

# Environmental Litigation and Toxic Torts Committee Newsletter

A joint newsletter of the Environmental Litigation and Toxic Torts Committee,  
Agricultural Management Committee, and the  
Environmental Impact Assessment Committee

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## MESSAGE FROM THE COMMITTEE CHAIRS

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For this first issue of the 2010-2011 ABA term, the Section of Environment, Energy, and Resources' (SEER) Agricultural Management, Environmental Litigation and Toxic Torts (ELTT), and Environmental Impact Assessment (EIA) Committees join forces for the first time to cover the critical nexus of environmental impact litigation in the agricultural sector with five articles covering key issues.

The first pair of articles in this issue discuss environmental impacts in the context of genetically engineered (biotech) crops. Kevin Haroff profiles the first U.S. Supreme Court decision on this topic, while Tom Redick examines the broader ramifications of that historic case and other pending cases in which growers seek compensation for alleged environmental/economic

impacts of agricultural biotechnology. Ongoing debates over the benefits and risks of biotechnology, including energy, food, and climate security issues, provide a powerful backdrop for this emerging class of cases and set the stage for future litigation with an increased profile and heightened implications.

In the third article, Brett Slensky and Angela Pappas discuss nuisance claims in the context of wind farm litigation, including possible defenses under state right-to-farm laws.

The fourth article, by Walter Hanspeter, explores Endangered Species Act claims in the context of water rights cases.

Finally, Lisa Bail takes us to Hawaii where the state supreme court ruled that changes in project timing (including lengthy delays) may require the submission of supplemental environmental impact statements.

The next issue of ELTT's newsletter will present relevant and informative articles about the dynamic topic of oil spill liability. Contact the ELTT Newsletter Vice Chair, Alex Basilevsky (alex.basilevsky@obermayer.com) with ideas for the upcoming oil spill issue or any other environmental litigation topic.

The editor of the newsletter for the Agricultural Management Committee is Thomas Redick (thomasredick@netscape.net) who is also serving as newsletter coordinator for SEER; Thomas is always willing to work with a "guest editor" or another

**Environmental Litigation and  
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Alex Basilevsky, Editor**

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committee to address issues of common concern. The Agricultural Management Committee plans to publish another “Ag Litigation” issue next year.

Jim Farrell ([jim.farrell@butlersnow.com](mailto:jim.farrell@butlersnow.com)) is the newly appointed editor for the newsletter of the EIA Committee. Although the EIA Committee has expressed initial interest in devoting one or more future editions of the newsletter to: (1) the more prominent role NEPA is likely to play in post-Gulf Oil Spill offshore drilling operations and (2) the proposed new role of NEPA as a critical tool in the assessment of potential climate change impacts, Jim will gladly welcome additional suggestions for future issues.

Please contact any of the Committee Chairs or newsletter editors listed here with your ideas for upcoming newsletter articles or programs. We look forward to your input and participation in the committees and to an active 2010-11 ABA term.

## Upcoming Section Programs—

For full details, please visit  
[www.abanet.org/environ/calendar/](http://www.abanet.org/environ/calendar/)

November 30, 2010

### **Maximum Green: Using Tax Credits to Optimize Energy Investments**

Primary Sponsor: Forum on Affordable  
Housing and Community Development  
Law

Webcast/Teleconference

February 23-25, 2011

### **29th Annual Water Law Conference** San Diego

March 17-19, 2011

### **40th Annual Conference on Environmental Law** Salt Lake City

## **ASSESSING THE ENVIRONMENTAL IMPACTS OF AGRICULTURAL BIOTECH-GEERTSON SEED FARMS AND BEYOND**

**Kevin T. Haroff**  
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Two important recent Court decision highlight the potential environmental impacts of genetically modified (GM) crops and may help shape future litigation over the application of NEPA to GM crops. In *Monsanto v. Geertson Seed Farms*, No. 09-475, 561 U.S. \_\_\_ (June 21, 2010), the U.S. Supreme Court addressed how the federal government regulates the production and marketing of GM seed products in vacating the U.S. Department of Agriculture’s (USDA) approval of Roundup Ready alfalfa (RRA). The Northern District of California then followed *Geertson* in *Center for Food Safety v. Vilsack*, No. C 08-00484 (N.D. Cal. August 13, 2010), vacating USDA approval of Roundup Ready Sugar Beets (RR Sugar Beets) and elaborating on the role courts may play in providing judicial supervision to the regulatory process. Both of these cases involved the National Environmental Policy Act, 42 U.S.C. §§ 43121–4335 (NEPA), and each shows the limitations of employing that statute as a substitute for effective administrative decision-making.

### **Regulatory Background**

The *Geertson Seed Farms* and *Center for Food Safety* cases focus on the procedure used by the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS), to deregulate the use of two GM plant products: RRA and RR Sugar Beets. Both plants are able to survive the application of glyphosate, a nonselective herbicide that can kill or severely damage many plant species. Both products are subject to regulation under the federal Plant Protection Act (PPA), 7 U.S.C. § 7701 *et seq.*, pursuant to which APHIS has responsibility for regulating “organisms and products altered or produced through genetic engineering that are plant pests or are believed to be plant pests.” 7 C.F.R. §§ 340.0(a) (2) n.1, 340.6. APHIS regulations give the agency control over “regulated article[s],” prescribing

how they may be “introduce[d]” into the environment and forbidding their “release” or “move[ment in] interstate [commerce]” absent explicit approval. *Id.* § 340.1.

At issue in both *Geertson Seed Farms* and *Center for Food Safety* was the question of whether proposed decisions to deregulate regulated articles under the PPA constitute “major Federal actions significantly affecting the quality of the human environment” – if so, NEPA requires that the agency prepare a “detailed statement . . . on (i) the environmental impact of the proposed action.” 42 U.S.C § 4332(2)(C)(i). APHIS prepared separate preliminary environmental assessments which concluded that the deregulation of RRA and RR Sugar Beets would have no significant environmental impacts, and that a full environmental impact statement (EIS) was not required. In each case the deregulation decision was challenged on the grounds that NEPA had been triggered, an EIS was required, and the determination to deregulate without an EIS violated the prohibition against arbitrary and capricious agency action under the Administrative Procedure Act, 5 U.S.C. § 706 (APA).

### **Lower Court Decisions in *Geertson Seed Farms* Litigation**

Plaintiffs filed their lawsuit over RRA in 2006. Plaintiffs argued APHIS had not addressed concerns that, without appropriate safeguards, the plant’s genetically engineered trait would spread to conventional and organic alfalfa, and that widespread adoption would exacerbate the increase in herbicide use caused by other Roundup Ready crops (such as biotech corn, rice, and soybeans). The court granted partial summary judgment in plaintiffs’ favor, holding that increased distribution of RRA likely would cause genetic “contamination” and that APHIS failed to assess the anticipated proliferation of glyphosate-tolerant weeds from RRA alone and cumulatively with other GM crops.

In response to the court’s request, APHIS submitted an order that would have vacated the deregulation decision but allowed dissemination of RRA under

certain conditions. The district court then issued an order vacating APHIS's deregulation decision, directing that Roundup Ready alfalfa "is once again a regulated article," and entering a preliminary injunction "prohibiting future plantings" pending a ruling on permanent injunctive relief. After another hearing, the court entered a permanent injunction, noting that in a "run of the mill NEPA case," the balancing of relative harms often "favor[s the] issuance of an injunction," and it enjoined the planting of any additional RRA pending completion of an EIS. APHIS and the intervenors appealed the permanent injunction. The Ninth Circuit affirmed, and after petitioners sought rehearing *en banc*, the Ninth Circuit affirmed again in an amended opinion.

### **2010 Supreme Court Decision in *Monsanto v. Geertson Seed Farms***

On October 22, 2009, Monsanto and Forage Genetics petitioned the Supreme Court for a writ of certiorari to review the Ninth Circuit's decision. The petition argued that the Ninth Circuit's ruling contradicted the requirement that courts independently assess the potential for harm when approving injunctive remedies in environmental cases. By a vote of 7-1 (Justice Breyer abstaining), the Supreme Court decided that Petitioners did have standing to seek review of the district court's orders, and it reversed the Ninth Circuit's decisions approving those orders.

In reviewing the lower courts' nationwide injunction prohibiting RRA planting during the pendency of the EIS process, the Court confirmed that before a court may grant a permanent injunction, the plaintiff must satisfy a four-factor test, demonstrating irreparable injury, that the remedies available at law were inadequate, that the balance of hardships between the plaintiff and defendant warranted a remedy, and "that the public interest would not be disserved by a permanent injunction." The Court also confirmed that this test fully applies in NEPA cases; thus, the existence of a NEPA violation does not create a presumption that injunctive relief is available.

The Court found that the lower courts erred in supporting the nationwide injunction under the four-

factor test. Because it was inappropriate for the district court to foreclose even the possibility of a temporary deregulation, it was inappropriate to enjoin planting in accordance with such a deregulation decision. In addition, the Court emphasized that an injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course, citing *Weinberger v. Romero-Barcelo*. If a less drastic remedy (such as partial or complete vacatur of APHIS's deregulation decision) was sufficient to redress their injury, no recourse to the extraordinary relief of an injunction was warranted.

### **Center for Food Safety v. Vilsack**

At the same time *Geertson Seed Farms* was moving through the judicial system, the Center for Food Safety filed suit over the deregulation of RR Sugar Beets in January 2008, again on the grounds that the government's failure to prepare an EIS violated NEPA. In September 2009, the district court granted plaintiffs' motion for summary judgment on the merits, but reserved the issue of remedies until a later date. On March 16, 2010, the court denied plaintiffs' motion for a preliminary injunction, but made clear that its decision would not preclude issuing a permanent injunction pending completion of an EIS.

The court issued its "Order Regarding Remedies" on August 13, 2010. In light of its previous determination on the merits, plaintiffs asked the court to affirmatively vacate the deregulation decision and enjoin "all further planting, cultivation, processing, or other use of genetically engineered RR Sugar Beets or sugar beet seeds, including but not limited to permitting any RR Sugar Beets seed crops to flower pending APHIS's preparation of an EIS." On the request for vacatur, the court noted the APA provides that a reviewing court "shall ... set aside agency action, findings and conclusions found to be ... arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2) (a). Courts have held, however, that invalid regulatory orders can be left in place as a matter of equity pending remand to the appropriate administrative agency. In deciding whether to remand without vacatur, the court adopted the test applied by the D.C. Circuit Court of Appeals: "[T]he

decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993).

Defendants argued that equity required that the court remand without vacatur, since the deficiencies in the deregulation decision were not serious and APHIS almost certainly would reinstate its decision on remand. The court rejected these arguments, stating that "APHIS's apparent position that it is merely a matter of time before they reinstate the same deregulation decision, or a modified version of this decision, and thus apparent perception that conducting the requisite comprehensive review is a mere formality, *causes some concern that Defendants are not taking this process seriously.*" Order at 6 (emphasis added). With regard to the economic impacts of vacatur, the court said that "even if the Court could consider the potential economic consequences of a vacatur in an environmental case . . . Defendants and Defendant-Intervenors have failed to demonstrate that serious economic harm would be incurred pending a full environmental review or any interim action by APHIS. Accordingly, the Court finds that equity does not warrant remand without issuing a vacatur." Order at 8.

As to plaintiffs' request for an injunction, the court again cited the Supreme Court's June 21 decision in *Geertson Seed Farms*, stating that recourse to the "additional and extraordinary relief of an injunction" was not warranted if a less drastic remedy, such as vacatur, was sufficient to redress the plaintiffs' injury. The only argument plaintiffs made to support an injunction in addition to vacatur was that industry *might* violate the vacatur and APHIS *might* not be able to enforce the reinstated regulated status of RR Sugar Beets. The court found those arguments to be speculative and dependent on future conduct, and therefore it denied the injunction request. Moreover, because plaintiffs apparently had not sought to have the vacatur apply to RR Sugar Beets already planted, the vacatur was limited to any planting of RR Sugar Beets after the date of the court's order, thus avoiding destruction of the crop that had been planted prior to August 13, 2010.

In response to the August 13 order, APHIS announced on September 1 2010, that it would continue to allow limited sugar beet planting, subject to restrictions. In particular, APHIS announced that it would issue permits to authorize RR Sugar Beets "steckling" (i.e. seedlings) production in fall 2010 under permit conditions that would not allow flowering of the stecklings. APHIS also announced that it is evaluating a request for a partial deregulation of RR Sugar Beets. These actions were challenged almost immediately in a new court filing, claiming that the actions directly violate the August 13 court order. *See Center for Food Safety v. Vilsack*, 10-04038 (N.D. Cal. September 9, 2010). As this article was going to press, APHIS released a plan for comment (on November 4, 2010). The Federal Register notice can be found at: [http://www.aphis.usda.gov/biotechnology/fr\\_notices.shtml](http://www.aphis.usda.gov/biotechnology/fr_notices.shtml).

## Conclusion

The prospect of future deregulation decisions of GM crop plants, as well as judicial oversight of these decisions, will continue to be a source of anxiety in the agricultural community, a focus of attention in Congress and the subject of litigation. On June 23, 2010, Senator Patrick Leahy (D-Vt.) and Representative Peter DeFazio (D-Ore.) wrote Agriculture Secretary Tom Vilsack to express "serious concern" regarding the a proposed EIS to support a deregulation decision for RRA, stating that "[w]e have concluded that USDA's preliminary finding of 'No Significant Impact' cannot be justified." The letter specifically cites new authority under the 2008 Farm Bill to bolster regulation of GM plant products and complains that the Department of Agriculture has failed to adopt regulations appropriately implementing that authority.

At the same time, Senators Blanche Lincoln (D-Ark) and Saxby Chambliss (R-Ga.) have written Secretary Vilsack to express concern that recent court cases are hampering the U.S. regulatory system for agricultural biotechnology. Senator Lincoln chairs the Senate Committee on Agriculture, Nutrition and Forestry, and Senator Chambliss is the committee's ranking member. The senators' letter, which references the *Geertson Seed Farms* decision, states that "[d]espite countless findings and studies confirming the safety of genetically

engineered crops, recent wrongly-decided court decisions threaten to thrust the U.S. regulatory system for agricultural biotechnology into a non-functioning regulatory system.” The senators encouraged the Department of Agriculture, along with the U.S. Department of Justice, “to continue to mount vigorous defenses against lawsuits that seek to upend science-based regulatory decisions.”

In light of the recent decisions described above and the arguments being made on Capitol Hill, pending further clarification from the courts or USDA, biotech crops will continue to provide fertile ground for environmental impact litigation.

**Kevin Haroff** is partner and a member of the *Environmental and Toxic Tort Law Group* at *Shook Hardy & Bacon LLP* in the firm’s San Francisco and Orange County offices. He was counsel of record for the *Washington Legal Foundation* on an *amicus curiae* brief with the Supreme Court to support the petition for writ of certiorari in *Monsanto v. Geertson Seed Farms*.

## BIOTECH CROPS ENCOUNTERING NEW “ECONOMIC LOSS” LIABILITY

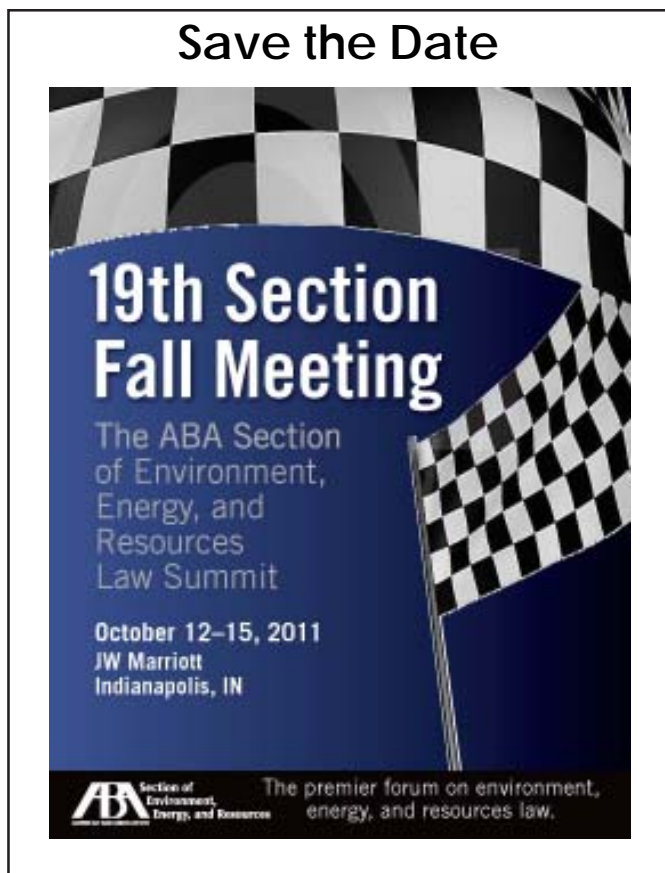
**Thomas P. Redick**

This article discusses pending common law cases involving economic loss from commingling of biotech crops, in particular the jury trials under way in thousands of rice grower cases against Bayer CropScience LP, the producer of genetically modified (GM) rice. It also examines the international implications of U.S. Supreme Court NEPA caselaw (profiled below in Kevin Haroff’s review of *Geertson v. USDA* and *Center for Food Safety v. Vilsack*), such as potential impacts on the ongoing negotiations relating to resolving international liability disputes under the Cartagena Protocol on Biosafety (Biosafety Protocol) liability for internationally traded biotech crops.

### A. Bayer Mass Tort Trials - Managing Billions of Dollars of Liability Risk

The common law liability of biotech seed companies is being tried by a jury for the first time in history. In a federal trial under way in St. Louis (*In re LL601 Rice Contamination*), Bayer CropScience and its parent Bayer AG (Germany), along with other defendants (a rice cooperative and university), are defending claims for nuisance and negligence after their experimental herbicide-resistant Liberty Link® rice (LL Rice) commingled in 2006-07, prior to United States governmental approval, with the foundation seed used in rice production throughout the United States. The commingling allegedly caused the loss of export markets and a drop in rice prices, and litigation ensued. The jury trials of test plaintiffs began in December 2009, continuing through this year. Juries found defendants negligent in allowing Louisiana-based field trials of LL Rice to be planted too close to the foundation seed used in U.S. rice production.

In the fourth trial ending April 14, 2010, an Arkansas jury awarded Arkansas farmers \$48 million in punitive damages, which is the first time a biotech seed company has incurred such damages. On October 19, Bayer agreed to pay \$290,000 to settle claims with



eight plaintiffs from three farming operations. Approximately 7,000 plaintiffs have already filed suit and verdicts are averaging about \$550,000, meaning Bayer's potential liability in these cases could be in the billions of dollars.

The future of biotech crops and the financial success of companies that sell them may depend upon continuous improvement in stewardship strategies that protect export, non-GM, and organic interests from undue economic impact caused by commingling (now called "contamination" in both Missouri federal court summary judgment ruling and a U.S. Supreme Court decision).

As Kevin Haroff's article above discussed, the U.S. Supreme Court in *Monsanto v. Geertson Seed Farms*, No. 09-475, 561 U.S. \_\_\_ (June 21, 2010), held that under the National Environmental Policy Act (NEPA) the federal government had to avoid "contamination" (i.e., unwanted commingling with organic or "non-GMO" alfalfa) in regulating the production and marketing of biotech or "GM" seeds products. In affirming the lower court decision vacating the USDA's approval of Roundup Ready Alfalfa (RRA), the U.S. Supreme Court sent a message about economic loss—and its avoidance—that echoes in common law and international legal settings.

## **B. Will State Common Law Nuisance Evolve in Response to *Geertson*?**

The Supreme Court's finding of "contamination" under NEPA could influence common law rulings and pending decisions whether to appeal the LL Rice verdicts to higher courts. The Supreme Court rejected USDA's approach to assessing environmental impacts of RR Alfalfa via an Environmental Assessment-Finding of No Significant Impact (EA-FONSI). By requiring an environmental impact statement that includes various economic impacts to other crops, the Supreme Court sent a message about coexistence, with precedential impact that remains to be seen. For example, the combined effect of the LL Rice verdicts and the *Geertson* decision finding a "contamination" risk that requires containment could also influence some courts to require that biotech crops be "fenced-in" in regions that depend on exports or non-GM/organic markets,

as has occurred with livestock in the eastern US. *See, e.g.,* A. Bryan Endres, *Coexistence Strategies, the Common Law of Biotechnology and Economic Liability Risks*, 13 DRAKE J. AGRIC. L. 115-148 (Spring 2008).

It is important to note that in the US, courts applying common law nuisance and trespass have yet to rule that the sale of USDA-approved biotech crops that lack approval in major markets overseas could lead to viable claims for common law nuisance or negligence. Where there is a prevailing standard of care that requires biotech seed companies to avoid export impact, as grower associations and grain trade associations have demanded, there could be finding that a duty of care (for negligence) or community standard (for nuisance) exists. Commentators have pointed out that a Canadian court rejected such claims in *Hoffman & Beaudoin v. Monsanto Canada*, 2005 SKQB 225, appeal dismissed, 2007 SKCA 47. Any decision under U.S. common law finding that a biotech crop approved by the USDA had caused a nuisance could raise significant risks for the agricultural biotechnology industry. This could also influence common and civil law liability for biotech crops in other nations that are grappling with these issues.

USDA approval could arguably preempt a state law determination that a given biotech crop is an alleged nuisance under common law. In some cases, federal approval creates a "presumption" that due care was exercised. The preemptive or presumptive power of US approval under new partial deregulation decisions under NEPA, however, remains to be determined. Will evidence of compliance with federally-mandated identity preservation provide a defense for biotech seed companies? For example, if USDA implements a partial deregulation approach for a controversial new biotech corn from Syngenta that contains amylase, this USDA approval via an EA-FONSI might survive legal challenges given the detailed identity preservation plans presented during the process of approving this biotech crop, which can only go to certain ethanol plants (e.g., those not sending byproducts to overseas markets that have not approved this genetic event in corn). *See* Environmental Assessment for Syngenta Event 3272, at [www.aphis.usda.gov/brs/aphisdocs/05\\_28001p\\_ea.pdf](http://www.aphis.usda.gov/brs/aphisdocs/05_28001p_ea.pdf). This may also be sufficiently

protective of economic impacts to avoid common law nuisance liability as well as *Geertson*-following NEPA cases.

### **C. Biosafety Protocol Parties Draft International Biotech Liability Law**

As noted above, the legal decisions arising under NEPA and nuisance, which recognize both the prevention of economic impact (under NEPA) and compensation of export-related economic impacts, raise legal issues that will be discussed in many other jurisdictions and venues around the world.

The dual questions of regulating to avoid economic impact (*e.g.*, NEPA) and compensating harm from economic impact (*e.g.*, nuisance or other common law torts) were discussed in liability negotiations that began in earnest in 2004 and recently concluded negotiating the text of the first international law on liability for “modified organisms” produced by biotechnology. In October 2010, a negotiating group the 2003 Cartagena Protocol on Biosafety (Biosafety Protocol) finally completed, and submitted for consideration, the text of the “Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety” (NKL Protocol) under the Convention on Biological Diversity (CBD). It opened for signature after all parties approved the text at this meeting. This is the first international environmental law imposing liability on the cross-boundary movement of biotech crops and other “living modified organisms” (LMOs). This law could enter into force if it is ratified by forty parties.

The scope of this NKL protocol is limited to “administrative” remedies allowing Biosafety Protocol (BSP) parties to act to protect their biodiversity. Nations can seek compensation should “damage” occur to “the conservation and sustainable use of biological diversity” (including “human health”). In this setting, “damage” means an “adverse effect” that is “significant” and “measurable or otherwise observable” using “scientifically-established baselines recognized by a competent authority.” In international liability law, the term “significant” connotes a higher standard for finding harm than a domestic court would impose under common or civil law. (For a detailed explanation of the meaning of “significant” in this context, *See, e.g.*,

Rebecca M. Bratspies, Russell A. Miller, Eds., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (City University of New York)). This higher level of proof may reflect respect for national sovereignty, but it does not impede recovery for transboundary impacts of a toxic substance “affecting public health, endangering lives or producing serious irreversible conditions”. *Id.* at 130.

Attorneys from the BSP Secretariat review cases in the United States and elsewhere involving biotech crops and share summaries with BSP parties. As a result, it should come as no surprise that they are attentive to both the Supreme Court’s alfalfa decision and the Liberty Link rice contamination cases pending in St. Louis. The U.S. litigation over NEPA and Bayer’s rice provide the BSP parties with models to follow on both the administrative liability side (NEPA) and the common law liability issues (Bayer’s billion-dollar LL601 exposure). It is hard for the United States to tell other nations not to impose liability for economic loss when judges and juries in the United States are consistently finding that such economic interests should be protected (as interrelated environmental impacts) and are awarding compensatory damages at a level that appears to exceed the export-related impact. The questions of recovery for economic loss, or injunctions demanding remediation of a crop variety lacking regulatory approval, will continue to provide fodder for litigation in the United States and discussion at BSP liability meetings.

### **D. Conclusion**

Going forward, both USDA and biotech seed companies will need to monitor and prevent economic impacts, even after regulatory approval in the United States. USDA assessments of environmental impacts must include relevant economic interests, to maintain peaceful coexistence among biotech, non-GMO, and organic crop interests. Sound stewardship at home will also help governments overseas steer clear of restrictive liability laws.

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# WIND POWER PROJECTS, NUISANCE CLAIMS AND RIGHT-TO-FARM

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**Brett Slensky and Angela Pappas**

## Introduction

The development of wind power projects on and around our nation's farmland is a growing trend. This growth, which has been metaphorically described as the "crop of the 21st century," may be attributed to a number of factors, including technology improvements and equipment cost reductions, the reality that some of our nation's best wind resources are found in traditionally agricultural areas, and the emergence of state and federal policies that have incentivized these projects. The U.S. Department of Agriculture's Rural Energy for America Program, which in part provides grant funding to farmers of up to twenty five percent of eligible project costs for renewable energy development, including wind, is one example of these policy initiatives. These factors and the additional benefits that may flow to a project owner or host have collectively contributed to making these projects financially viable and increasingly attractive to the farming community. For example, a farmer may lease its land to a third-party wind project developer to gain more control over energy costs and a predictable, alternative long-term revenue stream.

Despite the upside associated with these projects, a range of legal risks remains. This article will examine one category of these risks—the risk of nuisance suits—that a system owner or host may face in connection with the development of a wind power project and/or the existence of a wind turbine on a farm.

## Nuisance Claims

With the proliferation of wind energy projects across the country, there has been a rise in opposition to such projects on the basis that they constitute a private nuisance. Although none of the reported decisions involve nuisance claims asserted specifically against the owner or host of wind power projects located on farmlands, some do involve wind power projects located in rural areas. As such, these cases may be viewed as a proxy for the types of claims that could be

asserted against the owner or host of a wind power project located on a farm. Accordingly, the lessons learned from these cases become a valuable reference point as wind energy development continues to grow in agricultural areas.

Generally, a private nuisance is an unreasonable invasion of another's interest in the private use and enjoyment of land. Restatement (Second) of Torts §§ 821D; 822 (1979). In determining whether a nuisance exists, courts balance the gravity of the harm against the utility of the conduct. *Id.* § 826. Plaintiffs can sue for damages or for injunctive relief. *Id.* § 822, cmt. c. But because nuisance law is state-specific, the outcomes of nuisance suits can vary dramatically.

The reported nuisance decisions relating to wind power projects are no exception to this general rule of inconsistent outcomes. Although cases have come out on both sides, the concerns raised by neighboring property owners and citizen groups in support of nuisance claims are often similar. Plaintiffs complain that the turbines cause noise and vibration, are aesthetically displeasing, pose dangers due to the threat of thrown blades, reduce property values, or are otherwise annoying because of the "flicker" or "strobe" effect created when light hits the turbine blades. More often than not, plaintiffs seek an injunction as opposed to damages caused by the nuisance.

The plaintiffs in *Rose v. Chaiken* and *Burch v. Nedpower Mount Storm* were both able to establish that wind turbines were or could constitute a nuisance. In *Rose v. Chaiken*, a neighboring property owner in a residential development complained that the noise from defendant's turbine caused stress-related symptoms. *Rose v. Chaiken*, 453 A.2d 1378, 1380 (N.J. Super. 1982). Relying on New Jersey precedent for what constitutes a nuisance, the court enjoined the nuisance on the basis that the noise was unreasonable and offensive in light of the surrounding residential neighborhood. *Id.* at 1382.

In *Burch v. Nedpower Mount Storm, LLC*, plaintiffs survived a motion to dismiss on their nuisance claim and enjoined the construction and operation of a large wind power station. *Burch v. Nedpower Mount Storm, LLC*, 647 S.E.2d 879 (W. Va. 2007). Residential homeowners complained that the intended

facility would cause unreasonable noise, reduced property values, and unsightliness by the flicker or strobe effect from the turbines. *Id.* at 885. Relying on nuisance case law in West Virginia, the court held that each of plaintiffs' claims could provide grounds for a nuisance. *Id.* at 893.

By contrast, the plaintiffs in *Rassier v. Houim* and *Rankin v. FPL Energy, LLC*, were unsuccessful in establishing the presence of a nuisance. In *Rassier*, a residential property owner failed to establish that the noise from a neighbor's wind turbine was an unreasonable interference that justified abatement. *Rassier v. Houim*, 488 N.W.2d 635, 638–39 (N.D. 1992). Relevant to the court's analysis was the fact that plaintiff had moved to the neighborhood two years after the turbine was in place, and that this "coming-to-the-nuisance" principle weighed in favor of finding against plaintiff. *Id.* at 640.

In *Rankin v. FPL Energy, LLC*, plaintiffs, having lost at trial on issues that a large wind development would be unreasonably noisy and reduce property values, appealed only the issue of whether the project constituted an aesthetic nuisance. *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506 (Tex. Ct. App. 2008). Relying on Texas precedent, the court found that neither claims for aesthetics nor for any emotional impact created by the unsightliness of a wind power project could alone constitute a nuisance. *Id.* at 512–13.

## Possible Defenses

In defending nuisance claims involving wind power projects, system owners and/or hosts will want to establish that the plaintiff(s) failed to prove a nuisance under prevailing state law precedent. Factors that may be argued to try and tip the balance in favor of the defendant include the social utility of wind energy projects and maintaining that such projects promote the national and state goals of energy conservation through use of alternative energy sources. Courts have entertained these policy considerations as factors to be considered in balancing the gravity of the harm against the utility of wind power projects. *See e.g., Rose*, 453 A.2d at 1382 ("[t]he social utility of alternate energy sources cannot be denied; nor should the court ignore

the proposition that scientific and social progress sometimes reasonably require a reduction in personal comfort.").

The fact that a wind power project complies with government regulations and has received necessary permits and approvals is another important consideration. Courts have considered such governmental sanctioning of a wind power project as another factor in balancing the gravity of harm against the social utility. *See e.g., Rose*, 453 A.2d at 1382. For example, although *Burch* ultimately held that plaintiffs' nuisance claim survived a motion to dismiss, the court stated that the West Virginia Public Services Commission's granting of a siting certificate to the wind developer is "persuasive evidence of the reasonableness and social utility of the [developer's] use of the property to operate a wind power facility." *Burch*, 647 S.E.2d at 895. Thus, diligence during the initial phases of project development, including careful attention to permitting and zoning requirements and acquiring the necessary permits and approvals, can bolster one's possible defense to nuisance suits.

The reasonableness of the use of the property may be even easier to establish in states that have amended their zoning and permitting regulations to encourage wind power projects. For example, New Jersey recently amended the definition of "inherently beneficial use" for obtaining zoning variances under its Municipal Land Use Law, 40 N.J. STAT. § 40:55D, et seq., to include "wind, solar or photovoltaic energy facility or structure." 40 N.J. STAT. § 40:55D-4.

Ripeness is another possible defense to nuisance suits involving wind power projects. To the extent that a system owner or host encounters a nuisance suit prior to actual construction of the wind power project, a ripeness defense is available. In one case, the Seventh Circuit affirmed dismissal of a nuisance claim because the turbines had not yet been built and thus no invasion had yet occurred. *Muscarello v. Cty. Bd. of Commissioners*, 610 F.3d 416, 425 (7th Cir. 2010). *But see Burch*, 647 S.E.2d at 893–94 (overturning dismissal of claim for proscriptive injunction).

Finally, state right-to-farm laws may provide another possible defense for certain wind power projects

located on farmland. Right-to-farm laws have been enacted in all fifty states and, in general, provide either a qualified or absolute immunity from nuisance suits relating to certain covered farming or agricultural-related operations, subject to certain regulatory requirements (e.g., the passage of a defined period of time, the operation's conformance with generally accepted agricultural practices or the relevant state and local laws or guidelines, etc.). The types of farming or agricultural-related operations that may be protected under these laws generally include traditional farming activities such as the plowing and preparation of soils, the production, cultivation, fertilizing, growing of horticultural or agricultural crops or commodities, the breeding, raising, and producing of livestock, the generation of noise, odors, dust, and fumes associated with these activities, etc.; however, at least two states – Vermont and New Jersey – depart from this norm and expressly include the on-site generation of renewable energy as a potentially covered activity.

For example, Vermont's right-to-farm law defines "agricultural activity" to include "the on-site production of fuel or power from agricultural products or wastes principally produced on the farm." 12 VT. STAT. ANN. tit. 12, § 5752 (2010). Although this language limits right-to-farm protection to renewable energy projects using agricultural products or farm wastes as the fuel source, the provision nonetheless could provide a basis to argue that similar protection should be afforded to other types of renewable energy projects (e.g., wind) that may comport with the state's Right-to-Farm policy rationale. *See* 12 VT. STAT. ANN. tit. 12, § 5751 (2010).

New Jersey's right-to-farm law goes one step further and expressly addresses renewable energy generated from wind resources. In particular, P.L. 2009, c.213, which was signed into law in January 2010 and in part amended the state's right-to-farm law, specifies that power or heat generated from wind energy (as well as biomass and solar) is a permissible activity for certain commercial farms provided certain other requirements are met. *See* N.J.S.A. § 4:1C-9 (2010). According to the New Jersey Department of Agriculture's State Agriculture Development Committee (SADC), which administers the state's right-to-farm program, based on this amendment, SADC will provide right-to-farm

protection to these on-farm energy generation projects upon the SADC's adoption of agricultural management practices for these activities. This express inclusion of wind projects as within the range of farming or agricultural-related operations that may be protected under state's right-to-farm law could serve as a model for other states to follow.

## Conclusion

Nuisance suits can significantly delay or even halt wind power projects, potentially resulting in serious economic consequences. Because of this risk, it is important for system owners and hosts to understand the elements of nuisance claims and the possible defenses in assessing all of the legal risks associated with wind power projects.

As a final point, although this article focuses on the risks associated with nuisance claims, system owners and hosts should understand that the construction and operation of a wind power project presents a host of other legal risks. For example, local opposition to these projects may occur at the early stages of project development through challenges to permitting, siting, and zoning decisions. In addition, system owners and hosts have been subjected to claims under federal and state wildlife protection laws alleging that wind turbines kill birds, bats, and other avian life. Moreover, with the numerous contracts controlling each stage of any wind power development project (i.e., lease or easement agreements, power purchase agreements, contracts for operation and maintenance of turbines, financing agreements, design and engineering contracts, insurance contracts, and interconnection contracts with a utility), contractual disputes are also a possibility.

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# THE CROSSROADS OF NEPA AND THE ESA—A FOUR WAY STOP FOR FEDERAL AGENCIES

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Hanspeter Walter

## Introduction

In response to stiff new restrictions imposed on state and federal water projects, the state of California and numerous local water agencies sued the federal government for violations of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). After a brief overview, this article summarizes recent rulings in favor of water users on NEPA claims, and explains that, if widely applied, these rulings could improve ESA consultations.

Like many California water cases, this saga begins in the Sacramento-San Joaquin Delta, the largest estuary on the West Coast. The Delta supports myriad species and drains approximately 40 percent of California's land area. The Central Valley Project (CVP), operated by the U.S. Bureau of Reclamation (Reclamation), and the State Water Project (SWP)(collectively "CA water projects"), operated by the California Department of Water Resources (DWR), are the largest federal and state water projects in the nation, respectively. The CVP and SWP annually deliver millions of acre-feet, providing water supplies to 25 million residents and millions of acres of farmland. Reclamation and DWR closely coordinate CVP and SWP operations, which are described in a document known as the Operations Criteria and Plan (OCAP).

To comply with the ESA, Reclamation and DWR consulted with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) pursuant to 16 U.S.C. § 1536(a)(2) (Section 7). These Section 7 consultations evaluated the effects of CVP and SWP operations on several ESA-listed species. On December 15, 2008, FWS issued a biological opinion for the delta smelt, concluding OCAP operations would jeopardize the species and adversely modify its critical habitat (smelt BiOp). On June 4, 2009, NMFS issued a biological opinion concluding the same for the salmonid species (salmon BiOp). As required by the ESA when FWS or NMFS

find "jeopardy" or "adverse modification," both BiOps included reasonable and prudent alternatives (RP Alternatives). The RP Alternatives modified California water projects' operations, principally through reductions in diversions from the delta or releases of water stored in upstream reservoirs. As part of real-time implementation of the alternatives, FWS or NMFS retained ultimate control of determining what particular pumping restrictions would apply to the California water projects at any given time during sensitive biological periods. Reclamation and DWR agreed to implement the RPAs.

The RPAs sparked immediate controversy. This stemmed, in part, from the fact that despite much study and analysis, a great deal of scientific uncertainty surrounds the issue of what factors most affect the smelt and salmonid species' viability. The list of suspects is long and includes loss of natural habitats, invasive species, reduced primary productivity, predation, and competition. Also, water users believed the CVP and SWP were being unjustifiably required to provide water supplies to solve all the delta's ills regardless of fault and without knowing whether the RPAs would benefit the species.

In contrast, implementation of the RPAs guaranteed a significant reduction to water supply reliability. For example, from January 20 through March 24, 2010, "potential and actual exports were diminished by 522,561 acre feet." *The Consolidated Delta Smelt Cases*, \_\_F.Supp.2d\_\_, 2010 WL 2195960 at \*29 (E.D. Cal. 2010) (*Smelt PI Findings*) The social and environmental impacts of this reduction included "destruction of permanent crops; fallowed lands; increased groundwater consumption; and subsidence; reduction of air quality; destruction of family and entity farming businesses; and social disruption and dislocation, such as increased property crime and intra-family crimes of violence, adverse effects on schools, and increased unemployment leading to hunger and homelessness." *Id.* at \*34.

## The Smelt and Salmon OCAP Lawsuits

In 2009, many water districts dependent on CVP and SWP supplies challenged the BiOps and RPAs in the

federal district court for the Eastern District of California. The court consolidated these suits into *The Consolidated Delta Smelt Cases* and *The Consolidated Salmonid Cases* (collectively, OCAP cases). (E.D. Cal. Lead Case Nos. 1:09-CV-407 and 1:09-CV-1053, respectively.). The state of California later joined both as a plaintiff. Among other issues, plaintiffs alleged violations of NEPA and the ESA's requirement to use the best available science. The OCAP cases are ongoing, but in four published decisions the court has already granted plaintiffs' motions for summary judgment on NEPA, and granted motions for preliminary injunctions earlier this year. Because the legal issues are very similar, the court's collective 400+ pages of rulings in both cases are jointly and interchangeably discussed and quoted below.

Plaintiffs' first motions for summary judgment argued that the issuance and implementation of the BiOps and RPAs were "major federal actions" triggering NEPA. 42 U.S.C. § 4332. FWS, NMFS, and Reclamation maintained no NEPA review was required. The court rejected plaintiffs' argument that issuance of the BiOps triggered NEPA, but held "Reclamation's implementation of the BiOp is major federal action because it substantially alters the status quo in the Projects' operations." *The Delta Smelt Consolidated Cases*, 686 F.Supp.2d 1026, 1049 (E.D. Cal. 2009) (*Smelt NEPA Ruling*) Accordingly, the Court ruled that "Reclamation and the Secretary of the Interior ... violated NEPA by failing to perform any NEPA analysis prior to provisionally adopting and implementing the 2008 BiOp and its RPA." *Id.* at 1051. In the *Salmonid Cases*, the court similarly found that "NMFS and Reclamation's implementation of the 2009 Salmonid BiOp and its RPA without preparing any NEPA documentation violated NEPA." *The Consolidated Salmonid Cases*, 688 F.Supp.2d 1013, 1035 (E.D. Cal. 2010) (*Salmon NEPA Ruling*). In sum, because all three agencies collaborated to jointly implement the RPAs, the court found NEPA violations on the part of Reclamation, FWS, and NMFS.

Facing the threat of reductions in water supply from implementation of the RPAs, in spring of 2010 plaintiffs

sought preliminary injunctions. In addition to the NEPA violations, the court found likely ESA violations:

NMFS has failed to adequately justify by generally recognized scientific principles the precise flow prescriptions imposed by RPA Actions .... The exact restrictions imposed, which are inflicting material harm to humans and the human environment, are not supported by the record. Rather they are product of guesstimations and attempts to try to achieve "equity," rendering it impossible to determine whether the RPA Actions are adequately protective, too protective, or not protective enough. Judicial deference is not owed to such arbitrary, capricious, and scientifically unreasonable agency action.

*The Consolidated Salmonid Cases*, \_F.Supp.2d\_, 2010 WL 2011016 at \*50 (E.D. Cal. 2010) (*Salmon PI Findings*).

In the *Smelt Cases*, the Court held that "FWS's reliance on analyses that utilize raw (as opposed to population-normalized) salvage data is an undeniable failure to use the best scientific methodology." *Smelt PI Findings, supra*, at 52.

With violations of law established, the court considered their significance and the appropriate remedy. The court explained that "[t]his case presents a critical conflict between these dual legislative purposes, providing water service for agricultural, domestic, and industrial use, versus enhancing environmental protection for fish species...." *Id.* at \*4. The Court elaborated:

Congress created public expectations in the Amended Reclamation Act by instructing Reclamation to contract for water service to hundreds of public-entity water service providers that supply water to millions of people and thousands of acres of productive agricultural land. The agencies have not fully discharged their responsibility to effectively allocate Project water resources.

*Salmon PI Findings* at \*51.

The court explained that "FWS did not engage in a systematic consideration of impacts to the human environment and/or consideration of alternatives that

took into account those impacts, ordinarily performed as part of a NEPA review.” *Smelt PI Findings, supra*, at \*4. The court noted that the “public policy underlying NEPA favors protecting the balance between humans and the environment,” and “[i]f both these objectives can be realized by astute management, it is the government’s obligation to do so.” *Id.* at \*47.

The court concluded:

This is a case of first impression. The stakes are high, the harms to the affected human communities great, and the injuries unacceptable if they can be mitigated. NMFS and Reclamation have not complied with NEPA. This prevented in-depth analysis of the potential RPA Actions through a properly focused study to identify and select alternative remedial measures that minimize jeopardy to affected humans and their communities, as well as protecting the threatened species. No party has suggested that humans and their environment are less deserving of protection than the species.

*Id.* at \*49.

Given the dynamic biological and hydrological issues involved, the court held several days of evidentiary hearings where the parties provided up-to-date information on the distribution and status of the species and CVP and SWP operations. The court subsequently enjoined implementation of two salmon RPA actions. The smelt RPA action at issue expired for the seasons by its own terms while the parties were discussing an acceptable remedy.

## Synthesis

The OCAP cases are not the first to consider how NEPA applies to the ESA. Most intriguing is the current circuit split of authority regarding whether NEPA applies to critical habitat designations. The Ninth Circuit ruled NEPA does not apply because “the ESA furthers the goals of NEPA without demanding an EIS.” *Douglas County v. Babbitt*, 48 F.3d 1495, 1506 (9th Cir. 1995). A year later, the Tenth Circuit held NEPA does apply. *Catron County Board of Commissioners v. U.S. FWS*, 75 F.3d 1429 (10th Cir. 1996). Interestingly, the Tenth Circuit’s analysis of

the important role of NEPA closely resembles the court’s reasoning in the OCAP cases:

NEPA ensures that a federal agency makes informed, carefully calculated decisions when acting in such a way as to affect the environment and also enables dissemination of relevant information to external audiences potentially affected by the agency’s decision. . . . By contrast, ESA’s core purpose is to prevent extinction of species by preserving and protecting habitat upon which they depend. . . . While protection of species through preservation of habitat may be an environmentally beneficial goal, Secretarial action under ESA is not inevitably beneficial or immune to improvement by compliance with NEPA procedure.

*Id.* at 1437.

Those who view the ESA as a super-statute will disagree with the court’s rulings in the OCAP cases, and will see no reason to inject NEPA into the Section 7 process. However, there is nothing in the ESA indicating it trumps NEPA. In fact, NEPA requires “all agencies of the Federal Government” to satisfy its mandates “to the fullest extent possible.” 42 U.S.C. § 4332. This statutory language is “neither accidental nor hyperbolic,” but instead “a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle.” *United States v. SCRAP*, 412 U.S. 669, 694 (1973). Furthermore, federal agencies can avoid NEPA only where there is an “irreconcilable and fundamental” statutory conflict. *Flint Ridge Development Co. v. Scenic Rivers Assoc.*, 426 U.S. 776, 787–88 (1976); *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986).

In fact, there is no irreconcilable conflict between Section 7 and NEPA. For example, the ESA regulations allow for extending consultations to gather additional data (*see e.g.*, 50 C.F.R. § 402.14(f)). They also expressly contemplate coordination and consolidation of ESA and NEPA reviews. 50 C.F.R. § 402.06. Federal agencies also have ample discretion with respect to the formulation and implementation of RPAs because “the ESA does not explicitly limit the Secretary’s analysis to apolitical considerations. If two

proposed RPAs would avoid jeopardy . . . , the Secretary must be permitted to choose the one that best suits all of its interests, including political or business interests.” *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 n. 5 (9th Cir. 1998).

It is also important to remember that NEPA is much broader in scope than the ESA. NEPA is directed to all facets of the environment (e.g., air, water, land use, recreation, aesthetics . . . ). The ESA, by contrast, is narrowly focused on only one thing – protecting species. The Ninth Circuit recognized this difference in holding that an ESA biological assessment (BA) could not substitute for a NEPA environmental assessment (EA):

While a BA analyzes the impact of a proposed action upon endangered species, an EA analyzes the impact of the proposed action on all facets of the environment. Thus if only a BA is prepared, there may be gaps in the agency’s environmental analysis.

*Save the Yaak Comm. v. J.R. Block*, 840 F.2d 714, 718 (9th Cir. 1988).

Finally, NEPA requires public disclosure and demands government accountability, which “obligates the agency to make available to the public high quality information, including accurate scientific analysis, expert agency comments and public scrutiny, before decisions are made and actions are taken.” *Center for Biological Diversity v. US Forest Service*, 349 F.3d 1157, 1167 (9th Cir. 2003) (citing 40 C.F.R. 1500.1(b)). The ESA contains no equivalent mandate, and while federal action agencies and “applicants” are afforded some input during a Section 7 consultation (e.g., 50 C.F.R. § 402.14(d)), not all potentially affected interests may gain applicant status. (See e.g., *Hawaii Longline Association v. NMFS* (D.D.C. 2002) (2002 WL 732363).)

These recent rulings should cause all stakeholders to consider the benefits of applying NEPA to Section 7 consultations when those consultations will result in RPAs significantly altering federal activities or management of resources. In fact, application of NEPA to such Section 7 consultations offers the hope of more

scientific and publicly accountable regulatory decisions. These are elements often perceived as lacking by those whose lives and environments have been affected by implementation of the ESA. In fact, it was not until 1997 that regulated entities were even granted article III standing to sue FWS and NMFS for arbitrary regulation under the ESA. *Bennett v. Spear*, 520 U.S. 154 (1997). But even though regulated entities – not just environmentalists – can now sue to prevent “haphazard” or “overzealous” ESA regulation based on “speculation or surmise,” deferential standards of administrative review and defenses based on best professional judgment have limited actual legal successes in such cases. *Id.* at 176.

NEPA requires analysis of a range of alternatives, full public disclosure of uncertainties and conflicting information, and consideration of impacts to the whole of the human environment. The injection of these NEPA elements into the Section 7 consultation process, at least when “jeopardy” biological opinions and RPAs are being prepared, should assist FWS and NMFS in selecting carefully crafted RPAs that satisfy the ESA’s legal thresholds without causing unnecessary dislocation or disruption to other aspects of the human environment. Such a process should also lead to more efficient allocation of resources. As explained by the court:

The species and their critical habitats are entitled to protection under the ESA . . . . Nonetheless, NMFS and Reclamation, as the consulting and action agencies, must take the hard look under NEPA at the draconian consequences visited upon Plaintiffs, the water supply of California, the agricultural industry, and the residents and communities devastated by the water supply limitations imposed by the RPA Actions. Federal Defendants have failed to comprehensively and competently evaluate whether RPA alternatives can be prescribed that will be mutually protective of all the statutory purposes of the Projects.

*Salmon PI Findings, supra*, at \*51.

Just as important as NEPA’s potential ability to fine tune the development and selection of RPAs, is its mandate for public disclosure and the government accountability it brings. Without NEPA, the public is

not adequately informed of the collateral human and environmental impacts of RPAs or of how FWS and NMFS develop and select RPAs. For instance, in briefing in the OCAP cases, the agencies raised the defense of best professional judgment and the so-called “precautionary principle.” The court responded that “nowhere in the BiOp (or any other document in the administrative record cited by the parties) does NMFS disclose its intent to use a ‘precautionary principle’ to design the RPA Actions nor is that ‘level’ specifically defined or justified.” *Id.* at \*24.

Whether FWS and NMFS are even allowed to make regulatory decisions under the ESA based on the precautionary principle or based on scientifically untested professional judgments is debatable. But NEPA review would at least inform the public of the true nature of such decisions. Put plainly, the public deserves to know when ESA decisions are based on rigorous science and alternatively when they are essentially policy calls or, as the court stated, “guesstimations” made in the face of uncertainty. Such disclosures are fundamental and essential in our democratic system to allow constituents to evaluate how the ESA is being applied. With such information, the public and their elected representatives can seek legislative or administrative changes or improvements to the ESA.

To conclude, the functions of NEPA and the ESA are not at cross-purposes. In fact, as illuminated by the court in the OCAP cases, it is at the crossroads of these two statutes where Section 7 consultations could evolve into more rigorous, technical, and publicly accountable processes. However, the *OCAP Cases* remain pending, no final judgments have been entered, and the federal agencies have not yet begun NEPA review. Readers will have to stay tuned to see how this latest delta saga ends.

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## **SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENTS: AN “ESSENTIALLY DIFFERENT ACTION” AT TURTLE BAY**

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**Lisa A. Bail**

In the 1980s Kuilima Development Company prepared an environmental impact statement (EIS) for its proposed expansion of the Turtle Bay hotel on the north shore of Oahu. The project included expansion of the existing hotel, three new hotels, new condominium units, a commercial complex, renovation of the existing golf course, the addition of a new golf course, a clubhouse, tennis center and equestrian center, and infrastructure improvements. The EIS was accepted in 1985. Twenty-five years later, when the project was not yet built, the Hawaii Supreme Court concluded that a supplemental EIS should be prepared and reviewed. *Unite Here! Local 5 v. City and County of Honolulu*, Civil No. 28602, 2010 WL 1408403, 2010 Haw. LEXIS 61 (Hawaii Apr. 8, 2010) (*Turtle Bay*) (citations in this article are provided based on pagination in the slip opinion).

### **Supplemental EIS Requirements in Hawaii**

Regulations under Hawaii’s EIS law, HAW. REV. STAT. §§ 343-1 et. seq. (2010), requires supplemental EISs, as do the federal NEPA regulations. But the requirements of Hawaii’s regulations differ from those in NEPA. NEPA requires the preparation of a supplemental EIS if there are either “substantial changes in the proposed action that are relevant to environmental concerns” or “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 CFR § 1502.9. Hawaii’s regulations, on the other hand, provide that a supplemental EIS shall be prepared when the proposed action “has been modified to the extent that new or different environmental impacts are anticipated” and is warranted “when the scope of an action has been substantially increased, when the intensity of environmental impacts will be increased, when the mitigating measures originally planned are not to be implemented, or where new circumstances or evidence have brought to light different or likely increased environmental impacts . . .” Haw. Admin R. § 11-200-

27. Concerns expressed include ancient burial grounds, the monk seal's habitat, and simple gridlock from increased traffic that expanding a road would create. It is up to the accepting authority or approving agency to determine whether a supplemental EIS is required. *Id.*

### **Standard of Review for Supplemental EISs**

Prior to the *Turtle Bay* opinion, there was no standard of review for a supplemental EIS by the Hawaii courts. In April 2010, the Hawaii Supreme Court applied, for the first time, a “rule of reason” and “arbitrary and capricious” standard of review to cases involving an agency’s decision regarding supplemental EISs. The “rule of reason” analysis, first articulated in *Price v. Obayashi Hawaii Corp.*, 81 Hawaii 171, 914 P.2d 1364 (1996), provides that an EIS need not be exhaustive and include all possible details, but will instead be upheld if it sets forth sufficient information to allow the decision maker to fully consider environmental factors and make a reasonable decision. The agency involved in the Turtle Bay expansion was the City and County of Honolulu Department of Planning and Permitting (DPP), which was presented with a subdivision application from Kuilima Resort Company (Kuilima) in 2005. *Turtle Bay* at 13. In response to the subdivision application, the DPP received two letters asking that the DPP require a supplemental EIS. Although there is no “shelf life” for an EIS in Hawaii, both letters referenced the twenty years that had elapsed since the EIS for the project was prepared in the 1980s. One letter alleged, without offering specifics, changes in traffic, water availability, hotel and housing needs, and endangered species habitat needs. The other letter requested a supplemental EIS to allow community input and to address new concerns. *Turtle Bay* at 13. The DPP evaluated these requests, sent responses and tentatively approved the subdivision application without requiring a supplemental EIS. Four years of litigation later, the Hawaii Supreme Court characterized the DPP’s conclusion that a supplemental EIS was not required as “unreasonable and seemingly cursory,” and therefore arbitrary and capricious.

What would the Hawaii Supreme Court have had the DPP do in response to the letters it received? This question is not answered, but it is clear that the Court

is of the opinion that what was done by the DPP was not enough to constitute the requisite “hard look.”

### **Timing Qualifications May Invalidate an EIS**

The original approvals for the Turtle Bay expansion project, when issued, were not qualified by timing, and another project agreement contemplated a flexible schedule. Although stating that the fundamental starting point for statutory interpretation is the language of the statute itself, the Hawaii Supreme Court instead started with the administrative rules, because Hawaii’s EIS law is silent as to supplemental EISs. Looking at the administrative rules regarding EISs, the Court found that every EIS is inherently qualified or limited by some sort of time frame, and agreed with the plaintiffs that the failure to consider the timing of a project “guts environmental review.” According to the Court, an EIS can only meet its intended purpose if it assesses “a particular project at a given location based on an explicit or implicit time frame.” On its review of the record, the Court concluded that the Turtle Bay EIS prepared in 1985 projected through the year 2000, and therefore only addressed project impacts within that time frame. *Turtle Bay* at 55.

Hawaii regulations are clear that an EIS, once accepted, satisfies the statute unless the proposed action has “changed substantively in size, scope intensity, use, location or timing, among other things.” Haw. Admin. R. § 11-200-26. Significant changes in these criteria, the regulations say, mean that the original EIS is no longer valid “because an essentially different action would be under consideration.” *Id.* Although acknowledging that the Turtle Bay expansion project was unchanged in terms of size, scope, location, intensity and use, the Hawaii Supreme Court found it to be an “essentially different action” due to the change in timing, which thereby rendered the original statement invalid. Finding that a supplemental EIS may be required, the Court next examined whether the timing change “may have a significant effect.”

### **Burden of Proof in a Supplemental EIS Challenge**

A plaintiff’s burden in litigation challenging whether a supplemental EIS is required is not to show that “significant effects will in fact occur” but is instead only

to “raise substantial questions whether a project may have a significant effect.” The Hawaii Supreme Court concluded that such substantial questions were clearly raised in the Turtle Bay litigation, and found support for this proposition in several post-EIS traffic reports in the record, along with information regarding a demonstrated increase in the green sea turtle population and the monk seal. The Court concluded that plaintiffs had “clearly” presented new evidence that was not considered in the 1985 EIS and could likely have a significant impact on the environment. Consequently, it held that the project constituted an “essentially different action” under Haw. Admin. R. § 11-200-26, and required a supplemental statement. *Turtle Bay* at 60.

### Validity of Supplemental EIS Rules

There is reason to question whether there is any authority at all to require a supplemental EIS. The plain language of the statute states that, “[a] statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter, and *no other statement* for the proposed action shall be required.” HAW. REV. STAT. § 343 5(g) (emphasis added). Not only is there no statutory authority to require a supplemental EIS, the statute is clear that other statements are not required. Was there valid authority, then, for adoption of rules requiring supplemental EISs? The Hawaii Supreme Court’s answer is that an agency has implied powers reasonably necessary to carry out powers expressly granted and therefore there was an “express grant” of the power to promulgate rules regarding EISs. *Turtle Bay* at 51. Kuilima has sought reconsideration on this point based on the statutory language to the contrary. As of the writing of this article, the ruling on the motion for reconsideration has not been issued.

### Unresolved Issues

The Hawaii Supreme Court’s decision leaves unresolved questions that beg clarification. First, what is the scope of the supplemental EIS that must be performed? Is it limited to the traffic, sea turtles and monk seals identified as the basis for the court’s ruling, or must all the issues in the original EIS be reexamined? Second, since the plaintiffs are seeking injunctive relief, what is the potential scope of any

injunction that may be issued? Is it limited only to the portions of the project that are included in Kuilima’s 2005 subdivision application, or does it enjoin all work on the project? Kuilima has sought clarification from the Hawaii Supreme Court on these issues.

The *Turtle Bay* opinion is significant for its new standard of review regarding supplemental EISs, for the imposition of time limits on EISs, and for its conclusion that “an essentially different action” resulted from the passage of time. This decision will likely increase the number of lawsuits alleging that supplemental EISs should be prepared, and will change how timing considerations are articulated in EISs. Proposed statutory amendments are already being discussed and administrative rule amendments will likely follow.

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### CALL FOR NOMINATIONS



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