COX CASTLE NICHOLSON

LAND USE & NATURAL RESOURCES

CLIENT ALERT AUGUST 27, 2010

# TAKE OF ENDANGERED PLANTS IN PRIVATELY-OWNED WETLANDS NOT PROHIBITED UNDER ENDANGERED SPECIES ACT

In an important decision, the Ninth Circuit Court of Appeals provided more clarity this week on the reach of Section 9 of the Endangered Species Act (ESA). Among other things, Section 9 of the ESA makes it unlawful to remove, damage, or destroy an endangered plant species in "areas under Federal jurisdiction." This phrase is not defined in the ESA or in the regulations implementing the ESA, and no published Court of Appeals decision has considered the question of what exactly constitutes "areas under Federal jurisdiction."

With no real guidance on this issue, there has been uncertainty as to whether such areas included lands owned by the federal government, such as national forests and parks, or lands subject to federal regulatory jurisdiction, such as the Army Corps of Engineers (Corps) jurisdiction over waters of the United States. This week's Ninth Circuit Court of Appeals decision finally provides some much needed direction on this question by holding that federal regulatory jurisdiction over land is not enough to prohibit the take of endangered plant species.

In *Northern California River Watch v. Wilcox*, Case No. 08-15780 (9th Cir. August 25, 2010), the California Department of Fish and Game (CDFG) was notified by an amateur naturalist that an endangered plant existed on private property that included a little under two acres of Corps delineated wetlands. The landowners suspected that the endangered plant was not naturally occurring, but had been planted to delay a development project on the site. CDFG investigated these claims by removing specimens of the endangered plants to examine their roots and also by bringing several plants back to CDFG's offices to be retained as evidence. River Watch later sued CDFG and the landowners, alleging that CDFG's employee actions constituted unlawful "take" under Section 9 of the ESA. Whether such action did in fact constitute "take" turned on the phrase "areas under Federal jurisdiction."

In the Court of Appeals, River Watch argued that according to the plain language of the statute, the Corps' delineated wetlands were included in the term "areas under Federal jurisdiction," while CDFG and the landowners argued that the plain language of the statute limited the phrase to land owned in fee by the federal government. The United States Fish and Wildlife Service (USFWS) filed an amicus brief arguing that USFWS interpreted the term more broadly than CDFG, and that the term also include other property interests in addition to fee title, such as conservation easements held by the federal government, and that this interpretation was subject to deference under a legal doctrine known as the *Chevron* doctrine.

The court rejected River Watch's interpretation that the phrase "areas under Federal jurisdiction" in Section 9 included areas subject to the Corps' regulation due to the presence of wetlands or other jurisdictional waters of the United States. The court reasoned that this view was "simply too large" and could lead to Section 9 reaching "private lands which are subject to any sort of federal regulatory jurisdiction by any federal statute, i.e. everywhere."

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**Los Angeles**
2049 Century Park East, 28th Floor
Los Angeles, CA 90067
P (310) 277-4222
F (310) 277-7889

**Orange County**
19800 MacArthur Blvd., Suite 500
Irvine, CA 92612
P (949) 476-2111
F (949) 476-0256

**San Francisco**
555 California Street, 10th Floor
San Francisco, CA 94104
P (415) 392-4200
F (415) 392-4250

The Court held that while "areas under Federal jurisdiction" include areas under the control of the federal government, i.e., through ownership, leasehold-estates, or conservation easements, the court did not view "areas under Federal jurisdiction" as encompassing wetlands subject only to the regulatory jurisdiction of the Corps.

This decision provides long-awaited guidance on the take of endangered plant species by giving some direction to regulators and the regulated community alike on the meaning of the phrase "areas under Federal jurisdiction." Under *Northern California River Watch*, whatever Congress intended this phrase to mean, "areas under Federal jurisdiction" is not the same as merely private land with areas that constitute "waters of the United States" subject to Clean Water Act jurisdiction.

Thus, this case supports the view that the take of endangered plants from jurisdictional waters, such as wetlands, located on private property is not prohibited under Section 9 of the ESA.

*If you have any questions regarding this alert, please contact:*

R. Clark Morrison at 415.262.5113 or cmorrison@coxcastle.com
Scott B. Birkey at 415.262.5162 or sbirkey@coxcastle.com
Christian H. Cebrian at 415.262.5123 or ccebrian@coxcastle.com