Supreme Court struck down in *Lujan*. The court noted that the environmental groups challenged past, ongoing, and future timber sales approved by the Forest Service, and that the Forest Service obviated its general duty to properly monitor and inventory. Consequently, this challenge sought "wholesale improvement" of Forest Service practices in the Texas National Forests, including practices that have not yet occurred. The court reasoned that this was not a justiciable challenge under *Lujan* because the program of timber management to which the environmental groups objected did not "mark the consummation of the agency's decisionmaking process," or constitute "an identifiable action or event." Instead, the court noted, the environmental groups impermissibly brought a general challenge to the Forest Service's day-to-day operations. The district court's entertaining of this challenge, therefore, exceeded the court's jurisdiction under the APA.

The court proceeded to note that although the environmental groups did include challenges to specific Forest Service timber sales in their complaint, this did not render the action justiciable. The fact remains, the court noted, that the environmental groups challenged the general practices of the Forest Service. The court found that the environmental groups could not challenge an entire program by simply identifying specific allegedly improper final agency actions within that general program. The court noted that rather than concentrating their challenge on these specific Forest Service practices, the environmental groups used these instances merely as evidence to support their sweeping argument that the overall practices of the Forest Service violated the NFMA.

Next, the court stated that the environmental groups could not sustain a challenge against Forest Service practices under the alternative theory that the Service "failed to act." The court conceded that in certain instances, agency inaction might be sufficiently final to warrant judicial review. However, the court noted, such inaction was not present in the noted case. The environmental groups' challenge that the Forest Service failed to comply with the NFMA did not reflect a case of agency "inaction." Indeed, the court found that the Forest Service was not being challenged for not attempting to comply with the NFMA by an omission of a specific act, but rather for an affirmative action that allegedly did not comply with the NFMA. The court noted that characterizing the challenge against Forest Service practices as agency inaction subject to judicial review would permit all plaintiffs to artfully plead their complaints against agency actions as agency inactions.

The court then noted the concern that the district court shared; namely that a finding of no final agency action in the present case would effectively put all Forest Service on-the-ground violations of the NFMA beyond review. The court stated, however, that this concern was misplaced and not currently before the court. The court then explained that plaintiffs may still challenge site-specific Forest Service actions. The prohibition in this case only operates against a challenge of general, nondiscrete Forest Service actions.

Finally, the court addressed the environmental groups' contention that a ruling of no final agency action would "prevent [plaintiffs] from challenging the manner in which specific timber sales are implemented." The court dismissed this argument as not being currently before the court "because [plaintiffs] did not attack the implementation of specific Forest Service actions." Rather, the court stated that here, the plaintiffs attacked only the general Forest Service practices in the Texas forests. "Thus, we need not address whether the implementation of a timber sale . . . is a final agency action which can be challenged in court." The court stated that "[i]nstead, we determine that where, as here, the challenge extends to general forestry practices, we lack jurisdiction to consider it." The court conceded that requiring the plaintiffs to challenge individual timber sales may place a "higher burden on environmental groups wishing to monitor Forest Service practices," but "this does not allow us to disregard the jurisdictional requirement of a final agency action."

Eric W. Hammonds

VI. ENDANGERED SPECIES ACT

Wyoming Farm Bureau Federation v. Babbitt, 199 F.3d 1224 (10th Cir. 2000)

This case involves an appeal from the District Court of Wyoming's ruling regarding the introduction of a population of gray wolves into Yellowstone National Park and parts of central Idaho. The district court held that the "final rules governing the introduction of a nonessential experimental population of gray wolves . . . [was] violative of section 4(f) and 10(j) of the Endangered Species Act."

This case traces the history of the protection of the gray wolf species under the Endangered Species Act (ESA), beginning in 1978, when the Secretary of the Interior listed the entire species as endangered in all the lower forty-eight states except for Minnesota. Pursuant to this listing, an initial Department of Interior species recovery plan was initiated, and subsequently updated in 1987. In June 1994, Secretary Babbitt adopted a recovery plan and final rules that called for the release of ninety to one hundred fifty wolves from Canada into designated areas of Yellowstone and central Idaho over a three to five-year period.

The parties to this case are a diverse group of individuals and organizations, which as the court asserts, "represent the educational, economic, and social interests of individuals who reside, recreate, farm, and/or ranch in or near the designated experimental population areas." The plaintiffs/appellees ("The Farm Bureaus"), disputed the legality of the wolf reintroduction rules and invoked the statutory language of the ESA in support of their opposition to wolf reintroduction.

The Farm Bureaus asserted that pursuant to section 10(j)(1) of the ESA, "experimental populations of an endangered species must be wholly separate geographically from nonexperimental populations of the same species." The Farm Bureaus argued that because there is a possibility of overlap in wolf "populations," and a possible overlap between the experimental areas and the "current range" of naturally occurring wolf populations, the introduction of the experimental population contravened section 10(j)(1). The Farm Bureaus based their argument on legislative history that, as they asserted, "specifically prohibits the overlap of 'individuals' and/or 'specimens' of a species, not just the overlap of entire populations of a species." They asserted that this piece of legislative history "demonstrates Congress's intent that an 'experimental population' should exist 'only

when there is no possibility that members of the "experimental population" could overlap with members of naturally occurring populations.'"

The court began its review of the case by looking at the cited portions of the ESA to determine the extent to which relevant terms are expressly defined, those which have otherwise been clearly spoken to, and the degree to which Congress delegated authority over the matter to the Department. The court noted that "the Endangered Species Act does not define the relevant terms or otherwise address the precise question at issue—whether the phrase 'wholly separate geographically from nonexperimental populations' means that a reintroduced population of animals must be separate from every naturally occurring individual animal." The court determined that pursuant to the statutory language and legislative history, Congress purposely left the resolution of such management and conservation issues to the Department of Interior. The court stated that as long as the Department's interpretation of the phrase "[geographically] wholly separate" is not in conflict with the plain language of the ESA, the court would afford the agency interpretive deference. Furthermore, the court found that the Department's definition of "population" and interpretation of "wholly separate" were consistent with the "paramount objective of the Endangered Species Act to conserve and recover species not just individual animals."

The Farm Bureaus additionally argued that "the reintroduction program creates law enforcement problems by characterizing naturally occurring individual wolves that wander into the experimental population as 'experimental' rather than 'endangered.'" The result of this possibility, the Farm Bureaus argued, is an effective loss of statutory protection for naturally occurring wolves. The Farm Bureaus argued that this result violated the ESA in that it allowed naturally occurring wolves, which are entitled to the full protection of the ESA, to be "taken" pursuant to a violation of the recovery plan.

The court responded to this contention by pointing out that the broader objective of the ESA (i.e., to conserve species, not only individual animals) establishes that "individual animals can and do lose Endangered Species Act protection simply by moving about the landscape." The court further noted that while the protection of individual animals is one way to achieve the goals of the ESA, "population management practices tailored to the biological circumstances of a particular species could facilitate a more effective and efficient species-wide recovery, even if the process renders some individual animals more vulnerable." Furthermore, the court stated

that "section 10(j)(1) expressly references the Secretary's broad discretion to identify and authorize the release of an experimental population under section 10(j)(2)." Because the court determined that the Secretary was entitled to broad discretion under section 10(j)(1) to implement a recovery plan for the gray wolf, and because the reintroduction rules were consistent with the objectives of the ESA, the court reversed the district court's order to remove all Canadian wolves and their progeny from the experimental population areas.

Also as part of this appeal, the court considered a cross-appeal by James and Cat Urbigkit ("the Urbigkits"). The Urbigkits claimed that a genetically distinct subspecies of wolf, *Canis lupus irremotus*, or the Northern Rocky Mountain Wolf, lives in parts of Yellowstone and Wyoming. The Urbigkits claimed that the Department of Interior decided to reintroduce the gray wolves without reference to subspecies differences in accordance with their obligation under the National Environmental Policy Act.

The Urbigkits further argued that because the *Canis lupus irremotus* subspecies was originally listed as an endangered subspecies of gray wolf in 1973, and never formally delisted, it is entitled to full ESA protection separate and apart from the broader gray wolf recovery program. The agency, however, concluded that "the original genetic stock [of *Canis lupus irremotus*] cannot be restored to the area, as it no longer exists." The determination that the species no longer exists was "supported by evidence in the record comparing older taxonomic studies to more recent and sophisticated studies." Absent further evidence produced by the appellees to refute the agency's determination that the subspecies *irremotus* no longer existed, the court adopted the agency's determination, thus rendering any consideration of possibly negative effects of reintroduction moot. The court determined that this contention on behalf of the appellees was simply a disagreement over scientific opinions and conclusions, and that "[a]pplying the arbitrary and capricious standard of review, [the court] cannot displace the Defendants' choice between two fairly conflicting views, and must defer to the agencies' view on scientific matters within their realm of expertise."

Scott R. Lovernick

VII. TAYLOR GRAZING ACT

Public Lands Council v. Babbitt, 529 U.S. 728 (2000)

After a seventy-year legacy of largely unabated, unregulated grazing on public lands, the United States Supreme Court has recently recognized the Secretary of the Interior's broad discretionary power under the Taylor Grazing Act and emphasized deference to the Secretary's decision to alter the way grazing permits are negotiated and issued to members of the public. Most importantly, the Court has recognized the right of the Department of Interior to set environmentally desirable goals such as making the rangeland management program "more compatible with ecosystem management."

In 1995, the Secretary of the Interior promulgated new regulations governing the administration of livestock grazing on public lands. The Secretary promulgated these regulations under the Taylor Grazing Act of 1934 (TGA), the Federal Land and Policy Management Act of 1976 (FLPMA), and the Public Rangelands Improvement Act of 1978 (PRIA). The Public Lands Council, along with several other livestock industry groups, brought suit against the Secretary challenging the validity of ten of the new regulations on the grounds that the Secretary had exceeded his authority or lacked a reasoned basis for departing from the previous rules.

In a unanimous opinion, the Supreme Court held that:

> (1) a regulation redefining "grazing preference" to reflect a relationship to land use plans did not exceed the scope of the Secretary's authority under the TGA;
> (2) a regulation eliminating the requirement that, in order to qualify for a grazing permit on public land, the applicant had to be "engaged in the livestock business" did not exceed the Secretary's authority under the TGA; and
> (3) a regulation granting the United States title to all future permanent range improvements constructed under cooperative agreements with permit holders did not violate the TGA.

The TGA grants the Secretary of the Interior the authority to divide the public rangelands into grazing districts, to specify the amount of grazing permitted in each district, and to issue grazing leases or permits to "settlers, residents, and other stock owners." It further gives preference of permits to "landowners engaged in the livestock business," and specifies that grazing privileges "shall be adequately safeguarded." While the statute makes clear that the

issuance of a permit does not create a right or title in the land, the Bureau of Land Management's (BLM's) lack of substantive regulation over the last seventy years has caused ranchers to read the statute to mean that any regulation of grazing permits violates the "adequately safeguarded" provision. Perceived threats to this "right" to graze are springing up all over the country, and this ruling recognizes and supports the Secretary's decision to more actively manage these lands and ensure that grazing permits are renewed only when they comply with the applicable land use plan.

The new regulations allow the Secretary to grant permits based on available forage on any given allotment rather than on the particular amount of forage needed by any one rancher. The rancher's view is that the history of the TGA has "created expectations in respect to the security of 'grazing privileges,'" and they have relied on these expectations for years. Essentially, according to the ranchers, if the BLM has the right to change the terms of the grazing permits based on the amount of forage available, the ability of ranchers to graze as many cattle as they need to will be severely constrained. Despite this history, the Supreme Court recognized that while grazing privileges are to be safeguarded in light of the TGA's basic purposes, those purposes include not only "stabilizing the livestock industry," but also "stopping injury to the public grazing lands by preventing overgrazing and soil deterioration." Further, Congress has mandated that land use plans must be developed for grazing districts and it is well within the scope of agency authority to ensure that any permits issued comply with those plans.

The ranchers' second challenge focused on the pre-amendment regulatory requirement that a permit could only be issued to those who owned livestock and were engaged in the livestock business, thereby precluding the ability of conservationists to apply for permits and preserve the land in its natural state. The new regulation eliminated the words, "engaged in the livestock business," and limited issuance of permits only to "stock owners." Theoretically, this would allow an environmental organization to own stock, perhaps one or two cattle, and still be eligible for permits.

The Court pointed to the legislative history of the TGA which shows that while Congress imagined permits would be granted to ranchers, there was no absolute requirement that permits had to be granted to those intending to graze livestock. However, the Court further pointed out that under the regulations, a permit holder must make substantial use of the land as set out in the grazing permit,

which thus prohibits the Secretary from issuing permits for conservation use.

The ranchers' final challenge focused on a change in the way the new regulations allocate ownership of rangeland improvements, such as fencing or weed control. When a permit is issued to graze on public lands, the BLM has the right to incorporate certain terms into the permit or to acquiesce to certain terms through a cooperative agreement. For instance, a rancher might be required to maintain fences that direct his cattle away from environmentally sensitive areas, or he might be required to install an alternate water source to encourage cattle away from fragile riparian areas.

Before the 1995 regulations, the United States held full title to nonstructural improvements such as spraying for weeds, and to nonremovable improvements such as wells. Further, structural enhancements such as fences or stock tanks were owned by both the permit holder and the government in direct proportion with the respective amount of contribution to the construction. The new regulations, however, place title of permanent rangeland improvements in the hands of the United States, regardless of who constructed the improvements. The Court analyzed this provision under landlord-tenant law by recognizing that through a cooperative agreement, the BLM (i.e., the landlord) has the power to authorize range improvements and to set terms of title ownership to such improvements. Further, the rancher (i.e., the tenant) is free to negotiate the terms upon which he will make those improvements, including whether he will be compensated in the future for the work that he has done. Thus, the third amended regulation was held to be valid.

Jennifer Marshall

VIII. WASHINGTON STATE GROWTH MANAGEMENT ACT

Association of Rural Residents v. Kitsap County, 4 P.3d 115 (2000) (en banc)

The state of Washington passed a Growth Management Act (GMA) in 1990 to preserve areas like a site recently described by the Washington Supreme Court as "covered entirely with forest . . . . There is wildlife on the property, including black bear, deer, river otters, coyote, red foxes, flying squirrels, tree frogs, salamanders and numerous species of birds, including bald eagles . . . . There are steep slopes and bluffs throughout the property." The appeals court

description varied slightly. "Totally undeveloped, the property is mainly characterized by forest land intersected by a ravine and bordered on the east by high slopes. It contains bald eagle perches, a bear den, and is home to a large variety of other wildlife." On this site, the defendants planned to develop

> 106 residential lots, with on-site septic systems and water to be provided by the Kitsap County Public Utility District. These lots would consume about 52 of the 123 total acres, leaving the rest for open space (including a ballpark) and roadways. The resulting average lot size is slightly less than half an acre in size, with overall density proposed at about one unit per 1.13 acres.

The Washington GMA was enacted with thirteen specific goals including reduced sprawl, efficient development in urban areas, preservation of open space, and protection of the environment. The GMA set up a structure in which the state supplies financial and technical assistance, sets standards, and enforces the Act, but local and county governments play large roles in achieving GMA objectives by developing comprehensive plans to manage growth. Local governments are free to choose the priority they give the various goals, but their plans must include elements for land use, housing, capital facilities, utilities, rural land, and transportation. The plans must provide for open space corridors and public facilities. They must designate critical areas, implement growth controls, and require developers to pay development fees and provide for potable water and other services and facilities before permits will issue. Local governments must adopt development regulations and promote public participation in these processes. However, perhaps the most significant action counties must take, as the ultimate authorities, is to designate Urban Growth Areas (UGAs).

The function of UGAs is to draw lines outside of which urban growth may not occur. Self-contained urban development can occur outside of UGAs only if it complies with strict requirements. To prevent defeat of the GMA goal of containing growth within UGAs, county governments adopted interim UGAs (IUGAs) that essentially "froze" development outside the IUGAs until cities and counties could develop comprehensive plans and formalize permanent UGAs.

The main bodies responsible for addressing allegations of failure of state agencies, counties, or cities to comply with GMA requirements are three regional Growth Management Hearing Boards (GMHBs). The Boards do not hear appeals of individual land use decisions. Complete permit applications submitted and permits issued to developers receive vested rights protection and may go forward

despite subsequent zoning changes, including those made pursuant to the GMA. However, comprehensive plans and development regulations remain valid despite GMHB findings of noncompliance. This point was clarified in amendments to the GMA in 1995. The GMHB remands such plans to the local or county government, which then has a time limit within which to achieve compliance.

Kitsap County adopted an ordinance designating its IUGAs in 1993. On June 3, 1994, the Puget Sound GMHB found the IUGA was noncompliant. The GMHB had no power to invalidate the plan, but remanded it to the county for compliance. The remand period ended on October 3, 1994, but the county had not completed its comprehensive plan by that date. On December 15, the defendant Apple Tree Point Partners (ATPP) filed a plat and application to develop one hundred and twenty-three acres in Kitsap County. Fourteen days later, the county issued its final GMA comprehensive plan, development regulations, and UGA.

The instant action began when the Association of Rural Residents, a group of neighboring landowners, appealed the county's approval of ATPP's plan to the state trial court, which overturned the approval. The trial court held that the development constituted urban growth outside the IUGA and violated the GMA. It also ruled that if the project were to proceed, an Environmental Impact Statement (EIS) would be needed under the State Environmental Policy Act. ATPP and the county appealed the decision.

The state appellate court held that ATPP had a vested right to have its development proposal considered under the land use regulations in effect when it submitted its application to the county. ATPP's development plan was within the requirements of the pre-GMA zoning ordinance. However, the court decided that IUGAs are development regulations, and as such they preempted the county zoning ordinance that allowed growth outside of the IUGA. The court pointed out that "[t]o hold that the county's pre-GMA land use regulations continue to control development outside the IUGA until the county enacts local ordinances that comply with the GMA would render ineffective and meaningless the statute's requirement for designation of an interim urban growth area." The court ruled that despite the fact that the IUGA was not in compliance with the GMA at that time and had been remanded to the county, it had not been invalidated and therefore its prohibitions were in effect when ATPP's rights vested. The location of the property outside of the IUGA meant ATPP could not develop the property despite the approval it had received from the county under the pre-GMA zoning ordinance. In

addition, the GMA's prohibition against growth such as that proposed by ATPP outside of the growth boundary conflicted with the local zoning ordinance. The court ruled that where a "local ordinance cannot be harmonized with a conflicting statute, the statute prevails."

ATPP appealed to the state supreme court. The supreme court decided that the pre-GMA zoning ordinance applied to ATPP's project because the IUGA was not in effect at the time ATPP submitted its plat and application on December 15, 1994. The court ruled that after the period for remand expired (October 3, 1994), and before the county issued the comprehensive plan (December 29, 1994)—the interval during which ATPP submitted its application—the IUGA was not in effect. Further, the supreme court ruled that no GMA plan or regulation was in effect when the application was submitted, such that any decision made regarding the ATPP project must be made under pre-GMA land use regulations. The court did not mention the 1993 ordinance that adopted the Kitsap IUGA over a year prior to ATPP's application.

The court explained its decision as follows: "a non-complying regulation remains in effect during the period of remand. This allows the non-complying IUGA to remain in effect while it is being amended." The 1995 GMA amendments specified "a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand." The court did not address the fact that, although it may not have been absolutely clear whether the IUGA remained in effect during remand before the 1995 amendment to the GMA clarified the issue, the law certainly did not provide that the IUGA was not effective while on remand.

The dissent in the case argues that the IUGA remained in effect after remand and until it was amended because the GMHB had not invalidated it, nor had Kitsap County rescinded it. Thus, the IUGA continued to have force of law. The dissent posits:

> [T]he majority's position makes no sense in light of the history and purpose of the GMA and is diametrically opposed to the intent of the people of Washington. The Legislature intended IUGAs to prevent urban sprawl during the planning grace period . . . . The plain effect of the majority opinion is to permit urban sprawl and reward county recalcitrance in complying with the terms of the GMA.

The supreme court ruled that the trial court did not apply the proper standard when it deferred to the hearing examiner's recommendation to the county that an EIS be prepared for the ATPP development. The supreme court therefore remanded the case to the

trial court to decide if the county's decision that an EIS was not required was clearly erroneous. Ironically, the outcome of ATPP's project may depend on Washington's version of a law enacted long before most environmental laws existed—the National Environmental Policy Act.

Laura Pfefferle

IX. FEDERAL ADVISORY COMMITTEE ACT

Holy Cross Neighborhood Ass'n v. Julich, 106 F. Supp. 2d 876 (E.D. La. 2000)

Holy Cross Neighborhood Association and other citizen groups ("Citizens") brought suit against Colonel Thomas F. Julich, the District Engineer of the United States Army Corps of Engineers, New Orleans District ("Corps"), seeking immediate declaratory and injunctive relief barring the Corps from continuing to hold closed meetings of the Community-Based Mitigation Committee (CBMC). The Citizens alleged that the Corps failed to comply with the Federal Advisory Committee Act (FACA) which obligates the Corps to open all meetings of the CBMC to the public and allows the Citizens and other members of the public to appear before, and file statements with, the CBMC pursuant to the express requirements of FACA. The Corps, in response to this suit, filed a motion for summary judgment arguing that the CBMC is not a federal advisory committee and thus not subject to the constraints imposed by FACA.

The Industrial Canal Lock has been in existence since the 1920s, and the recent implementation of a modernization program gave rise to this litigation. The United States District Court for the Eastern District of Louisiana described the Industrial Canal Lock as "a vital link in the Gulf Intracoastal Waterway System, making navigation between the Mississippi River in New Orleans and the Gulf Intracoastal Waterway and Mississippi River-Gulf Outlet possible." However, the modernization project "will be a major undertaking that will significantly impact the communities surrounding the Canal." Therefore, the Corps was ordered by Congress to form the CBMC in order to mitigate negative impacts on surrounding communities.

According to the Citizens, the Corps, in conjunction with an independent contractor, subverted the open meeting requirement established by FACA, and denied committee membership to certain sections of the community. The Corps allegedly did this, in part, by conditioning membership upon signing a "Partnership Agreement."

This Agreement sought to obtain a commitment from everyone involved in creating the mitigation plan to work together in good faith for the citizens most affected by the Industrial Lock. Since they were excluded from active participation in the CBMC, therefore, the Citizens were relegated to relying on the Corps' goodwill in implementing the project.

The paramount issues for the court were whether the law required the CBMC to hold open meetings and whether the Citizens, as a result of the closed meeting format, suffered irreparable and substantial harm. Before addressing these issues, however, the court had to determine whether the CBMC was a federal advisory committee, and subject to FACA guidelines. Citing *Food Chemical News v. Young* and *Byrd v. United States Environmental Protection Agency*, the court found that there was a genuine issue of material fact as to whether the CBMC was subject to FACA. The court ultimately denied the Corps' motion for summary judgment based on its participation in selecting the CBMC's membership. Specifically, the court noted that Colonel Julich sent the Citizens a letter explaining that CBMC membership would be granted upon signing the Partnership Agreement with the Corps. Said letter, according to the court, created a genuine issue of material fact as to whether the Defendants were proactively involved in controlling the makeup of the CBMC. If it were found that the Corps did exercise authority and control over the CBMC membership, FACA's jurisdiction would be activated.

The court's decision to deny the Corps' Motion for Summary Judgment, however, did not advance the Citizens' request for declaratory and injunctive relief. Although there was evidence lending support to the Citizens' claim that FACA did govern CBMC meetings, the court determined that the Citizens failed to demonstrate any substantial or irreparable harm resulting from their inability to "attend, appear before, or file statements" with the CBMC.

The court's decision to deny injunctive relief for want of substantial or irreparable harm was based in part on its finding that FACA does not strictly require open meetings. The court noted that one of the primary goals of FACA "is to reduce the influence exerted by special interests on agency decision makers through advisory committees by ensuring the openness and accountability of such committees." Here, however, the court found that openness and accountability were provided by the CBMC through an interactive website that was set up to inform the public as to the contents of meetings, the dates of future meetings, and other relevant information.

Thus, although meetings were not literally open, the CBMC, as a substitute, established a forum by which Citizens could interact with the committee and access minutes from meetings. Therefore, although the court found that the CBMC did not necessarily comply "with the letter of the law, it . . . complied with the spirit, and the harm is neither substantial nor irreparable."

Thomas Trent