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Legal Alerts

Property Owners Can Challenge an Agency's Decision to List Waterbodies as "Impaired" if the Listing Diminishes the Property Owner's Property Value

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In a precedent setting opinion,1 a divided Ninth Circuit Court of Appeals ruled that a property owner has a legal basis to challenge an "impaired waters" listing if the listing diminishes the landowner's property value. Although this particular case addressed Clean Water Act regulations, the breadth of this decision may provide legal grounds for property owners to challenge other environmental regulations that have an adverse impact on property values.

The Clean Water Act requires states to identify waterbodies that fail to meet water quality standards. Those waters are identified as "impaired." An impaired water listing may trigger the requirement for the development of a water quality cleanup plan, known as a Total Maximum Daily Loads ("TMDLs"), which sets pollutant budgets for the impaired waterbody. Those pollution budgets can affect industries, municipalities, and landowners by requiring actions to reduce the pollutant load into the affected waterbody.

Before the Ninth Circuit Court of Appeals, Barnum Timber Company, a landowner, appealed the District Court's ruling that the landowner lacked standing to challenge EPA's determination to list a waterbody as "impaired." Based on Barnum's declarations from two forestry experts describing how the impaired water listing adversely affected the landowner's property value, the Ninth Circuit held that the landowner had standing under the Administrative Procedures Act to challenge the EPA's impaired waters listing.

The Court solely addressed whether the landowner had a legal basis to challenge the Clean Water Act regulation. It did not address whether the listing was arbitrary and capricious, and, therefore, invalid.

The Court's decision is timely as throughout the Pacific Northwest there are thousands of waterbodies that are listed as impaired and the list continues to grow. This precedent-setting case provides legal grounds for landowners to challenge an impaired waters listing if the landowner can demonstrate that the listing would adversely affect the landowner's property value. Finally, the breadth of the Court's ruling potentially establishes legal grounds for landowners to challenge other environmental regulations that have an adverse impact on property values.

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If you have any questions, please contact Lori Terry Gregory (206.447.8902 | lori.terry@foster.com) or any lawyer in Foster Pepper's Environmental & Natural Resources Group.

1 Barnum Timber Co. v. E.P.A., ___ F.3d ___, 2011 WL 383012.

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