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## Washington Environmental Law in Review

Robert Sykes

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## WASHINGTON ENVIRONMENTAL LAW YEAR IN REVIEW

*Robert Sykes*

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## INTRODUCTION

This annual publication from the Washington Journal of Environmental Law & Policy provides a summary of recent developments in Washington State environmental law. This Year in Review summarizes laws passed during the 2013-2014 legislative session and environmental case law decided the Washington State Supreme Court from late 2013 to late 2014. The court and legislature addressed several important environmental issues this year, including timber and water rights, renewable energy, air quality, and agency reporting requirements.

The author reviewed these developments in Washington environmental law and summarized those determined to be most significant. All agencies referred to are Washington agencies. The author refers to agencies by shortened names, for example, the Department of Ecology (Ecology) and the Department of Fish and Wildlife (Wildlife).

## FORESTS

### *HB 2099: Extending the Expiration Date for Reporting Requirements on Timber Purchases*

House Bill 2099 extends the reporting requirements for certain timber purchases.<sup>1</sup> Purchases in excess of 200,000 board feet of privately-owned timber through confidential sales must be reported to the Department of Revenue.<sup>2</sup> This requirement was set to expire on July 1, 2014, but HB 2099 extended it to July 1, 2018.<sup>3</sup> The report must provide, among other things, (1) the purchaser's and seller's names and contact information; (2) the sale date; (3) the total acreage; (4) the tree species; and (5) the estimated net volume of timber.<sup>4</sup> Failure to comply with this requirement will result in a \$250 fine for each violation.<sup>5</sup> The requirement is part of a general legislative scheme designed to encourage forestry and reforestation of land

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1. Act of March 31, 2014, ch. 152, 2014 Wash. Sess. Laws 791 (codified as amended at WASH. REV. CODE § 84.33.088 (2014)).

2. See Act of March 21, 2010, ch. 197, 2010 Wash. Sess. Laws. 1530 (amended 2014).

3. Act of March 31, 2014, ch. 152, § 1(5), 2014 Wash. Sess. Laws 791, 792.

4. *Id.* § 1(2), 2014 Wash. Sess. Laws at 791–92.

5. WASH. REV. CODE § 84.33.088(3).

in the hopes that “natural ecological equilibrium” will allow future Washingtonians to enjoy the state’s forests for years to come.<sup>6</sup>

*SB 5973: Creating the Community Forest Trust Account*

SB 5973 creates a new account to assist the Department of Natural Resources’ management of Community Forest Trusts (CFTs).<sup>7</sup> In 2011, the legislature created the Community Forest Trust Program.<sup>8</sup> That same year, it also gave the Department of Natural Resources (DNR) discretion to create and manage CFTs in furtherance of forest conservation objectives.<sup>9</sup> To meet these objectives, the legislature imposed financial constraints on DNR. Under these directives, DNR must receive legislative guidance on how to spend CFT revenues. Secondly, it must obtain financial commitments from local communities before establishing a CFT. Lastly, revenue from transfers of other state trust lands into the CFT must be distributed to trust beneficiaries.<sup>10</sup> DNR previously used the Resource Management Cost Account and Parkland Trust Revolving Fund to manage CFT funds and costs.<sup>11</sup> Under the new law, however, an account is created specifically for management of CFT assets.<sup>12</sup> DNR must deposit all monies generated for CFT purposes, by appropriation or otherwise, into this account.<sup>13</sup>

ALTERNATIVE ENERGY

*HB 2708: Concerning a Qualified Alternative Energy Resource*

In HB 2708, the legislature slightly increased the list of qualifying alternative energy sources utility companies must offer their customers.<sup>14</sup> Since 2002, all Washington utility

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6. *Id.* § 84.33.010.

7. Act of March 17, 2014, ch. 32, 2014 Wash. Sess. Laws 90 (codified as amended at WASH. REV. CODE §§ 43.30, 79.64, 79.155, 43.84).

8. WASH. REV. CODE §§ 79.155.010–79.155.150.

9. See FINAL B. REP., Second Substitute S.B. 5973, 63d Leg., Reg. Sess., at 117 (Wash. 2014).

10. *Id.*

11. *Id.*

12. Act of March 17, 2014, ch. 32, § 1, 2014 Wash. Sess. Laws 90, 90.

13. *Id.*

14. Act of March 28, 2014, ch. 129, 2014 Wash. Sess. Laws 658 (codified as amended

companies must offer customers an option to purchase qualified alternative energy resources, whether from their own resources or through credit purchases from other providers.<sup>15</sup> Previously, organic sources from solid non-chemically-treated woody biomass qualified as an alternative energy resource.<sup>16</sup> With the passage of HB 2708, sources from liquid woody biomass now meet the criteria as well.<sup>17</sup>

*ESHB 1643: Regarding energy conservation under the energy independence act*

The legislature modified the way electric utilities meet conservation goals under the Energy Independence Act in ESHB 1643.<sup>18</sup> In 2006, Washington voters passed Initiative 937, the Energy Independence Act,<sup>19</sup> which requires utilities with 25,000 or more customers to meet conservation targets and use eligible alternative energy resources.<sup>20</sup> Since 2010, it has called for utilities to assess available acquisition targets through 2019.<sup>21</sup> Utilities must model their conservation targets using methodologies consistent with those used by the Pacific Northwest Electric Power and Conservation Planning Council.<sup>22</sup>

ESHB 1643 permits utilities to receive credit for exceeding previous years' conservation targets. Qualifying utilities may use conservation achieved in excess of their biennial goals to meet no more than twenty percent of its subsequent two biennial goals.<sup>23</sup> A utility may meet an additional five percent of its biennial goals with excess conservation achieved from "single large facilities,"<sup>24</sup> such that it uses this excess to meet

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at WASH. REV. CODE § 19.29A.090 (2014).

15. WASH. REV. CODE § 19.29A.090(1)–(2).

16. WASH. REV. CODE § 19.29A.090(1)–(2) (2013).

17. Act of March 28, 2014, ch. 129, § 1(3)(h), 2014 Wash. Sess. Laws 658, 658–57.

18. Act of March 17, 2014, ch. 26, 2014 Wash. Sess. Laws 77 (codified as amended at WASH. REV. CODE § 19.285.040 (2014)).

19. Act effective Dec. 7, 2006, ch. 1, 2007 Wash. Sess. Laws 1 (codified at WASH. REV. CODE §§ 19.285.010–19.285.903).

20. WASH. REV. CODE § 19.285.040(1).

21. *Id.* § 19.285.040(1)(b).

22. *Id.* § 19.285.040(1)(a).

23. Act of March 17, 2014, ch. 26, § 1(1)(c), 2014 Wash. Sess. Laws 77, 78.

24. *Id.* § 1(1)(c)(ii), 2014 Wash. Sess. Laws at 78 ("[S]ingle large facility conservation savings' means cost-effective conservation savings achieved in a single biennial period

no more than twenty-five percent of its goals.<sup>25</sup> Likewise, qualifying utilities may use excess conservation from directly interconnected facilities to meet no more than twenty-five percent of their biennial conservation goals.<sup>26</sup> They must calculate conservation according to the same methodologies previously imposed by the Energy Independence Act.<sup>27</sup>

*Friends of the Gorge, Inc. v. State Energy Facility Site Evaluation Council*

The court upheld the siting process for the Whistling Ridge Energy Project (WREP) in *Friends of the Gorge, Inc. v. State Energy Site Evaluation Council*.<sup>28</sup> The WREP has been the subject of controversy for several years.<sup>29</sup> The project is located in rural Skamania County near—but not in—the Columbia River Gorge Scenic Area.<sup>30</sup> Project opponents object to the project’s siting near the Gorge because of its potential effects on birds, fish, wildlife, and views from the gorge.<sup>31</sup> Of the 1,152 acres of land owned by the parent company of WREP, the project uses fifty-seven acres for wind turbines.<sup>32</sup> Although that land is predominately old logging roads, power lines, and natural gas pipelines, the turbines would be visible in the gorge, recognized by many as an “area of pristine natural beauty.”<sup>33</sup> Two environmental groups, Friends of the Gorge and Save Our Scenic Area (“Friends”) sought invalidation of the site’s approval.<sup>34</sup>

To affect its alternative energy policy, the legislature created the Energy Facility Site Evaluation Council (EFSEC) to

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at the premises of a single customer of a qualifying utility whose annual electricity consumption prior to the conservation savings exceeded five average megawatts.”).

25. *Id.*

26. *Id.* § 1(1)(c)(iii), 2014 Wash. Sess. Laws at 78.

27. *Id.* § 1(1)(a), 2014 Wash. Sess. Laws at 78.

28. *Friends of the Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wash. 2d 320, 310 P.3d 780 (2013).

29. *See, e.g., Stop the Whistling Ridge Energy Project*, FRIENDS OF THE COLUMBIA GORGE, <http://www.gorgefriends.org/section.php?id=56> (last visited December 13, 2014).

30. *Friends of the Gorge*, 178 Wash. 2d at 327, 310 P.3d at 782.

31. *Id.* at 327–28, 310 P.3d at 782–83.

32. *Id.* at 327, 310 P.3d at 782.

33. *Id.*

34. *Id.*

evaluate new alternative energy proposals through public hearings and adjudications.<sup>35</sup> When it receives a proposal, EFSEC conducts public hearings in the county the project will be sited and involves representatives of the major state environmental agencies.<sup>36</sup> If EFSEC approves a proposal, it submits a draft certification agreement to the governor, who may reject, modify, or approve the proposal execute and execute a site certification agreement (SCA).<sup>37</sup> The SCA describes the conditions the applicant must comply with and displaces other state regulations.<sup>38</sup> Friends did not challenge EFSEC's compliance with these statutory requirements.<sup>39</sup> Instead, it challenged EFSEC's compliance with various environmental regulations demanding consideration of adverse environmental and wildlife effects.<sup>40</sup>

The court upheld the SCA and held that Friends failed to prove WREP's compliance with governing law. Friends had alleged that WREP failed to include a complete assessment of nighttime avian collisions. The court held, however, that WREP's estimate, modeled off data from other wind projects, was sufficient for EFSEC to review.<sup>41</sup> Friends also complained that the application failed to comply with WDFW wind power guidelines, but the court emphasized that those were simply "guidelines."<sup>42</sup>

The court called other inconsistencies in WREP's application "insignificant."<sup>43</sup> Complete resolution of all issues, according the court, cannot be addressed at the application stage.<sup>44</sup> The court also addressed Friends' concerns about scenic views. The court held that EFSEC considered scenic views as much as the statute required, stating that Friends misunderstood EFSEC's role in balancing competing interests.<sup>45</sup> EFSEC weighed those

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35. *Friends of the Gorge*, 178 Wash. 2d at 329, 310 P.3d at 783.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Friends of the Gorge*, 178 Wash. 2d at 337, 310 P.3d at 787.

42. *Id.* at 336, 310 P.3d at 787.

43. *Id.* at 340, 310 P.3d at 788.

44. *Id.*

45. *See id.* at 344, 310 P.3d at 791.

preferences and ultimately reduced the wind turbine acreage.<sup>46</sup> In fact, EFSEC's adjudicative order and the SCA require additional mitigation tactics to preserve the view from the gorge.<sup>47</sup>

## CLEAN AIR

### *E2SHB 2569: Reducing Air Pollution Associated with Diesel Emissions*

E2SHB 2569 expands Ecology's diesel idle-reducing investment program.<sup>48</sup> Previously, Ecology could provide grants for private and public entities' diesel idle-reducing goals.<sup>49</sup> Now, it promotes the same goals through its Diesel Idle Reduction Account, from which it offers low- or no-interest loans to state and local governments.<sup>50</sup> The loans are predicated on considerations of the environmental impacts of diesel idling.<sup>51</sup> Consequently, only entities whose vehicles primarily reside in Washington are eligible to receive them.<sup>52</sup>

### *PT Air Watchers v. Department of Ecology*

In *PT Air Watchers v. Department of Ecology*,<sup>53</sup> the court deferred to Ecology's findings and approved a new energy cogeneration project in Port Townsend. Port Townsend Paper Corporation (PTPC) applied to Ecology for a permit to build a new, non-fossil-fueled cogeneration facility at its current plant.<sup>54</sup> The project would add a new turbine to the plant's steam boilers and decrease the burning of fossil fuels in favor of woody biomass.<sup>55</sup> Using woody biomass would improve the plant's overall efficiency and allow PTPC to sell surplus

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46. *Id.*

47. *Id.*

48. Act of March 27, 2014, ch. 74, 2014 Wash. Sess. Laws 350 (amending WASH. REV. CODE § 43.84.092 (2014) and adding a new chapter to WASH. REV. CODE tit. 70).

49. See FINAL B. REP., Engrossed Second Substitute H.B. 2569, 63d Leg., Reg. Sess., at 77 (Wash. 2014).

50. Act of March 27, 2014, ch. 74, § 3(1), 2014 Wash. Sess. Laws 350, 350.

51. *Id.*

52. *Id.* § 3(3), 2014 Wash. Sess. Laws at 350.

53. *PT Air Watchers v. Dep't of Ecology*, 179 Wash. 2d 919, 319 P.3d 23 (2014).

54. *Id.* at 923, 319 P.3d at 25.

55. *Id.*



electricity back into the power grid.<sup>56</sup> Pursuant to SEPA, Ecology issued a determination of non-significance and approved the construction project.<sup>57</sup> PT Air Watchers appealed, claiming that Ecology failed to consider the impact of carbon emissions from burning woody biomass and the effect on the Pacific Northwest's forests.<sup>58</sup>

Generally speaking, Washington courts defer to SEPA as a lead agency.<sup>59</sup> When a developer submits an application to Ecology, it makes a threshold determination of environmental significance, which is entitled to "substantial weight."<sup>60</sup> This initial determination is drawn from an environmental checklist prepared by the applicant.<sup>61</sup> If action is determined to be significant, Ecology requires an Environmental Impact Statement (EIS); otherwise, Ecology issues a determination of non-significance.<sup>62</sup>

The court gave substantial weight to Ecology's determination. Ecology had argued that, by burning biomass, PTPC burns fewer fossil fuels and any carbon emitted from burning biomass would show up in the atmosphere anyway; thus, there is actually a net *decrease* in carbon emissions from burning woody biomass.<sup>63</sup> Ecology pointed to the legislature's preference<sup>64</sup> for burning biomass to burning biofuels,<sup>65</sup> which the court called a "legitimate reference" for Ecology.<sup>66</sup> Further, the court noted, Ecology has authority under SEPA to reach independent and project-specific determinations of significance.<sup>67</sup> In fact, Ecology did consider the climate effects of burning woody biomass.<sup>68</sup> After it received the application, it heard public comments. All sides had the opportunity to

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56. *Id.* at 923–24, 319 P.3d at 25.

57. *Id.*

58. *Id.* at 924, 319 P.3d at 26.

59. *See PT Air Watchers*, 179 Wash. 2d at 925, 319 P.3d at 26.

60. *Id.* at 926, 319 P.3d at 27.

61. *Id.* (citing WASH. ADMIN. CODE § 197-11-315 (2013)).

62. *Id.* (citing WASH. ADMIN. CODE § 197-11-340).

63. *Id.* at 928, 319 P.3d at 27.

64. *Id.* (citing WASH. REV. CODE § 70.235.020(3) (2013)).

65. *Id.*

66. *PT Air Watchers*, 179 Wash. 2d at 929, 319 P.3d at 28.

67. *Id.*

68. *Id.*

oppose and support the project.<sup>69</sup> In the end, the court deferred to the Ecology's expertise on its conclusion.<sup>70</sup>

The court also addressed PT Air Watcher's concerns for adverse impacts on Washington forests.<sup>71</sup> Without much explanation, the court concluded that Ecology relied on the fact that the project would have to comply with state and federal forest regulations.<sup>72</sup> The court deferred to Ecology's finding that the project would not have an adverse impact on forests because PTPC did not plan on cutting down any new trees to source its woody biomass.<sup>73</sup>

Finally, the court considered whether an EIS should have been required despite Ecology's determination of non-significance.<sup>74</sup> PT Air Watchers had argued that section 70.95.700 of the Revised Code of Washington requires an EIS for any solid waste incineration or energy recovery facility operated after January 1, 1989.<sup>75</sup> PTPC has burned some solid waste for at least 30 years.<sup>76</sup> PT Air Watchers argued that this exemption should not apply because PTPC never used the facility to generate electricity and sell to outside parties.<sup>77</sup> Instead, PTPC used the facility to recover useable energy for its own operations and the project in this case merely modified an existing facility.<sup>78</sup> On this point, the court ruled that energy recovery under the statute includes converting solid waste into usable energy, not only selling it to outside parties.<sup>79</sup> Any other reading, the court ruled, would render the exemption meaningless.<sup>80</sup>

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69. *Id.*

70. *See id.* at 930, 319 P.3d at 28.

71. *See id.* at 931, 319 P.3d at 29.

72. *PT Air Watchers*, 179 Wash. 2d at 931, 319 P.3d at 29.

73. *See id.*

74. *Id.*

75. *Id.* at 933, 319 P.3d at 30.

76. *Id.*

77. *PT Air Watchers*, 179 Wash. 2d at 934, 319 P.3d at 28.

78. *Id.*

79. *Id.*

80. *Id.*

## WATER AND WATER RIGHTS

*SHB 2454: Developing a Water Quality Trading Program in Washington*

The legislature addressed water quality trading in SHB 2454.<sup>81</sup> Adding a provision to section 89 of the Revised Code of Washington, the legislature ordered Ecology and the Conservation Commission to determine whether water quality buyers and sellers in the State's watersheds could support implementation of a trading program.<sup>82</sup> The Commission must now report its findings to the legislature and coordinate with other state agencies and local Indian tribes when drafting the report.<sup>83</sup> Ecology must approve any report submitted by the Commission.<sup>84</sup>

Water quality trading is a market-oriented solution to water-pollution control. It allows bigger polluters to purchase credits from smaller ones.<sup>85</sup> Essentially, the legislature recognized that different water polluters face different costs to control the same pollutants.<sup>86</sup> Providing trade-based pollution-control mechanisms, the State could achieve the same level of control as it does now, but at a lower cost to regulated industries.<sup>87</sup> However, any chance of water quality trading occurring will depend on action by the legislature. State lawmakers will have to implement such a program in order for it to get off the ground. Ecology has explored this issue in the past, but the Legislature found a lack of interest to be a barrier to large-scale implementation.<sup>88</sup>

*Swinomish Indian Tribal Community v. Dept. of Ecology*

The court addressed minimum instream flows and water rights in *Swinomish Tribal Community v. Department of*

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81. Act of March 27, 2014, ch. 73, 2014 Wash. Sess. Laws 348 (codified at WASH. REV. CODE § 89.08.600 (2014)).

82. *Id.* § 2(1), 2014 Wash. Sess. Laws at 349.

83. *Id.* § 2(2)–(3), 2014 Wash. Sess. Laws at 349.

84. *Id.*

85. *Id.* § 1(1), 2014 Wash. Sess. Laws at 348.

86. *Id.*

87. *Id.*

88. *Id.* § 1(5), 2014 Wash. Sess. Laws at 349.

*Ecology*.<sup>89</sup> Narrowing Ecology's statutory authority to impair minimum instream flows, the court held that the "Overriding Concern for Public Interest" (OCPI) exception to the state's minimum flow requirements does not permit Ecology to balance beneficial uses against harms of impaired water rights.<sup>90</sup>

The *Swinomish* litigation has a long and complex history. With more than 3,000 rivers and streams flowing into it, the Skagit river system is the third largest river system in the western United States.<sup>91</sup> The system is also the only one in the lower 48 states that contain all six species of Pacific Salmon.<sup>92</sup> The river system provides water for "a very large number of water right holders."<sup>93</sup> In 2003, pursuant to its statutory authority,<sup>94</sup> Ecology promulgated the Skagit River Basin Instream Flow Rule.<sup>95</sup> That rule set minimum instream flow levels in the Skagit River Basin without allocating non-interruptible water for new uses.<sup>96</sup> Instead, it ruled that water set aside for new uses was subject to shut-off if stream flows fell below minimums established by the rule.<sup>97</sup> Arguing that this rule prevented new commercial and residential development, Skagit County sued Ecology.<sup>98</sup>

The *Swinomish* suit grew out of the settlement from the earlier case. From 2003–2006, Ecology attempted to resolve the dispute by amending the rule.<sup>99</sup> In 2006, Ecology started rulemaking and proposed an amended rule: Skagit County offered to drop its suit in exchange for a revised rule reserving water for specified uses, even if the streams were below the levels set by rule.<sup>100</sup> Water set aside for these uses would not

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89. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wash. 2d 571, 311 P.3d 6 (2013).

90. *Id.* at 576, 311 P.3d at 8.

91. *Id.* at 577, 311 P.3d at 8.

92. *Id.*

93. *Id.* at 577, 311 P.3d at 8–9.

94. *Id.* at 576, 311 P.3d at 8.

95. *Swinomish*, 178 Wash. 2d at 577, 311 P.3d at 9 (citing WASH. ADMIN. CODE §§ 173–503 (2012)).

96. *Id.*

97. *Id.*

98. *Id.* at 578, 311 P.3d at 9.

99. *Id.*

100. *Swinomish*, 178 Wash. 2d at 578, 311 P.3d at 9 (citing WASH. ADMIN. CODE §§

be shut off, despite instream levels below the minimum level set by the previous rule.<sup>101</sup> Ecology justified the rule under the OCPI exception to the minimum instream flow rule because water shut-offs would adversely affect domestic, industrial, municipal, and agricultural uses of water and the overall impact on fish and wildlife would be small.<sup>102</sup> The Swinomish Tribal Community disagreed and sued Ecology, claiming the agency had misconstrued the OCPI exception.<sup>103</sup> Under that exception, the State cannot interfere with those minimum flows unless “it is clear that overriding considerations of the public interest will be served.”<sup>104</sup> Ecology’s water restrictions unquestionably impaired minimum instream levels.<sup>105</sup> The question in this case was whether that impairment was justified.

Ecology failed to persuade the court, which described Ecology’s rationale as a balancing test “of its own devising.”<sup>106</sup> To determine whether OCPI applied, Ecology weighed “beneficial uses” of impairing minimum flows, such as commerce and development, against potential harms and the overall benefits of the new rule outweighed any potential harms stemming from impairment.<sup>107</sup> However, as the court noted, had the legislature adopted Ecology’s “beneficial use” measure, rural developments would virtually always prevail over environmental concerns.<sup>108</sup> That would conflict with the legislature’s stated policy to ensure that adequate water supplies remain available while preserving water for future

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173-503-073–173-503-075).

101. *Id.*

102. *Id.* at 579, 311 P.3d at 9–10.

103. *See id.* at 579, 311 P.3d at 10.

104. *Id.* at 579, 311 P.3d at 9; *see also* WASH. REV. CODE § 90.54.020(3)(a) (2014) (“The quality of the natural environment shall be protected and, where possible, enhanced as follows: (a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.”).

105. *Swinomish*, 178 Wash. 2d at 583, 311 P.3d at 11.

106. *Id.* at 583, 311 P.3d at 12.

107. *See id.* at 583–84, 311 P.3d at 11–12.

108. *Id.* at 587, 311 P.3d at 14.

users' enjoyment.<sup>109</sup> Ecology's test does not give effect to that policy.<sup>110</sup> The legislature and the court treat minimum water flows, created by appropriation, as a water right.<sup>111</sup> Like other water rights in Washington, they have priority over later appropriations and those appropriations cannot impair them.<sup>112</sup> However, by aggregating various beneficial uses together—none of which would constitute an overriding public interest on its own—Ecology essentially relegates minimum flows to a lesser class of water rights.<sup>113</sup>

The upshot of this decision is that economic gains, standing alone, will not justify impairment of base water flows. Instead, Ecology must consider the overall environmental impact of its impairment of base flows, including the effect of fish, wildlife, and recreation.

## FISH AND WILDLIFE

### *ESSB 6040 Concerning Invasive Species*

ESSB 6040 strengthens Wildlife's enforcement power with regard to invasive species.<sup>114</sup> The Act designates the Department as the "state's lead agency" for managing many types of aquatic and terrestrial invasive species.<sup>115</sup> Calling for an "integrated management approach,"<sup>116</sup> the Act empowers Wildlife to develop a wide range of rapid-response, prevention, eradication, and monitoring programs. It permits the Department to conduct outreach initiatives, to ensure that standards are aligned with regional and national practices, and to provide management assistance to government entities.<sup>117</sup> It is free to make rules in order to implement any of

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109. *Id.* (citing WASH. REV. CODE § 90.54.010(1)(a) (2012)).

110. *See id.* at 588, 311 P.3d at 14.

111. *See Swinomish*, 178 Wash. 2d at 589, 311 P.3d at 14.

112. *See id.* at 596–97, 311 P.3d at 18.

113. *Id.* at 596, 311 P.3d at 18.

114. Act of April 2, 2014, ch. 202, 2014 Wash. Sess. Laws 972 (creating a new chapter in WASH. REV. CODE tit. 77 (2014) and amending and repealing parts of WASH. REV. CODE §§ 77.12, 77.15, 77.60, 43.06, 43.43, 10.31).

115. *Id.* § 103, 2014 Wash. Sess. Laws at 976.

116. *Id.* § 101(11), 2014 Wash. Sess. Laws at 972.

117. *See* FINAL B. REP., Substitute S.B. 6040, 63d Leg., Reg. Sess., at 129 (Wash. 2014).

its powers granted under the law, and it can also delegate this authority to agencies with relevant expertise.<sup>118</sup>

The Act also introduces a new aquatic species classification scheme.<sup>119</sup> It allows rulemaking in order to classify and list prohibited non-native species according to the risk they pose, the management action required, and the resources available to manage them.<sup>120</sup> Species that pose a high invasive risk are classified as “Prohibited Level 1” and are prioritized for prevention and rapid response.<sup>121</sup> Posing a slightly lower risk, “Prohibited Level 2” species are prioritized for long-term infested site management.<sup>122</sup> All other prohibited species, which pose a moderate-to-high risk, “may be appropriate” for preventive or rapid-response action.<sup>123</sup>

The Department may also classify “regulated,” non-native aquatic species.<sup>124</sup> Type A species pose a low-to-moderate invasive risk and can be managed based on their intended beneficial use or geographic scope of introduction.<sup>125</sup> Wildlife must balance these species’ invasive risk against their beneficial use.<sup>126</sup> All other species are either Type B or Type C—their risk is so low that no rule mandates their listing.<sup>127</sup> Type B refers to non-native species with low or unknown invasive risk.<sup>128</sup> In fact, Type B species can be used for commercial purposes, but they must be clearly identified in writing. All other species with low or unknown invasive risk are Type C.<sup>129</sup> The Department can reclassify any species at its discretion.<sup>130</sup>

The new law also clarifies the scope of Wildlife’s response to invasive species. If it detects a Prohibited Level 1 species, it

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118. Act of April 2, 2014, ch. 202, § 104, 2014 Wash. Sess. Laws 972, 977.

119. *Id.* § 104(1), 2014 Wash. Sess. Laws at 977.

120. *Id.*

121. *Id.* § 104(1)(a), 2014 Wash. Sess. Laws at 977.

122. *Id.* § 104(1)(b), 2014 Wash. Sess. Laws at 977.

123. *Id.* § 104(1)(c), 2014 Wash. Sess. Laws at 977.

124. Act of April 2, 2014, ch. 202, § 104(3), 2014 Wash. Sess. Laws at 977.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* § 104(3)(a), 2014 Wash. Sess. Laws at 977.

129. *Id.* § 104(3)(b), 2014 Wash. Sess. Laws at 977.

130. Act of April 2, 2014, ch. 202, § 104(1), 2014 Wash. Sess. Laws at 977.

may respond rapidly and quarantine affected areas.<sup>131</sup> Wildlife will end its response only once the species is eradicated, contained, or reclassified.<sup>132</sup> If Wildlife detects a Prohibited Level 2 species, it may implement long-term management actions in conjunction with quarantine.<sup>133</sup> If the agency finds a Prohibited Level 1 or a Prohibited Level 2 species seriously endangers the environment or economy, the Director may ask the governor to order emergency remedial measures.<sup>134</sup>

The law also imposes criminal penalties. Any person entering the state in possession of an “aquatic conveyance” must produce a certificate of compliance upon request of the fish and wildlife operator—failure to do so is a gross misdemeanor.<sup>135</sup> Any person who knowingly introduces a prohibited Level 1 or Level 2 species without authorization is guilty of a class C felony.<sup>136</sup>

### *2SHB 2251: Concerning Fish Barrier Removals*

2SHB 2251 amends various statutes concerning fish barriers.<sup>137</sup> Construction projects that will “use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state” must first obtain Hydraulic Project Approval (HPA)<sup>138</sup> from the Washington Department of Fish and Wildlife (WDFW).<sup>139</sup> Projects meeting the criteria of a “fish habitat enhancement project” may qualify for streamlined review, receiving an HPA decision within forty-five days, and are exempt from local government permitting or fees.<sup>140</sup> WDFW and the Department of Transportation (DOT) share responsibility administering programs that eliminate fish

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131. *Id.* § 107(1), 2014 Wash. Sess. Laws at 979.

132. *Id.* § 108(1), 2014 Wash. Sess. Laws at 979.

133. *Id.* § 109(1), 2014 Wash. Sess. Laws at 980.

134. *Id.* § 111(1), 2014 Wash. Sess. Laws at 981.

135. *Id.* § 205(2), 2014 Wash. Sess. Laws at 990.

136. Act of April 2, 2014, ch. 202, § 206(2), 2014 Wash. Sess. Laws at 990.

137. Act of March 28, 2014, ch. 120, 2014 Wash. Sess. Laws 616 (codified as amended at WASH. REV. CODE §§ 77.55, 77.95, 19.27, 35.21, 35.63, 35A.21, 35A.63, 36.70, 36.70A, 43.21C (2014)).

138. *See* WASH. REV. CODE § 77.55.011(11) (defining “hydraulic project” as “the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state”).

139. *Id.* § 77.55.021.

140. *Id.* § 77.55.181.



passage barriers caused by state roads and highways.<sup>141</sup> Previously, this duty fell upon a jointly-convened Fish Passage Barrier Removal Task Force.<sup>142</sup>

Before the amendments, there were six ways to approve fish habitat enhancement projects for streamline review. WDFW was central to three of them: acting pursuant to chapters 77.95 or 77.100, sponsoring a department-wide program, or establishing a formal grant program. (The legislature had the same grant-making authority.) Alternatively, one could streamline review through a chapter 89.08 watershed restoration plan sponsor, through the Jobs for the Environment program, or through the approval process for conservation-district projects.<sup>143</sup> The Bill adds three avenues for streamlined approval: 1) DOT's Environmental Retrofit program; 2) as a standalone fish passage barrier correction project; and 3) through a grant program designed to implement standalone fish passage barrier corrections.<sup>144</sup> The legislature also added a provision excusing the state from all liability for streamline review projects, except in cases of gross negligence or willful or wanton misconduct.<sup>145</sup>

Lawmakers directed WDFW and DOT to correct barriers in whole streams to “maximize[e] habitat recovery,” and to work with other entities “in a manner that achieves the greatest cost savings to all parties.”<sup>146</sup> Under this scheme, WDFW must form a barrier removal board to replace the defunct task force.<sup>147</sup> The board is to be chaired by a representative from WDFW, and comprised of members from DOT, cities, counties, the governor's Salmon Recovery Office, tribal governments, and the Department of Natural Resources.<sup>148</sup> The chair has discretion to expand the membership of the board to include representatives of other government entities, stakeholders, and “interested entities.”<sup>149</sup>

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141. *Id.* § 77.95.180.

142. *Id.* § 77.95.160.

143. *Id.* § 77.55.181(1)(c).

144. Act of March 28, 2014, ch. 120, § 1(1)(c)(viii)–(x), 2014 Wash. Sess. Laws 616, 616–17 (codified as amended at WASH. REV. CODE § 77.55.181).

145. *Id.* § 1(5), 2014 Wash. Sess. Laws at 617.

146. *Id.* § 2(1)(b), 2014 Wash. Sess. Laws at 618.

147. *Id.* § 4(1), 2014 Wash. Sess. Laws at 619.

148. *Id.*

149. *Id.*

## AGENCY ACTION

*SHB 2261 and SHB 2262: Concerning the Use of Science to Support Significant Agency Action*

Substitute House Bills 2261<sup>150</sup> and 2262<sup>151</sup> emphasize the necessity of peer-reviewed science in two agencies' reporting requirements. Under Washington administrative procedures, Ecology and Wildlife must allow public inspection of any records within their purviews.<sup>152</sup> The records must be indexed to include any interpretative or policy statements, declaratory orders, or orders from agency adjudications.<sup>153</sup> Additionally, the departments must identify any peer-reviewed scientific literature as well as any other sources relied upon to support "significant agency action."<sup>154</sup>

Under the new law, the agencies must post any such scientific information online, ranked in order of the sources' level of outside review<sup>155</sup> This information includes research independently reviewed by a third party, agency staff, or agency-selected persons; documents whose review is not limited to invited organizations or individual; legal and policy documents; non-peer-reviewed data from primary research and monitoring activities; and records of agency employees' professional opinions. The legislature did not state a preference for any one specific source of information over another.<sup>156</sup>

The new requirement reflects a legislative emphasis on science-based policy. Under current administrative procedure, Washington courts review agency action under specified

150. Act of March 13, 2014, ch. 21, 2014 Wash. Sess. Laws 67 (codified as amended at WASH. REV. CODE § 34.05.271 (2014)).

151. Act of March 13, 2014, ch. 22, 2014 Wash. Sess. Laws 69 (codified as amended at WASH. REV. CODE § 34.05.272).

152. WASH. REV. CODE §§ 34.05.271–34.05.272.

153. *Id.*

154. Significant agency action is defined as an act that results in the development of a significant legislative rule, technical guidance, or fish and wildlife recovery plans. WASH. REV. CODE § 34.05.271(c)(3).

155. *See* Act of March 13, 2014, ch. 21, § 1(1)(c), 2014 Wash. Sess. Laws 67, 68; *id.* § 1(1)(c), 2014 Wash. Sess. Laws at 69; *see also* FINAL B. REP., Substitute H.B., 63d Leg., Reg. Sess., at 54 (Wash. 2014).

156. Act of March 13, 2014, ch. 21, § 1(1)(b), 2014 Wash. Sess. Laws 67, 68; *id.* § 1(1)(b), 2014 Wash. Sess. Laws at 69.

standards of review.<sup>157</sup> Courts may strike down agency rules if the records, when viewed as a whole, do not support agencies' decisions.<sup>158</sup> By mandating the disclosure of the intensity of outside review, the legislature has given the courts another factor to consider when reviewing Ecology and Wildlife actions.

## DEVELOPMENT AND GROWTH

### *Town of Woodway v. Snohomish County*

In *Town of Woodway v. Snohomish County*,<sup>159</sup> the Washington State Supreme Court considered SEPA's effect on the state's vested rights doctrine. In this case, the court created an exception to SEPA, holding that a developer's rights vest when it submits a complete development application, even if governing local ordinances violate SEPA.<sup>160</sup>

Washington follows the minority version of the vested rights doctrine.<sup>161</sup> The doctrine holds that developers have a vested right to have their proposals processed under land use regulations in effect at the time they submit a complete application.<sup>162</sup> Courts and agencies cannot invalidate projects under regulations after the developer submits a completed application.<sup>163</sup> As a policy matter, the doctrine favors land developers and assures certainty when they apply for a development permit.<sup>164</sup>

*Town of Woodway* considered the scope of the doctrine in relation to SEPA. In this case, a developer, BSRE Point Wells LP (BSRE), owned 61 acres of waterfront in unincorporated Snohomish County designated as Urban Industrial.<sup>165</sup> BSRE lobbied the County to re-zone the land as "Urban Center," which would permit retail, commercial, and residential

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157. WASH. REV. CODE § 34.05.570.

158. *Id.* § 34.05.570(5).

159. *Town of Woodway v. Snohomish County*, 180 Wash. 2d 165, 322 P.3d 1219 (2014).

160. *See id.* at 169, 322 P.3d at 1221.

161. *See id.* at 173, 322 P.3d at 1223.

162. *Id.*

163. *See id.*

164. *Id.* at 173, 322 P.3d at 1223

165. *Woodway*, 180 Wash. 2d at 170, 322 P.3d 1222

development along the waterfront.<sup>166</sup> Complying with the request, the County re-zoned the land in 2009 and amended its building ordinances to accommodate BSRE's planned development in 2010.<sup>167</sup> As required by the Growth Management Act (GMA),<sup>168</sup> the County drafted an Environmental Impact Statement (EIS), issued a determination of non-significance, and approved the new building rules.<sup>169</sup> The Town of Woodway and Save Richmond Beach, Inc. (collectively, "the Town") opposed the County's decisions and sought growth board review.<sup>170</sup> The growth board struck down the new County ordinances, ruling that the County's EIS failed to consider multiple alternatives to the Urban Center designation.<sup>171</sup> Because the development regulations relied on the faulty EIS, the board remanded the new ordinances.<sup>172</sup> The board also invalidated the building amendments because they substantially interfered with the GMA.<sup>173</sup> However, before the board issued its order, BSRE had already completed and submitted its complete development application.<sup>174</sup> The town sought a declaratory judgment that BSRE's rights had not vested because the ordinances were void as noncompliant with SEPA and GMA.<sup>175</sup> Granting the petitioners' request the trial court enjoined any further development.<sup>176</sup>

On review, the Supreme Court held that the developer's rights had vested under the town ordinances, despite their SEPA noncompliance.<sup>177</sup> The Growth Board can review development plans for SEPA and GMA defects,<sup>178</sup> but land use

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166. *Id.*

167. *Id.*

168. *Id.*

169. *See id.* at 171, 322 P.3d at 1222.

170. *Id.*

171. *Woodway*, 180 Wash. 2d at 171, 322 P.3d 1222

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *See Woodway*, 180 Wash. 2d at 173, 322 P.3d 1223.

178. *See id.* at 174, 322 P.3d at 1223.

regulations are valid upon adoption<sup>179</sup> and the GMA's remedial provisions are prospective only:

A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the [growth] board's order by the county or city or to related construction permits for that project.<sup>180</sup>

The court said this language is “clear and unequivocal” and the board's finding did not affect BSRE's pre-existing plans.<sup>181</sup>

The Town maintained that regulations violating SEPA are void and could not create vested rights.<sup>182</sup> The court answered that GMA amendments superseded prior case law holding that void ordinances do not create vested rights.<sup>183</sup> From 1991–1997, the Legislature amended the GMA (1) by allowing the board to review SEPA violations; (2) designating GMA as the “integrating framework for all other land-use related laws”; and (3) emphasizing that findings of invalidity are prospective only.<sup>184</sup> The court considered these amendments clear indications that the board's finding of SEPA invalidity will not void a development application made in reliance on a local ordinance.<sup>185</sup>

The court considered the Town's argument that its holding permits developers to use the vested rights doctrine as a sword.<sup>186</sup> According the court, that argument misses the mark—the doctrine protects due process and property rights by setting a date-certain standard for development rights, and “avoids the morass and uncertainties” of determining bad

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179. *Id.*

180. *Id.* at 175, 322 P.3d at 1224 (citing WASH. REV. CODE § 36.70A.302(2) (2013)).

181. *See id.* at 174, 322 P.3d at 1223.

182. *Id.* at 176, 322 P.3d at 1224.

183. *Woodway*, 180 Wash. 2d at 178-79, 322 P.3d 1225.

184. *Id.*

185. *See id.*

186. *Id.* at 179–80, 322 P.3d at 1226.

faith.<sup>187</sup> That protection creates certainty and predictability for all parties involved.<sup>188</sup>

Dissenting, Justice Johnson wrote that the court's holding writes SEPA and the GMA "out of existence."<sup>189</sup> According to the Justice, GMA's invalidity provision is written in the past tense and applies only to rights that have actually vested and should not be read to create independent rights and shield BSRE's illegal development.<sup>190</sup>

*ESHB 1090: Increasing the Dollar Amount for Construction of a Dock that does not Qualify as a Substantial Development under the Shoreline Management Act*

ESHB 1090 increases the dollar threshold for a dock to qualify as a "substantial development" under the Shoreline Management Act (SMA).<sup>191</sup> The SMA is a cooperative regulatory framework under which local governments with qualifying shoreline access must adopt and enforce a shoreline master program.<sup>192</sup> The program must include a shoreline use plan with goals, use regulation, and development standards in accordance with Ecology's guidelines.<sup>193</sup> Before starting any "substantial development" on a shoreline, a developer must obtain a "substantial development" permit.<sup>194</sup> Previously, docks were not considered substantial developments if they were (1) used for pleasure craft; (2) used for non-commercial purposes; and (3) had a fair market value not exceeding \$2,500 (in saltwater) or \$10,000 (in freshwater).<sup>195</sup>

This law increases the dollar threshold for freshwater docks.<sup>196</sup> Freshwater docks replacing existing docks of equal or

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187. *Id.* at 180, 322 P.3d at 1226 (quoting *Allenbach v. City of Tukwila*, 101 Wash. 2d 193, 198, 676 P.2d 473, 475 (1984)).

188. *Id.*

189. See *Woodway*, 180 Wash. 2d at 187, 322 P.3d 1229. (Johnson, J., dissenting).

190. *Id.*

191. Act of March 17, 2014, ch. 23, 2014 Wash. Sess. Laws 70 (codified as amended at WASH. REV. CODE § 90.58.030 (2014)).

192. See FINAL B. REP., Engrossed Substitute H.B. 1090, 63d Leg., Reg. Sess., at 1 (Wash. 2014).

193. WASH. REV. CODE § 90.58.030(3)(c).

194. Act of March 17, 2014, ch. 23, § 1(3)(e)(vii), 2014 Wash. Sess. Laws 70, 74.

195. WASH. REV. CODE § 90.58.030(3)(e)(iii).

196. Act of March 17, 2014, ch. 23, § 1(3)(e)(vii), 2014 Wash. Sess. Laws 70, 74.

greater square footage within jurisdictions that updated their master programs to be consistent with 2003 Ecology guidelines qualify as substantial developments when their value exceeds \$20,000.<sup>197</sup> Otherwise, freshwater docks must still meet the \$10,000 threshold to qualify as a substantial development.<sup>198</sup>

## POLYCHLORINATED BIPHENYLS

### *SSB 6086: Reducing PCBs in Products Purchased by Agencies*

The legislature committed the State to PCB-free procurement in SSB 6086.<sup>199</sup> Recognizing the environmental and health effects of Polychlorinated Biphenyls, the legislature established new agency procurement policies.<sup>200</sup> Under the new law, the Department of Enterprise Services (DES) must establish a procurement preference for products packaged in materials containing PCBs below a “practical quantification limit.”<sup>201</sup> No agency may knowingly violate that preference unless it is not cost-effective or technically feasible to do so.<sup>202</sup> DES does not need to actually test the products; it may accept testing provided by suppliers from accredited laboratories.<sup>203</sup>

### *ESB 6501 Concerning PCB contamination in Used Oil Recycling*

ESB 6501 requires Ecology to maintain best practices for preventing PCB contamination at public used oil collection sites.<sup>204</sup> These practices must provide for proper testing, cleanup, labeling, disposal, spill control, and model contract language for use with oil vendors.<sup>205</sup> Ecology must also update its practices to allow parties to petition the legislature for

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197. *Id.*

198. *Id.*

199. Act of March 28, 2014, ch. 135, 2014 Wash. Sess. Laws 681 (codified as amended in scattered sections of WASH. REV. CODE § 39.26).

200. *Id.* § 3, 2014 Wash. Sess. Laws at 684.

201. *Id.* § 2, 2014 Wash. Sess. Laws at 682.

202. *Id.* § 3(2), 2014 Wash. Sess. Laws at 684.

203. *Id.* § 4, 2014 Wash. Sess. Laws at 684.

204. Act of March 31, 2014, ch. 173, 2014 Wash. Sess. Laws 848 (codified as amended at WASH. REV. CODE §§ 70.95I.020–70.95I.030, 43.21A.711).

205. *Id.*

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relief from extraordinary costs incurred from managing used and contaminated oil.<sup>206</sup>

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206. *Id.* § 2(5), 2014 Wash. Sess. Laws at 849.