

# Public Land and Resources Committee Newsletter

Vol. 6, No. 2

August 2004

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## MESSAGE FROM THE CHAIR

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**Robert D. Comer**

Thank you for your continued support of the ABA Section of Environment, Energy, and Resources and the Public Land and Resources Committee. Public land issues continue to rise to the forefront of the news and the public conscience. This includes increased print and media coverage over a wide range of topics, such as motorized and mechanized recreational use, wilderness set asides, federal water policy, cultural and archaeological resource protection, energy production and wildlife conflicts.

This issue of the Public Land and Resources Committee Newsletter discusses several of these newsworthy topics, including a discussion of the temporary takings and relevant parcel aspects of regulatory takings claims under the Endangered Species Act; new Bureau of Land Management regulations governing "cooperator" status under the National Environmental Policy Act for tribal, state and local governments; the recent Supreme Court case in *SUWA v. Norton*, which may become a landmark Administrative Procedures Act case; an analysis of a recent Colorado district court case concerning the duty of federal agencies to evaluate the impact of agency actions on the environment and determine whether such actions jeopardize the existence of endangered

or threatened species like Preble's meadow jumping mouse; and information on the largest land conservation agreement ever entered in New York State for the protection of Adirondack State Park public lands.

We hope you enjoy this newsletter and find it of interest. In an effort to broaden the subject matter of the Committee, it has been restructured to include consideration of tribal, state and local public land and resource issues. Now we need your help in making the Committee the best it can be. Please become more involved, both in helping to develop programs and in making contributions to future newsletters. One way to get a start is to come visit your colleagues and other Committee members at the 12th Section Fall Meeting in San Antonio, Oct. 6-10, 2004. The program is a first-rate networking and educational opportunity and is a great way to begin to become more involved in Committee activities. Check out the program agenda for the time and location of the Committee roundtable and panel. A list of this and other Section meetings is included inside this newsletter.

As the outgoing Committee chair, I extend my sincere thanks for your efforts and assistance in guiding the Public Land and Resources Committee in its new direction. In particular, all of our thanks are owed to Craig Donovan for his fine efforts in preparing biannual newsletters, to

**Public Land and Resources  
Committee Newsletter  
Vol. 6, No. 2, August 2004  
Craig T. Donovan, Editor**

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This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



Vonnie Larvie for preparing a *Year in Review* chapter well worth reading and to Denise Dragoo for keeping the Committee’s profile elevated through the identification and conduct of numerous excellent Public Land and Resources programs.

See you in San Antonio!

**U.S. SUPREME COURT ADDRESSES  
WILDERNESS DISPUTE BETWEEN ORVS  
AND WSA NON-IMPAIRMENT OF WSAs**

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On behalf of a unanimous court, Supreme Court Justice Scalia issued an opinion in *Norton v. Southern Utah Wilderness Alliance*, 2004 WL 1301302 (U.S.), confirming the Bureau of Land Management’s (BLM’s) broad discretion to manage Wilderness Study Areas (WSAs), to balance such uses as off-road vehicles (ORV) with the mandate to protect wilderness characteristics. Southern Utah Wilderness Alliance (SUWA) asserted that BLM had failed to adequately protect WSAs in Utah’s Henry Mountains area from damage by increasing ORV usage and filed a complaint in federal district court seeking declaratory and injunctive relief on three bases. First, SUWA contended that BLM had violated its non-impairment obligation under the Federal Land Policy and Management Act (FLPMA) to protect wilderness characteristics of WSAs from damage by ORVs. 43 U.S.C. § 1782(c). SUWA also asserted that BLM had failed to implement land use plans (LUPs) requiring the monitoring of ORV use in WSAs. Finally, due to increasing ORV use of public lands, SUWA sought supplemental environmental analyses under the National Environmental Policy Act (NEPA). SUWA claimed standing to redress

each of BLM's alleged failings under the Administrative Procedures Act (APA) which provides a limited waiver of sovereign immunity, to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Utah Federal District Judge Dale Kimball dismissed the matter for lack of subject matter jurisdiction. *SUWA v. Norton*, 147 F. Supp. 2d 1130 (D. Utah 2001). On appeal, the Tenth Circuit reversed finding that BLM had a mandatory, non-discretionary duty under § 706(1) as to all three claims including BLM's non-impairment obligation. *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002). The Supreme Court's decision issued on June 14, 2004 reverses and remands the Tenth Circuit ruling and narrowly construes § 706(1) to limit the circumstances when an agency's "failure to act" may be redressed by the APA.

Justice Scalia, well recognized for his scholarship regarding administrative law, clearly prescribed the boundaries which the APA places on judicial review of an agency's "failure to act." The Court distinguished the more traditional use of the APA to provide private redress for "agency action" under § 706(2) from SUWA's complaints alleging BLM's "failure to act" under § 706(1). The Court confirmed that "failure to act" is limited under the APA to a "discrete agency action that it is *required to take*." 2004 WL 1301302 at \*5. Justice Scalia then clarified that the doctrine of separation of powers prevents the courts from granting relief under § 706(1) regarding a broad programmatic attack on agency policies better addressed either administratively or by Congress. The Court then dismissed each of plaintiff's claims for "failure to act" because they did not involve discrete, non-mandatory duties to act, capable of judicial redress.

As to SUWA's non-impairment claims, the Court recognized FLPMA's mandate "to manage . . . in a manner so as not to impair suitability of such areas for preservation as wilderness."

43 U.S.C. §1782(c). The Court acknowledged the difficulty faced by BLM in balancing competing uses such as ORV activities with the non-impairment of lands with wilderness characteristics. The Court confirmed that BLM has significant discretion in meeting the non-impairment objective and found that FLPMA did not mandate injunctive relief to exclude ORV use to meet this objective. Without a clear mandate, the Court deferred to BLM in determining how to meet FLPMA non-impairment objectives and stated its reluctance to "injecting the judge into day-to-day agency management." 2004 WL 1301302 at \*6.

The Court likewise dismissed SUWA's second claim that BLM had failed to comply with ORV monitoring and implementation LUPs for the Henry Mountains, thereby violating FLPMA's mandate to "manage the public lands . . . in accordance with land use plans." See 43 U.S.C. § 1732(a). The district court dismissed these claims because they did not relate to site-specific actions and concerned the sufficiency of BLM's actions rather than the failure to act under § 706(1). The Tenth Circuit found that the failure to implement a program specifically promised in an LUP has the same effect as if the agency had taken an affirmative act in direct defiance of its LUP obligations. 301 F.2d 1217, 1235-1236. The Supreme Court reversed the Tenth Circuit and clarified that it would not compel BLM action under § 706(1) regarding a statement in an LUP that BLM will take certain action, "absent clear indication of binding commitment . . ." 2004 WL 1301302 at \*8. The Court cited BLM's Land Use Planning Handbook to confirm that land use plans are not normally used by the agency to make site-specific implementation decisions, but are more in the nature of policies. 2004 WL 1301302 at \*9. Therefore, BLM's statements regarding ORV monitoring set forth in the Henry Mountain LUP are not a legally binding commitment enforceable under § 706(1). 2004 WL 1301302 at \*10.

Finally, the Court dismissed SUWA's contention that BLM failed in its duties under NEPA to supplement environmental analyses to reflect increasing ORV use of public lands. SUWA argued that BLM could be compelled under § 706(1) to consider supplementing NEPA studies prepared prior to designation of the Utah WSAs. The Court concluded that it did not need to address whether supplementation was a mandatory duty under the APA. Rather, the Court found that supplementation was not required under CEQ rules because no proposed federal action was pending as required by 40 C.F.R. § 1502.9(c)(1)(ii) (2003). The Court contrasted the facts in *Norton* to those in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 370-374 (1989), in which the Court ruled that supplementation was required when federal dam construction was pending. By contrast, the federal action in *Norton* involved completed LUPs which were not proposed for amendment. While acknowledging that approval of an LUP is a "major Federal action" triggering NEPA analysis under 43 C.F.R. § 1601.0-6, the Court found that the federal action is complete once the LUP is finally approved. Therefore, final LUPs issued by the Utah BLM in this case did not constitute pending federal action requiring supplemental analysis under NEPA. 2004 WL 1301302 at \*10.

In sum, the Court has declined to use § 706(1) of the APA as a means to redress day-to-day agency operations, allowing BLM broad discretion in implementing LUPs and in administering the WSA non-impairment requirements of FLPMA. Further, the Court has clarified that supplemental analyses of LUPs under NEPA cannot be required once the plan is finally adopted or amended.

The ABA Section of Environment, Energy, and Resources' Public Land and Land Use Committee has assembled a panel to discuss the implications of *Norton v. SUWA* on Friday, Oct. 8, 2004, from 10:30 a.m. to 12:00 pm. at

the 12th Section Fall Meeting in San Antonio, Texas. Our 2003-04 committee chair, Robert Comer, Regional Solicitor, U.S. Department of the Interior, will be joined in the panel discussion by Jim Angell with EarthJustice and John Andrews, State of Utah, School and Institutional Trust Lands Administration. All three panelists represent parties who participated in the briefing of *Norton v. SUWA*. In addition to discussing ORV and WSA non-impairment policies on federal lands, the panelists will address the new roadless rule impacting the wilderness characteristics of forest lands and the pending Tenth Circuit appeal of a settlement between the Bush administration and the state of Utah in *Utah v. Norton*, No. 96-CV-870 (D. Utah 2003), setting aside BLM's wilderness reinventory. The debate promises to be lively and timely as we mark the 40th anniversary of the Wilderness Act of 1964. We hope you can join us in San Antonio!



The graphic features a blue header with the ABA logo on the left and a globe on the right. Below the header, the text "Public Land and Resources Committee Newsletter" is centered. A globe is positioned behind the text. Below the header, the text "LIKE TO WRITE?" is centered. Underneath, there are two paragraphs of text: "The Public Land and Resources Committee welcomes the participation of members who are interested in preparing this Newsletter." and "If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact the editor Craig T. Donvoan at [ctdonovan@yahoo.com](mailto:ctdonovan@yahoo.com) or 212/385-2122."

**LIKE TO WRITE?**

The Public Land and Resources Committee welcomes the participation of members who are interested in preparing this Newsletter.

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**THE TEMPORARY TAKING AND  
RELEVANT PARCEL ASPECTS OF  
REGULATORY TAKINGS CLAIMS UNDER  
THE ENDANGERED SPECIES ACT**

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Land developers do not have to look far to find cases where the presence of an endangered species on their property has resulted in substantial and costly development constraints. For example, in *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), a South Florida land developer was prevented from developing his property because two different endangered species, the Lower Keys marsh rabbit and the silver rice rat, lived on his property. Most recently, in *Seiber v. United States*, 2004 WL 830172, No. 03-5010 (Fed. Cir. April 19, 2004), state and federal regulators prohibited Oregon timber harvesters from logging a large parcel of property due to the presence of nesting habitat for the threatened northern spotted owl. Indeed, the threat of regulatory deprivation of development rights looms on the horizon anytime an endangered or threatened species is identified on private property.

Consider the bald eagle, for instance, which is protected under three different federal laws, including the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1544; the Bald Eagle Protection Act (BEPA), 16 U.S.C. §§ 668-668d; and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703-711. If a land developer discovers even the nest of one of these national birds in the wake of development, she is obligated to immediately cease development in the vicinity and adjust the development plans to avoid harming the eagle's habitat.

In 2001, such a discovery occurred in North Carolina. See 66 Fed. Reg. 15736 (Mar. 20, 2001). During the construction of a 10,000-acre lakeside residential development in North Carolina, a developer came across one bald eagle's nest at the construction site. *Id.* After the United States Fish and Wildlife Service (FWS) confirmed that it was indeed a bald eagle's nest, the construction activities at the site came to a halt. Although FWS eventually allowed limited development to continue, it restricted activities within a 750-foot radius of the nest, including a temporary moratorium on residential construction. The developer sought and obtained an incidental take permit for the eagle's nest in exchange for a habitat conservation plan which required extensive concessions, such as committing to provide six undeveloped sites for bald eagle habitat conservation, eliminating the cutting of trees greater than four-inches in diameter near the eagle's nest, and protecting any future eagle nesting sites that might be discovered. *Id.* at 15736, 15737-15738.

Fortunately, the framers of the United States Constitution, while not specifically anticipating the twentieth-century's species protection laws, included within the Fifth Amendment to the Constitution a provision guaranteeing that no "private property [shall] be taken for public use, without just compensation." U.S. CONST. amend. V. Although this constitutional guarantee has commonly been applied to "physical takings" of property (*i.e.*, where the government physically occupies a portion of the property), a modern trend also requires just compensation when government regulation limits a landowner's use of his property – the so-called "regulatory taking." Important questions, however, are repeatedly presented in this context – questions for which the courts until recently held no consensus. These questions involve both the temporal and spatial dimensions to the regulatory takings doctrine. First, if the government action only *temporarily* restricts the landowner's use of his property, has a taking of

property requiring just compensation occurred? Second, if the landowner can still use a *portion* of his property, has there been a taking of property requiring just compensation? See Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 190-220 (2004) (discussing at-length the proper denominator for measuring regulatory takings). After much uncertainty, the Supreme Court recently answered some of these questions, but many commentators expect that the Court will revisit these issues as it develops a more coherent regulatory takings doctrine.

### **Takings Without Just Compensation**

Courts have identified three types of Fifth Amendment takings claims. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). First, a “physical taking” generally occurs when the government directly appropriates or occupies private property. *Id.* at 1014. Second, a “regulatory taking” generally involves regulations which limit the use of private property. *Id.* at 1014-15. Finally, the Supreme Court has identified a special category of regulatory takings, referred to as “categorical takings,” which involve regulatory takings that are so significant that they warrant treatment as physical takings of property. *Id.* at 1015.

### **Physical Takings under *Loretto***

The most obvious type of taking occurs when the government encroaches upon or occupies private land for its own use. As the Supreme Court recognized in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), even a minimal “permanent physical occupation of real property” requires compensation. *Loretto*, 458 U.S. at 427 (holding that a state regulation requiring a landlord to allow television cable companies to install cable wires in apartment buildings constituted a physical

taking). Only one court, however, has held that the ESA produced a physical taking for which the government had to compensate the property owner. See *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 320-324 (Fed. Cl. 2001). Holding that a physical taking occurred where the listing of the chinook salmon severely restricted the amount of water that could be withdrawn by a county water district, the court in *Tulare* stated that “[t]he federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so.” *Id.* at 324. *But see Seiber*, 2004 WL 830172 at \*8 (holding that an ESA-based “prohibition against logging in protected owl habitat did not constitute a physical taking”).

### **Regulatory Takings under *Penn Central***

The development constraints imposed by the ESA and other species protection laws most often present a regulatory takings question. For almost a century, the Supreme Court has recognized that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Supreme Court held that a regulation may take private property for public use, thus requiring just compensation, if it “denies an owner economically viable use of his land.” See *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). If a regulatory taking occurs, the landowner’s damages will be based upon the property’s fair market value. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001).

The Supreme Court, however, has yet to develop a precise formula for determining whether a regulatory taking has occurred. See *Lucas*, 505 U.S. at 1014-1015. Instead, where a regulation places limitations on land that fall short of eliminating *all* economically beneficial use, the Supreme Court will consider various factors in determining whether there has been a compensable taking. See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104,

124 (1978). These “*Penn Central*” factors include: (1) the extent to which the regulation interferes with reasonable investment-backed expectations, (2) the economic impact of the regulation and (3) the character of the government action. *Id.* The *Penn Central* factors are “informed by the purpose of the Takings Clause, which is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Palazzolo*, 533 U.S. at 617-18. Several relevant cases illustrate the application of the *Penn Central* factors. See *Seiber*, 2004 WL 830172 at \*11-12 (holding that a temporary ban on logging did not constitute a regulatory taking under *Penn Central* where the plaintiffs failed to show any economic impact); *Good v. United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999) (holding that no taking occurred because the plaintiff “lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking”); *Florida Rock Industries v. United States*, 18 F.3d 1560, 1566 (Fed. Cir. 1994) (remanding the case to determine whether a regulatory taking had occurred since an “active though speculative investment market” for Florida Rock’s property existed even after the permit denial).

### **Categorical Regulatory Takings under *Lucas***

In addition to the regulatory takings subject to the *Penn Central* analysis, the Supreme Court has defined at least two discrete categories of regulation which are compensable without any case-specific inquiry. See *Lucas*, 505 U.S. at 1015. The first category of these so-called “categorical takings” involves regulations that compel the property owner to suffer a “physical invasion of his property.” *Id.* According to the Supreme Court, where a regulation results in a physical invasion – “no matter how minute the intrusion, and no matter how weighty the public purpose behind it” – compensation is required.

*Id.* More importantly for developers faced with an ESA obstacle, the second type of categorical taking is where a “regulation denies all economically beneficial or productive use of land.” *Id.* While the government may not actually take physical possession of the property, some regulations may be the “equivalent of a physical appropriation” from the landowner’s perspective. *Id.* at 1017. In other words, “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good [by leaving] his property economically idle, he has suffered a taking.” *Id.* at 1019 (referring to these regulations as “confiscatory regulations”).

In *Lucas*, the Supreme Court held that South Carolina had to compensate the owner of beachfront property where the state enacted a law depriving him of all viable use of his property. The plaintiff, David Lucas, paid almost \$1 million for two lots on the South Carolina coast for residential development. *Id.* at 1006-07. Two years later, the state enacted the Beachfront Management Act, which had the direct effect of barring Lucas from erecting any permanent habitable structures on his two parcels. *Id.* at 1007. The state argued that harmful uses of property may be prohibited by government regulation without compensation. *Id.* at 1023. Rejecting this contention, the Supreme Court stated: “Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” *Id.* at 1027. In other words, if a government regulation results in a categorical taking, the Court explained that compensation must be paid unless the activity on the property would be characterized as a common law nuisance under the applicable state law. *Id.* at 1029.

The *Lucas*-style “total taking inquiry” involves an analysis of several factors to determine whether

the government regulation falls within the category of “confiscatory regulations” or is simply a proper exercise of the state’s police powers, including the degree of harm to public lands and resources or adjacent property posed by the claimant’s proposed activities, the social value of the claimant’s activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government or adjacent private landowners. *Id.* at 1030-1031. After establishing these guiding principles for categorical takings, the Supreme Court remanded the case to the South Carolina courts for an evaluation of Lucas’ case in light of the decision.

In *Palazzolo*, however, the Supreme Court held that a *Lucas*-style categorical taking did not occur where the state’s denial of a wetlands permit allowed development on a smaller portion of the property. 533 U.S. at 630-631. In 1959, Anthony Palazzolo purchased three undeveloped, adjoining parcels along the Rhode Island coast. Over a decade later, the state promulgated regulations designating much of the coastal area, including Palazzolo’s property, as coastal wetlands. *Id.* at 614. During the 1980s, Palazzolo applied unsuccessfully to obtain the necessary state permits to develop the property. In response to the repeated permit denials, Palazzolo filed suit contending that the state’s wetlands regulations had taken his property without just compensation. *Id.* at 615. Since Palazzolo retained \$200,000 in development value (of the \$3.15 million value for his intended use), the Supreme Court held that a total taking did not occur. *Id.* at 616. The Court did, on the other hand, remand the case with instructions for the lower courts to consider whether a regulatory taking occurred based on the *Penn Central* factors. *Id.* at 616. As this case illustrates, and as more recent Supreme Court precedent reveals, the category of cases that will involve “categorical takings” is extremely narrow – only

applying where a “regulation *permanently* deprives property of *all* economic value.” See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2002) (describing the *Lucas*-type situations as “extraordinary”) (emphasis added).

### **The Temporal Aspects of the Regulatory Takings Doctrine**

The final *Penn Central* factor involves the character of the government action, which often focuses on whether the regulation effects a “temporary” or “permanent” taking of property. For example, when a landowner files a takings claim based on some ESA prohibition, the government – in its efforts to show that the regulation has not “gone too far” – may argue that the development constraints do not constitute a compensable taking because the constraints are only temporary. That is, the government may argue that the constraints will be removed when the relevant species is delisted from the endangered species list or when the species vacates the protected habitat. See *Seiber*, 2004 WL 830172 at \*6 (discussing various types of temporary takings). Importantly, as the Supreme Court explained in 2002, a temporary taking may still be compensated based on the *Penn Central* test depending on the totality of the circumstances. See *Tahoe-Sierra*, 535 U.S. 302. *But see Seiber*, 2004 WL 830172 at \*9 (suggesting that a “temporary categorical taking may be possible” when a permit denial is rescinded).

In *Tahoe-Sierra*, a regional planning agency imposed two moratoria, totaling 32 months, on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan. 535 U.S. at 306. Various real estate owners filed a takings claim against the agency arguing that the moratorium constituted a categorical taking of property under *Lucas* because the moratorium, while in effect, denied the property owners all viable economic use of their property. *Id.* at 318. Rejecting the property owners’ argument, the Court held that the *Penn Central*

analysis for normal regulatory takings was the proper framework for evaluating temporary deprivations of the use of property – not the *Lucas* test for categorical takings. *Id.* at 321. “Anything less than a complete elimination of value, or a total loss,” the Court explained, “would require the kind of analysis applied in *Penn Central*.” *Id.* at 330. Therefore, under the Supreme Court’s most current approach, claims that a regulation has effected a temporary taking require the weighing of factors under *Penn Central*. *Id.* at 335. Importantly, this conclusion does not mean that the “temporary nature of a land-use restriction precludes finding that it effects a taking,” rather a regulatory takings claim may succeed based on an evaluation of all relevant factors, including the duration of the regulation. *Id.* at 337, 342 (stating that the “duration of the restriction is one of the important factors a court must consider in the appraisal of a regulatory takings claim”).

### **The Proper Denominator or Relevant Parcel for Regulatory Takings Claims**

In addition to the temporal considerations, courts must consider the spatial aspects of regulatory takings claims as well. Whether constraints placed on development by endangered species laws may constitute “regulatory takings” is a question subject to dispute among the various courts, and this dispute often centers around the so-called “whole parcel rule.” See Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court’s Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 460-63 (2004). Prior to last year, the Supreme Court refused to provide a clear message as to the proper denominator for measuring whether a compensable taking had occurred. According to one commentator, “the relevant parcel issue centers on a single question: What property unit is the appropriate focus in a takings analysis?” Thomas J. Koffer, *What to “Take” From Palazzolo and Tahoe-Sierra: A Temporary Loss for Property Rights*,

21 VA. ENVTL. L.J. 503, 525 (2003). Two competing rules are at issue: the “whole parcel rule,” which provides that the entire parcel will serve as the appropriate property unit in a takings analysis, and the “conceptual severance rule,” which provides that only those areas affected by the government action serve as the appropriate property unit. *Id.*

For example, in *Coast Range Conifers v. Oregon*, an Oregon state court held that the Oregon Board of Forestry’s refusal to allow logging on a nine-acre parcel due to the presence of a bald eagle’s nest was an unconstitutional taking of property without compensation. 76 P.3d 1148 (Or. App. 2003). Shortly after a logging company acquired a 40-acre parcel of forested land, two nesting bald eagles were discovered on the property. *Id.* at 1149. The logging company’s first proposal for an incidental take permit, which included a 330-foot buffer around the eagle nest, was rejected. The Oregon Department of Fish & Wildlife (ODFW) agreed to allow harvesting if the logging company committed not to harvest within 400 feet of the bald eagle nest and to preserve half of the live trees between 400 and 500 feet from the nest. The logging company agreed. *Id.*

A few months later, the bald eagle nest was no longer occupied since the nesting season had ended. After the ODFW rejected the application to harvest the area now vacated by the eagles, the logging company challenged the agency’s action as an uncompensated taking of property in violation of the Oregon Constitution and the U.S. Constitution. Central to the logging company’s argument was the assertion that “it had been denied all economically productive use of the nine-acre tract that the state would not permit it to log.” *Id.* at 1150.

Addressing the Oregon constitutional issues, the court recognized the “validity of regulatory takings claims under [the Oregon Constitution].” *Id.* at 1154-55. Without specifically stating it, the

court seemed to apply the *Lucas* test for categorical takings. For example, the court framed the applicable rule by stating that “a regulation of use gives rise to a compensable takings claim under [the Oregon Constitution] when the regulation ‘deprives the owner of *all* economically viable use of the property.’” *Id.* at 1155 (emphasis added). ODFW contended that the appropriate benchmark for measuring the deprivation of economically viable use was the “whole parcel” (that is, did the logging company retain any viable use of any part of the 40-acre parcel?). *Id.* Holding in favor of the logging company, the court reasoned that a takings claim under the Oregon Constitution could be based on the loss of viable use of *any portion* of the property. *Id.* at 1157-58.

In a similar case, a Florida court came to the opposite conclusion. See *Florida Game & Fresh Water Fish Comm’n v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. Dist. Ct. App. 1994). In *Flotilla*, a Florida state court held that restricting development of 48 acres of a 173-acre parcel to protect bald eagle nesting sites did not deprive the developer of most or all of its interests in the property. In that case, a developer purchased 173 acres of undeveloped land for a residential subdivision. Six months after beginning construction, the developer discovered a bald eagle’s nest in a tree situated within the development area. The developer ceased operations within 750 feet of the nesting tree under threat of criminal prosecution and filed a takings claim under the Florida Constitution for the loss of 48 acres comprising the area set aside for the eagle’s benefit. *Id.* at 763.

Applying the “whole parcel rule,” the court stated that “in deciding whether government effects a taking, the focus is on the extent of the interference with the landowner’s rights in the property as a whole, not merely the affected portions.” *Id.* at 765 (citing *Penn Central*, 438 U.S. at 130-131). Thus, under the reasoning of the Florida court, a categorical regulatory taking

does not occur where a developer is prevented from developing only a portion of his property due to the presence of an endangered species. *Id.*

In 2001, the Supreme Court explained its then-current position on the relevant parcel issue, stating:

[Palazzolo] asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. . . . Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, . . . ; but we have at times expressed discomfort with the logic of this rule, [citing *Lucas*], a sentiment echoed by some commentators . . . .

*Palazzolo*, 533 U.S. at 631-632 (internal citations omitted). Despite noting its “discomfort” with the whole parcel rule, the Court refused to resolve this issue because the landowner did not “press the argument in the state courts.” *Id.*

In 2002, however, the Supreme Court ended its indecision on the matter by laying down a clear rule. In *Tahoe-Sierra*, the Supreme Court differentiated between physical and regulatory takings for purposes of applying the whole parcel rule, explaining:

When the government *physically* takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.

\* \* \*

Justice Brennan’s opinion for the Court in *Penn Central* did, however, make it clear that even though multiple factors are relevant in the analysis of *regulatory*

*takings* claims, in such cases, we must focus on “the parcel as a whole.”

535 U.S. at 322, 327 (emphasis added). In other words, courts should apply the conceptual severance rule for physical takings (*i.e.*, where the government permanently occupies any portion of property), but courts should apply the whole parcel rule for all regulatory takings, including categorical regulatory takings under *Lucas* and other regulatory takings under *Penn Central*.

The practical implication of the *Tahoe-Sierra* decision is that, for a regulatory takings claim under *Penn Central*, the court will consider the relevant factors in light of the entire parcel – not just the regulated portion. Nonetheless, some commentators continue to argue that the Supreme Court may revisit the relevant parcel issue yet again. See Koffer, *supra*, at 531. It should be noted that since the whole parcel rule applies to all regulatory takings claims, a landowner would have difficulty arguing that it has been deprived of “all” economically beneficial use of its property. The classic case of a categorical taking in *Lucas* involved a landowner that lost all use of his entire lot. This does not appear to be the case for most regulatory takings under the ESA. In fact, categorical takings only arise in the extraordinary case where a “regulation permanently deprives property of all economic value.” See *Tahoe-Sierra*, 535 U.S. at 332.

### **Merging the Temporal and Spatial Aspects: *Seiber v. United States***

Interestingly, as illustrated by the Federal Circuit’s recent decision in *Seiber v. United States*, the concepts of temporary takings and the relevant parcel may at times overlap to be the two determinative factors in a regulatory takings claim. In *Seiber*, an Oregon couple, Marsha and Alvin Seiber, owned 200-acres of timberland which they intended to harvest for merchantable timber. 2004 WL 830172 at \*2.

By 1996, however, forty acres of the Seiber’s property had been designated as protected owl-nesting habitat for the northern spotted owl, which was listed as a threatened species. *Id.* A few years later, FWS denied the Seiber’s application for an incidental take permit that would have authorized the logging of the protected timberland, and in response, the Seibers filed a Fifth Amendment takings claim. *Id.* Interestingly, the northern spotted owl – as birds often do – vacated the Seiber’s property shortly after the filing of the lawsuit, resulting in the lifting of the logging ban and leaving the Seibers free to harvest the timber. *Id.* at \*4. Nonetheless, frustrated by the two-year delay in their logging plans, the Seibers continued to pursue their Fifth Amendment claim, arguing that they had suffered either a “temporary categorical taking” under *Lucas* or a temporary regulatory taking under *Penn Central*. *Id.* Temporary takings, the Federal Circuit recognized, may arise in two situations. First, a temporary taking may occur when a “permanent taking is temporally cut short,” such as when a court strikes down a regulation that previously constituted a taking, an agency revokes a regulation after a taking has occurred, or an agency grants a permit after a previous decision to deny a permit. *Id.* at \*6. Second, a temporary taking may occur when there is an “extraordinary delay in the governmental decision making process.” *Id.* The Seiber’s case, which involved FWS’ decision to rescind its earlier permit denial, fell under the rubric of the first category of temporary regulatory takings. *Id.* at \*6-7 (noting that the two types of temporary takings are governed by their own standards).

Considering the Seiber’s taking claim under both the *Lucas* and *Penn Central* analyses, the court held that neither theory justified compensating these landowners. *Id.* at \*9-12. First, the court rejected the temporary categorical taking claim, explaining that “the Seibers did not lose all value in their parcel as a whole.” *Id.* at \*10. Notably, since the Seibers

could still log other portions of the 200-acres of timberland, the court reasoned that they had not been “deprived of *all* beneficial use” in the “*whole parcel* of land.” *Id.* In fact, the court even rejected the Seiber’s argument that the trees themselves constituted a separate property interest, thereby requiring compensation for each tree taken regardless of whether the whole parcel of land was involved. *Id.* This argument fell short, the court reasoned, because the Seibers failed to allege that “their timber on the entire two hundred-acre parcel was rendered valueless.” *Id.* at \*11.

Likewise, the Federal Circuit rejected the Seiber’s contention that they suffered a temporary regulatory taking under *Penn Central*. *Id.* at \*11-12 (recognizing that a regulatory taking under *Penn Central* must be considered in terms of the “parcel as a whole”). Interestingly, the court’s rejection of this regulatory takings claim was based primarily on an evidentiary flaw in the Seiber’s case. The Seibers, who were obligated by the *Penn Central* analysis to show an “economic impact” caused by the regulation, failed to introduce convincing evidence that either the value of the property as a whole or the value of the timber harvest decreased as a result of their inability to harvest the timber for the two-year period. *Id.* at \*12. Had the Seibers introduced sufficient evidence showing an economic loss during the two-year logging ban – a decrease in either the value of the property as a whole or the value of the timber harvest – the Federal Circuit would have been forced to look more closely before rejecting the Seiber’s demand for compensation *in toto*.

## **Conclusion**

The distinction between physical and regulatory takings is important because, as the Supreme Court recognized in *Tahoe-Sierra*, courts should “not apply [Supreme Court] precedent from the physical takings context to regulatory takings claims.” 535 U.S. at 323-23. In fact, as

discussed above, there is a completely different framework and an entirely different application of the whole parcel rule for physical and regulatory takings. Thus, a unique body of case law distinct from physical takings has developed for regulatory takings. As a result, in determining whether any landowner may successfully pursue a takings claim, it is first necessary to determine the type of takings claim at issue.

Depending on the facts surrounding the purchase and development of the private property, and the extent to which the government restricts development on the property (in either temporal or spatial respects), a landowner may successfully pursue a regulatory takings claim. A court considering such a claim may be persuaded by the Oregon court’s rationale and agree that the loss of use of a portion of the property due to habitat preservation for an endangered species must be compensated under state constitutional law grounds. Nonetheless, in the wake of the recent decisions by the U.S. Supreme Court and the Federal Circuit, and given the fact that the Oregon decision rested on state constitutional grounds and the conceptual severance rule (a rule which the U.S. Supreme Court rejected for federal regulatory takings cases), a landowner’s ability to pursue compensation for such claims in federal court is more unlikely now. Fortunately for private landowners, even though the Takings Clause originates with the Bill of Rights, regulatory takings claims based on endangered species preservation is a relatively recent phenomenon and should not be considered a settled area of law. See Blaine I. Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, 15 YALE J. ON REG. 329, 332 n. 9 (1998) (noting that, as of 1998, no case had squarely addressed the propriety of takings challenges to the ESA).

## **UPCOMING EVENTS OF THE SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES**

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P The conference "Brownfields 2004: Gateway to Revitalization" will be held from Sept. 20-22, 2004. The conference will feature numerous presenters, participants and exhibitors and include educational sessions covering key legal issues of interest to brownfields professionals including sessions for both practitioners new to the field and seasoned experts. Information about the conference and its location can be found on the American Bar Association's Web site at [www.abanet.org](http://www.abanet.org) or obtained by e-mail at [brownfields2004@icma.org](mailto:brownfields2004@icma.org).

P The 12th Section Fall Meeting of the Section of Environment, Energy, and Resources will be held from Oct. 6-10, 2004. More information to be posted on the American Bar Association's Web site at [www.abanet.org/environ/](http://www.abanet.org/environ/).

P The 23rd Water Law Conference will be held at the Westin Horton Plaza in San Diego, California, from Feb. 24-25, 2005. Information about the conference will be posted on the American Bar Association's Web site at [www.abanet.org/environ/](http://www.abanet.org/environ/).

P The 34th Annual Conference on Environmental Law will be held at the Keystone Resort and Conference Center, Keystone, Colorado, from March 10-13, 2005. Information about the conference will be posted on the American Bar Association's Web site at [www.abanet.org/environ/](http://www.abanet.org/environ/).

P Rocky Mountain Mineral Law Foundation will offer the following upcoming courses: Development Issues & Conflicts in Modern Gas and Oil Plays, Nov. 4-5, 2004, Houston Texas; Federal Offshore Oil & Gas Law Short Course, Oct. 25-27, 2004, Houston, Texas; Oil and Gas Law Short Course, Oct. 25-29, 2004, Houston, Texas; International Energy Law, Contracts, and

Negotiations: Upstream Issues & Agreements, Sept. 27-Oct. 1, 2004; Midstream Issues & Agreements, Oct. 4-8, 2004, Houston, Texas; and Natural Resources & Environmental Administrative Law and Procedure, Sept. 16-17, 2004, Denver, Colorado. Registration information can be obtained at 303/321-8100 or at [www.rmmlf.org](http://www.rmmlf.org).

### **COLORADO DISTRICT COURT FINDS ENERGY DEPARTMENT VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT AND ENDANGERED SPECIES ACT FOR FAILURE TO CONDUCT ENVIRONMENTAL IMPACT REVIEW AND CONSULTATION CONCERNING A ROAD EASEMENT AND AN EXPANSION OF SAND AND GRAVEL MINING IN THE HABITAT OF PREBLE'S MEADOW JUMPING MOUSE**

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#### **Introduction**

In an important decision concerning a federal agency's duty to conduct environmental impact review under the National Environmental Policy Act (NEPA) and consult with the U.S. Fish and Wildlife Service (USFWS) on the impact of federal agency actions on threatened or endangered species under the Endangered Species Act (ESA), the U.S. District Court for the District of Colorado held that the U.S. Department of Energy (DOE) violated NEPA by granting a road easement across buffer zone land of the National Wind Technology Center for a proposed expansion of a sand and gravel mine without determining whether an environmental assessment (EA) or environmental impact statement (EIS) was required. *Sierra Club v. U.S. Dep't of Energy*,

255 F. Supp.2d 1177, 1189 (D. Colo. 2002). In addition, the district court held that DOE violated § 7 of the ESA by failing to consult with USFWS on the environmental impacts of the easement and the proposed mining project on the habitat of Preble's meadow jumping mouse, a threatened species listed under the ESA. *Id.* at 1190.

***Factual Background of DOE's Road Easement to Western Aggregates, Inc. (WAI) for Expansion of Sand and Gravel Mining Activities in Rocky Flats***

In 1951, the U.S. government obtained the Rocky Flats facility, a processing plant for plutonium and manufacturing facility of triggers for nuclear warheads, located between Golden and Boulder, Colorado. *Id.* at 1180. In 1975, the government acquired additional surface rights and expanded the size of the Buffer Zone around the facility to 6,500 acres in total. *Id.* In 1977, DOE took over the administrative and managerial duties of the plant. *Id.* In 1992, the government ceased production of plutonium at Rocky Flats and initiated remediation of ground contamination in areas immediately surrounding the facility. Several areas of the Buffer Zone, however, were not contaminated. *Id.* Prior to 1992, owners of subsurface rights to Rocky Flats were not permitted to access their mineral rights. The owners of the subsurface mineral rights leased these rights to Western Aggregates, Inc. (WAI), an operator of an existing gravel pit and grading facility located west of the Buffer Zone. *Id.* Mineral Reserves, Inc. currently holds all property rights, permits and other interests previously held or applied for by WAI. *Id.* DOE operates a National Wind Technology Center on two hundred acres of the Buffer Zone.

The Buffer Zone purportedly contains one of the last remaining xeric tall grass prairies in the world. *Id.* In addition, the Buffer Zone is home to a significant population of Preble's meadow jumping mouse (*Zapus hudsonius preblei*), a

small rodent found in seven counties in Colorado and two counties in Wyoming. See 63 Fed. Reg. 26517 (1998) (codified at 50 C.F.R. Part 17). Preble's meadow jumping mouse occupies riparian shrub lands and mixed grasslands that receive moderate amounts of moisture. *Id.* at 26518-26519. The species forages beneath shrubs and long grasses for seeds, berries and insects and builds dens lined with leaves, where it hibernates during seven months of the year. "Species Profile: Preble's Meadow Jumping Mouse," Wildlife Report: News from The Colorado Division of Wildlife located at [www.dnr.state.co.us/cdnr\\_news/wildlife.html](http://www.dnr.state.co.us/cdnr_news/wildlife.html) (visited April 15, 2004). In recent years, habitat loss and degradation caused by agricultural, residential, commercial and industrial development have adversely affected the survival of Preble's meadow jumping mouse. 63 Fed. Reg. at 26517. On May 13, 1998, USFWS designated the mouse as a threatened species in its entire range under the ESA. *Id.* See "USFWS Species Profile for Preble's meadow jumping mouse" available at [www.ecos.fws.gov/species\\_profile/SpeciesProfile](http://www.ecos.fws.gov/species_profile/SpeciesProfile) (visited March 9, 2004). USFWS currently is examining petitions to delist the species under the ESA.

In 1997, WAI applied for an amendment to its mining permit from the Colorado Mined Land Reclamation Board in order to expand its sand and gravel mine to approximately 425 acres located in the Buffer Zone. *Sierra Club v. U.S. Dep't of Energy*, 255 F. Supp.2d 1177, 1180 (D. Colo. 2002). The expanded area would include part of the land used as a National Wind Technology Center by DOE. In addition, WAI received a conditional approval of its rezoning application from Jefferson County, Colorado. *Id.* According to a rezoning resolution on Feb. 13, 1996, Jefferson County required WAI to preserve the hydrological and ecological resources in the proposed mining area. *Id.* In addition, the rezoning resolution mandated that WAI undertake environmental and hydrological studies of the xeric tall grass prairie and draft a mine operation plan for submission to the

Jefferson County government for approval. *Id.* Jefferson County would then make a finding whether the studies supported WAI's proposed expansion of the gravel mine. *Id.* Moreover, the rezoning resolution required WAI to post reclamation bonds and obtain an air quality amendment permit from the Colorado Department of Health and a highway access permit from the Colorado Department of Transportation before WAI could begin mining activities in the expanded area. *Id.*

In July 1995, DOE granted a road easement to WAI. The easement allowed WAI and its successor, MRI to construct a road from Highway 128 across the NWTC to the existing mine and the area for the mine's expansion. *Id.* The easement would allow MRI to more efficiently remove sand and gravel from the mine. DOE's Field Office in Golden, Colorado promulgated rules and regulations concerning the use and occupation of the road. *Id.* The grant of easement stated, "[T]he construction, use and/or operation and maintenance of said easement shall be performed without cost or expense to the Government under the general supervision and subject to the prior approval of the Manager of the Golden Field Office of the Department of Energy." *Id.* at 1181. In addition to granting the easement, DOE entered a memorandum of understanding with WAI concerning operations at the mine. WAI agreed not to undertake mining activities on the portion of the property used by DOE for the National Wind Technology Center (NWTC) for a period of twenty years after receiving approval from Jefferson County. *Id.* The memorandum of understanding stated,

DOE agrees that upon mutual agreement between WAI and DOE of appropriate terms and conditions, DOE shall grant to WAI an easement traversing the NWTC over which WAI may construct, at no cost to DOE, a roadway connecting WAI's existing facilities to Highway 128 on the north.

*Id.*

## Procedural History

On March 17, 1997, the plaintiff, Sierra Club filed a lawsuit in the U.S. District Court for the District of Colorado against the U.S. Dept. of Energy, the secretary of Energy and the U.S. Army Corps of Engineers. Sierra Club alleged that the defendants failed to take measures to protect valuable wetlands, open space and habitat for Preble's meadow jumping mouse from WAI's planned expansion of the sand and gravel mine located in Rocky Flats. *Sierra Club v. U.S. Dep't of Energy*, 150 F. Supp.2d 1099, 1101-1105 (D. Colo. 2001). Sierra Club's complaint contained eight claims for relief. The defendants argued that Sierra Club's lawsuit was not a matter appropriate for court review because Sierra Club did not have standing to bring the case. *Id.* at 1106-1107. In addition, the defendants asserted that Sierra Club's claims were not ripe for adjudication because even though WAI received conditional approval for rezoning and an expansion of its mining permit, WAI had not undertaken any expanded mining activities. *Id.* The district court declined to address the issue of standing and held that Sierra Club's claims against DOE and U.S. Army Corps of Engineers were not ripe for adjudication. *Id.* at 1107-1108.

Sierra Club appealed only its NEPA and ESA claims to the Tenth Circuit Court of Appeals. *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1261 (10th Cir. 2002). The Tenth Circuit reversed and remanded for further proceedings holding that Sierra Club's NEPA and ESA claims were ripe for adjudication because Sierra Club had satisfied the requirements for standing. *Id.* at 1265-1266 (citing *Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996)). After remand to the district court, Sierra Club filed an amended complaint joining the Center for Native Ecosystems as co-plaintiff in the case. On Aug. 30, 2002, the district court granted Mineral Reserves, Inc., assignee of the road easement, permission to intervene as a co-defendant. *Sierra Club v.*

*U.S. Dep't of Energy*, 255 F. Supp.2d 1177, 1179-1180 (D. Colo. 2002).

## **Analysis of the Issues Raised by the Parties**

### *DOE's Use of the A7 Categorical Exclusion under NEPA*

The first issue that the district court considered on remand was whether DOE's grant of the road easement for access to the mine without preparing an environmental assessment or environmental impact statement was in violation of NEPA. *Sierra Club*, 255 F. Supp.2d. at 1182-1183. DOE argued that the granting of the easement did not violate NEPA because the easement was granted in accordance with an A7 "categorical exclusion" to full NEPA review, which eliminated the need for preparation of an environmental assessment or environmental impact statement. *Id.* at 1182. The plaintiffs, Sierra Club and the Center for Native Ecosystems, however, asserted that DOE's reliance on an A7 categorical exclusion violated NEPA because (1) the A7 categorical exclusion was not applicable to an easement for a mine road across the NWTC's land located in the Buffer Zone, (2) DOE limited its analysis to the easement only and did not consider all impacts on the environment including the impacts of the mine, and (3) the granting of the easement necessitated preparation of an environmental assessment or environmental impact statement due to the significant environmental impacts from the easement and the mine. *Id.* at 1183.

NEPA requires federal agencies to consider the environmental consequences of their actions. NEPA does not require the government to prevent or eliminate harm to the environment. 42 U.S.C. § 4332(2)(C) (2003); 40 C.F.R. § 1502.4 (2003). In order to evaluate the impact on the environment of its actions, a federal agency must comply with NEPA, which may include the preparation of an EA or EIS. An EA is a less detailed document used by an agency to decide whether to prepare an EIS or

determine that the action would have no significant impact on the environment. 40 C.F.R. § 1508.9 (2003). If the agency, however, finds that the action would have a significant impact on the environment, the agency will prepare an EIS. 42 U.S.C. § 4332(2)(c)(i)-(v); 40 C.F.R. § 1502.10 (2003). The EIS may be a more detailed document addressing the purpose and need for the proposed action, environmental impacts from the action, unavoidable adverse environmental impacts of the proposed action, alternatives to the proposed action, the relationships between uses in the short-term and productivity in the long-term, and the amount of resources to be used in the proposed action. *Id.* A federal action, however, may be exempt from NEPA's EA or EIS requirements if the action falls into one of the categorical exclusions under the implementing regulations of the Act. 40 C.F.R. § 1508.4 states,

*Categorical Exclusion* means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

40 C.F.R. § 1508.4 (2003). Some categorically excluded actions, however, may still have to comply with NEPA's EA or EIS requirements if there are extraordinary circumstances surrounding the action. *Id.* "Extraordinary circumstances" may include unique situations created by a specific proposal such as scientific disagreement over the environmental effects of a proposal, uncertain effects, effects involving unknown or unique risks or conflicts over alternate uses of available resources. *Id.* See 10 C.F.R. § 1021.410(b)(2) (2003). In order to determine whether a federal agency's action qualifies as a categorical exclusion under

NEPA, federal administrative agencies must consider the direct, indirect and cumulative impacts of the action and the impacts of connected actions on the environment. 40 C.F.R. §§ 1508.7 & 1508.8 (2003). See 40 C.F.R. § 1508.25(a)(1) (2003). Federal courts will review agency actions classified as “categorical exclusions” and set them aside “only if a court determines that the decision is arbitrary and capricious.” *Sierra Club v. U.S. Dep’t. of Energy*, 255 F. Supp.2d 1177, 1182 (D. Colo. 2003)(citing and quoting *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1023 (10th Cir. 2002)).

Under 10 C.F.R. § 1021, DOE may apply an A7 categorical exclusion to actions involving transfers of property where the use of the property will not change and the type and extent of the impact basically remains unchanged. 10 C.F.R. § 1021, app. A to subpart D (2003). *Sierra Club* and the Center for Native Ecosystems argued that DOE’s use of this categorical exclusion was unlawful because the granting of the easement allowing the construction of a road to provide access to the mine constituted a new land use, rather than an unchanged land use of the property. *Sierra Club*, 255 F. Supp.2d 1182-1183. Prior to the granting of the easement, DOE used the National Wind Technology Center’s land in the Buffer Zone to study and research wind energy only. *Id.* The land did not contain any roads and easements. In addition, the easement would result in new impacts on the environment of the center’s land. *Id.* These new impacts would include the construction of paved roads over undisturbed areas of soil and grass, the increase of truck traffic across the land to and from the mine, and the application of pesticides and herbicides to control the growth of vegetation during the construction of the road. *Id.* In addition, the easement would impact the environment because the road would be built through an archaeological site, cross a tributary stream of Rock Creek and destroy habitat for wildlife. *Id.* The Court held that DOE’s

application of the A7 categorical exclusion was inconsistent with a plain reading of 10 C.F.R. § 1021 and that the construction of the mining road on the center’s land would not be the same land use as the center’s research and study of wind energy. *Id.*

#### *Connection of DOE’s Road Easement to Other Actions With Significant Impacts*

The second issue that the district court considered was whether DOE’s road easement was connected to other actions with significant impacts on the environment. *Id.* at 1183-1184. DOE argued that it was not required to consider and evaluate the impacts of the mine because the easement and the mine were not connected actions. *Id.* at 1184. 10 C.F.R. sec. 1021.410(b)(3) provides,

(b) To find that a proposal is categorically excluded, DOE shall determine the following:

(3) The proposal is not “connected” (40 C.F.R. 1508.25(a)(1)) to other actions with potentially significant impacts, is not related to other proposed actions with cumulatively significant impacts (40 C.F.R. 1508.25(a)(2)), and is not precluded by 40 C.F.R. 1506.1 or § 1021.211 of this part.

*Id.* Connected actions are defined as actions that “cannot or will not proceed unless other actions are taken previously or simultaneously.” 40 C.F.R. § 1508.25(a)(1)(ii) (2003). Connected actions may also include actions that trigger other actions that may require EISs or are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(1)(i) & (iii) (2003).

In making its argument, DOE relied on the Tenth Circuit Court of Appeals’ case, *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012 (10th Cir. 2002). This case concerned whether the U.S. Forest Service was

required to comply with the requirements for NEPA review when an owner of a ski resort approached the Forest Service and requested the Service to enter into a land interchange transaction. *Id.* at 1017-1021. The interchange transaction would involve the Forest Service transferring small fractions of government land to a ski resort in return for 6.71 acres of land adjacent to other federal property. *Id.* at 1019-1021. The Forest Service approved the transaction and determined that the transaction would be “categorically excluded” from NEPA review because an analysis of existing regulations showed that the transaction did not pose a significant risk of impacting the environment. *Id.* at 1019-1024. Previously, the ski resort owner submitted a master development plan to the Forest Service concerning another transaction proposing extensive renovations to the ski resort including construction of additional chair lifts, improved hiking trails, construction of a conference center and a resort facility. *Id.* at 1023-1024. The Forest Service contended that the transaction fell within a categorical exclusion exempting a land exchange from NEPA review because the resulting land use would remain basically the same. *Id.* at 1024. The plaintiff challenged the Forest Service’s categorical exclusion because the agency did not explain the basis for its conclusion that the activity on the federal lands to be exchanged would “remain essentially the same.” *Id.* The Tenth Circuit held that the land transaction was categorically excluded from NEPA review. *Id.* The transaction and the master development plan were “sufficiently independent that they could not be considered connected actions.” *Id.* at 1029. The record showed that the renovations and growth of the ski resort would have taken place in accord with the master development plan regardless of whether the land exchange occurred or not. The Forest Service was not required to perform NEPA review because the renovation of the ski resort and the land transaction “were not dependent on another for their justification and were not connected actions.” *Id.* at 1023-1024.

In contrast, in *Sierra Club*, the Sierra Club and the Center for Native Ecosystems, asserted that DOE was required to analyze the impact of the road and the purpose of the road’s construction because DOE’s road easement was essentially an access road on federal land. *Id.* at 1184. See, e.g., *Save the Yaak Comm. v. Block*, 840 F.2d 714, 720 (9th Cir. 1988) (holding that reconstruction of roads as well as the building of roads for harvesting timber were “connected actions” requiring analysis by the U.S. Forest Service in deciding whether to prepare an EIS or only an EA); *Alpine Lakes Protection Soc’y v. U.S. Forest Serv.*, 838 F. Supp. 478, 480-483 (W.D. Wash. 1993) (holding that the Forest Service had to consider the access road across the National Forest and logging activities on adjacent private lands). The federal district court held that DOE was required to study and evaluate the mine’s impacts on the environment because the road easement and the mine were connected actions. *Sierra Club v. U.S. Dep’t of Energy*, 255 F. Supp.2d 1177, 1184-1185 (D. Colo. 2002). The court reasoned that the road easement and mine were “inextricably linked” because WAI and its successor, MRI, would gain access to the mine due to the existence of the road only. In addition, if the mine did not exist, the road would not have any independent utility. *Id.*

#### *DOE’s Duty to Evaluate the Cumulative and Indirect Impacts of the Mine and the Road Easement*

The third issue that the district court considered was whether DOE had a duty to evaluate the cumulative and indirect impacts of the mine and the road easement. *Id.* at 1185-1186. Sierra Club and the Center for Native Ecosystems argued that DOE had a duty under NEPA to review the indirect and cumulative effects of the proposed expansion of the sand and gravel mine. They argued that the indirect and cumulative effects of the road easement included the mine because the mine was a “reasonably foreseeable future action” shown by

the fact that the mining company leased the subsurface rights for the mine from a private party and developed a plan for the mining site. *Id.* at 1185. In addition, they asserted that the mine was a reasonably foreseeable future action because the mining company acquired an easement for an access road to the mine, applied to the county government for rezoning and received an approval to undertake mining operations on 22 acres in the Buffer Zone. *Id.*

40 C.F.R. sec. 1508.8 defines “indirect effects” as those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* “Cumulative impacts” are defined as impacts of “other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7 (2003). Federal courts have held that an agency shall undertake a reasonable analysis of the total impacts of a proposed project and not view a proposed project in a vacuum. *Sierra Club*, 255 F. Supp.2d at 1185 (citing *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002)). The district court agreed with the plaintiffs’ argument holding that the agency had a duty to analyze the mine’s cumulative and indirect effects because the easement was an integral part of the mining project and that there were “firm plans” already in place at the time the easement was granted for the mine to be expanded. *Id.* DOE acted arbitrarily and capriciously in failing to consider both actions in determining whether an EA or EIS was required. *Id.*

#### *DOE’s Performance of NEPA Review in the Future and Assertion that the Agency Lacked Discretionary Authority over the Mine*

The fourth and fifth issues that the district court confronted were whether DOE had a present duty to conduct NEPA review of the mine even though the location of the road was not yet known and whether DOE lacked discretionary

authority over the mine. *Id.* at 1185-1186. DOE argued that it had only a future duty to undertake NEPA review of the mine because the location of the road was not yet known. *Id.* at 1186. The agency asserted that if it performed NEPA review before finalizing the location of the road, the agency’s NEPA analysis would be “fraught with speculation and uncertainty” and based on “hypothetical and theoretical assumptions.” *Id.* In addition, DOE’s review under NEPA would not provide an important environmental analysis for a federal action impacting the environment if the analysis were performed before determination of the road’s location. *Id.* Moreover, DOE argued that review of the mine’s impacts on the environment were categorically excluded from NEPA’s environmental assessment or environmental impact statement requirements because DOE did not have discretionary authority over mining activities in the Buffer Zone. *Id.* at 1185.

The district court, relying on a plain reading of 10 C.F.R. § 1021.410(b)(3) held that DOE had a present duty to evaluate the mine’s impact on the environment at the time the easement was issued. *Id.* The district court also held that DOE had discretionary authority over the mine’s activities. *Id.* at 1185-1186. An examination of the record showed that DOE had power and control over the mine’s operations. *Id.* at 1186. The court noted that DOE prohibited the public from having access to the Buffer Zone until 1992 and parties from using their mineral rights in the Buffer Zone, including the mining site. *Id.* In addition, the court emphasized that DOE and WAI entered into a memorandum of understanding restricting and conditioning mining operations on the National Wind Technology Center’s land in the Buffer Zone. Moreover, DOE stated in a letter to WAI that the agency could prohibit actions by WAI that would lead to an “unreasonable use of the surface resources by WAI, in the interest of protecting surface resources.” *Id.* (quoting DOE’s letter to WAI dated June 4, 1994).

*DOE's Duty to Consult with the USFWS under Section 7 of the Endangered Species Act*

The sixth issue that the district court considered was whether section 7 of the ESA imposed a duty on DOE to consult with USFWS on the environmental impacts of the easement and the proposed expansion of the mine on the natural habitat of Preble's meadow jumping mouse. *Id.* at 1186-1187. Sierra Club and the Center for Native Ecosystems argued that DOE undertook an agency action by granting the easement over federal land permitting an access road to the mine. *Id.* at 1188. In addition, the plaintiffs asserted that because DOE's action extended beyond the scope of the road easement and included the mine, DOE failed to evaluate all direct, indirect and cumulative impacts of the agency action including interdependent and interrelated actions. *Id.* at 1187-1188. The plaintiffs supported their argument by referring to one of the major reasons why USFWS listed Preble's meadow jumping mouse as a threatened species under the ESA. *Id.* When USFWS promulgated its final rule listing the mouse, USFWS stated,

An additional threat is potential disruption of the current hydrology by mining operations. There are proposals to expand existing commercial sand and gravel extraction and processing activities in the Rock Creek drainage both outside and within the boundary of Rocky Flats. . . . [S]uch mining can destroy and fragment Preble's meadow jumping mouse habitat. . . . [M]ining impacts are significant and . . . cause permanent changes to Preble's habitat. Mining also targets gravel deposits that may provide key hibernation sites.

63 Fed. Reg. at 26525. See *Sierra Club*, 255 F. Supp.2d at 1187-1188. In addition, regulations referring to ESA consultations provide that federal agencies must revisit past decisions and initiate or reinstate consultation if the agency retains "discretionary Federal

involvement or control." 50 C.F.R. § 402.16(d) (2003).

Section 7 of the ESA provides that federal agencies must consult with USFWS concerning actions that may affect a species listed under the ESA. 16 U.S.C. § 1536(a)(2) (2003). 16 U.S.C. § 1536(a)(2) applies exclusively to federal agencies and private "applicants," and requires that federal agencies:

in consultation with and with the assistance of the [National Marine Fisheries Service or Fish and Wildlife Service], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat]."

*Id.* The Joint Section 7 Consultation Requirements define an "agency action" as all activities or programs of any kind authorized, funded or carried out, in whole or in part, by federal agencies in the United States or upon the high seas. Examples of actions include actions intended to preserve listed species or their natural habitat, the promulgation of regulations, the granting of licenses, contracts, or leases, or actions directly or indirectly impacting land, water or air. 50 C.F.R. § 402.02 (2003). An "action area" is broadly defined as areas directly or indirectly affected by the action and are not limited to those areas "in the immediate area involved in the action." *Id.*

The ESA and its implementing regulations provide that a federal agency undertaking an action consider all "indirect" and "direct" impacts of the federal agency action. *Id.* "Indirect effects" are defined to include any effects caused or induced by the action that "are reasonably certain to occur." *Id.* The regulations also require that the agency consider the cumulative impacts of the action as well as interrelated and interdependent actions. The

regulations define “cumulative impacts” as the “effects of future, state or private activities, not involving federal actions, that are reasonably certain to occur within the action area of the federal action subject to consultation.” *Id.* In order to meet the standard of cumulative effects, one must demonstrate that there is more than a mere possibility that the action may proceed considering the economic, administrative, or legal obstacles to be overcome. Preamble to Final Joint Consultation Rules, 51 Fed. Reg. 19926-19933 (1986). Interrelated actions include actions part of a larger action and are justified by the larger action. Interdependent actions are actions with no independent utility except from the action under consideration. *Id.*

In contrast, DOE asserted that it had a duty to consult with USFWS only after a species is listed as endangered or threatened under the ESA. *Sierra Club*, 255 F. Supp.2d at 1188. See 16 U.S.C. §§ 1533, 1536, 1538 and 1539 (2003). DOE argued that because it granted the easement to the mining company in July 1995 before the mouse became listed as a threatened species under the ESA in May 1998, DOE did not have a duty to consult with USFWS when the easement was granted. *Id.* at 1188. In addition, DOE asserted that it was not required to revisit the easement grant because DOE was not presently involved in any discretionary action relating to the easement. The plaintiffs responded by arguing that the date of the listing of a species was irrelevant because the duty to undertake consultation under the act continued for the agency action’s duration. *Id.* at 1188-1189.

The court held that because the easement continued for a term of 99 years and was still in effect, the easement qualified as a continuing agency action subject to the consultation requirements of the ESA. *Id.* at 1189. See also *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (holding that although the Northern Spotted Owl was listed by USFWS under the ESA after the Forestry Service

implemented a 15-year Forest Management Plan, the Forest Service was required to consult with USFWS because the Service’s Plan was still in effect and qualified as a continuing agency action). The court also determined that DOE had a duty to consult with USFWS because DOE had discretion over the easement shown by the mining company’s rights to construct and use a mining access under the 1995 easement, supervise construction and uses of the road to the mine and control mining activities in the Buffer Zone. *Id.*

## Conclusion

In sum, the federal district court’s decision in *Sierra Club v. U.S. Dep’t of Energy* confirms that federal agencies have a duty to evaluate the impact of agency actions on the environment and determine whether agency actions jeopardize the continued existence of endangered or threatened species, or cause destruction or adverse changes to their critical habitat.

NEW ON THE SECTION OF  
ENVIRONMENT, ENERGY, AND  
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*Natural Resources & Environment*  
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*The Year in Review 2003* and current  
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## AGENCY ACTIVITIES AND NEWS

### BUREAU OF LAND MANAGEMENT PROPOSES FORMAL RECOGNITION OF LOCAL, STATE AND TRIBAL ENTITIES AS COOPERATING AGENCIES IN THE DEVELOPMENT OF LAND USE PLANS FOR PUBLIC LANDS

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**Craig T. Donovan**

On March 10, 2004, the Bureau of Land Management (BLM) proposed amending its regulations to formally recognize state, local and tribal entities as cooperating agencies in the land use planning process for public lands under the jurisdiction of the BLM. "BLM Strengthens Role of Local, State, and Tribal Partners in Planning," The Bureau of Land Management News available at [www.blm.gov/nhp/news/releases/pages/2004.htm](http://www.blm.gov/nhp/news/releases/pages/2004.htm). BLM Director Kathleen Clarke announcing the proposal, stated, "Cooperating Agency status can give us broader public participation in resource management decisions and, ultimately more effective solutions . . . . Local communities, states and tribes all have a tremendous stake in the land management issues that confront our agency. We want to ensure that they also have a place at the table when these issues are addressed, and a strong voice in the planning process decisions that are made." *Id.*

The regulations of the Council on Environmental Quality, which implement the National Environmental Policy Act (NEPA) define a "cooperating agency" as follows:

*Cooperating agency* means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the

quality of the human environment. . . . A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

40 C.F.R. § 1508.5 (2003). 40 C.F.R. § 1501.6 (2003) explains the selection process of cooperating agencies by lead agencies and outlines the responsibilities of cooperating agencies. The lead agency must request at the earliest possible time that a cooperating agency participate in the NEPA environmental review process and use the environmental analysis and proposals of cooperating agencies to the maximum extent possible in accordance with the responsibilities of the lead agency. 40 C.F.R. §§ 1501.6(a)(1) and (a)(2) (2003). Cooperating agencies must participate in the NEPA process as early as possible and participate in the scoping process. 40 C.F.R. §§ 1501.6(3)(b)(1) and (b)(2) (2003). The scoping process is defined as an "early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." 40 C.F.R. § 1501.7 (2003). Moreover, a cooperating agency may develop information and prepare an environmental impact statement upon the request of a lead agency including sections of the statement that the cooperating agency has special expertise. 40 C.F.R. § 1501.6(3)(b)(3) (2003). Furthermore, the cooperating agency may provide support staff when requested by a lead agency in order to expand the lead agency's interdisciplinary capability and expend its own funds unless the lead agency funds the major activities or analyses from the cooperating agency. *Id.* §§ 1501.6(b)(4) and (b)(5) (2003). Cooperating agencies may also refuse to assist in preparing an environmental impact statement or become involved in an agency action when requested by a lead agency if the cooperating agency has other program commitments and submits a reply to the Council on Environmental Quality. 40 C.F.R. § 1501.6(c) (2003).

The BLM has proposed amendments to its regulations in order to establish consistency in the BLM's use of cooperating agencies. The first amendment includes language instructing BLM state directors and field managers to request appropriate federal agencies, state and local governments and Native American tribes to become cooperating agencies in the development of resource management plans on public lands under the jurisdiction of the BLM. "BLM Strengthens Role of Local, State, and Tribal Partners in Planning," The Bureau of Land Management News available at [www.blm.gov/nhp/news/releases/pages/2004.htm](http://www.blm.gov/nhp/news/releases/pages/2004.htm). In addition, the BLM will amend the regulations to include language requiring BLM state directors and field managers to consider requests for cooperating agency status from other federal and state agencies and local and tribal governments. *Id.*

The BLM's proposal to recognize state and local governments and tribes as cooperating agencies in the development of land use plans for public lands will help ensure that the NEPA's goal of cooperation among the federal, state and local governments in order to preserve the environment while fulfilling the social and economic needs of present and future generations will be maintained. In addition, the BLM's amendments will implement the agency coordination requirement under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712(b)(9). The agency coordination requirement provides:

In the development and revision of land use plans, the Secretary shall—

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within

which the lands are located, including, but not limited to, the statewide outdoor recreation plans . . . and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. . . . [T]he Secretary shall . . . keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands . . . .

43 U.S.C. § 1712(c)(9)(2003). The BLM's proposed amendments do not impose any new obligations on other federal agencies, other than obligations already existing under the regulations of the Council on Environmental Quality. The effect of the amendments is limited to federal, state, local and tribal government entities only.

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**Public Land and Resources Committee:**

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ANNOUNCE THE LARGEST LAND  
CONSERVATION AGREEMENT IN NEW  
YORK HISTORY TO PRESERVE 257,000  
ACRES OF COMPANY-OWNED  
ADIRONDACK FORESTLAND**

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**Craig T. Donovan**

On April 22, 2004, New York State, International Paper Co. and The Conservation Fund announced a partnership in which New York State will acquire conservation easements on approximately 257,000 acres of forestland owned by International Paper. "The Conservation Fund Joins Governor Pataki and International Paper to Announce the Largest Land Conservation Deal in New York History," The Conservation Fund News Release available at [www.conservationfund.org](http://www.conservationfund.org) (visited April 23, 2004). See "International Paper, State of New York and Conservation Fund Partner to Conserve About 257,000 Acres in Adirondacks," International Paper Co. News Release available at [www.investor.internationalpaper.com](http://www.investor.internationalpaper.com) (visited April 23, 2004). This agreement is the largest land conservation agreement in the history of New York State and will allow for the permanent conservation of working and managed forests to support the economy and community of the Adirondacks, while protecting open space and providing opportunities for recreational use by the public. *Id.* In addition, the land conservation agreement will restrict future development and subdivision of the property, provide rights of public access on the property and continue to comply with the Sustainable Forestry Initiative (SFI). SFI is an independent certification system ensuring that trees will be planted, grown and harvested, while protecting biodiversity and controlling soil erosion, sedimentation, air pollution and water pollution. *Id.* The agreement will also provide open space and recreational opportunities, protect major river corridors and land bordering rivers and preserve natural habitat for wildlife such as bats, spruce grouse and rare plants. *Id.*

In announcing the agreement, Gov. George Pataki, stated, "This truly historic agreement represents a significant milestone in achieving our goal of protecting more than one million acres of open space by the end of the decade. . . More than 100 years ago, the people of New York State had the foresight to create the Adirondack Park to ensure the preservation of these environmentally significant lands for our benefit and that of future generations. New York is a national leader in open space preservation and . . . we are proud to build on that legacy . . ." "International Paper, State of New York and Conservation Fund Partner to Conserve About 257,000 Acres in Adirondacks," International Paper Co. News Release available at [www.investor.internationalpaper.com](http://www.investor.internationalpaper.com) (visited April 23, 2004). The Conservation Fund, a national nonprofit organization that works in partnership with other organizations, government agencies, foundations, corporations and individuals to protect land and water resources around the Nation, assisted New York State in analyzing the natural resources located in the protected area, provided guidance on land use policy and structured the conditions of the conservation easement. *Id.* Larry Seltzer, president of The Conservation Fund, stated, "We believe this partnership represents a new brand of conservation and model for the nation, bringing together public, private and nonprofit organizations to balance economic and environmental objectives." *Id.*

The land conservation agreement will involve placing conservation easements on the forestland in three phases. In late 2004, the New York State Department of Environmental Conservation will complete the first phase of the plan. *Id.* The second and third phases will be completed in years 2005 and 2006. *Id.* New York State will purchase two conservation easements. The first easement will involve 84,232 acres of Adirondack forestland and grant access rights to the public for recreation activities such as hunting, fishing, trapping, hiking and canoeing, while permitting

International Paper Co. to maintain non-exclusive cabin sites and to exercise control over hiking and snowmobile trails in relation to forestry operations. *Id.* The second easement consists of 171,004 acres of Adirondack forestland leased to hunting and fishing clubs and defines specific and limited rights to recreation in corridors and on trails. *Id.*

### **NEW SECTION COMMITTEES: HYDRO POWER AND ENERGY FACILITIES AND SITING**

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**Cherise M. Oram  
Angela R. Morrison**

ATTENTION Environmental, Resource and Energy practitioners! The ABA's Section of Environment, Energy, and Resources (Section) has created two new energy-related committees to best serve its members: the Hydro Power Committee and the Energy Facilities and Siting Committee. Practitioners in these areas should consider getting involved because this is where *energy* meets the *environment* and *resources*.

We encourage you to visit the new committee Web sites and find out how your practice can benefit from joining one or both of these committees. Through both formal and telephone conferences, articles and newsletters, and other communications, we will address important developments and emerging issues and provide opportunities to contribute to this dialogue through speaking and writing on subjects of interest.

The Hydro Power Committee was created to serve the interests of hydro practitioners across the country. The Committee focuses on licensing and relicensing issues before FERC, as well as environmental and other resource compliance issues. It serves as a forum for sharing information and apprising members of new developments in the law through conferences, brown bags and telephonic

programs, list serve announcements, and newsletters that highlight legal developments of national and regional importance. For more information on the Hydro Power Committee, please visit <http://www.abanet.org/environ/committees/hydropower>.

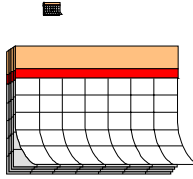
The Energy Facilities and Siting Committee was formed to provide a forum in which practitioners, policymakers, and academics can exchange legal analyses and practical experiences and can develop professional best practices and standards. The Committee seeks to identify and balance the many competing interests in the energy facilities siting and permitting processes, both in the United States and abroad. Our focus includes the production, transportation, and distribution of electricity, natural gas, coal, oil and petroleum products and other energy sources, and the environmental and energy security implications of these additions to infrastructure (e.g., power plants, transmission, natural gas pipelines, liquefied natural gas terminals, petroleum infrastructure, nuclear, hydro, renewable energy facilities). The wide range of issues currently under consideration include: the "Energy Bill," siting renewable energy projects, CO<sub>2</sub> mitigation for power plant, smart growth and energy, siting and permitting transmission grids on wildlands, environmental justice, FERC vs. State in LNG siting, streamlining siting process through consolidation of licensing and improving agency coordination, siting on Indian lands and "energy security." Check out our Web site at <http://www.abanet.org/environ/committees/energyfacilities/home.html>.

The Hydro Power Committee and the Energy Facilities and Siting Committee welcome your membership and participation. Indeed, our success depends upon it. Please go to <https://www.abanet.org/environ/committees/signup.html> to sign up today.

Remember, if you are a Section member, you may join up to five committees as part of your membership. We hope you'll join us!

**AMERICAN BAR ASSOCIATION  
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES**

***Calendar of Section Events***



**Brownfields 2004**

Sept. 20-22, 2004

St. Louis

(Cosponsored with U.S. EPA and the International City/County Management Association.

For more information, see [brownfields2004.org](http://brownfields2004.org).)

**12th Section Fall Meeting**

Oct. 6-10, 2004

San Antonio

**Clean Water Act: Law and Regulation**

Oct. 27-29, 2004

Washington, DC

(Cosponsored with ALI-ABA. For more information, see [ali-aba.org](http://ali-aba.org).)

**Environmental Sciences**

Nov. 4-5, 2004

Dallas

**23rd Annual Water Law Conference**

Feb. 24-25, 2005

San Diego

**34th Annual Conference on Environmental Law**

March 10-13, 2005

Keystone, Colo.

***For more information, see the Section Web site at  
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